The Panel met in The George Washington University Law School, Faculty Conference Center, 716 20th Street, NW, Washington, D.C., at 9:04 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

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

STAFF:
Colonel Kyle W. Green, U.S. Air Force - Staff Director
Lieutenant Colonel Kelly L. McGovern, U.S. Army - Deputy Staff Director
Ms. Maria Fried - Designated Federal Official
Ms. Julie Carson - Attorney/Advisor
Ms. Meghan Tokash - Attorney/Advisor
Mr. Matt Osborn - Attorney/Advisor
Ms. Meghan Peters - Attorney/Advisor
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MS. FRIED: Good morning. The meeting is now open. Welcome, Panel Members. Thank you for being here today. This is the 12th public meeting of the Judicial Proceedings Since FY2012 Amendments Panel, also known as the Judicial Proceedings Panel.

My name is Maria Fried and I'm the Designated Federal Official for the JPP. The JPP issued its first report on February 4, 2015 and that report is available on the JPP website at www.JPP.whs.mil. Additional information on the establishment of the Panel, Panel membership, and its Charter is available on the JPP website.

Information such as presentations and resources used by the Panel are also available at the website. The distinguished Members appointed to the JPP are as follows: the Honorable Elizabeth Holtzman who's also the Chair of the JPP, the Honorable Barbara S. Jones, Vice Admiral (Retired) Patricia Tracey, Professor Thomas
Taylor, and Mr. Victor Stone.

Please note that all information provided to the JPP is available to the public upon request. Information provided to the Panel Members is a matter of public record. As such, material provided to it, including reports, transcripts, minutes, agendas, and other documents, are accessible to the public unless any of the nine Freedom of Information Act exemptions apply.

I would like to turn the meeting over to Ms. Holtzman. Thank you.

CHAIR HOLTZMAN: Thanks very much, Ms. Fried. And good morning, everyone. I would like to welcome everyone to the August meeting of the Judicial Proceedings Panel. All the Panel Members are here today.

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

The Judicial Proceedings Panel was
created by the National Defense Authorization Act for FY2013 as amended by the NDAA for FY2014 and 2015. Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the most recent amendment to Article 120 of the UCMJ in 2012.

Since the Panel issued its first report in February, we have focused our public meetings on two important topics, restitution and compensation for victims of sexual assault crimes in the military, and the prevention and response to retaliation and ostracism against victims of sexual assault crimes.

We will devote most of today to Panel discussion and deliberations on these two topics. We briefly deliberated on restitution and compensation issues at our April meeting, but today will be the first time we've deliberated about retaliation, assuming we get there and I hope we do.
Our Staff has prepared materials to assist our deliberations. They developed a list of issues and an initial draft report on restitution and compensation that summarizes what we've learned and heard about the topic.

During this meeting, we will review the issues and draft and discuss what findings, conclusions, or recommendations we will want to make as a part of our report.

The Staff also developed a list of issues encompassing what we've heard and received on retaliation. And we will use this information to begin our discussion and deliberations on retaliation.

The agenda for today has been updated from the initial schedule posted in the Federal Register Notice for this meeting. We have moved the time for the Panel and Staff to discuss current and planned topics of February 2016 to the last session of the afternoon. As indicated in the Federal Register Notice, all meeting agenda updates are posted to the JPP website.
Finally, each public meeting of the Judicial Proceedings Panel includes time to receive comments and input from the public. The Panel received no comments or requests from the public for today's meeting.

All written materials received by the Panel Members for today's meeting and previous meetings are available on the JPP website at JPP.whs.mil.

Thanks very much for joining us today, and we are ready to begin our discussion and deliberations on restitution and compensation. Colonel Green, do you want to help us navigate through this process?

COL GREEN: Yes, ma'am. Panel Members, your meeting in March was focused on compensation and restitution, again just reminding that this goes back to a task assigned to you in the FY14 NDAA to assess the adequacy of the provision of compensation and restitution for victims of offenses under the UCMJ and develop recommendations on expanding such compensation
and restitution including consideration of three options.

First, providing the forfeited wages of incarcerated Members of the Armed Forces to victims of offenses as compensation. Second, including bodily harm among the injuries meriting compensation for redress under Section 939 of Title 10 U.S. Code, which is Article 139 of the UCMJ. And third, requiring restitution by Members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

As Ms. Holtzman indicated, you held a short deliberation session in your April meeting, Mr. Stone joining as he could by phone. And so we've had some, or you've had some discussion on this topic. But obviously you've received more information. Much of your June meeting was devoted to additional information on restitution and compensation.

And so today the Staff has prepared what we believe, based on your deliberations and discussion, encompass the major issues for your
consideration on this topic. And so we provided
you that issues list of ten issues, obviously
subject to anything else that the Panel Members
might want to discuss.

And we've also prepared, again, as Ms.
Holtzman indicated, the draft report for you to
just sort of summarize the materials and
presentations that you've heard to at least get
started on that process.

So I would recommend, Ms. Holtzman,
perhaps just going through the issues, or unless
the Panel Members have any other issues that they
want to bring up prior to beginning issues and
deliberations.

CHAIR HOLTZMAN: Sure. Okay, well we
have this booklet that we received which, it's
called Judicial Proceedings Panel and it's dated
6 of August 2015. And I think that we turn to
Page 1 which is under Tab 5. It gives us the
lists of the issues through Page 4. And we could
go through them one by one.

Issue number 1 is "whether the
convening authority and parole board's power to
grant the accused's request to pay the victim's
expenses are sufficient restitution mechanisms
throughout the military judicial process."

Is there anything further that we need
to do with this? Isn't this just a summary of
where the system is?

COL GREEN: It is. But one of the
principal questions that the Panel has and one of
the principal questions posed to you by Congress
is whether requiring restitution by members of
the Armed Forces to victims of their offenses
upon the direction of a court-martial.

Again, and the key point here is,
currently restitution is not an authorized form
of punishment under the UCMJ. And the only way
that restitution can be directed through the
military judicial process currently is through a
pre-trial agreement, an agreement between the
accused and the convening authority, which isn't
a term ----- you heard from presenters that is a
term that's used rather infrequently. And I
don't believe any presenters indicated that they
were aware of a restitution provision in a pre-
trial agreement involving a sexual assault
offense.

But that is a means by which
restitution can be directed to a victim. Or
restitution imposed or used as a matter of
clemency post-trial, either through the convening
authority's clemency process under Article 60 or
the post-trial clemency and parole board process
which occurs after final action is implemented by
the convening authority.

So those are the current ways that
restitution can be directed. You heard that
obviously testimony about the federal system and
the use of restitution in the federal system and
other various judiciaries.

And so the question, I think, for the
Panel is whether the military should adopt
restitution, and if so, by what means.

CHAIR HOLTZMAN: Well, I guess what is
confusing to me is what's the difference between
Issue 1 and Issue 2 on our sheet? And do we need to answer Issue 1 separately, or can we just go to Issue 2?

VADM TRACEY: Madam Chair, I think there's some value in the first question in sort of parsing out what the existing system does for different categories of victims. So different expenses are already covered for an active duty victim for instance than would be covered for a dependent or a civilian.

I think the table on Page 7 of the draft report begins to get at just a little bit of a fine point on, you know, what expenses are not covered. I think it's in the blue folder, table.

COL GREEN: It's the separate report that's in your folder.

VADM TRACEY: So in terms of our analysis of this first issue, is there some value in understanding that there are some differences between a civilian victim in a civilian court in terms of what is already covered because an
active duty person is covered by some things in
the active duty system, and that those same
situations don't apply to other categories of
victims.

I do have a question for
clarification. I'm not sure I remember this, but
for active duty encompasses Reserve and National
Guard when they're mobilized or federal, right?

COL GREEN: Yes, ma'am.

VADM TRACEY: Are they covered when
they're under their active duty for training? Do
these same coverages apply to them when they're
on active duty for training, because I don't
think they have consistent TRICARE access if
they're Reservists. So it may be important to --

COL GREEN: Differentiate.

VADM TRACEY: -- differentiate what
the status is of Reservists and National Guard
and what's true about National Guard when they're
in a state-activated versus a federal activation.

MR. STONE: Before we jump there, if
I may just comment on the question that the Chair
asked, I think that Issue 1 is simply a threshold
to which we give a yes or a no because if we
think it's adequate, then the rest is obviated
and it just punctuates that we need to move on to
the details of what we're going to do next
because without a no the current authority is not
enough, we wouldn't get to any of the other
questions.

So I think it's just sort of the
overview question at the beginning. I think
you're right. It is summarized, but I think even
when the report is written it will start with us
saying we've looked at the whole system, it needs
improvement. I mean, that's what this says.

Can we leave it as it is or not? I
think that's, it's simply an open the door to the
question.

VADM TRACEY: And I'm suggesting this
table points to the fact that it varies depending
on what the status of the, its adequacy probably
varies depending on the status of the victim.

CHAIR HOLTZMAN: Well, I don't know
that it's restitution that varies. It's the what
the existing system can pick up in terms of
paying for expenses. So that's a slight
difference from what you're talking about, but I
think it's an extremely important point.

I guess my question going again to
Issue number 1 is the way it's phrased, it says
whether the convening authority and parole
board's power to grant the accused's request to
pay the victim's expenses. Well why should this
depend on the accused's request?

MR. STONE: That's all there is now,
though. That's just simply the current state of
affairs. That's all there is.

VADM TRACEY: So that's the only one.

CHAIR HOLTZMAN: But it doesn't say
that.

MR. STONE: Okay. So you want to say
"whether the convening authority's current
power," is that what you want to say? The status
quo.

CHAIR HOLTZMAN: So it's only at the
request, right now, just to clarify, right now the only way in which restitution can be paid, even as part of a pre-trial agreement, is at the request of the accused?

COL GREEN: That's correct. The nature of a pre-trial agreement is an offer by the accused to plead guilty or, in normal cases that's the usual exchange is an offer to plead guilty in exchange for some benefit to the accused. And so the accused presents the proposed terms of that.

CHAIR HOLTZMAN: Well suppose it's a bargain? The accused says, "well, I don't want a jail sentence," and the convening authority says, "okay, will you pay restitution?" Or, "I will do that if you agree to pay restitution."

It may not be a request on the part of the accused. That's what I'm saying. I think this is not properly worded because it's not, in that situation it wouldn't be really a request.

MR. STONE: No, but I think if I can just --
CHAIR HOLTZMAN: Maybe I --

MR. STONE: -- I don't want to split hairs but even if the convening authority says, "I won't give you probation unless you pay restitution," that bargain is still going to be a request by the accused to pay the restitution.

CHAIR HOLTZMAN: Is that how it's formulated?

MR. STONE: The judge can't impose it and then just have a yes. It comes from the accused.

CHAIR HOLTZMAN: Okay, so is that correct?

COL GREEN: That's correct, and Mr. Stone's right. So the final form, there's obviously negotiations that go into the pre-trial agreement process. But the final form of a pre-trial agreement is, I offer this in exchange for this.

CHAIR HOLTZMAN: That offer still doesn't say, "I request."

COL GREEN: Well, that's right.
MR. STONE: That's what it is.

COL GREEN: And so, I mean, it may be the wording there, and certainly we can --

LTC MCGOVERN: The clemency after is in the form of a request.

CHAIR HOLTZMAN: Well, somehow it should be clarified because I don't think that, it just should be clarified because I'm just concerned that it's not quite accurate.

Okay, but regardless of the wording, what do we, how does the Panel feel? I don't think you were at the last meeting, Judge Jones. So perhaps you want --

JUDGE JONES: So I would like to ask a question, and you'll all forgive me if you already all know the answer. So as a practical matter, assuming that there is not a pre-trial agreement where the defendant or the accused offers to make restitution, then at the moment there is no mechanism to order it.

We're trying to decide whether there should be a mechanism within a court-martial to
order it. Who would make that decision, the panel? Would they decide what the restitution should be, or would the military judge order it and decide what the number was?

Or do we not know because there is no such system yet? I'm worried about the practicality of this. And I don't think restitution in this situation is as complicated as, I mean, it's been my experience and I'm sure yours, Mr. Stone, in a large-scale federal case. But I'm still worried about how you get either the judge or the panel gets the information about what actual restitution to order. And I also don't know, does the victim offer to pay X number in a pre-trial agreement?

Like, I'll pay $1,000 towards restitution, or does a victim just say, "take my wages towards restitution"? Or do they say, "I'll pay for one of the categories on this list?" I mean, I've asked about three different questions.

COL GREEN: Well, right. I think
probably the starting point is just a reminder
that the testimony the Panel heard was that there
are no examples of restitution being ordered in a
sexual assault case.

CHAIR HOLTZMAN: Right.

COL GREEN: So I think this is
something that is occasionally used for property
crimes as a compensation for loss, you know,
something lost in that sense.

The way that it would typically work
is if there is an agreement to pay restitution,
it probably is for an amount. And I think you
heard testimony from presenters in June that
usually the restitution requirement is to be paid
prior to a trial. And so it's a conditional pre-
trial process.

JUDGE JONES: So the bargain is

finished --

COL GREEN: Correct.

JUDGE JONES: -- between the accused
and the commander, the authority?

COL GREEN: Yes, ma'am. That's not
required, and certainly there could be a term
that requires restitution just at some point.
There's no mandate for that. So when it's used,
again typically in property crimes that's
typically the form that it takes.

MS. FRIED: And if I may, sometimes
when you see it, it originates with the defense
so they have an idea of what the bill of the
damage is. And then --

JUDGE JONES: They have an idea to do
what?

MS. FRIED: To pay a certain amount.
And then the other thing is, sometimes it's not
part of the pre-trial agreement, but they do it
anyway because they think it's going to mitigate
the sentence in the long term, so it's a
mitigating factor.

So it's not always something that has
to be agreed to between the convening authority.

JUDGE JONES: Then whose bailiwick is
it for the restitution sentence? Would it be a
panel decision? Or we don't know? Or would it
be the military judge? That's what's up in the air.

COL GREEN: Right. Because there is no restitution mechanism right now, so the sentencing process doesn't contemplate this. But the way the sentencing process works in our system is, you have one sentencing authority.

And so if you have a case that's tried before panel members, then the panel members also decide the sentence. There's nothing that splits that that would allow, I mean, under the current UCMJ there's no mechanism for the panel to impose part of the punishment and then the judge to impose another part.

JUDGE JONES: Right.

COL GREEN: And that doesn't happen. Again, if restitution, if the panel were to believe that that's something that should be done by the judge and not the panel members, certainly that could be modified to reflect that. But under the current system, there's nothing.

JUDGE JONES: So I guess my last
question is simply this, who would help whoever
the sentencing authority turned out to be for the
restitution part to decide what the number is?

COL GREEN: And there was some
presentations about that again. And because
there's not a probation process or a report given
to the judge or the panel members prior to
sentencing, our system goes straight from
findings to sentencing.

There's no split in time there. So
anything, unless you modify that system, anything
providing for restitution or information would
have to be done pre-trial.

And at this point, there's no
independent office that exists that would
independently provide that information if you
were to put it on the trial counsel under the
prosecution, it could be an added requirement for
them to gather certain information in advance of
trial to provide that.

I think you heard some testimony from
presenters and the like about concern about that
because obviously information gathered about a victim pre-trial and how or if that information could be used perhaps to the victim's detriment, you know, providing that information, just either try to portray the victim in a negative light or provide information that the victim might not want out in the course of the trial.

And so those are some of the concerns raised by presenters to you.

MR. STONE: If I might, we actually heard testimony at the last session from an individual who in the military settles tort claims internationally when they're brought against members of our military overseas.

And he pointed out that he does in fact sometimes have to make a payment which is like restitution in certain countries where it's demanded if a Service member commits a crime.

But I thought he was saying when they do that, and they have a handful of sexual assault cases where they've had to do it, I thought he said it was more like a liquidated
damages number like $15,000 or something.

And he was going to get back to us, we asked him. And so I guess my question for Colonel Green is whether he in fact has gotten back to us yet.

He was going to give us the details because he had some real cases, although it was in a context that is a little different than ours because those are foreign countries where when you commit a tort you will pay a certain liquidated damage about it once you're found guilty, even if it's in a criminal case. So did they ever get back to us on that?

COL GREEN: We've not received any information. Those are, the payments made under the Foreign Claims Act are essentially almost the solatia type payment where they're made gratuitously to try to maintain relations in many cases. I think that's the common form in my experience.

MR. STONE: Well, he said it was to settle the cases. He didn't say it was
gratuitous. But I would love to see what he had
to send in. I have one, and I guess this is sort
of a just a language issue as we talk about
restitution that I would like to bring forth and
surface because I really feel very strongly about
it.

And I do not believe restitution has
anything to do with punishment. Punishment is
something you do to the defendant, and when you
order a fine as punishment it runs to the
government to collect it and it's because they
did something and we're trying to balance it with
an appropriate, I don't know, smack on the hand
as it were.

Restitution, what we're talking about,
should be part of the sentence disposition, not
sentence punishment, at the same time as the
punishment, but it's a disposition. It runs to
the victim, not the state.

State could say, "I'm not interested
in it, I don't care." But if the victim wants it
because the victim can show you a bill that
hasn't been paid, the victim gets it and it's to restore them to the position they were in. It's not to rap the defendant at that point on the back of the hands.

I mean, if you crash somebody's car in some way, they have to get a new car. If they have insurance and there's only a deductible, then a lot of times the judge will only order a deductible.

If they have no insurance, a judge will order you as restitution to pay for the whole car. But that's not punishment per se, that's part of the disposition.

And I will probably, you know, I would hope that even if we loosely talk about it here, that in our report we stick with disposition because otherwise later it has all kinds of enormous consequences when defendants start saying, "I've already been punished," implying that they don't have to have restitution as a separate issue. And it is definitely a separate issue with a separate movant, the victim.
CHAIR HOLTZMAN: Can I just make one point about that? I mean, I think your distinction is very important, but I'm not sure that the distinction in fact is carried out in terms of those people who are advocating for increased restitution.

One of the main arguments for restitution in the military justice system with regard to sexual assault is that it helps the victim because the defendant has to pay, and therefore the defendant is now in a way being punished because he/she understands the consequences of his act or her act.

So it is a kind of punishment and motivation in terms of the advocacy for this point.

MR. STONE: Well see, and that's one of the reasons I wanted to surface that.

CHAIR HOLTZMAN: No, I think it's a really important point.

MR. STONE: I think that when you hear that, what we're hearing is something of
confusion between hoping that the Service member
forfeits his pay or is fined as compared with the
restitution where you only get it for a bill
that's of a certain kind and there's no pain and
suffering.

If it were truly for punishment say,
then we probably should allow pain and suffering
and certain intangibles. But across the country,
that disposition of restitution is always treated
separately.

At least in Maryland and I know in
other places, that part of the judgement is
separately appealable by the victim, and the rest
of the sentence is not. And it's totally
different. It's filed as a civil judgment
against the defendant, which even the fine is not
filed as a civil judgment for those collectable
by the government.

So I mean, it carries many different
consequences. And so in order to keep our
process on the right line as to restitution, I
just hope we will not, you know, even though a
victim may be happy to see that it comes out of
the pocket of the defendant, so does the fine or
the forfeiture of their salary even if there's no
restitution request.

So I think that we have to recognize
what we're trying to do is take care of the
victims by restitution, and what appear to be
identical victims may have very different
restitution claims.

So for example, if one victim failed,
through oversight or any other reason, to pay
their medical insurance, so after they're injured
they have a $10,000 bill from the hospital
because their insurance turned out to be expired
the day before versus another victim who only has
a $10 bill from the hospital because they paid,
or none because they're in the military and their
medical expenses were totally covered, they're
going to get different restitution awards even
though they might have been identically sexually
assaulted.

And so I think that's why you have to
remember this is a, it's not part of the punishment, it's part of allowing the victim to heal. And anyway, I just wanted to sort of lay that out there because it gets lost a little bit.

JUDGE JONES: Can I pick up on that for just a minute?

CHAIR HOLTZMAN: Yes, of course.

JUDGE JONES: I'm not sure that I'm for expanding restitution and putting it into the UCMJ to authorize as a form of sentence. But let me ask you this, Mr. Stone.

Would the model be here in your view something like the federal criminal system where a judge will fine the defendant according to the statute, and then will also grant mandatory restitution, right, to the victim?

Neither of them, they're both in the criminal judgment, although obviously we all understand restitution is not meant to be a punishment. Would that be the form that you would see?

MR. STONE: Yes. And then in Maryland
and I think in the federal system there's a
requirement that the unsatisfied restitution be
filed as a civil judgment as well. That piece,
not the fine, just the restitution if there is
unpaid restitution.

And just to sort of, I'm sorry to
complicate this a little more, then when you talk
about those state compensation programs, they
operate in addition and behind what the judge has
ordered in the criminal case because very often
the judge has ordered it all but none of it's
ever paid.

So the state compensation program, the
"last resort program" comes around behind and
says, oh, well let's see. This Serviceman
forfeited, they forfeited his pay. He's in jail,
he doesn't have a job in jail. He's never going
to pay the fine or the restitution.

Our system, the state, or the military
or the U.S. government, whatever the compensation
program is, we realize that those medical bills
never got paid, and here's our schedule of what
we pay to them.

So for example funeral expenses in Maryland, you get $5,000 for funeral expenses even if it's a $10,000 funeral which it often is. But I mean, they come around behind it and back it up, recognizing that despite that ruling, something like 95 percent of the time the restitution's not paid.

CHAIR HOLTZMAN: I guess I have a few questions about this. Number one is what you just raised now which is the, what's the impact, the practical impact of a restitution order in a sexual assault case.

And since they've never been ordered, even as part of pre-trial agreements from what we've heard, or at least not in anybody's memory, I don't know what the records would show but nobody seems to be able to recall this, it's not clear that there's a need for this, although we have identified areas where there could be.

I'm just curious in Maryland, how many restitution cases do you have, or sexual assault
cases do you have a restitution order that's
actually paid? Do you have any idea, are we
talking about --

MR. STONE: I don't have the numbers,
but I can tell you that one of the things that
you get restitution for, as was said before, it
may include property loss.

So in a lot of these cases, during the
sexual assault event, the defendant may have
taken and smashed a person's cell phone so that
they can't call for help or, you know, something
like that. And so they say, I lost my $500 cell
phone, it was an i6. And so --

CHAIR HOLTZMAN: But the property
damage we already have covered under, what is it,
139?

COL GREEN: You just make a 139 claim.

CHAIR HOLTZMAN: Right, so there's a
mechanism for recovering, for dealing with
property loss outside of the court-martial.
Isn't it correct? It's outside the court-martial
system, the 139.
COL GREEN: Correct. It is not tied to the case.

CHAIR HOLTZMAN: Okay.

MR. STONE: But there's a civil process in all the states, too. But the whole point was you've got a victim who's injured, you don't make that victim have to start a whole new separate civil proceeding. They could always file a tort suit. But no, you don't make them do -- that's how we proceeded for hundreds of years.

CHAIR HOLTZMAN: All right, but I'm asking this question for a purpose.

MR. STONE: Yes.

CHAIR HOLTZMAN: If we have a small number of claims for restitution, and probably even a smaller number of cases in which restitution is actually awarded, and we have alternative systems to provide at least for property damage in the military, what we would have to do in order to have a restitution program that passes constitutional muster, because you've got to have due process.
You can't order restitution without showing that there's a bill, I mean, for bodily damage or unless you show some actual bill.

MR. STONE: Hospital bills come in.

CHAIR HOLTZMAN: So there's got to be an opportunity for the victim to say, "I've had this loss," and for the defendant to say, "no, you didn't have that loss, you changed the number from a zero to a nine. You had no loss and that's not a bill or you faked the bill."

You have to have some process. There is no opportunity for this process. So I'm saying that what we would have to do in order to create restitution is to, for maybe a tiny number of cases in which the present system doesn't cover property damage or which results in an award that's recovered, we would have to change things dramatically.

We would have to create an opportunity for there to be some way to present evidence on the loss and challenge that loss within the court-martial system. We would have to figure
out who is going to, how the sentence is going to
be imposed, when it's going to be imposed.

If a sentence is to be immediate,
unless this information is acquired before the
trial, you're going to have to postpone the
imposition of a sentence which would be changing
the criminal justice system and this military
quite substantially.

So I'm trying to understand how, what
practical, good effect for victims this
restitution system would have as opposed to
making sure that the property damage system that
we now have works properly, and having a proper
compensation system, which would not involve
these kinds of major changes to the criminal
justice, to the uniform military justice system.

MR. STONE: I think your question
presupposes the answer. I don't think there are
major changes. I think that from some of the
discussions we had last month and my own
background knowledge, if we're going to give
victims a voice at all, it probably is going to
require something like the sentencing being
delayed until the next day, at least overnight.

    And my own experience and background
in military cases, and I'm certainly willing to
be corrected, is that delaying things and having
the panel and the attorneys come back the next
morning is not typically going to create a
tremendous inconvenience to the system, and it
won't be a wholesale difference.

    And the answer would be when they came
back you would say any restitution claim should
be made the next morning. And in Maryland, that
hearing typically takes less than a half an hour
because they're supposed to have the evidence,
which means they typically bring bills.

    And I don't think I've ever seen
anybody challenge the hospital bill or the lost
wages information, which if they are not a
military person, if they're an off-base civilian
they may have both, a hospital bill and a lost
compensation from work bill. Those are the two
typical kinds.
But they're certainly available to do that. The judge passes it around, everybody looks. If they have any questions they can ask. And the judge makes the initial ruling right there and then.

So I think since we're going to have to have, I think, some better opportunity for victims to be able to compose themselves and even get the right victims there after the court-martial conclusion because often it may not be on all the counts.

It could be, the defendant could be charged with three different assaults on three different women. They could find him guilty on one and not the other two.

And that victim's going to have to know, you know, the other two now won't matter, this one will. And she will at least want a chance to talk with her Victims' Legal Counsel overnight.

If we're going to have to delay some of that until the next morning, we can fold the
time for a restitution request right into that.

You are correct, I don't think there will be a
huge number of restitution requests because most
of the victims are military.

I don't think that there will be a
tremendous amount of money being changing hands
here because often, well I shouldn't say that.
The medical bills can run, I've seen them in the
tens of thousands of dollars.

They're usually way higher than the
lost wages unless the person was so injured that
they've been out for months. But it seems to me
that's the opportunity that we provide.

And I would disagree that we're going
to have even less orders than requests because I
would require it to be mandatory just like in the
federal system and in Maryland. Restitution --

CHAIR HOLTZMAN: What would be

MANDATORY?

MR. STONE: Restitution. If a
restitution request is made, and if the
restitution request is backed up by evidentiary
support, a restitution order is mandatory with only two exceptions typically.

And the two exceptions are that the judge has to find that there's no possibility that the person can pay, that's one exception. And the second exception, I would have to find the language of it but it's also a very narrow exception.

It's not a generalized exception that a judge cannot order it because they don't feel like ordering it or because there's a plea for leniency. It has to be based on a specific.

JUDGE JONES: But in the federal system, the victim doesn't have to request it. It's mandatory, period.

MR. STONE: Right, it's mandatory.

Exactly.

JUDGE JONES: I just wanted to clarify that, which means you're going to have restitution orders, if we use that model, as a part of every sentence if we make it mandatory in sexual assault cases.
And then we're going to have what I think you've also alluded to which is virtually, I don't know what the percentage is but a very high percent of totally uncollectable restitution orders.

MR. STONE: Well, it would be a little different because of the context. On the one hand, we have people who we knew were earning a living and were getting paid a salary, and they may have had taxes withheld or whatever.

So we know where their money is coming from and where it has come from. And we don't know for sure whether it will be forfeited.

So they're in a somewhat different situation than when you have just a member of the public who's a defendant and they were self-employed or they were being employed by somebody off the books and there's nothing to track what they got or where their bank account is or what assets they have. So I do think it's a little bit different than that.

JUDGE JONES: But we would still need
a system for enforcement, right, of the orders?

MR. STONE: By definition, but we also need a system for enforcement of a fine that's imposed. So I don't think that's so different.

JUDGE JONES: Are there fines? I haven't heard. I know there's the capacity for it. And do you know how that's working? I mean, traditionally in at least the regular civil system, the amount of uncollected restitution is mega billions. So there is a number somewhere. It might have been $46 or $50 billion. But what about fines? I didn't, are they used frequently?

COL GREEN: Not frequently, ma'am. It's an authorized punishment. I mean, again, personal experience, I think what the Panel heard is that it's not a commonly used form of --

(Simultaneous speaking.)

COL GREEN: What's that?

VADM TRACEY: For Article 120 cases.

COL GREEN: That's correct.

VADM TRACEY: It is pretty --

JUDGE JONES: For sexual assault? But
other cases it is?

VADM TRACEY: Unjust enrichment cases, usually. So if there's bank fraud.

JUDGE JONES: Okay.

MR. TAYLOR: I would like to jump in here if I can. I think this is a very close question, and I think there are really good arguments on both sides.

But I think that one thing that was important to me in listening to the testimony and evaluating not only what victims' advocates had to say but also what victims had to say was the importance of trying to give the victim a reassertion of control over his or her life.

And one of the arguments that I found very compelling for restitution was that this was some money that acknowledged that they had been injured in a very personal and harmful way with which they could do as they chose.

Some examples of expenses not normally covered had to do with putting a security system in or putting a fence around a house or buying a
guard dog or doing other things that would not be
covered through normal compensation systems. So
it seems to me that there is a piece of this
that's pretty important that goes into weighing
where we decide to come out on this.

As to the difficulty of putting the
system together and the problems of providing due
process, which of course is important, many times
over my career as a Pentagon lawyer we were faced
with questions just like this of how do you put
in place a system that will provide ample
evidence, the right standard of proof, and some
outcome that people would find generally is
agreeable and maybe even appealable.

I don't think it's insurmountable in
a case like this. I think if we wanted to do it,
if we wanted to recommend it, it wouldn't take
that much time and difficulty to put that system
in place.

I guess the third piece, for me at
least, is that while I'm still leaning in favor
of thinking this is a good idea, I don't know
that I would make it mandatory.

    I think that giving the military Judge
the authority to order restitution represents an
opportunity to put another arrow in the quiver of
a military Judge to use when appropriate in his
or her discretion in the right kind of case, or
to give to a jury to use.

    To your point, Judge Jones, about who
would make the decisions. I think this is a very
tough issue, but the fact of the matter is that
in general, military juries are pretty well
educated, they have a pretty good understanding
of what's going on. I think they can grasp the
elements pretty quickly to decide what might be
fair in a particular case.

    JUDGE JONES: Yes, I don't disagree.
My question was more towards when would they get
the information they needed.

    MR. TAYLOR: Right. And that would be
an additional burden, if you will, on the
prosecution to do things ahead of time. But
listen, every requirement we give to prosecutors
is always an additional burden, so that's not an unusual complaint from those who are administering the system.

But I guess the final thing I would mention to the point of whether or not it really makes a difference. I think there have been cases fairly recently involving very senior officers, even flag officers, who have been found guilty of misconduct of a sexual nature in which fines have been levied along with other kinds of punishment.

But careers have been ruined in the process. And it seems to me that for a person who retires as a senior military officer, even not at the flag officer grade perhaps in which the misconduct occurred, they've got resources, they've got money.

So it's not as if they're not able to compensate, particularly lower level junior officers and enlisted people who are the subjects of whatever abuse took place or whatever offense took place, it's not as if they don't have the
means to help those people along, send them back
to school, perhaps do something else with their
careers.

So I just wanted to put those ideas on
the table at least as you think about where we
ought to come out on this.

JUDGE JONES: Well that raises, in my
mind, what you think the contours of categories
for restitution would be.

MR. TAYLOR: Yes. Well that's just
it. I mean the idea is if it's restitution then
it's up to the person who receives the money to
determine how best to spend it.

Whether it's for security systems or
I mean isn't that the idea of restitution? It
doesn't have to be tied, necessarily, to
something that is a loss.

Because if it's compensable loss there
might be other ways to deal with it, right?
Because that's compensation.

MR. STONE: Well we have to be careful
when we discuss the two.
MR. TAYLOR: Well that's right.

MR. STONE: To which I kind of think that we're very close to the line there. But I do agree that the military, and I think I've said this before, being a closed system, and we heard testimony about this from victims, that after their sexual assault they couldn't go back to their specialty. Because their specialty was so narrow that it was either at one or just a few locations.

And everybody there was at least socially retaliating. And they had to be totally retrained.

And so to give up, you know, it's like going from being an electrical engineer to maybe a civil engineer or something.

They had to go into a different field or drop out of the military. Because they just said they couldn't go back to those locations because of the social ostracism.

And that, in some ways, that's like a big company. You're in a big corporation and
there's a sexual assault by a manager on an employee.

The employee is going to say, "you know, you just ruined my career here." And so there is some consequences for that too.

So you're right. There may be some retraining that would be more appropriate as restitution.

Because they lost something about their military occupational specialty that we might want to define in the military that we wouldn't see in a civilian court. Where, if you have to, you can go to a different college or a different city.

JUDGE JONES: Well you might -- I mean I can see where you would say this was something that caused suffering. But I don't think we could start ordering the military to put that person back into that specialty.

Is that what you're talking about? Or to find something --

MR. STONE: Well that's what we were
hearing in testimony in some of the prior
sessions from individuals who said, you know, it
took an extraordinary effort and intervention on
a one-on-one basis for someone to finally re-
designate them to a new military --

JUDGE JONES: I just don't --

MR. STONE: -- occupation --

JUDGE JONES: Yes.

MR. STONE: -- or they were going to
be discharged because they couldn't get
themselves to go back to that one or two
locations, at their level in their Service, who
were the only ones that did what they were
trained to do since college days.

JUDGE JONES: Right. No, I see that
as harm.

MR. STONE: Yes.

JUDGE JONES: And maybe there is some
form of restitution.

MR. STONE: Yes.

JUDGE JONES: But not within trying to
fix it within the military in terms of, as part
of a criminal case. Ordering the military to,
you know, fix this. Get this person back into
their specialty.

I don't see that. But I --

MR. STONE: Well that may come --
maybe that will be part of it if there is an
administrative compensation board that follows
behind this process.

Or in other words, I just think that
those are slightly different issues than
restitution. Where you show up and show you've
lost wages or you've had medical bills.

And typically that's because you're a
dependent of a military person and you work
outside the base or you're an off-base person and
you were assaulted when you were at a party on
base. Or you've been discharged from the
military and you know that it's coming, you know
that was coming up.

I mean one of these gap situations
that we identified. But the notion that
restitution be a part of the disposition and not
be something the defendant decides whether or not
is going to happen. It seems to me, I don't have
any trouble with that.

CHAIR HOLTZMAN: Well I just want to
go back to the point that Mr. Taylor raised,
which I think is a really important point.
Because I think we have elided over it.

Which is, what is really the
difference between restitution and compensation?

As I understood it, and you know, I
could definitely be wrong about this, restitution
was to compensate, as you just last said, for
bodily injury, out-of-pocket costs. It is a
compensation.

Restitution really is a form of
compensation that's ordered by the court as part
of the sentence. And it's for physical property
damage, bodily injury, medical bills.

MR. STONE: There was just a few other
little things too. Of course in most systems, if
you have childcare of course while you attended
the trial --
CHAIR HOLTZMAN: Taxi.

MR. STONE: -- parking fees. Right.

Right, taxi fees.

JUDGE JONES: Money to make you whole.

If this hadn't happened. Right?

CHAIR HOLTZMAN: Right. Up to the past.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Well how many -- are you going to get future medical bills covered by this?

MR. STONE: Well it depends on the situation. The Supreme Court decided in the Paroline case, which it took from the 5th Circuit, there was a projection of a lifetime of psychological visits.

But an expert had to come in and offer testimony that this person was so messed up that, you know, the lost wages would continue and the psychological counseling would continue. But that was a specific of that program that allowed it, and then they got a projection of the cost.
CHAIR HOLTZMAN: Okay.

MR. STONE: It depends how we define it.

CHAIR HOLTZMAN: Okay. But we're talking about the cost for actual bills that either have been incurred or through an expert are going to be incurred.

MR. STONE: Sure.

CHAIR HOLTZMAN: So the guard dog, I mean is that -- I guess someone would have to decide that that's an appropriate expense to be reimbursed for. So it's not really -- so in a way, yes, you could decide you want to get a guard dog, but you're not, no one's going to say for sure that this is going to be paid for out of a restitution program. Any kind of, Maryland --

MR. STONE: Well we do --

CHAIR HOLTZMAN: Am I wrong in --

MR. STONE: I think a simple example would be --

CHAIR HOLTZMAN: Well I want to get to that example.
MR. STONE: -- you didn't have a cell phone and you bought a cell phone --

CHAIR HOLTZMAN: I don't want a simpler example.

MR. STONE: -- for protection.

CHAIR HOLTZMAN: I don't want a simpler example. I want that -- I want to deal with the guard dog. Okay.

MR. STONE: I haven't seen a guard dog, but I have seen, "I need a cell phone because I'm paranoid now when people follow me. And I want to be able to immediately punch 911. And I didn't have a cell phone."

CHAIR HOLTZMAN: Right.

MR. STONE: I have seen that covered.

CHAIR HOLTZMAN: Okay. But we don't know that.

MR. STONE: And that's a security system.

CHAIR HOLTZMAN: Right. So I guess --

JUDGE JONES: Any claim, like "I'm going to need a fence," or "I have a guard dog
that's really working out well and I'm going to need this guard dog well into the future," that would be an argument. And, you know, and the judge would have to decide. I mean, that's how I looked at it.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: I mean it seems to me that one of the ideas behind restitution, as I understood it, and I could be wrong about this, is that it does not bound the victim to X, Y and Z. It's whatever the victim needs in order to put his or her life back together. If it's a guard dog, if it's a home security system, it's a self-defense course. If it's a bigger fence around the house. I mean these are the kinds of things that --

CHAIR HOLTZMAN: Maybe I'm wrong. But I'm -- but in order to get the money, you have to go to the court and say, I have these bills. So it has to be for something that you already have decided, either you've expended or that you need, in connection with the injuries. Or the event.
MR. TAYLOR: Yes.

JUDGE JONES: And you have to put a dollar amount --

CHAIR HOLTZMAN: Right.

JUDGE JONES: -- on it.

CHAIR HOLTZMAN: Right, a dollar amount.

JUDGE JONES: Otherwise you wouldn't know. The judge wouldn't know what to --

MR. STONE: Right. You'd have to get a bill that said, assuming that the person was so scared and the psychologist said yes, they're not going to be able to lead a normal life without, let's go to your guard dog example. Guard dog costs, I don't know, $200 a month, and I believe they're going to need this at least two years. And a judge could say, okay, $200 a month for two years, I find that as restitution.

But you're right, a dollar value has to be put on that. That has to be offered to the judge so he has some record, and the judge, if there's a dollar number there, yes, that's a
typical restitution.

CHAIR HOLTZMAN: So theoretically restitution is being paid. It's really being paid. I guess the person can say, who gets the restitution, I'm not paying the hospital bill. I'm not paying the guard dog bill. I'm going to, you know, I'm going to the Riviera. I guess that's true. You could do that. But that's not the purpose of the restitution. The restitution is really to give you the money to be able to pay these bills.

MR. STONE: Right. Because the theory is, and the true life example is, we see plenty of victims in Maryland who didn't have proper medical insurance. They have a $10,000 bill at the local hospital, which they've never paid. They're trying to get restitution because in the next emergency, when they come by ambulance to that emergency room, they're going to look up their ID and say, "I'm sorry, you need to go to the next closest hospital." Because this person has a $10,000 unpaid bill.
And they will try and push that person
to -- in other words, they're not welcome at that
hospital, because the hospital has a very large
outstanding claim that they can't settle. And
they don't want that. Most of them want to
settle that, because God forbid there's an
emergency, they need to go to that closest
facility. They don't want to be ambulanced
around.

MS. FRIED: Yes, there's actually a
federal law that prohibits hospitals from doing
that. If it's an emergency.

MR. STONE: Well, but not necessarily
urgent care centers.

MS. FRIED: Yes.

MR. STONE: I mean private. I mean
there's all kinds of little wrinkles to that.

MS. FRIED: Right.

MR. STONE: Private doctors, you want
to go to your local doctor and he says I can't do
it because, you know, whatever. Sorry. You're
right. Big public hospitals that get federal
funding can't do that. But a lot of these rural communities don't have a big public hospital.

CHAIR HOLTZMAN: Can I ask this one other question about, it's sort of almost a due process question, in connection with the payment of a restitution. Theoretically, and I'm not talking about the case of the higher level official who's going to maybe have -- some higher ranking officer who may have substantial amount of resources. As I get -- understand the present system. If somebody is convicted of a crime and sentenced, there, to prison under 120, their pay would be forfeited. Is that correct?

COL GREEN: There is a provision under the UCMJ for automatic forfeitures of pay when certain sentence levels are imposed. So if I -- if the accused is sentenced to more than six months' confinement or a punitive discharge, then under Article 58 they are -- automatic forfeitures are imposed, and so their pay is forfeited. If it's at a general court-martial, all of it's forfeited. If it's at a special
court-martial then the jurisdictional maximum is
two-thirds. And so that portion of the pay would
automatically be forfeited.

CHAIR HOLTZMAN: Right. And then
there's an opportunity, however, for the
dependents of the, the children of the defendant,
to ask for a waiver of the forfeiture. Is that
correct?

COL GREEN: That's correct. There is
a provision under the UCMJ --

CHAIR HOLTZMAN: Okay.

COL GREEN: -- that allows the accused
to request that the conveying authority waive
forfeitures. And that can be done for up to six
months, for the benefit of the family members of
the accused. And what's required to show, what
the accused is required to demonstrate: financial
need on behalf of the family. And then that's a
discretionary judgment on the part of the
convening authority, whether the convening
authority wishes to do that or not.

So two forms of forfeitures of pay.
There's either that the court itself can impose forfeiture, or if the certain levels of sentence are reached in terms of confinement or punitive discharge, then automatic forfeitures automatically kick in. But either -- all right, those automatic forfeitures can be waived by the convening authority, at the request of the accused.

JUDGE JONES: At any stage, once the charges are brought? Once there's a preferment?

COL GREEN: No. No, ma'am. The waiver of forfeitures is part of the -- is post-sentencing. So it's --

JUDGE JONES: It's only post-?

COL GREEN: It's post-trial. Yes. Prior to final action.

CHAIR HOLTZMAN: I guess my question is, and now I'm not sure that it really makes any -- that my concern really is a real concern. But would there be a situation in which a restitution could be ordered, and that would affect the right of the dependents to receive monies from the
accused for their support?

VADM TRACEY: It wouldn't affect the right, but it would affect the practicality of whether there's anything, any resources to cover all these demands.

JUDGE JONES: Instead of dueling, a situation, if there's a waiver of the forfeiture and then the money automatically goes to the dependents, and then in the midst of all of this there's a restitution order.

MR. STONE: But that's a typical consequence that the family of the defendant --

JUDGE JONES: Well I know. If in fact, in practice, that would mean that the victim would have the right to those wages as part of payment of the -- of his or her restitution. That's a big consideration.

COL GREEN: But you would have to establish a hierarchy of which --

JUDGE JONES: Right.

COL GREEN: -- which order would be --

JUDGE JONES: Right.
COL GREEN: -- would trump the other, in terms of priority.

JUDGE JONES: Right.

CHAIR HOLTZMAN: And would they have right then to be heard. This goes back, again, to an issue, do they have a right to be heard? Which again would go to the issue of when these hearings are going to take place, how this process would work.

MR. STONE: But that's in place now. If the family members, the dependents of the convicted defendant, if you think they have some --

CHAIR HOLTZMAN: But that's outside --

MR. STONE: -- right and --

CHAIR HOLTZMAN: But that's out --

MR. STONE: -- salary, they have that right now, when any forfeiture is ordered.

CHAIR HOLTZMAN: But that's outside the court-martial.

MR. STONE: Yes.

CHAIR HOLTZMAN: Itself.
MR. STONE: Correct.

CHAIR HOLTZMAN: Whereas this would be inside the court-martial.

MR. STONE: I don't think so.

CHAIR HOLTZMAN: So when would -- the restitution would be --

MR. STONE: The restitution is inside.

CHAIR HOLTZMAN: That's what I'm saying.

MR. STONE: But the family members don't have, their dependents don't have a right inside the court-martial.

CHAIR HOLTZMAN: Obviously. That's my point.

MR. STONE: Yes.

CHAIR HOLTZMAN: That's my whole point.

MR. STONE: Yes.

CHAIR HOLTZMAN: So if they have, if they're going to be injured "possibly" by the -- so that's what I'm asking, if they could be injured as a result of the restitution situation,
will they have a right someplace in this process
to be heard? And if so, how and when?

MR. STONE: That's something, again,
that was explained by Professor Taylor, that they
could have a procedure that they submit a letter.
I mean I have a case in the 9th Circuit right
now, a federal case. Comes out of Hawaii. It
has nothing to do with -- it's a recorded case by
the way -- it has nothing to do with the
military.

But the defendant engaged in mortgage
fraud. And a couple who lost their house and
their entire retirement, equity in it of a
quarter of a million dollars, judge gave a very
light sentence and said, "I want restitution
starting at ten percent of your wages every
month." And gave him almost no jail time.

And the defendant pled guilty and he
waived his right to appeal. And then he didn't
make the payments. And he lied to the probation
officer by saying, check is in the mail. So it
was a probation revocation hearing.
And he said, "I can't make these payments and also have my own apartment, and my car, and pay my child support, and take care of my family." And the judge said, "those things are really not, you know, those are going to be in the discretion of what we think you have to pay. But now I'm going to, having heard that, I'm going to reduce it to eight percent of your take-home salary -- it's going to be restitution."

"It's not my problem if you have to take the bus and rent a room instead of having an apartment, and if your kids have to go to your wife's family to be supported. Somebody here is a defendant of whom you took $250,000 from." Now that, you know, that is the issue that the people who were hurt are first in line to be repaired. And yes, it's always true that when any defendant goes to jail, his family loses their breadwinner. I mean, that's a consequence of committing a crime.

JUDGE JONES: I like Mr. Taylor's idea
very much. That if we were to propose something
here, beyond what we already have, which is not
much, I agree, that it be a system where it would
be discretionary, not mandatory. And that
probably, to make things even more efficient, it
would be in the bailiwick of the military judge.

And in that scenario, there could be,
you know, as things developed, it would surprise
me if a military judge didn't take into account,
when he was deciding what the restitution order
would be, the fact that for another few months
there's money for the defendants that he doesn't
want to stop. Or maybe he'll make it, he or she,
would make a different decision.

So I mean we can't really get into
every detail. I think really all we can hope to
do here is figure out the contours. And I think
discretion and having it in the hands of the
military judge may make it the most practical way
to go forward if we want to do this.

COL GREEN: Judge Jones, can I --

JUDGE JONES: That's my two cents.
COL GREEN: I'm sorry, I didn't mean to --

JUDGE JONES: No, no. Go ahead, comment.

COL GREEN: Two things just to keep in mind in terms of that discussion. Our sentencing process, the accused has an opportunity to present evidence in mitigation --

JUDGE JONES: Right.

COL GREEN: -- so in terms of the defendant, the accused having the opportunity to present information about family member issues that might be -- might result from a restitution order, I mean I do think our sentence, current sentencing process, would even offer an opportunity for the accused to present that information during that preceding.

JUDGE JONES: Right.

COL GREEN: One of the issues going to Mr. Stone's point, about the modification of an order post-trial by a judge, based on a defendant showing family need that was impacted by that
restitution order that I think is important, is
courts-martial are of limited jurisdiction, and
close at the conclusion of the case.

And so we don't have standing courts.

And so that type of modification by the judicial system, and I know Mr. Taylor said, you know, the details work those -- but the one thing that's just for you to know, currently there is no standing court by which that case could be reexamined, in terms of a restitution order based on a modification.

Convening authorities have the authority, through their clemency process, to modify sentence provisions to a limited degree under Article 60. They can do so with fines. If a fine is ordered the convening authority does have the opportunity to reduce a fine.

And so I guess post-trial there, until the convening authority's final action and the case is done, you would have the convening authority opportunity to perhaps modify a restitution order. If you all would recommend
that. Or rather than being completely within the
purviews --

   JUDGE JONES: But I'm saying -- but is
it practical -- well, it can be done, obviously.
It's just a legislative issue. But the military
judge, could he be or she be designated as the
sole arbiter with respect to restitution? In
other words, wouldn't be left to a panel. The
panel would do the sentence, but they would never
-- that would never include restitution.

   COL GREEN: Yes, ma'am. The
interesting thing would be if that's within the
discretion solely of the military judge, would
that then -- would the convening authority have
the opportunity or obligation to examine that
restitution order post-trial, before making final
action?

   JUDGE JONES: Right.

   COL GREEN: Because again, in our
system, the sentencing authority makes -- imposes
a sentence, but essentially that's a -- this is a
loose word, but it's a recommendation to the
convening authority. And the convening authority
can modify that sentence to reduce it down.

And I guess the question is, if the
military judge becomes the arbiter, the person
who's responsible for imposing restitution, the
panel might want to think about whether that is
the responsibility then of the convening
authority to consider that, or whether the
convening authority should not have the
opportunity to consider that.

MR. TAYLOR: I'd just like to pick up
on that point. I agree with Judge Jones that
this should be discretionary, if we should decide
to do it. But I think the long arc of history,
when you talk about the relationship between
military judges and convening authorities, is
that the authority of military judges has
expanded. And the ability of convening
authorities, to do something different, from what
the judge and the SJA have recommended, has
diminished.

So I think that would put us in line
with the way the system is evolving over time. And I would trust, I would trust the military judge to look at all the facts and circumstances, as Judge Jones said, and to evaluate what would be fair in a particular case.

And the kinds of cases that particularly bother me are those where you do have senior officers who, perhaps, may be charged with a sexual assault. But because of the difficulties of proof and all the things we understand about the way these proceedings evolve, you end up pleading to something less than that.

So there are times when I don't think the sentence really reflects the gravity of the harm that the victims have suffered. And I think the one way to make that more equitable for the victims is to give the judge, in those cases, the opportunity to exercise his or her discretion, to provide restitution to the victims who may walk away from the system feeling as if justice was not done. And that has happened in several high-
profile cases over the years.

JUDGE JONES: So we would also have to designate, well, are we talking about restitution for all crimes, or are we talking about 120? And then if you're not convicted of 120, but you are convicted of some lesser offense, we would include those as eligible for restitution, right?

Or --

MR. TAYLOR: My --

JUDGE JONES: -- or any felony?

MR. TAYLOR: My thought was it shouldn't be confined only to 120.

JUDGE JONES: Okay.

MR. TAYLOR: That the recommendation should be broader than that. And cover all crimes where restitution would be appropriate. And how that should be defined --

JUDGE JONES: Let it --

MR. TAYLOR: -- I'm not sure.

JUDGE JONES: -- play. Yes.

MR. STONE: And I would tell you that, from the week-long training session that this
Panel sent me to last summer, there was presented at that training session, a panel of five victims. And my recollection is that two of the victims were people who had been the equivalent of special assistants to high ranking officers. And it was a high ranking officer who used his position to wind up sexually assaulting them.

So it's not an uncommon problem. It's not just in the barracks among equals. It's often the edge of, I'm going to lose this position because somebody has authority to use, and we heard some of that with the new recruits too. The same thing. They worried in the new recruitment cycle.

So I think it is correct that you do get people who are not at the lowest level and have some assets, as senior officers. And in those cases, at least in one of them, they did discuss the fact that the case was pled down. So I think there is support for the kinds of things you're saying. I would say though, I also look at the historical evolution of restitution in
non-military criminal cases in this country.

And it has largely gone in the opposite direction. From discretionary restitution, because when discretionary restitution was out there for 20 years and mandated, most judges, to save time or because they really thought, eh, it will never get paid or whatever, they didn't order it. And it was ordered in almost no cases.

And that's why victims came back and lobbied in state legislatures and federally, and got mandatory restitution, because they wanted to see a restitution order. And they didn't want to have -- basically it leads them to believe, anyway, and maybe this is even more true in the military, oh, well some of those people who are deciding on restitution are friendly or know some of these defendants and they're letting them off the hook.

And that problem is gone when it's a mandatory restitution decision. And the victim knows they got a restitution order. They know
that they may wind up having to get the compensation commission to back it up and pay.

But at least they -- and also the compensation commissions, you know, ask them, "have you done everything you can?" And they can say, "yes, we went, we got a restitution order. But here it is, it's a year and a half later, I haven't gotten a dime. And therefore I do come to you, as my last resort," and they feel, yes, our last resort function counts.

But I think, and we could get surveys of it, but I will -- my recollection is that the trend is not towards discretionary restitution, because it wasn't being ordered. It's towards mandatory restitution, in the places where there wasn't discretionary restitution.

CHAIR HOLTZMAN: Yes. But you see, the point you made was that the compensation system is a system of last resort. And if you change that, or made the compensation system more robust, and the question wasn't what you've done about restitution, you'd have a different, you
might have a different outcome. So it depends on how these things are structured, and they are interdependent in some way. And I feel very strongly the victims should be compensated, very strongly.

But I just am concerned about how a system that's not -- court-martial system that's evolved in the way it has over time, for good or for bad, is going to accommodate this. And whether we can do a lot better by beefing up and strengthening and creating, actually, a proper system for compensation, instead if what we have now, which is relegating people to states.

And they have to figure out what state they go to if they're, you know, if they're injured aboard, assaulted aboard. I mean it's unclear they're going to be covered. So we have a patchwork system that, in my opinion, is really horrific. And I'd like to see that strengthened.

I'm just -- I'm not objecting in any way, shape or form to the objective here, which is to help victims. In fact I feel very strongly
about that. I'm just trying to make a system
that's really going to be effective and work.
And just getting an order, as Barbara said, as
Judge Jones said, we have billions and billions
of unpaid restitutions orders. I mean, that's
just creating a bureaucratic nightmare. We don't
need that. We don't need that red tape. We
don't need those orders sitting around. What we
need is to get the money into the hands of the
victims so they can pay their bills.

MR. STONE: I completely agree with
you. And I think that I could completely agree
with us deciding that a compensation system,
funded by the military, is -- could take over
this whole problem.

Avoid it having to be during the
criminal case, although dependent on a guilty
verdict, and a victim who's been identified by
the guilty verdict, and then have the victim
impact statement by the victim, who wants to see
accountability by the defendant, ask for a fine,
you know, or forfeiture of pay to the government,
because they didn't have to worry about their own restitution.

I agree, that's a perfectly acceptable substitute, but it's a little different than what current restitution compensation systems out there have follow-on and want to be a last resort. So I completely agree with you. That's a very -- maybe in the context, we're dealing with the military context, it's a better paradigm for us to look at. It's certainly an alternate one that would be accepted.

And you also have experts, that way, deciding on the compensation question, because they're people who are appointed to do that every day, they're not somebody who's plucked to be a military judge or a panel member or a convening authority who sees it so rarely that if they only see it once a year, they don't have any experience with it. You'll have people who have experience with it every day. So that's another advantage of your ultimate scenario, which I think is absolutely plausible.
MR. TAYLOR: But, Mr. Stone, if I could ask, are you saying that that should be in addition to restitution option, or in lieu of?

MR. STONE: Well --

MR. TAYLOR: In other words, if you have the military compensation system, which when we discussed this in April, I think all of us generally leaned in favor of. I certainly agree with what the Chair said about establishing the system. But still, that is a system where the government is reimbursing or paying, as opposed to where the actual accused, the person who's been convicted at that point, makes restitution. Again, what are you saying about that?

MR. STONE: I think what I'm saying is, and I think this is along the lines of what the Chair is saying, is that it would be in place of a restitution system and that the victim, who felt that they wanted to see the defendant show responsibility, or to have his pay forfeited and/or order to be fined maybe in addition. That that would be, you know, that he would recognize
that forfeiture of pay and fine would run to the
government, and it's the same government who's
paying them their compensation.

So it's a little more roundabout, but
given the difficulties in the military system in
holding court-martials out in the field or
whatever, you know, without regular juries, I
mean the various differences that they would get
to ask for that in a roundabout way. "And I
think you should forfeit his pay, and fine him X
amount because of the injuries to me."

I mean they would get a chance to
express that. It just -- it may not come
directly to them, given all the difficulties of
ordering it, collecting it, seeing that it's
paid.

And again, they're going to want to
say that, I think, even if they do have military
health insurance for the rest of their life, they
may say, "he deserves the fine as well, because
although my medical bills are going to be paid, I
still have to go to a psychologist once a week
for the next five years because I can't sleep at
night, because I keep having these terrible
dreams of being sexually assaulted." So I mean,
they're going to want to say that, with or
without the bill, you know, for the Services, I
think.

VADM TRACEY: I want to just ask this
question for myself that, it sounds, in what you
just said, it sounded as if what you're
suggesting is that you combine the restitution
and compensation muscle, if you will. That
that's a decision, the decision to compensate the
victim by some mechanism, gets made at the trial.

The method by which we assure they get
paid is derived from making this a federal, you
know, the military sets up a compensation system
of its own, and in some cases that's funded by
the forfeitures from the accused. In cases where
it's a, you know, it's a much more junior person
without those means, it's essentially funded in
some way. I just wanted to understand.

MR. STONE: Okay, the --
VADM TRACEY: If --

MR. STONE: -- only decision made at trial is the threshold decision that a defendant is guilty of a crime against a victim. That's the only decision.

VADM TRACEY: Okay.

MR. STONE: Okay, the compensation board typically says, send us copies of the bills that you have, send us the categories that you're looking for. They decide that, that doesn't have to go to the military judge or the board at all. And they pay it, either to a maximum or on a schedule, without any limitation on how much they go back and are able to subrogate and re-collect. And typically it gets funded through completely separate mechanisms in the states.

So in other words, whether the forfeiture or the fine ever gets paid to the military or U.S. Government, is really not their issue. Because you don't want to penalize a particular victim whose attacker was a higher officer with a trust fund, versus one who was a
lower officer who didn't have anything.

So it's a little less direct than some of those details. But yes, I think it could be -- I think that would be acceptable to victims. They know that there's a place that if they're the person, the one in 20 who has uncompensated bills, there's a place to go. And some experts are going to look at it who really had no connection to that military unit, which is going to be comforting to them too.

There may be a Headquarters unit somewhere, or who knows. It's a multi-Services unit for all the Services. And they don't feel like, "oh, he knew those guys so I'm not getting my restitution." It eliminates some of that subjective feeling. It doesn't have to be a real feeling, but it's a subjective feeling that they don't want to pay me.

MR. TAYLOR: Well the issue for me, with that, is that what you're doing really, it seems to me, is letting the perpetrator off the hook, in terms of personal accountability to the
victims. Which was one of the main reasons that I was in favor of giving the judge, I think I'm in favor, of giving the judge discretionary authority to make that call in appropriate cases.

Because in the scenario I've described, involving a senior officer who was charged with a sexual assault offense with subordinates and pleads to something else, it just seems to me that that would be a really good way for the military judge to, again, restore the victim somewhat to the situation before all of this bad stuff happened to them.

And I don't know why that can't operate independently of the compensation system which can do a lot of the things that you described, being with compensable expense, that the victim will receive, but not because some judge ordered the perpetrator to make that victim whole with these restitution payments.

MR. STONE: Well, and we have to sort of jump for a minute back to the practical side here. A lot of states operate exactly the way
you are saying, even if they call it mandatory
restitution, because they want the judge to say
it, the victim may want to hear it at sentencing.

   It never gets paid. And then two
years down the line, before the statute of
limitations on the compensation commission comes
and expires, they have to go and say, "you are my
last resort," because it never got paid. And
given that in the military system, with anything
over six-month sentence, there's going to be an
automatic forfeiture of wages, how are you going
to collect on that in most of these serious
cases? Even if he has a trust fund or a house
somewhere, you have to go start getting involved
in state process to -- in a separate state --

   JUDGE JONES: Mr. Stone, can I ask you
to clarify one thing? Are you saying, and again,
I may not have ever heard this or I've forgotten.

   MR. STONE: Sure, that's fine.

   JUDGE JONES: In a state -- in many
state, or all compensation programs, if you have
a forfeiture order from a court, do they wait a
certain amount of time before they are willing to take your case and compensate you, is that what happens? So it could actually block you getting compensation?

MR. STONE: Well this --

JUDGE JONES: Until you can say I'm not getting anything out of this --

MR. STONE: You have to say, "I'm not getting anything." And typically they ask you to show that you have been unable to collect. They don't necessarily make you wait a long time, because they're realistic about it.

JUDGE JONES: Yes.

MR. STONE: And they don't make you file an independent separate civil suit, because even though you have a judgment against the guy --

JUDGE JONES: Right. And you don't actually need to walk in there with a sentence that shows a restitution order, right?

MR. STONE: No, you don't.

JUDGE JONES: You can just go in and
ask for compensation --

    MR. STONE: Well, but it depends on the state.

    JUDGE JONES: Well that that's -- I know that.

    MR. STONE: Sometimes states do --

    JUDGE JONES: And if we're doing this --

    MR. STONE: -- require the victim to have at least said, "yes, we asked for restitution and we didn't get it" --

    JUDGE JONES: All right.

    MR. STONE: -- or "we got it, but it was never paid."

    JUDGE JONES: Right. So --

    MR. STONE: And they're looking to see in a reasonable time, I think they feel if you didn't get anything in six months, it's never coming, you know.

    JUDGE JONES: All right. So in the military, which is a closed system, we could have a military judge who must examine whether
compensation or restitution should be required, and then has the discretion to say, yes or no. And then that would fudge the mandatory versus discretionary a little bit. Because these judges are going to be under tremendous amount of pressure.

And maybe they'll say, "yes, restitution is -- based on what I've seen, restitution should be made here. But I've also examined X, Y, Z." And I don't know, maybe we can say, so I believe the recommended course for this victim is to go to the compensation committee. I mean to -- it just would be a route.

I don't know whether that works or not, but I mean that's the way to get around the excessive numbers of orders that are never going to be, you know, restitution orders that are never going to get paid. Which would mirror the current civilian system.

And if we were to create -- this is all so much, so many pieces of the same, you
know, question that have to work together. It
would give some restitution to the victims
directly out of the court-martial. Some would
get it, some wouldn't. It would be considered,
if it didn't look like it was ever going to
happen, the judge could simply say, "I'm not
ordering restitution, although I think you
deserve it," or something along those lines.

I don't know how this gets structured.
I have to think about it some more. But this has
to -- I think it does have to be a system that --
where the victims think they're getting
restitution. Which, if we don't do anything in
the court-martial piece, I don't think they're
going to feel that way.

On the other hand, I think we have to
be -- as I think about it, I am a little
concerned about it being totally discretionary to
the poor military judge who's going to be asked
in every case to make a restitution order. Maybe
he just has to make a restitution decision right
then and there. And there are ways to streamline
it to get right to the compensation board. I don't know. I'm talking --

MR. TAYLOR: What I would, Judge Jones, what I would expect would happen would be that the Benchbook would come up with guidelines --

JUDGE JONES: Right.

MR. TAYLOR: -- so that there would be something out there that would give judges, you know, some --

JUDGE JONES: Right.

MR. TAYLOR: -- suggestions, tips, hints about when and when not to. Something like that.

JUDGE JONES: Right.

MR. TAYLOR: So it wouldn't just be completely --

JUDGE JONES: Oh, no, no. I --

MR. TAYLOR: Right.

JUDGE JONES: Yes.

MR. TAYLOR: Right.

MR. STONE: In the states --
(Simultaneously speaking.)

MR. STONE: -- victims aren't
foreclosed if a judge decides not to order
restitution. The compensation board has its own
authority to look at the case again and decide --

JUDGE JONES: And we could have that
here too.

MR. STONE: Yes.

JUDGE JONES: I'm just trying to get
the military judge off the hook and --

MR. STONE: Yes --

JUDGE JONES: -- also reduce the
paperwork.

MR. STONE: And I think that's an
admirable goal that we should try to do. I
agree.

VADM TRACEY: So require that the judge
at least consider it as restitution, and not
require them to do --

JUDGE JONES: To actually --

VADM TRACEY: -- ultimate action by
some sort of guidelines to help them decide, to
make those decisions. Vector the decision as to whether it is able to be paid by the accused, or it has to be paid somewhere else --

    JUDGE JONES: Right.

    VADM TRACEY: -- to the compensation commission. So the victim is not having to go make that case in front of the commission. And then leave open a route where if the restitution order is not approved by the judge, that there is another route to seek compensation.

    MR. STONE: And I'll tell you when that scenario suggested will work fine. It will work fine in the current restitution cases, few that they may be. Because what will happen is, they'll be an individual who has resources, who wants some sympathy from the judge for a lower sentence. And again, he's going to step forward and say, after he's convicted, maybe he didn't volunteer in a plea bargain, but his lawyer's going to say, judge, we see that the restitution here is like $1,000.

    I just had something in Maryland court
and the lawyer came running up to me, before the
sentencing, in the courtroom and said, he
whispered to me, "how much is the restitution
your client, the victim is going to be standing
up and asking for?" We said $2,500. He said,
"Wait a second."

He ran over, he came back with a check
for $2,500 right then and there. Because at the
sentencing, which was ten minutes later, he stood
up and he said, "and Your Honor, my client has
already paid the restitution, and I'm hoping that
you'll recognize that and give him a low
sentence." And the judge did.

And so it will come up sometimes. And
then neither the military will have to pay, and
the compensation board will have to pay, and it
will come from the person. There will be some of
those cases that the person wants that
consideration. And so you're right, some of that
will happen.

VADM TRACEY: So they're making it a
mandatory consideration, you do give the victim
an opportunity to come prepared, right? So that
it's not a --

JUDGE JONES: If they know it's going
to be --

VADM TRACEY: Yes.

JUDGE JONES: It has to be considered
and a decision has to be made. Yes, that gives
them the opportunity to come in.

MR. STONE: There's going to have to
a little bit of a delay, because that victim has
to say, "let me go home and dig up my hospital
bills and" --

JUDGE JONES: No, no, no. Not with
victims' counsel. They should be thinking about
that.

MR. STONE: Well not if they don't
know which count. If there's a plea, and a plea
can happen in the middle of the court-martial --

JUDGE JONES: Oh, I know. But you
start getting -- all I'm saying is --

MR. STONE: -- if it's a reduced plea,
it may not be to what they thought their bills
related to and they have to --

VADM TRACEY: But they put all their bills out and then some of them are disallowed --

MR. STONE: Well --

MR. TAYLOR: But, Mr. Stone, in a court-martial you don't have any --

JUDGE JONES: You --

MR. TAYLOR: -- in the middle of a court-martial, because you've got to go back to the convening authority.

MR. STONE: Right. Right.

MR. TAYLOR: There's always going to be some time built in there.

MR. STONE: Right. Well again, if it's the --

MR. TAYLOR: Yes.

MR. STONE: -- judge, the panel or the convening authority. But you may not have the conviction on all counts, and we do see --

JUDGE JONES: Well we don't know, if it's a panel, what they've convicted on anyway, right? Or do we? Which ones?
MR. STONE: Yes, I think we know what counts the panel convicts on.

COL GREEN: Yes, you know what they --

JUDGE JONES: So if there's four counts they'll all come back and say, we've convicted on --

COL GREEN: Sure. Absolutely.

JUDGE JONES: -- these two, not the --

COL GREEN: And the sentencing --

(Simultaneously speaking.)

COL GREEN: And then the sentencing moves forward on those particular counts for which the accused is convicted, and appropriate maximums and the like.

MR. TAYLOR: Could we have a five-minute break?

JUDGE JONES: Sure. How about ten?

CHAIR HOLTZMAN: Thank you.

(Whereupon, the above-entitled matter went off the record at 10:35 a.m. and resumed at 10:51 a.m.)

CHAIR HOLTZMAN: I think before we go
much farther in our own conversation, I think we should hear from Lieutenant --- I'm sorry, from Colonel Green, who pointed out some of the aspects of post-court-martial restitution opportunities. So, we have that in our head, too; just to complicate the ---- if it isn't complicated enough, we can complicate it a little more. So, you want to enlighten us, please?

COL. GREEN: The current process does allow the military judge to make a recommendation on restitution. So that is an opportunity that even though a military judge has no means, or the sentencing authority has no means to provide for restitution, he can make a recommendation as to the appropriateness of restitution in the clemency process post-trial.

The clemency process post-trial is twofold. For one, the convening authority takes the action in the sentence imposed by the court, and then ultimately makes final action, and can reduce the sentence that's imposed by a court, and so it can modify that.
So, restitution that's made post-trial, obviously, an accused can bring that forward to the attention of the convening authority, and the convening authority would have the discretion to reduce the sentence imposed based on an indication of restitution.

Subsequent to the Article 60 clemency process, the clemency and parole process, is obviously, a standard part of the process in courts-martial, and DoD policy does require that the Clemency and Parole Board must consider restitution as an element or a factor in considering the clemency and parole decisions that are made post-trial.

So, again, they don't have the independent ability to --- none of those bodies have the independent authority to direct restitution; however, both are provided opportunities to consider that in their independent decision.

CHAIR HOLTZMAN: Wait a minute. Now I'm really confused.
COL. GREEN: Okay.

CHAIR HOLTZMAN: So, they can --- so
the Clemency Board considers it and says, I think
there should be restitution. They can't say that
and they can't order it?

COL. GREEN: That's correct.

MR. STONE: No, but what they can do
is say, "oh, I see he paid restitution on his
own, even though there was never an order for it,
and even though it was not part of a plea
agreement. He decided -- just like you might pay
it before sentencing" ---

CHAIR HOLTZMAN: Right.

MR. STONE: --- "he decided to pay it
the day before the parole consideration. We can
consider it and say, okay, that shows an
acceptance of responsibility."

CHAIR HOLTZMAN: Well, I thought it
was mandatory. Maybe I misunderstood entirely
what you said. You said it's mandatory for the
Clemency Board, and for the convening authority
to consider restitution.
COL. GREEN: Well, it's not mandatory for the convening ---

CHAIR HOLTZMAN: Okay.

COL. GREEN: The convening authority in its Article 60 clemency process, there's no requirement that restitution be mandatory. It's discretionary, it's something the convening authority ----

CHAIR HOLTZMAN: No, no ----

COL. GREEN: ---- can consider in all of the ---

CHAIR HOLTZMAN: Are they mandated to consider it? Not to give it, but are they mandated to consider it?

COL. GREEN: The Clemency and Parole Board, DoD policy says they shall consider making restitution to the victim a condition of granting clemency and parole. That's the ---

CHAIR HOLTZMAN: Okay, so that's the ---so, it's only if they're going to grant clemency or parole. In other words, if they're going to change the sentence that they can ---
that they must consider restitution.

COL. GREEN: That's correct.

JUDGE JONES: But just --- and if it's offered, they must consider it, but they don't order restitution. Correct?

COL. GREEN: That's correct.

CHAIR HOLTZMAN: How does it ---

JUDGE JONES: And nor does the convening authority ---- or does the --- when there's a recommendation of restitution from the military judge as part of the sentence to the convening authority, a recommendation of restitution, what does that mean? Does the military --- does the convening authority --- he doesn't have the authority to order restitution either. Correct?

COL. GREEN: That's correct.

JUDGE JONES: Okay. So, what does that ---

COL. GREEN: I think, Judge, probably the hypothetical would be that a military judge would determine that a financial loss --- and,
again, I think in most of these cases, it would be property-type cases where there's a demonstrated financial loss.

    And you might have a military judge make a recommendation that if restitution is provided, then --- or in the case of the mitigation presented by the accused at sentencing shows that I have provided and I made restitution, then the military judge may say that, you know, based on either demonstrated restitution or proposed restitution, my recommendation to the convening authority would be to reduce the sentence appropriately based on those terms.

    But the convening authority would not have the independent authority to direct restitution, it would merely be, if it's demonstrated, I could mitigate my sentence or reduce my sentence accordingly.

    MR. STONE: Been voluntarily paid.

    CHAIR HOLTZMAN: So, in other words, the sentence --- there's no separate enforcement
procedure or order for restitution, but to obtain restitution it's conditioned on some action.

So, in other words, the convening authority will not grant restitution unless the defendant undertakes --- I mean, will not grant other things in order to get the defendant --- if the defendant himself or herself pays the restitution.

COL. GREEN: That's correct.

JUDGE JONES: So, all restitution is voluntary from the defendant?

COL. GREEN: That's correct. It is at the discretion ---

CHAIR HOLTZMAN: Quote, unquote, voluntary.

COL. GREEN: --- of the accused.

JUDGE JONES: Right.

MR. STONE: Yes, it's a showing of contrition.

VADM TRACEY: And there's no mechanism, I think, under what you said for ---- about restitution to be something that is
sufficient that it has to get paid over time, or
would have you assume -- in that instance that
you suggested where it's a ---- you know, pay for
recurring medical visits for some period of time
that, that would need to be paid in a lump sum
because there's no mechanism for anyone to make
sure it gets paid ---

COL. GREEN: Well, ma'am, I think you
as a convening authority, if an accused presented
a plan, like say some type of a contract between
an accused and a victim that said, "I'm going to
make payments to you over the course of the next
six years."

I mean, certainly you as a convening
authority could take that into consideration and
probably weigh that in terms of, is it going to
actually be paid, or has it already been paid?

MR. STONE: And his lawyer could come
up with a confession of judgment, say, and he is
--- "I agree for them to attach my wages,"
whatever. "I'm going to pay them X amount per
year, and here's a confession of judgment, should
I ever not pay it, that they can just go run in
and get a judgment against me."

They might come up with something like
that, or "here's a lien on my car, or my house
until it's paid." I mean, you could create a way
to figure out how to do something like that.

VADM TRACEY: But the convening
authority has no instruments like that, and it
would have to be something that was constructed
by the accused and their counsel.

MR. STONE: Who wants to do it.

CHAIR HOLTZMAN: Or if you wanted to
enforce the restitution you could say --- I mean,
could you say I'm going to impose an additional
sentence? Can the --- no, the convening
authority can't increase the sentence.

COL. GREEN: Cannot, no.

CHAIR HOLTZMAN: Or the convening
authority could say I would reduce the sentence
by a year if you paid this restitution. So, it's
--- that could happen, right? Or not?

COL. GREEN: There's not really a
bargaining process involved where the convening
authority would have sort of a time and say, "I'm
going to evaluate this case, and if you do this,
then I will reduce it by X." I mean, it's really
a one-time assessment of the case in the action,
and the approval of the findings and sentence.

CHAIR HOLTZMAN: Okay.

MR. STONE: And I think to some
extent, a proportion ---- I can't say what
proportion, but a proportion of victims are going
to be offended by the notion that the defendant
is going to make me financially whole in order --
-- so that he can get a break on what otherwise
would be a right sentence for him.

"I'm not here so he could get ---- to
be made whole, so he gets a break. He should get
the right sentence, and I should be made whole."
So there's that --- it's not really working right
as it stands, it seems to me.

CHAIR HOLTZMAN: But the point I was
trying to bring out is that there is an
opportunity, even though it's conditional on
reducing sentences, or it sort of works that way, that there is authority in the present system, limited as it is, for the convening authority to grant restitution.

MR. STONE: Well, no, to accept.

CHAIR HOLTZMAN: Not grant, to accept restitution.

MR. STONE: To accept that it's been paid.

CHAIR HOLTZMAN: There's a restitution element in that.

MR. STONE: Yes.

CHAIR HOLTZMAN: And there's also some kind of restitution element in the Clemency Board.

I'm just --- the reason I'm raising this is because I'm trying to be practical in the sense of, if we can figure out a system that's not --- the least disruptive system of --- for getting restitution or compensation into the hands of the victim is something that I think is to be desired. But everything would require some
kind of tinkering, but there is some kind of
restitution component in these various bodies
now.

MR. STONE: So when you mean --

VADM TRACEY: But isn't that an
important distinction ---- and I think we're
still on Issue 1, is that an important
distinction, that yes, there are mechanisms by
which restitution can be addressed, but they are
targeting a way in which the accused negotiates a
different outcome than would otherwise be
applied.

They're not designed around the issue
that Mr. Taylor raised of contributing to giving
the victim some satisfaction. They are around a
---

MR. STONE: But as long as the victim
gets to speak, there could be a box put on the
judgment and commitment form that says:
restitution, court recommends X amount; defendant
has paid, agrees to pay, or has not agreed to pay
it, and you check it off as part of the current
system without doing too much.

And then depending on what happened there, it may cut down the number of whatever a compensation commission has to do, because if the defendant --- it at least gives his lawyer a chance, even if there was not a plea, to say to him: "if you can, it's not so high, I think you ought to pay it off. Agree, come in there and look like you show some acceptance of responsibility and pay it off right now before we go to sentence. It can't hurt you, because sooner or later they may get it from you anyway."

So, I mean, he might want to do that and -- you know, and the victim will still ask for an appropriate sentence, but won't need to ask anybody else after that for restitution. So, yes, maybe we can tweak it a little bit so it's not quite as restrictive as it is today without totally changing this process and then, you know, back it up for the cases where it doesn't ---

CHAIR HOLTZMAN: So, you're ---

MR. STONE: --- get voluntarily taken
CHAIR HOLTZMAN: So, your suggestion, Mr. Stone, would be --- how would that work, this box? What is the sheet of paper? Who does it go to? When does it go? To whom does it go?

MR. STONE: Well, what would happen is at the say 24-hour-delayed sentencing, you know, the victim would indicate, you know, shortly after the verdict whether they will or won't be at the time of sentencing making a restitution request period.

And then they would show up let's say the next day, the 24 hours later, and say, "this is the kind of request, this is the amount that I think I'm due for medical injuries, lost wages, blah, blah, blah. I have some stuff here." And the judge might say, regardless of whether it was a plea or a trial, does the defendant, you know, wish to accept and agree to that restitution request? And he would note it down, you know.

I mean, I guess he would first get a chance to say, "I do think that looks right," or
"I don't. I'd like to say that, you know, for some reason I want to change the number." I've never seen that happen usually when they come in with numbers on a piece of paper, but he'd have a chance to look at it.

And he'd say, for the record, "does the defendant wish to make that restitution? I want to note it on my sheet so I can pass it along, you know, for sentencing that you have agreed to make it or you haven't." And just wouldn't be restricted to the negotiation situation.

CHAIR HOLTZMAN: All right. And then would that go to the sentencing panel?"

MR. STONE: Yes, it would go to the sentencing panel and they'd see what was down there. And then either the restitution could be ordered based on the voluntary basis right then. Or if it wasn't, everybody would know it wasn't, and then the commission/panel would come behind some of those cases, but it would get rid of some --- a few more of the cases in addition to the
ones that negotiated in a plea.

I mean, yes, that would mean fewer would have to go and be, A, delayed, and B, go to a commission --- a compensation commission. We know there's not going to be too many anyway, because in a lot of the cases, we're hoping if it's a Service person they're going to have their medical and lost wages situation already covered.

But the gap gets smaller and we're trying to accommodate the ones where --- I mean, if the defendant wants to pay it, I don't think we should ever stop him. We should make that available.

CHAIR HOLTZMAN: What's the --- I'm sorry.

JUDGE JONES: I was just going to say

---

CHAIR HOLTZMAN: Judge Jones.

JUDGE JONES: Just to put a little finer point on this, I don't think we want a system where a defendant is forced to say yes or no, particularly no, and then get sentenced
because it will look as though --- that's the flip side of the problem.

It'll look as though the panel is punishing him with the sentence because he wouldn't make restitution, which is not supposed to be part of their bailiwick, either. I mean, this voluntariness with respect to making restitution -- I mean, obviously, the defendant offers it and pays it with the hope that it will mitigate sentence, and it is a factor that he's trying to do his best. But I would be very worried about a system where he had to stand up and say no, I'm not making that restitution, and then he gets sentenced. I don't think that should be a factor.

CHAIR HOLTZMAN: But that doesn't have to go to the sentencing panel, but the fact that the defendant agreed to make restitution ---

JUDGE JONES: That would always go, right.

CHAIR HOLTZMAN: Okay, so that could go, but not the negative.
JUDGE JONES: I think.

MR. TAYLOR: Yes. I guess what this reminds me of is an admonition that the Chair gave us some time back in November-December when we had Members of Congress offering suggestions about congressional legislation. And I think you said at that time, we usually don't write legislation in a committee like this, it's not a --- so, I think the devil will always be in the details.

For me, the big issue is whether or not, as a sort of fundamental principle, we ought to be in favor of giving the court-martial, the military judge, the authority -- pretty much as Judge Jones outlined earlier, to maybe then orally consider restitution and then the authority to order restitution.

And the details will have to be worked out and assuaged by those who can take into account all the financial implications, and it will obviously require a greater effort than this committee, I think, is able to put together
beyond just the broad outlines.

JUDGE JONES: I agree.

CHAIR HOLTZMAN: But I do think we need to think about some of the implications. I mean if, for example, the judge is going to order restitution ---- I mean, under Mr. Stone's scenario, the judge doesn't order restitution. The judge just says, "I think restitution in this is appropriate," that --- what happens to that?

Does it go to the panel, doesn't go to the panel, and what happens to the order? Is there any order? Is it enforced? How is it enforced? If the defendant doesn't agree, how is it enforced? Do we have --- we don't have a system for that, so then you have to create a system. Are we recommending that that --- I mean, so that would have to be --- I don't think we could ignore some of the major consequences of what we recommend.

MR. TAYLOR: Right.

CHAIR HOLTZMAN: I mean, not at the finest details, but ---
MR. TAYLOR: Excuse me, yes, but how would the enforcement of that order be different from an order for a fine or forfeiture? Why wouldn't it be in the same category?

CHAIR HOLTZMAN: I don't know.

Colonel Green?

COL. GREEN: Currently, the fine is -- becomes part --- if it's the adjudged sentence and then the approved sentence becomes part of the judgment, and I believe it goes to DFAS as an enforceable provision ---

MR. TAYLOR: It's a debt. Right?

COL. GREEN: Yes, sir.

MR. TAYLOR: I mean, what I think the answer to that question is it becomes an adjudicated debt against the individual.

COL. GREEN: Right.

MR. TAYLOR: And like any adjudicated debt, they can be enforced by garnishment, by taking pay out, by eventually going to court and enforcing it like any other civil debt. I would assume. It's not my practice area, but that's
what I assume would happen.

MR. STONE: Except that the fine ---

the forfeiture is easy because you've already

got the property.

COL. GREEN: Right, right.

MR. STONE: It's --- you got a hold of

something and you're going to keep it, whether

you're forfeiting a car, or whatever you're

forfeiting, so that part --- or if it's the

salary, he never gets it. You've got it, you're

not letting it go. That part is easy.

The fine is a little --- is a tiny bit

different because when it's a fine owed to the

U.S. government, they probably can take it out of

taxes or tax returns and stuff like that;

whereas, when it's restitution to a private

person you can give it priority but it's not

quite the same. It's not the government's money,

which a fine is.

But, again, those are details, and I

think those details could be addressed. And I

think you're right; essentially, there is
somebody who's got to follow and collect that
forfeiture and fine, and be able to write off
that it's been done so that person could just
pick up another collateral duty.

I'm not sure that how we work it out
means that the judge would only or always
recommend and not order. I mean, maybe we want
to give him authority to order. I mean, that's
certainly what judges do in non-military courts
all around the country. They order the
restitution, they don't just recommend it.

But, you know, it depends in part on
how we are able to best accommodate the process
that's there now for military judges, and I think
that's what we want to do. We want to be
flexible enough to best accommodate what's there
now, and yet still see that the restitution in
these gap cases gets paid.

MS. FRIED: Ms. Holtzman, if I may.
Just from what I hear of the Panel discussion, we
talked about mandatory -- or you all talked about
mandatory and discretionary authority. We have
what's called the --- we have the authorized
punishments under every offense, so right there
you have a range of punishments that could be
imposed, but not necessarily imposed.

And I guess I'm trying to understand
if this Panel is considering making it an
authorized punishment in which it may be imposed,
but may not be imposed? Or are you asking to
make it a mandatory minimum sentence, along with
whatever else might be a mandatory minimum
sentence with regard to sexual assault cases? Or
is it something that could be considered a factor
of mitigation by the sentencing authority if it's
initiated by the accused?

After that's determined, then I think
we go to the process question of how it's
actually done, if you want to make it part of the
court-martial process. If you're talking about a
different compensation fund, then I don't know if
you're talking about it being a punishment or
not.

MR. STONE: That gets back to my
statement at the beginning, it's called a disposition. It's not a punishment, it's making --- helping the person who was injured become whole. Because if it turns out you are completely without assets as a defendant, it doesn't matter what gets ordered, you're never going to pay.

It's not going to be a punishment for you because you're going to say, "I have no assets." And let's say you're, you know, getting to the point where you're also discharged on the basis of age or --- you say, "I'm going to get my Social Security or whatever, my pension or, you know --- I'm not getting another job. I'm never going to pay this," and some of that happens in the non-military system.

So, it may be that it doesn't really punish the defendant at all. It's meant to bring the victim back to the state they were in, to the best extent you can, if the crime hadn't occurred.

CHAIR HOLTZMAN: It seems to me that
what you'd have to do ---- because restitution
theoretically is not a punishment -- is that
you'd have to amend that language to say
authorized punishments and dispositions, then you
would have this as a disposition. Am I --- does
that sound right?

MS. FRIED: Yes. Just from listening
to the conversation, ultimately you all make the
recommendation, but that's kind of what I wasn't
--- I was trying to understand where you were ---

CHAIR HOLTZMAN: Yes, because it can't
be a punishment. I mean, it's not a punishment
theoretically.

JUDGE JONES: Or it can be a ---
rather than go back and say restitution is also
an authorized disposition for this, this, and
this, you can have a freestanding section that
just says ---

MS. FRIED: Right.

JUDGE JONES: --- restitution shall be
considered in these, and you pick out what you
want. I mean, that's ---

MR. TAYLOR: Which is probably a good idea anyway, because as the conversation has developed, we understand that there are bits and pieces of restitution hiding in various pieces and parts of the system, and pulling them all together in one section that deals with all the aspects of restitution would probably be an organizational advantage just for everyone's understanding.

JUDGE JONES: We might know what we meant.

CHAIR HOLTZMAN: Really? Do you think we're ready to make a recommendation, or do we still have further conversation on this? If we have a recommendation, maybe we could --- somebody want to formulate what the recommendation would be?

JUDGE JONES: I think my own preference would be to talk about whether we're going to have a compensation system, freestanding compensation system, the other piece that we've
sort of been talking about.

I mean, I'm not leaning towards the structure that we've talked about here just yet. I'm more leaning towards it than I was when I came in here, but maybe I'm the only one out of five, so I think I'd just rather find out if we're going to have a compensation system or discuss that next.

VADM TRACEY: Are we agreed on some principles though that restitution for the victim seems like it's a factor we should be making available to the victim? That the current system is geared towards a mechanism by which the accused is able to achieve a negotiated lower sentence rather than being aimed at making a victim whole.

That there should not be a circumstance in which the accused is put in the position of having to say yes or no to restitution before the sentence is adjudged, that those are separate issues. Restitution is not a punishment.
You know, there's some --- a handful of things I think that we articulated here that have changed to the system to enable restitution as a way to make a victim whole, needs to fit as readily into the existing system as it can be, and still be able to achieve the objectives that we've indicated.

JUDGE JONES: You know what, Admiral, I agree with all those principles. I think I always go to the --- my tendency is to go to how is this going to work? And that's where my concerns are. But I can agree to those general principles.

CHAIR HOLTZMAN: Yes, me, too. I think that that's a very well stated --- in my opinion, very well stated list of the issues that we've grappled with. Now the question is what does that mean? What are we going to do about it?

I mean, I guess what Judge Jones is saying is that she wants to sort of skip the whole question about restitution for the moment -
--- or hold it in abeyance, go to compensation,
see how that would work. Is that what you're
saying?

JUDGE JONES: Well, yes, and if I
could just go back a minute to this. I guess, I
would like something --- maybe the Staff from
listening to us can draft something that they
believe is what we're talking about here, and
what would have to be changed in the UCMJ in
order to have a restitution mechanism in the
court-martial process, which is what we're
talking about, based on what we've said.

And then we could look at it. What
would be either consequences we haven't thought
about yet? That's my --- I don't want to sign
off on the structure, I guess, right now, but I'm
happy to sign off on those principles. If this
could be done ---

VADM TRACEY: Those are --- I'm sorry.

JUDGE JONES: --- I think it's a good
idea.

VADM TRACEY: I think collectively
we've sort of given some answers to Issue 2. We
don't believe the UCMJ should be amended to add
restitution as an authorized punishment.

JUDGE JONES: Yes, we did in the last
few minutes. You're right.

VADM TRACEY: It shouldn't be
mandatory, it should be discretionary, but we do
think the judge should have an expectation that
they're going to look at whether restitution is
due or not.

CHAIR HOLTZMAN: But I think, with all
due respect, Admiral -- and maybe, Barbara, I'm
not understanding your point properly -- but that
you are concerned, if it --- if this is to be
considered by the judge, what are the
consequences, specifically, and what else would
we have to do to change --- what other changes
would be made in the UCMJ?

And that I think is a very important
exercise, that if we took --- I guess --- am I
wrong? Maybe there's a consensus here that the
judge have --- that there be some opportunity in
the court-martial system for there to be a discretionary decision on restitution.

If that's the consensus, then what the Staff could do is say okay, how would this work in practice? What laws do we have to change? What systems do we have put in place? Then we could come back and look and say oh, well, we didn't think about this, but this is going to have to happen, so forget it. Or, yes, this is going to work very easily because of whatever.

VADM TRACEY: I agree. I think there's a sub-bullet, though.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: I think we've also agreed that the current construct is not aimed at the outcome we are trying to achieve.

CHAIR HOLTZMAN: Yes. I thought that was one of the principles that you ---

VADM TRACEY: Yes.

CHAIR HOLTZMAN: --- had articulated.

VADM TRACEY: Yes.

CHAIR HOLTZMAN: I thought that was on
MR. STONE: And ---

CHAIR HOLTZMAN: ---- overarching principles listed ---

MR. STONE: And then there's --- and I thought that's what I was hearing from Judge Jones. And then the additional principle is that, and there is going to be a backup compensation system of some kind, which we haven't figured out, but to be a backup. So that victims who don't get it in the first piece have a place to go thereafter.

In other words, that's --- if you're going to make it discretionary, it means you're going to have a backup compensation program.

JUDGE JONES: Well, yes. I mean, that's why I want to talk about a compensation program ----

MR. STONE: Yes, I thought that's why you did.

JUDGE JONES: ---- and see how the pieces fit, if they fit.
So, I think Admiral Tracey has sort of
gone through the principles. I think we've had a
lot of conversation where it's pretty clear the
sort of directions we want to take, so I ---

Madam Chair, I think your suggestion to ask the
Staff to write something up, so we can figure out
what changes this would require and whether it's
practical or not and can work, makes sense.
Right?

CHAIR HOLTZMAN: Is anybody opposed to
that? Anybody --- so I take it everyone is in
favor of asking the Staff to figure out what the
consequences are of what we've tentatively
suggested here.

Okay, so that takes us through, I
guess, Issues 1 and 2 for the moment. Do we need
to look at Issues 3 and 4, or do we go to the
compensation? Oh, I guess that's Issue 5.
Should we go to Issue 3 and 4?

COL. GREEN: If I could just
summarize, I think the Panel reached some
consensus on the modification of Article 139
under Issue 3 as to whether Article 139 should be amended to include claims for bodily injury. And as we noted, the four of you who were here in April said that you should recommend that Article 139 not be expanded to cover bodily harm.

JUDGE JONES: Yes. I mean, that's exactly what happened at that meeting in April. And it was because it's --- there's an independent investigation that's done with an Article 139.

In the sexual assault context, I guess, primarily there is --- you know, it's --- you've already got a different investigation going on. It would get complicated, and one would be, you know, a problem with the other.

So, there were lots of other remarks that were made and information that was given, but I don't think anyone thought it was a good idea to expand it to cover bodily harm just because of the dual --- dual investigations alone was enough to create a problem.

MR. TAYLOR: Right. I agree with
Judge Jones. I think that's a very good summary.

CHAIR HOLTZMAN: So, I take it we stand on the recommendation with respect to Issue 3. Any objection?

Okay. Issue 4 ---

MR. STONE: Three doesn't rule out, I might add though, whether or not we will have some aspect of that when we get down to the compensation commission. It just deals with Article 139.

CHAIR HOLTZMAN: Right. Issue 4, whether forfeited wages of incarcerated members of the Armed Forces should be directed to pay compensation to victims of military offenses.

COL. GREEN: And this is closely related to your discussion on restitution, obviously. It's an alternate means, rather than necessarily an independent provision, to provide restitution as an independent punishment.

There are provisions to allow either postponement of forfeitures or redirecting of forfeitures under the UCMJ currently, either to
the family members of the accused, as we discussed, or to delay the imposition of automatic forfeitures which usually occur 14 days after trial.

And so, a related to question to that is whether the --- something could be modified to add for --- to provide those forfeited wages to the victim either as a hierarchy instead of to the family members to the accused, or through some other means.

CHAIR HOLTZMAN: Well, can I just make a suggestion because this could also be compensation, that we do the compensation system and then come back to this, revisit this point?

COL. GREEN: And I was going to say, ma'am, I think in the Staff's review of the entire concept of restitution perhaps this is something we can take on and kind of demonstrate to the Panel what this might look like in the course of your earlier discussion.

CHAIR HOLTZMAN: Okay. So, skipping to 5, there are other gaps in compensation for
military members, active duty, or veterans who
are victims of sexual assault. Does the Panel
wish to make any recommendations regarding
compensation for medical expenses, lost income,
travel expenses during the judicial process," et
cetera?

COL. GREEN: And I think Issues 5, 6,
and 7 go to the three categories of victims you
identified through the course of your
discussions; those being military members,
dependents of military members, and civilians.
And Admiral Tracey brought up the chart that
we've been developing on page 7 of the draft
report which tries to summarize the types of care
that's available to each of those categories of
victims. So, some of the information you heard at
the June meeting from the VA and DoD
representatives regarding health care and
provisions of those benefits, and I guess these
three questions go to whether the Panel Members
believe there are gaps under the current system
for those three categories of victims that need
to be spoken to or addressed through a
compensation system.

VADM TRACEY: That's why I asked
earlier. I'd just like to understand a little bit
about how Reservists and National Guard get
treated in the circumstances they may be in.

CHAIR HOLTZMAN: Okay, so you ---

MR. STONE: You know, I didn't think
that --- and maybe I'm repeating the Chair's
concern about the first question. I didn't think
5, 6, and 7 were really controversial. I thought
that those were what we've been discussing all
along, that we've picked up some gaps, some are
little, some are big. And if medical insurance
which is under a lot of scrutiny by Congress
generally changes even a little bit in the
military, some of those gaps might close, some
might get bigger, but we just wanted to be sure
we covered gaps in all three of them in a
compensation program beyond --- and this goes
right to Question 8 in a compensation program
beyond what the states and locals are doing,
because those vary all over the map as to all kinds of little prerequisites that people fall in a hole, haven't been a citizen of the state long enough or, you know, the period is very short and they're overseas, or whatever it was that we want the program that didn't --- that we didn't have to go --- they didn't have to know at least 50 different programs. So, I kind of saw 5, 6, 7, and 8 as something we sort of --- I thought we were not finding they're controversial. Right?

MR. TAYLOR: Yes. I mean, my impression was that the gaps get greater as you go from the military members who are taken care of pretty well, to the family members who are taken care of okay, to civilian victims that aren't taken care of very well at all through our system, so I think the answer to all three questions is well, yes, a little, yes, more, and yes, a lot, in terms of gaps.

COL. GREEN: And I guess the Staff’s reasons for articulating these separately from the compensation system is you heard testimony,
for example, from the VA about how benefits
continue post-service, or how a former Service
member can make a claim for care under the VA.
And, obviously, I think what you're talking about
now is that can be dealt with potentially through
a compensation system to fill that gap, or does
the Panel say that that's a gap in the VA, and we
recommend independently that the VA's system be
corrected to provide for that particular aspect
of care or need. And I use the VA only as an
example, or is there something else you heard
about that you think that should be corrected, or
should it just be maintained as the status quo
and really just be dealt with through some type
of a compensation coverage that recognizes those
gaps and provides that independently. So, that's
really the only reason that we've articulated
this separately, is to offer the Panel an
opportunity to comment.

MR. STONE: In the non-military
situation, that can happen with state workmen's
comp programs, and they say, "are you getting it
there?" If the answer is no, they fill the gap. They don't say, "now we're going to change every state workmen's comp program." I think it would be an extraordinary burden if we were to go ahead and say we're going to change the VA program, we're going to change this, we're going to change that. I think we just say if there's a gap, and the applicant shows the gap, that they haven't been able to get compensation, then we try and fill it; because, otherwise, it would be reaching out into all kinds of areas that I think are beyond our original charge.

CHAIR HOLTZMAN: I agree. And I think, also, on the chart, I just want to make some suggestions. When we talk about personal property loss, damage, you say possible one seizes evidence, but it's also recoverable under 139, and should be there, too. Isn't that correct? I mean, so it's not possible. You know, one seizes evidence, but it's also under 139 they can get that.

Also, under future losses, that's
different from pain and suffering. For example, if I'm going to have future medical bills, according to Mr. Stone's example, I'm going to have to see a psychiatrist or a psychologist for the rest of my life, or for five more years, that's a future loss. And it's not necessarily pain or suffering, it's an actual medical loss. So, I mean, you should separate out pain and suffering from medical, or maybe you don't need future. I don't know, maybe that just gets subsumed under medical and mental health care including mental and medical health care in the future. But I think there's a difference between pain and suffering and future medical losses.

MR. STONE: Right, because you might say pain and suffering --- we're going to give $5,000 pain and suffering. We're going to call it liquidated damages to every victim of a sexual assault. You could say that. I mean, I don't know if they will, but in other words you could denominate and that wouldn't necessarily cover any of the future doctor visits, that would be a
separate thing.

       CHAIR HOLTZMAN: It's not the same thing.

       MR. STONE: Just like the insurance company; say you lose an eye, you get this much, you lose a leg, you get that much. They simply set a liquidated damages amount for a particular loss. I mean, sometimes you can do that so, I mean, I don't know how it works out, but ---

       JUDGE JONES: Well, normally you would --- I want to make sure I have this right, as well, Mr. Stone. Normally, if you wanted these kinds of damages, pain and suffering, you would bring a civil action?

       MR. STONE: Normally, you would have to go find a civil lawyer ---

       JUDGE JONES: Right.

       MR. STONE: --- and, typically, they are not going to agree unless they're paid up front to take the case, because they know how long it's going to take in the civil system until the case gets decided. And if they win, they're
going to worry they're never going to collect, so
that they'll never get their contingency fee. So,
they're going to ask the victim to have --- the
victim's going to have to (a) find them and pay
them up front.

JUDGE JONES: I'm just saying ---

MR. STONE: Which the victim is, "like
I'm trying to get my money back, the last thing I
want to do is pay somebody else up front."

JUDGE JONES: So, my next question is,
do the state compensation programs routinely pay
for these kinds of damages?

MR. STONE: The ones listed here?

JUDGE JONES: Well, I would assume they
do medical, they do lost --- maybe they do lost
income.

MR. STONE: Yes, they all do lost
income.

JUDGE JONES: Travel, relocation,
personal property loss.

MR. STONE: Yes.

JUDGE JONES: Do they do pain and
suffering, which is typically a civil tort?

    MR. STONE: We have to ask the individual who did all of them, but mostly they don't. Mostly, I think they don't, but I think there may be one or two that do.

    JUDGE JONES: Okay.

    COL. GREEN: I think there was one that did or does, does continue, but otherwise no.

    MR. STONE: And we certainly should look at that and see. We might even want to ask them how that's worked out.

    CHAIR HOLTZMAN: Did we have some testimony on that point?

    COL. GREEN: I think we did. Mr. Eddy spoke about that, I believe some of the ---

    CHAIR HOLTZMAN: Yes, maybe some states had put it in and then the costs were too high, and they removed it. Is that correct?

    MR. STONE: Yes. Right.

    CHAIR HOLTZMAN: Right, so I think ---

    JUDGE JONES: So, I'm leaning towards a recommendation we not put those types of
damages in the restitution system, so we ---

CHAIR HOLTZMAN: You mean the compensation system?

JUDGE JONES: Well, whatever you want --- yes, the compensation system, or even the restitution system, if we end up with one in the courts-martial process.

MR. STONE: Well, that's a question. Do you want the two to be exactly parallel or not?

JUDGE JONES: That's --- yes, I'm against it in either system, so that's my only thought right now. I think --- but I'd like to, if you could find me that testimony about it, and the issues that were created. I think it's really tough to make adjudications like this, so ---

MR. STONE: That's why I say some of those systems have a liquidated damage amount that you get for it.

JUDGE JONES: Right. Right.

MR. STONE: And they do that even for some of these others. Like I said, funeral expenses, Maryland just gives you $5,000. That's
the way they do it, you know.

JUDGE JONES: Right. Yes.

MR. STONE: As long as you have at least $5,000 in bills. They don't care how much it is, it's easier for them to set it. They don't worry that you wanted a Cadillac funeral and you wanted a Volkswagen funeral. There's $5,000 towards the funeral.

CHAIR HOLTZMAN: Yes, assuming you had those expenses, at least $5,000 in expenses.

MR. STONE: Yes. Right. But the idea is to make it as a practical matter much easier to administer, that once they make a decision about what they're giving, they can check boxes and figure out the amount in 20 minutes, and decide if you're getting a check.

COL. GREEN: Judge Jones, I found it. The draft report on page 29, footnote 211, one state CVC Program covers pain and suffering, and what we heard from Mr. Eddy in his written testimony was that the Tennessee program covers up to $3,000 in pain and suffering experienced by
sexual assault victims. So, it's capped, and
that's the only program that does.

MR. STONE: So that's a liquidated
damage number.

CHAIR HOLTZMAN: Right.

MR. STONE: It recognizes it ---

JUDGE JONES: Right, but it doesn't ---

it sets a count ---

MR. STONE: Yes, it doesn't break the
system, and it doesn't require a whole long ---
the whole panel of us to get together every time,
and ---

JUDGE JONES: Right.

CHAIR HOLTZMAN: Okay. So, we
understand there are gaps, and the only question
I think that exists with regard to the gaps is
one that Admiral Tracey raised, which is what are
the gaps re: the National Guard? Right? That was
your ---

VADM TRACEY: Reserve and National
Guard.

CHAIR HOLTZMAN: Reserve and National
Guard, okay. And do we want to make any
recommendations regarding the adequacy or use ---
we're on Issue 8 on page 3. "The adequacy and/or
use of state and local CVC Programs as a
mechanism for compensation?"

MR. STONE: I think we sort of agreed
that it was just too confusing.

CHAIR HOLTZMAN: Correct.

MR. STONE: It was just unfair to
subject them to 50 different programs.

CHAIR HOLTZMAN: Right, with antiquated
rules such as requiring the reporting within 72
hours.

MR. STONE: Well, some might be up to
date. That's what I mean, that's ---

CHAIR HOLTZMAN: Right.

MR. STONE: It's such a tough thing to
---

MR. TAYLOR: I think what we can take
from it is that, as you said, some unrealistic
rules like the 72-hour reporting period when we
know that sometimes the trauma doesn't really hit
until after that. And the cooperation with the local police, and what that can do to be a disincentive for people to report. So, I think we can look at those practices and say we don't want to do any of those. So, I think that's what we've learned from it.

CHAIR HOLTZMAN: Right. And the military itself by setting up a restricted reporting system has acknowledged that it's more important to provide the health care treatment to the victim than it is to require cooperation. So it shouldn't now create a new incentive which is oh, well, forget that. You know, if you want any compensation you've got to go ahead and now start making reports and do all that stuff. Yes, so I guess the Panel wants to make a recommendation that these programs are not adequate as a mechanism.

Do we --- going to Issue 9, do we "recommend the establishment of a DoD Compensation Board Program for sexual assault victims? If the Panel does recommend that a
program be established, does it wish to make any
recommendations with regard to the structure,
eligibility requirements, funding sources, et
cetera?"

Anyone want to comment about this? I
mean, I have my own very strong feelings, but I'm
--- Mr. Stone?

MR. STONE: I'd like to take up
Professor Taylor's issue that he mentioned
before. If it's a compensation program for sexual
assault victims, we want to make it clear that it
covers a victim who at any stage of the
investigation was a sexual assault victim, so
that way even if it later resulted in a plea to a
simple assault, that was not a sexual assault,
that they could still make the claim. Whether or
not it would get granted is something else, but I
wouldn't want to close it in a way that when
there's a reduced plea, they're out in the cold.
And I don't know that we need to extend it across
--- whether we have the authority to extend it
across all offenses, but we certainly do with
victims of sexual assaults, even if that's not
the ultimate conviction. I don't know, does that
get to where you ---

MR. TAYLOR: It does, but actually I
think even though it may be a slight expansion of
what we were asked to do, I think we should just
take it one step farther and say we really need
to have this for victims of all crimes. Whether
they should be felonies only, some reasonable
category of crimes, because I really --- even
though we're focusing on sexual assault victims,
there are also lots of other victims of major
felonies who also receive less support and less
treatment than they really deserve.

MR. STONE: I totally agree with you,
if we could do it, because I also think just
using the example I gave before, you might have
somebody in the on-base savings and loan somehow,
and that bad apple in that office causes some
military family to lose their house or their down
payment. You know, the same thing is true there,
too. I mean, if it's going to happen as a result
of some military-related event, then it would be

nice to cover them so people, you know, are
covered when they're hurt.

MR. TAYLOR: I was really thinking more

like violent crime, because ---

JUDGE JONES: That's what I was

thinking.

MR. TAYLOR: --- the government doesn't

really do that. I mean, that's --- even though

there are credit unions located on military

installations, they operate through the National

Credit Union Association. That's not the

responsibility of the individual command or the

U.S. government.

MR. STONE: I just think that some of

those --- again, we have to craft our words
carefully because some of those violent crimes
intentionally get pled down to something that
doesn't --- could qualify as a violent felony.

That's the whole point of the plea ---

MR. TAYLOR: On the other hand, you had

a robbery during the course of which people
suffered physical injury, then they should be eligible for compensation from ---

MR. STONE: What if it was a burglary, that everything in the house is now gone?

MR. TAYLOR: The devil is in the details.

MR. STONE: Yes.

CHAIR HOLTZMAN: Well, burglaries are covered under --- because it's a crime. They're covered under state compensation systems, so I think that we would want to recommend --- at least my recommendation would be that we cover crimes. But maybe you're right, are we just covering violent crimes? I mean, we could start with violent crimes to begin with, and if the system works, then the military can expand it. I mean, right now we're focused on sexual assault. That's a violent crime, so if we want to expand it to all violent crimes, I've got no problem with that.

I mean, I guess the question that's raised for me, though, is what happens when
there's an acquittal?

JUDGE JONES: I think, basically, you can probably still go to the compensation committee and tell them your facts and circumstances, and they'll take into account the acquittal and make a decision.

MR. TAYLOR: I totally agree. It seems to me that you've got two things at work here. One is the reasonable doubt standard of evidence in a court-martial, and what we would normally assume would be adequate evidence, such as preponderance of the evidence in a civil proceeding. And I would suppose that these boards should use some sort of civil standard like that so you could take the same evidence and say well, maybe it wasn't enough to prove beyond a reasonable doubt, but it's certainly enough ---

JUDGE JONES: Send somebody to jail.

MR. TAYLOR: --- to prove 51/49, the weight of the evidence that this occurred, and that this person deserves compensation.

MR. STONE: And you had that in the
O.J. Simpson case where the Goldman family brought a civil suit after the acquittal and got a judgment against O.J. Simpson based on wrongful death because it was a civil judgment under that standard.

MR. TAYLOR: Right.

CHAIR HOLTZMAN: Okay. So, we're on Issue 9. We're saying yes to the first question, I take it. Any objection to that?

MR. STONE: No.

CHAIR HOLTZMAN: And the second question, do we want to make any recommendations regarding program structure, eligibility requirements, funding sources, et cetera? Well, I would say funding source is up to Congress more or less; although, we could --- I mean, I guess the question comes up from earlier, do we want to say that any of the fines in these cases be used to fund this? But then there's a question about this retirement home, isn't there? So, maybe we just leave that up to ---

MR. STONE: Yes, let's leave that up to
---

CHAIR HOLTZMAN: Let's just leave that up to Congress and the government.

MR. TAYLOR: I agree. Because, I mean, the problem with Issue 4 is it has so many interlocking parts ---

CHAIR HOLTZMAN: Right.

MR. TAYLOR: --- that it's almost impossible to disassemble it.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: And figure out what would happen. But even though we might look at this as a big deal to have a separate funding source, if you look at the Pentagon budget, we're talking about budget dust, probably, to fund a program like this.

CHAIR HOLTZMAN: A rounding error, a rounding issue, yes. Of course, it's not very much money we're talking of. Do we want to make any other recommendations regarding the structure?

JUDGE JONES: You know, you make a good
point about the money, though. I mean, I'm under the assumption --- I don't have the numbers, and I would like those --- I'm sorry, Kyle. How many victims are already --- are military victims? And one can assume that they're going to have very few needs or requirements by way of, call it restitution, call it something from the compensation board. I mean, I would like to know if we're talking --- sort of how much money we're talking about here.

Then we have dependent --- coverage for dependent victims, which is a little different. How many of them are there? And as I think you put it very well, or someone did, the first category is taken very well care of, they shouldn't need much compensation, if any. The second group, okay, but they're going to need something. And then how many are civilians? Is it a third, is it a quarter? I just don't remember.

COL. GREEN: Judge Jones, the numbers we looked at from the unrestricted reports from the SAPR reports for 2012, '13, and '14, it was
between 15 and 18 percent ---

JUDGE JONES: Are civilians.

COL. GREEN: --- of the unrestricted reports were filed by non-military members.

JUDGE JONES: Okay.

COL. GREEN: Some of those --- they don't break it out by dependents and unaffiliated civilians ---

JUDGE JONES: Right, right.

COL. GREEN: --- so roughly I think you'd be looking at somewhere around 15 percent. So, for the total number, you'd be looking at, I believe it was 700-800 a year of the victims would not be military and fall into the second -- --

JUDGE JONES: And then they would have the option to either use, if this is created, the military compensation program, or go to the state, or do both.

COL. GREEN: I guess that's the question. I mean, if they were a military ---

MR. STONE: The states are all last
resort. The state, if there's a federal program, would say you've got to go there first.

JUDGE JONES: Right. Okay.

CHAIR HOLTZMAN: And you definitely wouldn't get double dip here.

MR. STONE: Yes, they wouldn't get the double dip. No state program lets you double dip. They want to know --- and they ask on the forms have you gone to them? And if you've gone to them, what did you get?

JUDGE JONES: Right. And then they look at that, and they could still give you more. Right?

MR. STONE: Well ---

JUDGE JONES: It's not really that important.

MR. STONE: In theory, they could, if you went to --- like if you went to Workmen's Comp first, and they said we'd only give you this little bit on that injury, sorry. And they said well, no, we give a higher number, they'd give you the difference.
CHAIR HOLTZMAN: In some states --- I mean, this is a point that I think we need to look at additionally. I mean, Feinberg himself recommended that we consider a bunch of criteria, which we haven't really --- we don't really have that set out for us, and we should look at that.

COL. GREEN: You do, ma'am. They're in 46 and 47 of the draft report. We've provided ---

CHAIR HOLTZMAN: Oh, it's not in our issues.

COL. GREEN: No, it's not.

CHAIR HOLTZMAN: Okay. Well, let me just make sure --- but, you know, we need to look at that, and we need to look at whether this should be among that. Many of the states have a cap on the amount of money that can go to any person. I mean, that may be something --- I don't know that we want to make a recommendation about that. If we do, what the amount should be, or if we don't, you know, then we leave it to the Congress, we leave it to DoD. But, you know,
these are questions that I think have to be addressed. Whether we want to in the end address them or not, we need to look at that.

MR. TAYLOR: I certainly agree with the Chair on this, and it seems to me that maybe a helpful thing we can do is to identify the issues.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: And then let others figure out what some of the answers are.

MR. STONE: Right.

MR. TAYLOR: Unless there's some that we have very strong feelings about. For example, as core principles, I would say the status of the victim should make no difference, to your point, Judge Jones. A second would be that ---

CHAIR HOLTZMAN: What do you mean "status of the victim"?

MR. TAYLOR: Whether civilian, military.

CHAIR HOLTZMAN: Oh, yes, right. Okay.

MR. TAYLOR: Right. Whether the person
filed a restricted or unrestricted report should make no difference, and that the standard of proof for whatever action, has got to be the administrative civil standard of proof ---

CHAIR HOLTZMAN: Right.

MR. TAYLOR: --- totally regardless of what happened in the criminal case. So, I mean, those are like three, for me, big ideas that ought to be considered as part of any kind of program, along with the ones that you suggested.

CHAIR HOLTZMAN: Right. Well, is there any disagreement with those principles, by the way? So, those could be part of what we recommend.

MR. STONE: Sure.

CHAIR HOLTZMAN: Okay. So, there's no objection, so those will be included.

JUDGE JONES: Tom, what was the second one, again?

CHAIR HOLTZMAN: Sorry.

JUDGE JONES: If you remember.

MR. TAYLOR: The second was, it was not
important whether you filed a restricted or an
unrestricted report.

CHAIR HOLTZMAN: So, in other words, it
does away with the 72-hour reporting requirement.

JUDGE JONES: No, no, it's broader than
that.

MR. TAYLOR: If it's unrestricted, you
can file the restricted sexual assault report and
still receive compensation from the board.

MR. STONE: Just like you can still get
medical treatment for it.

MR. TAYLOR: Right.

JUDGE JONES: Okay, I'd just like to
think about that one.

MR. TAYLOR: Okay.

JUDGE JONES: Because, you know, you're
making public what you were unwilling to make
public earlier.

MR. TAYLOR: But that will be a choice
--- that would be the choice of the individual.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Well, there could also
be a private proceeding.

MR. TAYLOR: Yes, they just open the
aperture enough to have the case filed without it
being generally disclosed ---

CHAIR HOLTZMAN: You can have Jane Doe
or John Roe, or whatever.

MR. STONE: Exactly.

CHAIR HOLTZMAN: It could be done that
way. So, you still want to think about it, or
what? That's okay.

JUDGE JONES: No, no. Yes, I do want to
think about it.

CHAIR HOLTZMAN: All right.

MR. TAYLOR: It deserves more thought;
I agree.

CHAIR HOLTZMAN: Okay, so won't have a
--- but the other two ---

JUDGE JONES: The other two are fine.

CHAIR HOLTZMAN: Okay. What do we have
as 10? "Does the Panel wish to make any overall
assessment to the adequacy of compensation and
restitution for victims in the military" --- I
think we've dealt with this Issue 10.

COL. GREEN: Yes, this is just a ---

CHAIR HOLTZMAN: Okay.

(Simultaneous speaking)

MR. STONE: ---- observation that it's a little bit artificial just to restrict it to people who were victims of sexual assaults. Because, I mean, you could have a case that starts out where one military person is making sexual overtures, and instead of forcing the sexual assault, they just get so angry they beat the other person to a pulp, and it has no sexual connotation after the first rebuff; and, yet, why should that be left out?

CHAIR HOLTZMAN: Where are Mr. Feinberg's suggested criteria?

COL. GREEN: Pages 46 and 47.

CHAIR HOLTZMAN: Okay, should we go through these?

COL. GREEN: He provided five overall categories of issues that he thought were essential to the establishment of any national
compensation program; that being funding sources, eligibility, the methodology for examining, the proof requirements, and then the due process principles of the program, and under due process he provided a number of specific questions under due process that he thought needed to be considered in the course of establishing a program. I think what Mr. Taylor just spoke to were some of the --- some of the issues spoke directly to the questions Mr. Feinberg asks, and it's a matter of whether there are others the Panel wishes to speak, or leave those to formative details.

CHAIR HOLTZMAN: Well, how do we want to proceed with regard to this? Do we want to go through these one by one? Maybe we should try to do that. What do you think? I mean, I guess we started to address the issue of how much will the program cost? And we can kind of get a better answer if we get clearer figures of who would be covered under this. And then we can --- I guess, if we're going to have a cap, we could figure
what a maximum cost might be. So, for example, if we had a $25,000 cap which may be --- somebody might know, how many states have caps on the total amount? Most of them.

MR. STONE: Yes, virtually all.

CHAIR HOLTZMAN: Okay. So, let's just say there's a $20,000, maybe we would go to $50,000. I don't know, but just say $25,000, so we could get a rough idea, if you took $25,000 times the number --- assuming they would get the maximum ---

MR. STONE: But do we really want to make the funding tail wag the dog of what's appropriate? I mean, it seems to me that if there's a lot of claims, or a little claim --- a few claims --- we should maybe look at the various states' averages and say they've had more experience, and let's stick within them. I mean, we're replacing them because of their complexity, not because we think they're really wrong or bad. I hate to worry about how many. I, frankly, think there's going to be very few, but I'd still like
the numbers to sort of reflect the consensus of what the 50 states are doing, rather than: how much do you think we can get into the fund right now? I want to leave that to somebody else. In other words, I'd rather us just say initially put this amount in, and if you have to defer claims -- the payment of some claims to the next funding year initially, let's do it. But let's give people approximately what the consensus of the whole country is.

JUDGE JONES: Yes, I didn't think we were going to get into specifics like that. To be honest, I was just --- I'm very happy to hear that basically we have 700-800 at the moment, maybe it will go up to 1,700 or 1,800, but it's not some enormous burden. So, that's all I was trying to nail down. And I think, you know, others can look at all of the --- what the states are doing, pick out the best operating ones and come up with a proposal, you know, that might work for us.

And we have gone through some of
these. I think we agree on the burden of proof. It should be the civil standard. And, Madam Chair, I guess on page 47 we have all these bullets.

CHAIR HOLTZMAN: Right.

JUDGE JONES: I don't know if I have an opinion on all of these right now, but we could give our basic reactions, or --- does that make sense?

CHAIR HOLTZMAN: Yes. I think that the more --- I think if we just throw this into the hands of Congress and say this present system is really a patchwork, it's not satisfactory, it's not --- you know, there are people left out that have been injured. You know, maybe they'll do something, and maybe they won't.

I think the more we do their own work for them, the better it is. I mean, I've seen that in just being in Congress. If you have a bill ready and nobody else has got --- has given any thought to it, and they like the idea, chances are they're just going to take that. So,
I do think that we should do as much as we can that's reasonable in terms of answering these questions. And I think, also, it would be helpful to have ----to be able to say that these are the issues that Mr. Feinberg raised, and we've --- you know, in terms of how funds are operated, and this is what we've done, and also give some comparison with some of the state systems, so that it looks like we've done our own homework here, as opposed to just dumping it on them.

That's my own preference.

MR. STONE: I agree. I'd like to see the Staff, though, first tell us what the majority and the minority positions are among the states on these questions, because I'm sure they've --- the states have staked them out.

CHAIR HOLTZMAN: Well, yes, but there may be some we have our own views, strongly held views. For example, what Mr. Taylor has said about the burden of proof, so I would just like to go through this quickly, if anybody's got any strong views, and then we can come back to this
point.

JUDGE JONES: Well, an easy one is: may or must the claimant be represented by counsel?

Certainly, "must" doesn't work; no claimant should have to be represented by counsel.

CHAIR HOLTZMAN: Right.

JUDGE JONES: If you want to let them be represented by counsel, I suppose you can; although, I would --- I prefer not to see lawyers get into the mix.

MR. STONE: Well, what a lot of these systems do is they allow it, but they say but none of this award is allowed to be used to pay counsel, or they might say but no more than $250 will be awarded. In other words, they limit what counsel can get from them.

JUDGE JONES: Right. So, with that provision, I like this.

MR. STONE: Because some of these people, they need help ---

CHAIR HOLTZMAN: What are you reading?

JUDGE JONES: I'm sorry, you know what,
I skipped right to one, two, three, four, five, bullet five, because I think that one is easy.

CHAIR HOLTZMAN: Oh, represented by counsel.

JUDGE JONES: Right.

VADM TRACEY: So, is that a role that we would expect the Special Victims' Counsel to be able to fulfill?

JUDGE JONES: Who would be doing it for nothing.

MR. STONE: Yes, I would specifically allow them, if they had the time.

JUDGE JONES: Yes, that's a good idea.

CHAIR HOLTZMAN: I'm going to raise an issue about that. Special Victims' Counsel are overburdened as it is, and if they're going to have this responsibility, they may not be able to handle the basic cases, the criminal cases themselves. So, I would just worry about throwing this on their shoulders, not that --- I think it's a great idea, if we had as many Special Victims' Counsel as we needed, I'd have no
problem with it. But if this is going to
undermine their ability to handle those cases ---

COL. GREEN: And I think what we heard
was that --- I mean, fundamentally, the Special
Victims' Counsel Programs are organized under 10
U.S.C. 1044, the legal assistance provision. And
one of the intents of the program is to assist
victims with Legal Assistance needs, so landlord-
tenant issues, financial issues, those types of
things. That's within the purview of the Special
Victims' Counsel programs now, and so --- and we
did hear some testimony ---

CHAIR HOLTZMAN: Not Special Victims'
Counsel. Special Victims' Counsel handles
landlord-tenant issues?

COL. GREEN: Yes, as needed. I mean,
they're able to assist their clients with those
issues. And you've heard testimony that they
routinely do. And I think you heard testimony
from Special Victims' Counsel that they do have a
working knowledge of these things. I mean, I
think you, sir, when you went to the training,
this was a point of coverage of the training
course?

MR. STONE: Yes.

JUDGE JONES: Well, the Army, in
particular. Right? Aren't all the Special
Victims' Counsel right out of that unit, the
earlier mentioned?

MR. TAYLOR: Legal Assistance.

JUDGE JONES: Legal Assistance Office.

MR. STONE: Yes, within the Army ---

COL. GREEN: But in the Army ---

JUDGE JONES: Yes.

COL. GREEN: The other Services operate
independently or they're solely designated --

JUDGE JONES: But they still can do
this.

COL. GREEN: Yes.

JUDGE JONES: Right.

MR. STONE: And, typically, if ---
especially if it's been an unrestricted case,
the Special Victims' Counsel already has the
report and has already examined all the issues. He can help that person who --- it's like tax forms. They'll tell you it'll take me a week to fill out the application, and he does it in 20 minutes because he is used to the application, and he knows their situation. So, I think, typically, it doesn't eat up a lot of additional time. We help people with compensation claims to be filed in the Maryland Criminal Injuries Compensation Board all the time because we can help them get through the thing in an hour.

CHAIR HOLTZMAN: I know, but that's Maryland, and we're talking about this system here.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: I'm just saying, to me that would be a concern.

VADM TRACEY: At minimum, I would want the Special Victims' Counsel to help the victim navigate the Legal Assistance system if that's the right way to do this. None of these are transparent systems to a seaman, so not having to
have to get a whole new lawyer, start all over again, and figure out how to navigate that system, so some nexus between the Special Victims' Counsel role and getting the counsel that you need for this claims process ought to be allowed.

MR. STONE: And also to describe what may have been a very embarrassing situation.

VADM TRACEY: Correct.

MR. STONE: Which sometimes it's very embarrassing, and they've finally gotten the courage up to discuss it with somebody, bring a whole new person in is ---

CHAIR HOLTZMAN: I would say that it should at least be the responsibility of the Special Victims' Counsel to advise the victim that this ---

VADM TRACEY: Is an avenue ---

CHAIR HOLTZMAN: --- procedure or program is out there and available. And, you know, I am not disagreeing that ---

MR. STONE: And assist, if possible,
something like that.

CHAIR HOLTZMAN: Yes, right.

COL. GREEN: And I think what you heard from the victims, Special Victims' Counsel is currently they --- this is something they advise them on, the State Victim Compensation Programs.

CHAIR HOLTZMAN: Right.

COL. GREEN: So, the burden of managing the myriad of jurisdictions and the rules, and the like.

CHAIR HOLTZMAN: Okay, so they ---

COL. GREEN: Quite frankly, a centralized system might be easier.

CHAIR HOLTZMAN: Free them up, give them more time. Okay, so if it's to the maximum extent feasible, I'm for that. I just want to make sure that we're not adding an impossible burden.

Okay. So, what about --- the claimant is entitled to a hearing. How formal is it? Is it transcribed? I guess they could make an audio tape; I don't know.
MR. STONE: Yes, they could make an audio tape.

CHAIR HOLTZMAN: Is it necessary?

JUDGE JONES: Well, I mean, there's going to be cases where you may want to have a hearing. I try to decide these as often as possible without a hearing. I mean, and nobody is going to ask for one, if you give them the $1,800 based on the packet they've given you, and you --

CHAIR HOLTZMAN: Right.

JUDGE JONES: I mean, I think that's a detail. I would say I think the fewer hearings the better, and --- but, you know, that would be something where it would be nice to know what was really going on with compensation, other compensation programs. The idea of starting to transcribe these and everything else, I mean again, it's all about volume. If these are pretty cut and dry, I think you won't need hearings because they're going to be approved, and there'll be a check. Then there'll be a smaller
population where you may need a hearing -- could be one officer who sits and listens and gets an explanation. I just vary it so that the most complicated situation would occur almost never.

MR. TAYLOR: Well, I would just add that for five years as a senior civilian, I sat on the Army Board for Correction of Military Records, and we were able to dispose of a vast number of our cases without a hearing, but the claimant could request a hearing, and then it could be within the discretion of the agency. And if there was a close call, or close case, or someone was about to be denied in a situation that you thought there might be more facts, then you would always vote to have a hearing. So, I think giving someone the opportunity to request a hearing, but not making them ---

JUDGE JONES: After you made your decision.

MR. TAYLOR: --- might be an avenue.

JUDGE JONES: So, you mean after you made the decision.
MR. STONE: But what a lot of these decisions do ---

JUDGE JONES: Or before?

MR. TAYLOR: Before.

MR. STONE: What they do in some of these systems, there's like a hearing examiner involved. He makes a recommendation of what he -- -- and the claimant gets to see it before they get to request a hearing. And that takes care of the vast majority when they see what the recommendation of the hearing examiner is. If they really don't like it, or think he's missed something because he typically writes a paragraph or two on how he got there -- I mean, it may just be based on these records, but it may be a little more -- then they can ask for a hearing, and they just take --- make a CD of it. And then that only gets to --- needs to --- and usually that hearing is half an hour long.

JUDGE JONES: Are compensation programs around the country being sued?

MR. STONE: Oh, well, what happens is
there's an appeal. It's not that they're sued.

JUDGE JONES: Right.

MR. STONE: In Maryland, there's an appeal to the lowest level trial judge for abuse of discretion, and that ends it. So, there is an appeal process somewhere for somebody to look over the shoulder, and in those cases a half an hour hearing is transcribed. I mean, in this case it could be an appeal, I don't know, to the Secretary of Defense, or the General Counsel, or the Department of Defense, or somebody. Just there's a mechanism for the person who feels like they didn't understand me. It's a very tiny percentage, because the vast majority are happy to stop as soon as they see what the recommendation is, even if it's not --- so the award, even though it's not exactly what they asked, if it's in the ballpark, they're done.

MR. TAYLOR: I would just add that based on my own experience, it works pretty much the way Mr. Stone said. Before each of these cases were brought to the Board, an examiner
reviewed the files, we circulated them all before
the Board hearing, and sometimes in cases where
the hearing examiner recommended let's say to
deny the request for a hearing, or to deny the
relief granted, the Board would say no, we really
need to have it. And then on an exceptional
basis, there would be a hearing. And then once
the Board made the decision, the appeal in the
Army at that time was to the Assistant Secretary
for Manpower and Reserve Affairs. You know, a
senior-level political appointee who could make
the final call on behalf of the Department. So, I
could envision something like that working.

CHAIR HOLTZMAN: What's your view about
that point?

JUDGE JONES: Well, I hadn't heard
about these constructs before, so ---

COL. GREEN: The other thing we can do, ma'am, is for each of these questions we can go
back to the materials that we have from the state
programs and give you an idea of ---

CHAIR HOLTZMAN: Yes, I think would be
very helpful.

COL. GREEN: --- commonalities, best practices, and that may help.

CHAIR HOLTZMAN: Right. Is an adversarial party permitted to oppose the claim? Who would that be?

MR. STONE: There is no adversarial party typically in a compensation case.

CHAIR HOLTZMAN: Right, so that's "if the claim is denied, does the claimant have the right to appeal?" And "if so, who hears the appeal?" I guess we could look at ---

JUDGE JONES: Well, that --- yes, that's part of what we were just talking about.

MR. STONE: Yes.

CHAIR HOLTZMAN: Right. And we could look at some other systems within the military for appeals like this, administrative kinds of appeals, and we could look at the state systems. I agree; it should be very restricted.

MR. TAYLOR: And I would say, also, to your point that the more it mirrors something
that Members of Congress have bought into and understand ---

CHAIR HOLTZMAN: Right.

MR. TAYLOR: --- the more likely it is that there would be minimal resistance.

CHAIR HOLTZMAN: Correct.

MR. STONE: And it may even be that they'll cross-designate some people in another scheme like you spoke about until they see whether there's enough claims filed to even appoint somebody full time to do the other. And the same person who gets the appeal you talked about, at least in the first year will be cross-designated to do these, as well.

JUDGE JONES: There's only one more thing I'd like to think about. I don't know the answer. Do we want a system where the claimant has the right to choose whether to go to the military compensation plan -- this is a civilian -- or to their state compensation plan? Because I'm worried state compensation plans are going to say you have to go to the military first, or they
may try to say that.

MR. STONE: Oh, yes. They will say

that, for sure.

JUDGE JONES: Do we want that? I mean, the victim may want to choose to go to their
state compensation system, not to the military
one. So, it's just a thought that we have to be
careful about in terms of creating this. We need
to figure out if we want to say something about
that. I mean, they shouldn't be prejudiced if
they want to go to their own state system, even
if they're wrong, and they would have done better
in the military system. You know, maybe they
don't want anything to do with the military
system. I don't know.

MR. TAYLOR: Well, just in looking at
the program information that we got earlier,
Judge Jones, it struck me that most states hit
between 25 and 50,000 as a maximum, with the
exception of Nevada, which has 100,000. So, if
you were a resident ---

JUDGE JONES: If you were in Nevada,
you would not want to have to go to the military system first. Right? Or be told that once you went there, you weren't going to get any more. So, that's my only point. Thank you for that example.

CHAIR HOLTZMAN: But I think one thing, Judge Jones, just because you've gotten X from the military ---

JUDGE JONES: Right.

CHAIR HOLTZMAN: Let's say you got $10,000 from the military; there's nothing to stop you from going to your state system and seeing if you could get the extra $15 or $35.

JUDGE JONES: Right.

MR. STONE: You've exhausted at that point what you can get from the military.

CHAIR HOLTZMAN: That's what you can get from the military. So, I don't think anybody's prejudiced by having to go to the military first.

VADM TRACEY: It may depend on the state.
JUDGE JONES: Yes.

VADM TRACEY: The state makes it, and we have no control over that.

CHAIR HOLTZMAN: Exactly.

VADM TRACEY: We would have to design a federal system such that it would preclude you.

JUDGE JONES: Right.

CHAIR HOLTZMAN: Right. And it couldn't.

MR. TAYLOR: It's like a secondary payer in an insurance policy, basically.

CHAIR HOLTZMAN: Correct. Correct. But the thing is that they wouldn't have to --- I mean, it also might depend on where they live and so forth. They may not make a claim at all to the military. They don't have to access the system. Nobody says that they have to.

MR. STONE: Well, no, that was implicit in the question. If as most states are, they are a system of last resort, they will say please make a military claim first ---

CHAIR HOLTZMAN: They may.
MR. STONE: --- before you come back to us.

CHAIR HOLTZMAN: They may, but they may not.

MR. STONE: Yes. I guess that's right.

CHAIR HOLTZMAN: We don't know how they'll treat this.

MS. FRIED: Ms. Holtzman, just as a point of clarification, is the Panel envisioning this as a ---

CHAIR HOLTZMAN: Yes, you're confused? You're not the only one.

MS. FRIED: Is the Panel envisioning this as a mechanism outside the military justice process, sort of a standalone process?

CHAIR HOLTZMAN: Yes. I think so.

MR. STONE: Yes.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Right.

MR. STONE: It doesn't have anything to do with the court-martial because a restricted claim could go to it.
MS. FRIED: I'm thinking ---

JUDGE JONES: Because this is not ---

MS. FRIED: --- on the restitution aspect.

JUDGE JONES: It's not --- well, the way I'm doing this in my head is restitution has to come from the accused, and that can only happen as a result of the military process, the justice process. Everything --- and restitution is money, and so it's also compensation. And when you talk about this compensation program, it's not restitution in the sense that it's not coming from the accused. It's a compensation program for victims that's funded by the, you know, the military or the states. I mean, that's how I distinguish them.

MR. TAYLOR: I agree.

VADM TRACEY: And it might be free to consider whether restitution had been paid or not as one of the determiners in ---

JUDGE JONES: Oh, yes. Of course.

MR. STONE: Most of the systems say
that you have to declare what restitution you've
gotten to date, and then it says, and if any
further restitution for any of these items is
forthcoming, you're obligated to notify us
because they now --- it becomes theirs. It goes
back to the fund, because they're paying you ---

JUDGE JONES: I'd love to see the
numbers on that.

MR. STONE: Well, they're not big.

JUDGE JONES: No, no.

CHAIR HOLTZMAN: Okay. So, the last
question in this is: if the claim is granted,
does the claimant, by accepting compensation,
thereby waive the right to file a lawsuit? Well,
there's no right to file a lawsuit against the
military. Right?

MR. STONE: Right, so it wouldn't be
the issue.

MR. TAYLOR: Well, they'd have to go
through the Federal Tort Claims Act ---

CHAIR HOLTZMAN: Yes.

MR. TAYLOR: --- and follow the normal
procedure to sue the sovereign.

CHAIR HOLTZMAN: I mean, should they have to give that up? Is that something we want to pay any attention to? I mean, how likely is that to happen in any case?

COL. GREEN: I think Mr. Feinberg posed this question in the sense of, you know, the civil case, obviously.

MR. STONE: And his state situations, not --- it didn't relate to really a military situation.

CHAIR HOLTZMAN: So, do we have --- so, what's the consensus on this?

JUDGE JONES: I think this is the kind of rule that you make when you're settling the, you know, the BP oil spill and you don't ---

CHAIR HOLTZMAN: Right.

JUDGE JONES: You're trying to keep cases out of court. But for our purposes, I don't think they need to waive if they want to file a lawsuit. Does that make sense?

CHAIR HOLTZMAN: Right.
MR. TAYLOR: Yes. I'm not even sure that would be an appropriate thing to do.

JUDGE JONES: Right. Right.

MR. TAYLOR: To waive the right to file a lawsuit because you didn't like the administrative award that you got. It seems to me like you can always do that, if you can meet all the other procedural requirements.

JUDGE JONES: Right.

MR. STONE: If you can find a jurisdictional statute that the person to sue doesn't have immunity.

CHAIR HOLTZMAN: Okay, so we are --- so, that's --- we have no waiver.

Now, I know, Judge Jones, that you went right to the due process issues, but could we just back up a little bit and look at the other issues ---

JUDGE JONES: You're going to --- (Simultaneous speaking)

CHAIR HOLTZMAN: Yes, let's take a look at 46 and see how far we can get on some of these
issues. "Funding: how much will the program cost?" We talked about kind of doing --- getting some idea from various states about what the state systems cost, and maybe doing some minor arithmetic on, you know, on taking the numbers of dependents, I mean, of civilians and giving --- multiplying that by, I don't know, either $25,000 or $50,000 to get maximum amount.

How much of a civil --- get ballpark or some rough idea. "What would be the source of the funding?" Of course, that's Congress, I think. Do we want ---

VADM TRACEY: Well, it would be interesting to know whether states appropriate money, or do they have some mechanism by which there are funds?

CHAIR HOLTZMAN: Well, they get money from the federal government.

MR. STONE: Yes.

CHAIR HOLTZMAN: So, there's some money ---

MR. STONE: Office of Victims of Crime,
and ---

CHAIR HOLTZMAN: Right. They also use some from their fines. I mean, that's a question we might want to say here, but then we get into the fine issue, aren't the fines used for that --

VADM TRACEY: Yes, forfeitures.

(Simultaneous speaking)

MR. STONE: Start to invade their other

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CHAIR HOLTZMAN: Yes, so I would just ---

MR. STONE: --- decisions.

VADM TRACEY: Because Congress doesn't even add to the Defense budget, so they come from someplace.

CHAIR HOLTZMAN: Waste, fraud, and abuse. Sorry. I'm sorry. I don't mean to be facetious. So, that would be the only --- okay, so source of its funding would be appropriated monies. Is that correct?

COL. GREEN: Right. I think what you
heard from the state programs was that the
majority of funding for state programs comes from
state criminal court fees and fines, and the
remainder comes from federal sources, such as
Crime Victims Funds, and through VOCA. Obviously,
the issue with the military system is without any
system of court fees or fines.

CHAIR HOLTZMAN: Right.

COL. GREEN: Whether that would be a
legitimate source of funds, whether that would
have to be entirely through other means.

CHAIR HOLTZMAN: Well, the problem is
that if we take the fines --- as I said, aren't
the fines now being allocated to this ---

MS. FRIED: Fines and forfeitures go to
the Armed Forces Retirement Home.

CHAIR HOLTZMAN: Okay, so if we took
away --- if we used fines and forfeitures, took
it away from the Army Home or whatever it's
called, Retirement Home, I mean, there would be a
lot of people screaming. I would recommend that
we just not deal with that issue. We could point
out in a footnote that states have used these funds to fund their programs, but that those funds, fines and forfeitures, are already allocated to this nursing, you now, this retirement facility.

MS. FRIED: There's one in Gulfport and there's one in D.C., so there's actually two.

MR. STONE: The states, actually, generally are in a slightly different position because they're looking to the enormous fines they get in these giant fraud cases, securities fraud cases and bank fraud cases where they get a settlement against a very big-name bank or securities house, and they get a couple of hundred million dollars, you know, think of the tobacco fines, and then they want to know what to do with it. So, they designate it, and put this much into the Victim Fund, and even the VOCA funds you're talking about the same thing. Those are also coming from gigantic criminal fraud settlements. That's what funds most of them. And in the military, we're not looking at those big,
gigantic fraud settlements, so it's not a good parallel.

MR. TAYLOR: Well, even though ---

MR. STONE: From the run of the mill, $2,000 here and $3 here.

MR. TAYLOR: Yes, even though I'm not a fiscal lawyer, and I'd welcome anybody on the Staff to correct me on this, but there's a percentage of the Defense Appropriations every year called Extraordinary Expenditure Funds, and these are basically funds that are used in the intelligence business for intelligence contingencies, for sometimes settlement and litigation, so it seems to me that they're --- I don't know how those funds are used. I know that there are uses of those funds that can be unusual, put it that way. So, I just can't believe that there won't be a way to fund this in a way that's not --- that is really disruptive to the overall business of the Department, with all due respect.

VADM TRACEY: No, I agree with you.
MR. TAYLOR: I mean, I think there are funds out there to deal with this kind of problem. I don't think we're going to be talking about a humongous amount of money when you're talking about the Defense Department's budget. So, I'm not trying to wish the problem away, but I'm just saying that I've seen other unusual circumstances where these contingency funds could be used.

CHAIR HOLTZMAN: Okay. "Eligibility: who is eligible to receive compensation?" And I guess the recommendation was anybody who's filed a restricted or unrestricted report. Suppose they haven't filed an unrestricted report?

MR. STONE: Unrestricted?

CHAIR HOLTZMAN: Suppose they haven't filed a restricted --- suppose they haven't filed any report, can they seek compensation?

MR. STONE: I guess I wouldn't necessarily exclude them, because they might say, "I didn't file those because a lot of time passed," but then you'd still require proof. And,
typically, it's going to be you've got to give us some proof, and usually that means a doctor or a hospital who saw you and said yes, look at these injuries, you know, saw you close to the time enough to document that there was an injury.

CHAIR HOLTZMAN: Well, what about the timeframe here? I mean, the restricted report started when?

MS. FRIED: Once they make the report.

CHAIR HOLTZMAN: No, no, no. When did ---


CHAIR HOLTZMAN: 2005, so I guess theoretically there could be people who didn't file a non-restricted report before 2005, because there was no other alternative. I don't know what their injuries today would be. Would they be eligible? Do we have a timeframe that people have to file these claims?

MR. STONE: Well, that's the question: do we have a timeframe?

MR. TAYLOR: I think that's a really
good one, too, because in thinking about the way
the VA is handling this, they've adopted a very
loose standard, remember, for their definition of
Military Sexual Trauma, and the amount of
evidence that's required to get you in the
system. If you remember, it was just a
corroboration that something occurred was enough.
So, the question would be: would that even be
even enough to get to the preponderance of evidence
standard that the board would have to address?
And so far as statute of limitations or some
reasonable period of time, when you're talking
about Korean War veterans, Vietnam War veterans,
I don't know. I don't know how far back ---

    MR. STONE: Well, we had a woman here
testify in front of us at the last hearing who
said that it occurred --- well, it was more than
20 years ago, maybe 30 years ago.

    COL. GREEN: 1970s.

    MR. STONE: 1970s, and it was a
terrible event.

    MR. TAYLOR: Yes.
MR. STONE: And she never felt she was made whole for it. I mean, if she could show us the bills ---

MR. TAYLOR: That's exactly what I was thinking of.

MR. STONE: --- and the reports, then why not? I mean, that's the idea. We're trying to redress the problem.

CHAIR HOLTZMAN: Right, okay. But that takes you up to 2005 when you had the opportunity to file a restricted report. After 2005, or after the time that you were allowed to file a restricted report, are we going to require anybody who seeks compensation from the system to have filed at least a restricted report?

MR. STONE: I wouldn't require it, but it would obviously be easier for them to meet their burden of proof of corroboration that it occurred, if they filed one or the other report. It would just be much harder for them. They might say, "I was out --- you know, I was on the front lines or wherever it was in some hotspot, and I
just didn't file a report, and then said the heck with it." I mean, they're going to have a tougher time corroborating their request.

    JUDGE JONES: And we certainly, I don't think, would turn this compensation board into an investigative agency that would try to go back and figure out if the claim was correct. So, we're really just talking about someone coming in, maybe they never filed a report, maybe it was Korea, maybe it was earlier, or later, and we --- a decision has to be made, that's all. They bring whatever they can bring in, and it's a decision. Unless we --- do any of these state compensation systems have some kind of statute of limitations ---

    CHAIR HOLTZMAN: Yes, try 72, isn't it?

    JUDGE JONES: Ten years, or ---

    CHAIR HOLTZMAN: It's like 72 hours, if you don't report within 72 hours, you can't file a claim ---

    COL. GREEN: Well, and actually ---

    CHAIR HOLTZMAN: --- of the incident.
And there may also be a statute of limitations.

COL. GREEN: There's a filing time limit, as well. The information we got from Mr. Eddy ranges, it looks between six months, 18 months, two years, there's one of five years, so there are different limits.

JUDGE JONES: Yes. Well, we ought to consider a time limit. I suppose we could. But I thought a lot of the states didn't --- were very loose on the 72 hours.

COL. GREEN: Yes, ma'am. You heard the testimony that most of them will find opportunities to consider claims that are otherwise outside that filing limit.

JUDGE JONES: And, also, that they don't --- many, if not most, don't require that you reported it to the authorities?

COL. GREEN: That's correct. The police report requirement and what the presentation of a legitimate claim, what the requirements are, they indicated that they are very liberal with that requirement in trying to provide compensation.
CHAIR HOLTZMAN: But there are still some states that do require that. I mean, you should give us some of that information. I mean, I guess --- I mean, I am very open to the idea. First of all, states have had these compensation systems in effect for a long time, so a lot of people may know about them, but the military hasn't had that. So, we're starting a brand new system, and it's not as though people have had the opportunity to make these claims before, they haven't, particularly not people from Korea, Vietnam, or whatever.

JUDGE JONES: Right, right, right.

CHAIR HOLTZMAN: Unless --- I am concerned, though, about --- well, I don't know. I guess if it's not going to open floodgates it's okay, we could just try it. But I do --- for more recent times when the military has been --- oh, yes, and the other reason people might not report is because they just said, what's the point? And we know that. But more recently, I think, we are getting reporting, so maybe there --- maybe it
would be justified to put some requirement, at
least a restrictive report, but I ---

JUDGE JONES: I'm just thinking off the
top of my head. I'm worried that if we have no
statute of limitations, we have expectations
built up ---

CHAIR HOLTZMAN: Right.

JUDGE JONES: --- and a lot of people
think they can come in and get something, and
then they may not be able to corroborate it. And
we've just caused more heartache.

CHAIR HOLTZMAN: Right.

JUDGE JONES: I just think we need to
give this a lot more thought, some more thought.

CHAIR HOLTZMAN: I agree.

COL. GREEN: One of the other issues
that I would recommend needs consideration is the
--- when I --- you can file an unrestricted or a
restricted report for a pre-Service incident, or
for an incident that occurred to me elsewhere.
So, if I'm a military member and I was assaulted
downtown by a civilian, I can file a report. If
I'm a person just coming into the Service and I was assaulted in high school prior to coming into the Service, I can file a report. So, I guess the question is ---

JUDGE JONES: Oh, now that's another eligibility question.

COL. GREEN: That's a different ---

exactly.

JUDGE JONES: I guess my immediate reaction was that your eligibility would require that your assault or the harm was caused to you by a military actor.

MR. STONE: Or on a military base, if they have jurisdiction. You might not have jurisdiction.

JUDGE JONES: Yes, okay.

MR. STONE: And I would think ---

JUDGE JONES: But then I wouldn't --- you're not suggesting, or maybe you're asking just so we can be clear about it, that if you --- there was a --- you had an assault prior to any contact with the military, even though you would
then file a report?

COL. GREEN: Yes, ma'am. I'm just pointing out that ---

JUDGE JONES: Yes.

COL. GREEN: --- saying that you have filed a restricted or unrestricted report establishes a class that may be broader or encompass different people ---

JUDGE JONES: I see.

COL. GREEN: --- than maybe you want to reach with ---

JUDGE JONES: Yes. I think --- I don't know. I think with your addition, I think the harm has to be caused by a military actor, or on a military base where there's jurisdiction. I mean, a Soldier ---

MR. STONE: It needs a nexus. There has to be a nexus to the military.

JUDGE JONES: Yes.

MR. STONE: Is what we're saying.

JUDGE JONES: Correct.

MR. STONE: And I ---
MR. TAYLOR: Well, on the other hand, just to follow-up on that, if you have a civilian board and a civilian supervisor of a military person who's the victim, that person should be covered.

JUDGE JONES: Right.

MR. TAYLOR: So, it can't be just ---

JUDGE JONES: Oh, absolutely.

MR. STONE: Yes.

MR. TAYLOR: It can't be just the status of ---

JUDGE JONES: That's --- yes.

MR. TAYLOR: But that could occur off a military installation.

MR. STONE: Yes. That's why I said, we have to --- the Staff will have to tinker with the nexus ---

MR. TAYLOR: Yes.

MR. STONE: --- to be sure we cover what we need to cover. And on some of those other questions, I wouldn't be surprised if Mr. Eddy doesn't either have a model, or a common example
that he uses for states when they talk about changing their current legislative model, and maybe the Staff can request if he has such a thing, that he'll send it in for us to use. And it'll go into the record, and that'll give us what he considers to be their current best practices for these questions. It may not be exactly applicable to the military, but at least we'll know the best practices that he sees from that whole association.

CHAIR HOLTZMAN: So, where do we stand on this? We have with regard to eligibility, we have some very tricky questions here. One, we have to develop --- we all agree there needs to be a nexus to the military, but what is that nexus? That needs to be fleshed out. Secondly, we're talking about compensation, but only for -- well, again, the nexus to the military. But then the other questions are, should there be a statute of limitations? Should there be any reporting requirement? What are the other issues that we have to --- I think we need to take a
good look at what the states do on statutes of
limitations.

VADM TRACEY: And would it be
inappropriate to apply a different set of
standards post-2005 when the opportunity to file
a restricted report was offered?

CHAIR HOLTZMAN: Yes, and I think that
that's a --- sure that could be done, but then
I'm thinking about the fact that even though you
had the opportunity to file the restricted
report, even the most recent statistics show that
only one in four reports, so we really have a
huge number of unreported cases even now, even
after all the publicity, and after all the
Special Victims' Programs, and after all the
military has tried to do, we still are not
getting full reporting. And if those people have
suffered some damage, of course, there's going to
be an issue about how they ever prove that.
Should they be precluded if it's within, you
know, like the last 10 years, or should they be
precluded at all? I mean, so I'm torn a little
bit about that, because I just don't know what
the numbers are going to be. And I think Judge
Jones raises a really important question about
raising people's expectations because the
likelihood they're going to be able to prove the
stuff even more than five years ago is going to
be very limited. But maybe we'll feel a little
more on solid ground if we get some better sense
of what the states are doing in this area.

JUDGE JONES: I agree.

CHAIR HOLTZMAN: Okay. "How direct need
a claimant's injuries be to be compensable?" I
don't know what that means. Does that mean if --

JUDGE JONES: Well, I guess it could
mean something like you were --- the sexual
attack occurred --- was someone who was not in
the military, didn't have a nexus, but there was
some negligent action on the part of your
military supervisor. I mean, one step away from
the supervisor himself having done it. That's the
situation that comes to my mind.

MR. STONE: Military guy that gets you
drunk and his buddy who has no connection to military commits the sexual assault. You know, something like that.

JUDGE JONES: Another example.

MR. STONE: Yes. And I think some of those will have to see what the state ---

CHAIR HOLTZMAN: Or you're fleeing ---

MR. STONE: --- standards are.

CHAIR HOLTZMAN: You're fleeing the scene and you get into a car accident.

MR. STONE: That's not quite --- for sexual assault that's not really going to be ---

JUDGE JONES: Well, that's what we're talking about ---

CHAIR HOLTZMAN: Yes, that's what we're talking about. Should we let that ---

JUDGE JONES: Yes. I could think of a million scenarios.

CHAIR HOLTZMAN: Yes. I think that that's just too fact-specific.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: "Methodology: how is
the amount of compensation calculated for each
victim? Does the methodology allow for varying
amounts based on tort concepts, such as pain and
suffering, and emotional distress? Is it a
simpler methodology allowing flat amounts for
certain defined eligible injuries regardless of
the extent of lost wages, pain and suffering? The
chosen method must be transparent, should not
take into account supplemental compensation that
the victims may or may not receive from other
sources." It should not take into account
supplemental compensation? These are all --- I
mean, I think this is a question, as opposed to a
statement.

So, rather than starting with the
first question, does the methodology of having
varying amounts based on tort concepts, such as
pain and suffering, and emotional distress? Are
we suggesting that people be compensated for pain
and suffering?

MR. STONE: I think there should be a
flat amount, if it's $3,000 or whatever. I think
it's appropriate to recognize it.

Chair Holtzman: Any other reaction to this?

Judge Jones: If we decided to include it, I would definitely do a flat amount, as Mr. Stone suggests. And it wouldn't waive your ability to go to court, which is where normally this kind of claim would be raised.

Mr. Stone: But there would certainly be a setoff if they went to court.

Judge Jones: Oh, sure.

Mr. Stone: Say, well, they got $3,000, so they only get anything above that, which will also discourage some of those claims. But I think that we want to acknowledge the pain and suffering of someone who's been sexually assaulted.

Judge Jones: Well, you're going to let us know how many compensation systems ---

Col. Green: Right. And, ma'am, this question goes back to --- the example Mr. Feinberg used was the Boston --- the One Fund
Boston protocol where they established clear rules in terms of what was covered, what was not recovered, different categories of injuries, and basically rather than requiring individual demonstration of damage, or financial loss associated with that injury, if it was --- I mean, not to get too graphic, but if it was a one-limb amputation, then it was eligible for this amount of compensation.

JUDGE JONES: Right.

COL. GREEN: And that's what he was talking about in the course of the different methodologies. So, I don't know that the --- I believe the state programs, correct me if I'm wrong, go more of a demonstrated expense, and they want to see that rather than a framework --

JUDGE JONES: I think most of this compensation will come from the bills they bring in ---

MR. STONE: Correct.

JUDGE JONES: --- for what was not covered by their insurance. And it'll be sort of
the kind of thing that you can count, you can see it, it'll be numbers. And then the only question is: do we want to have a category where we give a flat amount for pain and suffering? I have to think about that; I don't know.

COL. GREEN: Maybe ---

JUDGE JONES: I don't disagree with you, that you certainly want victims to --- have to be acknowledged for a victim's sake.

COL. GREEN: I think we have some testimony that we can gather about --- obviously, we have in terms of only one jurisdiction does that, and we can either get some information from Mr. Eddy, or pull up what we have in terms of why states have not done that, or why Tennessee changed it.

MR. STONE: And, remember, we're operating in a closed system where there's at least a feeling that the military has trained everybody there, so they have a little bit more responsibility, you know, to see that it doesn't happen. I can't leave and quit because I don't
like that the comments are getting nastier and nastier, and I'm going to go take another job. I'm sort of stuck there for my enlistment period, so there's a little more responsibility from the military custodian than you do in most other situations.

COL. GREEN: Okay. Doug pointed out, Mr. Eddy in his written statement to you from the June meeting talked about the history of pain and suffering and how states have dealt with that. Rhode Island initially offered a $25,000 payment for pain and suffering, and after a couple of decades of operation found itself bankrupt with claims waiting up to 12 years for payment. The Rhode Island legislature ended the benefit, reverting to an out-of-pocket model, and the same thing happened in Delaware. And Hawaii has a recognition award that --- of up to $800 that it can make in some cases. So, those are the other examples ---

CHAIR HOLTZMAN: What's the recognition award?
COL. GREEN: It doesn't really
describe. You ---

MR. TAYLOR: I think it means for some
pain and suffering, recognition that you've ---

COL. GREEN: But only --- those are the
examples where, why states have not, and then
only Tennessee offers the $3,000 cap.

JUDGE JONES: Which is like just a
recognition --- a flat-fee recognition award.

MR. TAYLOR: Well, the document you
gave us said it offers up to $3,000, and suggests
that there is some sort of a judgment that goes
into it, which I think would be very difficult in
sexual assault cases to determine the degree of
sexual assault, you put a monetary value on it.

So, I think for that reason if we're going to do
it, there should be a set fee, whatever it is.

JUDGE JONES: Yes. No, I don't
disagree. Trying to say you had more pain and
suffering than you did would be very difficult.

But, again, I'm not sure we should do it at all.

MR. TAYLOR: Right.
CHAIR HOLTZMAN: Because if you have that and you have no other bills, assume that case, how many applications are there going to be for the $3,000 fee? So, I don't know. Anyway, I'm going to take a closer look at that, because I think that that's going to be an important point and we'll be questioned on it, particularly since very few states do that.

On the other hand, we have the opportunity to do something since we're starting from scratch, doing something that, you know --- is really much more thought through.

Okay. "Proof requirements: what documentation" -- I don't think we need to go into that. I think we've already set the standard of proof. Right?

MR. TAYLOR: Yes.

CHAIR HOLTZMAN: Okay. So, I think we still haven't solved this issue, but we're getting closer.

MR. TAYLOR: Madam Chair, if I may, I would just like to compliment the author of this
report, which I thought was exceptionally well
done, well documented, well footnoted. Thank you
very much.

COL. GREEN: Doug is a good asset ---
CHAIR HOLTZMAN: Yes, great. Thanks.

Should we break for lunch?

COL. GREEN: Yes, ma'am.

CHAIR HOLTZMAN: That was good.

(Whereupon, the above-entitled matter
went off the record at 12:38 p.m. and resumed at
1:23 p.m.)
A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:23 p.m.)

CHAIR HOLTZMAN: So, let's resume discussion. Okay. I'm sorry for the extra noise, but it was a little cold in this room, so we are trying to let the outside breezes come in. If anybody gets uncomfortable or can't hear, let me know.

We're up to Tab 6 dealing with the JPP deliberations on retaliation. Everybody there? It's in this book.

I guess the first issue is whether DoD policy should uniformly define key retaliation terms, including retaliation, ostracism and maltreatment, which are used by the Services in regulations prohibiting retaliation as required by Section 1709 of FY14 NDAA 1709.

VADM TRACEY: I wondered whether it was actually important to sort of define this continuum that's in Tab 8 and sort of the messages that are captured on that continuum. It was the first time I had ever seen that, when
they brought it to our session a few months ago, and I thought this was quite useful to sort of get your head around what is the spectrum of issues that can occur here. And I thought this entire piece might -- it might be beneficial to bring that entire piece into a more formal construct that the Department would use.

COL GREEN: In addition to the three terms that we ask about in the issue, but also the other terms as well?

VADM TRACEY: I thought so, yeah.

JUDGE JONES: And because everything here is a form of retaliation.

VADM TRACEY: And even more than just the definitions, which are helpful, just sort of the whole message communicated by this continuum and the thought process that it reflects I thought was useful.

CHAIR HOLTZMAN: I guess my only concern -- I think it's a good idea, but the criminal retribution, isn't it that some of the -- it's just maybe the terminology, but couldn't
some of the other items be considered criminal,
such as promotion interference? So, maybe we can
clarify that last bar, or at least the
terminology.

JUDGE JONES: Well, do we think that's
right, or are these just civil violations, under
reprisal? I don't know. Maybe the -- I don't
know the answer to that.

MS. TOKASH: Well, some of them, like
maltreatment, is actually a violation under the
Code, the UCMJ. So that could be a criminal
violation, too.

JUDGE JONES: But under professional
retaliation. I'm just curious, are any of these
-- would some of them also come under the
criminal code?

MS. FRIED: If there is a separate
quid pro quo, under maltreatment, if you --

JUDGE JONES: I'm sorry. I can't hear
you.

MS. FRIED: If there is a separate
quid pro quo it would be punishable under Article
93. But it has to be done by someone in position of a superior --

JUDGE JONES: Right. Right.

CHAIR HOLTZMAN: But if a negative performance evaluation is given in retaliation for someone reporting something, is that criminal?

MS. CARSON: It's an employment matter. I mean, I think you have Article 92 that is now claimed to be usable, but nobody has provided us even a case where that's actually happened.

MS. FRIED: The purpose of Article 92, in order for it to be punishable, it has to be done with the intent to deter reporting or obstruct justice. So, if your intent to give this negative report is to chill someone from coming forward, that could be potentially prosecuted under Article 92.

MS. CARSON: As obstruction.

MS. FRIED: As retaliation.

MS. CARSON: Or retaliation.
MS. FRIED: Correct.

MS. CARSON: As the Services have defined it. That's specifically defined by the Services, the intent requirement. Their concern was it wouldn't survive constitutional scrutiny if it didn't have intent in the social retaliation.

MR. STONE: I wonder if we could close the door halfway?

CHAIR HOLTZMAN: Sure, yeah, alright.

Thank you.

MR. TAYLOR: Just to comment on the original question that you asked, it seems to me that in comparing the regulations that we had on a previous handout -- or maybe we've got it on this one, too, the regulatory provisions among the three Services -- it looked to me as if the Army had formulated its definitions differently from the Air Force and Navy, which were more or less the same.

And what I was hoping to find out from the Staff is whether there was any reason they --
or rationale they got from the Army about why they chose to use a different formulation.

MS. CARSON: What we got from the report that DoD made to Congress, that they were required to make -- to tell Congress what their position was on whether or not there should be a punitive article for retaliation, and they made the point in that report that the Air Force, and I think then the Navy followed, with this intent requirement, that the Army has not spoken to it at all.

So, what the NDAA has required is that the Department of Defense, the SecDef, define these terms. SecDef has not done it, so the Services have done it in the absence and it's different. And we don't know -- that's a question we haven't asked the Army.

MR. STONE: It makes it a little bit difficult not to have uniformity, it seems to me.

MR. TAYLOR: That was my point. I mean, unless there is a really good reason to have a different definition for something like
this, which they intend to be punitive -- make no
mistake about that, so that you can actually take
criminal action against someone -- then it seems
to me that at a minimum, within the Department,
there ought to be uniformity as to the
definition.

CHAIR HOLTZMAN: Where are the
different definitions? Where do we find them?

MS. CARSON: They are in that
regulation chart.

CHAIR HOLTZMAN: Where is the chart?

MR. STONE: What tab is that one?

MR. TAYLOR: Well, I brought this from
a previous session.

MS. CARSON: I thought it was in the
materials.

MR. STONE: Was it distributed in --

MS. CARSON: The materials have the
RFI -- a chart that has got the RFIs broken down,
but they are slightly different than the
regulation chart we sent out earlier.

MR. TAYLOR: This was March 27. I
brought this one from March 27th.

    JUDGE JONES: Well, I mean, I think your point is completely right, and the very next issue is about data collecting. So, if we are going to try to collect data in this area, like we do everywhere else, or try -- this was a huge issue with the RSP, too. Everybody should have the same definitions. I don't know what the difference is between the definitions, but I'm for the same definition among the four Services.

    MR. STONE: Well, and taking that to the next step, if we are going to be comparing it against non-military data, we've got to look at their definitions, because it's crazy to compare data that describes something one way against something that is not covered in the other data that we are getting from whatever, the Sentencing Commission.

    MS. CARSON: But it's not criminal.

    In the civilian world, it's a civil employment issue, retaliation.

    MR. STONE: Well, whatever it is, we
want to look at their definitions and try and at least be able to say, " Compared to that data we have this data." Otherwise, we are going to have different categories and people are going to say, " We don't understand what you're telling us," and they are going to be right.

MS. FRIED: So, the Air Force, if it helps, has a policy that is punishable under Article 92-134, and defines retaliation as, " taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action with respect to a military members, because the members reported a criminal offense."

It then defines ostracism as, " a form of retaliation with the intent to exclude or not have social..." -- well, let me read it. Is, " the exclusion from social acceptance, privilege or friendship, with the intent to discourage reporting of a criminal offense or otherwise discourage the administration of justice."

Maltreatment, " is treatment by peers
or by other persons that, when viewed objectively
under all of the circumstances, is abusive or
otherwise unnecessary for any local purpose, that
is done with the intent to discourage reporting
of a criminal offense."

This is different than the Article 93
one, because this doesn't require superior-
subordinate relationship. Again, "with the
intent to interfere with the administration of
justice and result in physical or mental harm or
suffering or reasonable -- or reasonably could
cause such."

Personnel action, "any action taken on
a military member that affects or has potential
to affect the member's current position or
career. Such actions include promotion,
disciplinary or otherwise, a transfer or
reassignment, a performance evaluation, a
decision on paid benefits, award to training, and
any other significant change in the duties
inconsistent with a military member's grade or
rank."
So that is how they define it for purposes of retaliation. I can read you the Army one also.

CHAIR HOLTZMAN: But that becomes a criminal offense, right, under that definition.

MS. FRIED: Correct.

CHAIR HOLTZMAN: So, the reprisal in this chart, the fourth red bar, becomes under some definition, at least the Air Force definition, criminal conduct.

MS. FRIED: And I think it's very similar in the Army.

CHAIR HOLTZMAN: So, I mean, that's why I was concerned about the headings of these two bars.

MR. STONE: How do you want the headings to read? What do you think they should be? Retribution crimes and reprisal crimes? I mean, how --

CHAIR HOLTZMAN: Yeah. Maybe. I mean, I don't know the difference between reprisal and retribution, frankly. You know,
It's just a different word, but they basically mean the same thing.

So, I don't know. I don't have a suggestion, but I just don't think that -- I think it's confusing and maybe inaccurate to suggest that only the last bar is criminal -- consistent with criminal conduct, and that it's not the other.

So, what else do we have to do on Issue Number 1, aside from saying that they need to be uniform? Do we want to pick among these various proposals which definitions we prefer? Of course, I don't have it in front of me. Mr. Taylor?

MR. TAYLOR: I would suggest that we simply refer it back to the Department. I mean, they were supposed to do it in the first place, but they punted it to the Services. In other words, the Defense Department was required by law to come up with a uniform definition, right? And rather than do that, they gave it out to the Services. So, you end up with two that are
pretty similar -- the Air Force and Navy -- and
the Army, which is pretty dissimilar. At least
in one of the definitions, of ostracism.

So, it seems to me that, as part of
their oversight, it would be the responsibility
of the Secretary of Defense's Office to make
these consistent.

COL GREEN: One point just to bring to
the Panel's attention is that the Secretary of
Defence levied a requirement by the 1st of
September for the Services and DoD to present to
the Under Secretary of Defense for Personnel and
Readiness their strategic plan for addressing
retaliation.

So, the Department internally is
working right now to develop that plan. We're
not privy to that. Obviously, it's internal at
this point. So, I mean, it's possible that DoD
is looking at standardizing some of these things.

But I think what we've seen is the
evolution since the POTUS report in December of
last year, and so what the Panel's information is
on is sort of the Services' responses since the
POTUS report. And then there is this ongoing
effort across DoD to develop a strategic policy
for dealing with this.

CHAIR HOLTZMAN: Let me get my dates
clear. In the FY14 NDAA, the Secretary of
Defense is required to set up uniform standards.
When was the FY14 NDAA passed? When was that
enacted?

MS. CARSON: I think it was December
2013.

CHAIR HOLTZMAN: December of 2013.
And we are a year and a half later and there are
no uniform standards. Isn't that --

MS. FRIED: I think part of the
problem, Ms. Holtzman, is they have -- based on
what I'm reading here, it looks like the purposes
of a UCMJ definition for criminal retaliation,
ostracism, those that rise to the level of
obstructing justice or intent to influence the
administrative justice process, it looks to me
the Services are pretty close together in their
definition.

And, yes, I guess there is not a uniform standard umbrella definition, but they seem very, very close, and I'd have to sit here word by word to kind of see where the difference is.

I think the problem comes in with how do we define ostracism or social retaliation that it's actually prosecutable. I think some of the concerns the Department has run into has to do with First Amendment protections, you know, and I think that's what they're struggling with, if that helps.

CHAIR HOLTZMAN: Well, it doesn't really help, because they were required by law -- it was passed in December 2013 -- we are now in July 2015, and these terms were supposed to be uniformly defined.

Or, wait a minute, was there -- as I read this -- maybe I'm wrong. So, there was no requirement that there be uniformity? Maybe the question for us is whether there should be
uniformity, but not that the DoD was mandated to have a uniform requirement -- a uniform definition.

MR. STONE: I also don't think that, in the context of the military, military members can't be more restrictive in their First Amendment rights, for all kinds of reasons, like unit cohesion. And there's not just restrictions based on security; there's all kinds of team and organizational reasons that there's a limit on behavior that you wouldn't find in the military.

So, I think that whatever the reason is, I agree we've got to see uniform definitions. And if they want to get to them by September, that's great. Maybe the simple answer is -- if the question is whether they should uniformly define, the simple answer is yes, and we hope to see it by September, or whatever the date is. Let's encourage them.

MR. TAYLOR: I was just going to -- to your question, Madam Chair, in Section 1709 of that Act, it says, "For purposes of this
regulation, required by subsection 8, the SecDef shall define retaliation to include, as a minimum," and then it says, "a) taking or threatening to take an adverse personnel action, withholding or threatening to withhold, with respect to a member of the Armed Forces, because the member reported a criminal offense, and b) ostracism and such acts of maltreatment as designated by the Secretary of Defense, committed by peers, by a member of" -- and so for and so on. So, it seems to me like the ball was in their court.

CHAIR HOLTZMAN: For a year and a half?

MR. TAYLOR: And what we've got are three different Service regulations implementing it slightly differently. That's just the way I see it, but I could be missing something.

CHAIR HOLTZMAN: Well, you know, I don't know that we have to wait until February to issue a report. We could just issue a letter to the Secretary of Defense now, or a report to
whomever, Congress and the Secretary of Defense, indicating that this requirement, you know, was adopted by law and it hasn't been implemented. Period. And should be. That's all. Promptly. And so, like, one paragraph.

MS. CARSON: A letter to the DoD while they are working on their policy now would be helpful.

JUDGE JONES: And I guess the only other thing we might say is, regardless of the law, because of our efforts to actually get good statistics, uniformity is really important, and just emphasize that, too.

MR. STONE: I guess I would rather say, "In addition to the law."

CHAIR HOLTZMAN: Okay. So, any objection to that? Can we officially designate that as a report?

MS. FRIED: Well, I think the report has to be made to the Secretary and Congress.

CHAIR HOLTZMAN: So if we send a copy to Congress, can it be a report? I guess we could
send the letter and then include it in a report
to Congress and to the Secretary of Defense, and
send the Secretary of Defense a copy -- I don't
know. You'll figure it out.

But do we need to do anymore -- I
mean, I know we have this chart, but I think the
chart, as I said, we have to figure out new
language for it. I mean, the headings. Why do
we have them in different sizes? Are they just-
- do you have them as more serious? I mean, how
do you --

COL GREEN: Do you mean the escalation
from left to right in the chart?

CHAIR HOLTZMAN: Yes.

COL GREEN: I think the issue is just
trying to create a graphic. This is modeled
after -- this is the Staff's attempt to model
something after a response to sexual harassment,
a chart that DoD SAPR has created. And so it was
the Staff's attempt to graphically represent the
escalation of issues associated with retaliation
from the most minor up to, obviously, the most
severe in terms of clear violations of the UCMJ on their face, not even just regulatory violations.

So, I mean, obviously, if the Panel has specifics that you want us to focus on, or issues that we can address, we can do that. The other thing is that the Staff can go back and continue to work on this according to your guidance.

VADM TRACEY: I look at this much from a commander, who has to train people, hold people accountable, short of taking them to trial. And this was a useful visual for me as a commander to get my mid-level leadership focused on the fact that all of the things in the left-hand side are a precursor to the things on the right-hand side. And if you don't do something to address the left-hand side as it emerges, you will march up the chain if you're not paying attention.

So, it's less about how we are going to court-martial people than it is about how you do things so you don't have to court-martial
people. And so I thought this was a useful visual which would benefit from, you know, precision in the language, to your point. But this was a pretty useful way to do this for just plain folks who are not lawyers.

JUDGE JONES: And it was helpful to me, too, because you see which group takes care of which types of violations.

VADM TRACEY: Yes, yes.

MR. STONE: Well, I would like to see, in the ostracism, "unsupported by members and unit." That needs to be amplified, because it isn't just -- when you perceive -- when you think you are being unsupported, but you're going out on a mission and everybody has weapons, you're worried that you are going to be thrown to the wolves one way or another. I mean, that's not just -- unsupported is a little -- you know, you need the team support sometimes to get through a mission.

So, it's not just social retaliation. It goes beyond that. It goes to the cohesion of
the unit and your ability to function in it confidently and not be in fear that when the going gets tough you're going to get abandoned.

You know, so I think that that's correct, but it's more. It's the deterioration in the morale, the necessary morale that a unit has. It's got a duty component to it, I guess. It's not just social; there's a duty component.

I mean, when they have a party in the barracks, it isn't just they're having a party among friends. It's all of those things have a morale component.

VADM TRACEY: But an instance in which a member of a unit is concerned that they are going to be -- that they can have friendly fire or they're going to be uncovered, that's on the right-hand side of this chart. That's not social ostracism.

MR. STONE: Well, no, no. That's a different -- if it happens, on the right-hand side. If they fear it, and it detracts from their ability to function in that unit --
MS. CARSON: But that would come from a threat, right? A threat would be something that is on the far side.

MR. STONE: Well, and it may even be an unexpressed threat. It's just they see that in the social ostracism. How far is this going to go? "I can't sleep now because I don't know how far this is going to go." Again, it's not the group of college friends and they say, "Well, they're excluding me from the party, but I'm just going to do other things today." You have to do things with the group.

VADM TRACEY: I think this device is built from the lens of the behaviors, not of perceptions. You're right that the social ostracism category of things could lead to a victim perception that, "I'm going to be abandoned in the field." That's not what this is. This is, what are the behaviors?

MR. STONE: Okay. I guess the behavior I'm looking for here is, you know, destruction of morale, group morale. It's a
deterioration of group morale. That's the --

JUDGE JONES: It's the deterioration

of the victim's morale, certainly, but --

MR. STONE: Yeah. Right.

JUDGE JONES: And I think this covers

it.

MR. STONE: You think that covers it?

JUDGE JONES: Yeah.

MS. TOKASH: So, we built this off of

the sexual harassment/sexual assault continuum.

And actually on the far left, it started out with

a healthy workplace environment. So, really,

maybe we want to consider whether we start with a

healthy reporting environment in terms of

retaliation. I mean, that's really the

escalation of --

CHAIR HOLTZMAN: I think it's good the

way it is, frankly.

VADM TRACEY: I like it the way it is.

But in terms of a training tool, I think you've

described the right device, that starts with,

what's a healthy reporting environment? But I
think for what this was intending to do, I really liked this.

MR. TAYLOR: I do, too. I sort of interpreted your X-axis here as a healthy environment, right?

VADM TRACEY: That's right.

MR. TAYLOR: So, that's your X-axis here, and then you escalate up in terms of less healthy environments.

CHAIR HOLTZMAN: Yeah. And I would add also, you know, it may be easier to put an asterisk next to them, but some of these items can, in certain circumstances, be criminal. So, maybe, you know, you put that, you know, with an intent -- I don't know how to do that visually -- but with an intent to stop them from reporting, or with an intent to -- something or other, that this could become a violation of the UCMJ or the regulations. I don't know. You know, but somehow it should be indicated.

MS. CARSON: I think part of the intent of putting that together is you would
expect, as you see the increasing severity of the behavior, retaliatory behavior, you expect to see an increasing severity of punishments. So, that's the question. At what point should it be criminal? At what point should it be a command environment or non-criminal --

CHAIR HOLTZMAN: Right. But I think the point I'm making is that even from what I -- because Maria was saying that, as she read the definition, that even some kind of ostracism can be criminal. So, I think that even though this seems to be, like, well, moderately bad but not the worst, it still could be criminal even though it's over there on the left side.

I don't know if that helps your need, Admiral Tracey, to indicate the criminality.

MS. CARSON: The question is, how does a commander know? What are the examples of --

CHAIR HOLTZMAN: Well, that's a different story. All I'm saying is that some of this behavior could be criminal, in any of these boxes except maybe the one all the way on the
left.

COL GREEN: Ms. Holtzman, the attempt
to indicate that is each of those arrows down
below indicates UCMJ, just in terms of the
response made to --

CHAIR HOLTZMAN: But that's not clear
to me. The labels aren't clear.

COL GREEN: No, I understand. And we
can try to make that more apparent.

CHAIR HOLTZMAN: And also threats. I
mean, I think you need to elaborate on what is a
threat. What kind of threats are we talking
about? It's too vague.

JUDGE JONES: What's the purpose of
this chart? It was very helpful to me in just
sort of getting an idea about, what are examples
of the kind of conduct that you would label
ostracism or reprisal. Are we putting this in
our next report?

COL GREEN: Judge Jones, when the
Staff started to look at this -- and I think it
goes back to the definitions of terms and that
they are somewhat varied, and the like, and so as the Staff struggled to even present to you how to frame this issue, one of the first things we realized is that some type of a graphic demonstration of this is appropriate.

So, I think we sort of considered this as sort of the touchstone by which a whole lot of other things are defined and explained throughout your report.

JUDGE JONES: Right. And what I love about it is it's got real examples in it, as opposed to just verbiage. You know, it's not charging language. It's examples. And that was very helpful to me, and I think to anyone who -- really, it doesn't matter whether you're a lawyer or a prosecutor or anything. I think this is very helpful.

So, I mean, I like it. I don't know what we would want to do with it, frankly.

MR. STONE: I do think that on the little box on the bottom under negative reactions, which says "not actionable," I mean,
that is not criminally actionable, it should say.

I think if I was a commander and I saw the unit all giving somebody the cold shoulder, I would say, "Whoa, I have a situation here that I have to address. It may not be criminally actionable, but I don't want to take this unit into combat that way."

MS. TOKASH: Well, that's a good point, because the DoD is using the term "actionable" as UCMJ action. And your point is right, because you have heard from several presenters, like Dr. Harmon, talk about how even commanders have a responsibility to address even negative reactions, because it's an environment. It's a climate sort of a thing. So --

MR. STONE: Like people walking around with automatic weapons. And if a guy has a bad day, that's how you get these incidents where they express it in an unacceptable way.

MS. TOKASH: Everything is actionable.

It might not be chargeable under the UCMJ.

MR. STONE: Right. So, that's why --
MS. TOKASH: So, it's a terminology issue.

JUDGE JONES: So, maybe just not UCMJ actionable is what you're talking about for negative reactions?

MS. TOKASH: Or just put the command arrow all the way to the left, because the command in the military has that power --

JUDGE JONES: Always to take care of that.

MS. TOKASH: -- to always take action, no matter what.

CHAIR HOLTZMAN: That's not only against offenders, but it's also to remedy the situation.

MS. TOKASH: Yes, ma'am. Right.

CHAIR HOLTZMAN: Okay. Well, we'll figure out what we want to use this for when we, you know, fine-tune the chart.

I guess we can go to our next issue, which is data collection. Would be Issue Number 2. Is that where we are? Data collecting and
reporting requirements: Whether the reports and associated outcomes of all retaliation complaints, regardless of type of retaliation, investigative authority, and punishment involved should be collectively tracked and reported?

So, I mean, it seems that the answer to that is obvious. Anybody disagree?

COL GREEN: Just as a background for this, the DoD, in response to the POTUS report, did try to create, in the spring, a standardized reporting form, and asked all of the Services to provide an accounting for all issues of retaliation. And there were a lot of -- I mean, again, I think it is one of those cases that the devil's in the details in terms of what qualified as a reportable incident. And so currently there is no centralized means.

A victim has the ability to make a restricted or unrestricted report, and there's a formalized procedure for that. There is no such thing for retaliation.

And so the sub-question is whether
there should be a standardized process by which someone can report retaliation and whether -- and regardless of the answer to the question, whether or not there should be a requirement to centralize, report and manage reports of retaliation, either from a centralized reporting process or from different methodologies by which retaliation is learned.

The Services have taken steps to use the case management groups at the installation levels to oversee issues of retaliation at the installation. And I think it's varied how those are implemented, and the management of those is really decentralized at this point.

MS. CARSON: The procedures for that were due January 2015, and we have procedures from -- the Army has issued guidance on it, and the Air Force has issued guidance on it. We have not received any guidance from the other Services on how the case management groups are to function. And none of them identify a form or any very specific criteria on what is being
reported, only in kind of a general sense that a commander is required to ask about it and see that it is investigated and continue to follow up.

CHAIR HOLTZMAN: But in other words, if you don't have an official reporting form, how do they know there has been any follow-up?

MS. CARSON: Exactly.

CHAIR HOLTZMAN: So, we don't have that. That doesn't exist. In other words, we have a good system at least in place for reporting a sexual assault. You can report it through all these various people who then have to report it. There's a form and it's tracked and it's kept in a -- no longer in a file cabinet, but in some kind of repository, and that information is accessible.

And so we can track how many complaints were made, and then we can find out what happened to them. But the retaliation reports, there's no formal complaint form, and there is no formal, therefore, requirement of
retention of the information that a complaint has been filed.

MS. CARSON: That's right.

CHAIR HOLTZMAN: And there is no responsibility for -- well, then, how can you track whether it has been followed up? Right?

MS. CARSON: Well, they do have -- this was sent out one time by DoD Personnel Readiness, which was a spreadsheet that asked all of these questions, these retaliation questions. That was to be done at the March 2015 Case Management Group meetings, and the Services came back with responses, but it was on a very short timeframe for the Services to turn that around, and there wasn't a lot of clarity on what would happen next.

It has never been asked again from the Services, and it's still not a form. It's just a spreadsheet that each Service is supposed to fill in and send to Personnel Readiness to determine what's happening.

CHAIR HOLTZMAN: Well, how did they
fill in the spreadsheet?

MS. CARSON: Pardon?

CHAIR HOLTZMAN: How could they fill in the spreadsheet if they don't have some documentation of the complaint?

MS. CARSON: Right. That was --

MR. STONE: Well, they can only fill it in if there was actually, what, an Article 92 offense charged. In other words, if it rose to a certain level of a criminal offense, then you might find it that way. But of that page we were looking at, that's probably only less than a quarter of everything on the page.

MS. CARSON: It's just all very vague, what is --

COL GREEN: But the data request was broader than that, Mr. Stone.

MR. STONE: Right.

COL GREEN: It was not something that triggered a UCMJ violation, and therefore would establish that baseline for it. It was broader than that, and I think it even asked for issues
of social ostracism.

MS. CARSON: They just wanted allegations of retaliation, whatever form.

MR. STONE: Okay. And the question that I, then, have about that question, and also about us talking about a form is, did it request information on retaliation following an allegation of sexual assault? Or did it just request information on retaliation in the unit?

Because it seems to me you won't always be able to nail down an allegation of a sexual assault that was threatened or didn't take place, but there might be retaliation because it was rebuffed in the bar, for example. But then also you have retaliation just because maybe they don't like somebody for some other, I don't know, religious, racial, or social reasons.

And so I guess the question I'm sort of asking is, are we looking to get a measure of retaliation for things inappropriate on this scale, regardless of the origin, or only if we think it comes out of a sexual assault attempt?
And how do we distinguish those two exactly?

I mean, some of those are going to be discouraged so early, the attempted sexual harassment, that you see the retaliation, but you may not even know why because the person simply turned on their heel and walked away from somebody and now that other person is going to get back at them. I mean, I just don't know how you --

MS. CARSON: Well, starting at a place of zero knowledge, the direction from this initial data collection was for unrestricted reports of sexual assault. Those are the only cases that are discussed in Case Management Groups.

MR. STONE: Okay.

MS. CARSON: So, this would be retaliation that is related to an unrestricted report of sexual assault.

MR. STONE: Okay. The question I'm asking is, does it need to be a little broader?

CHAIR HOLTZMAN: Well, let's just
maybe start with that. I mean, that's pretty obvious. I mean --

MR. STONE: Well, you have a couple of categories. That's the easiest category to identify on the form.

CHAIR HOLTZMAN: It is, you're right. But it seems to me that if they don't have a form, I don't know -- if they don't have a form, and they don't have a regularized system for making complaints, how will they ever be able to track them, much less respond to them?

MR. STONE: It's going to be anecdotal. It'll be what somebody remembers when you ask them a question.

VADM TRACEY: So, the case management process, though, a lot of it is oral, right? A lot of it is oral. It's the SAPR and the SVC, if they can be there, and what have you, in a review with the commander of how those cases are going. And so in that process, presumably the SAPR will have some awareness of the victim as saying that they are being retaliated against in some way,
shape or form. But that's what is going to come out of that, because of the way that process is intended to work.

MS. CARSON: The Air Force guidance is that the SARC is required -- that they're the only ones that have really very extensive guidance. And that is that the SARC is supposed to speak with every restricted report reporter before the case management group and find that out ahead of time, and then that will be discussed in the case management.

VADM TRACEY: So, does the case management process -- I've forgotten this -- do they require any roll-up on a quarterly or annual basis to any sort of headquarters level of the case management?

MS. CARSON: This is the first request. That's what was just sent --

VADM TRACEY: So there is no other report, no other --

MS. CARSON: There is no other requirement.
CHAIR HOLTZMAN: But let me go back to this issue about the SARC. So, the SARC, that's when -- when no complaint has been filed, the SARC has to reach out proactively in every unrestricted case and find out at the outset --

MS. CARSON: For the Air Force.

CHAIR HOLTZMAN: Right. For the Air Force. And do they have to do it every -- how often do they have to do it, just once?

MS. CARSON: Every month.

CHAIR HOLTZMAN: They have to do it every month. And how do they record that they have done that?

MS. CARSON: There is no specific guidance on how that's done.

CHAIR HOLTZMAN: Well, I guess our question, first -- I mean, the Air Force model seems like not a bad approach. I mean, this seems like a very logical person, the SARC, to be asking this question.

So, I mean, maybe we need to know more about how that's working and what the Air Force
thinks about it, and maybe why the other agencies haven't adopted it. But that seems to me a pretty useful system.

But still, don't you think there should be some kind of formal document reporting that such an inquiry was made and there was no report of retaliation? Or there was report of retaliation?

Now, the SARC would also know, wouldn't they, about the unrestricted reports?

Who would know about the -- going to your point about --

MS. CARSON: You mean the restricted reports.

CHAIR HOLTZMAN: I mean the restricted reports.

MS. CARSON: Correct.

CHAIR HOLTZMAN: The SARC would know about those restricted reports.

MS. CARSON: Yes. And they can ask -- I mean, you would presume there isn't going to be retaliation because it's restricted, but they can
certainly inquire.

MR. STONE: I don't think you can make that presumption. I think that the person who was -- I mean, the incident occurred, they're so scared of the retaliation, that's part of the reason they may not be reporting it. So they are trying to --

CHAIR HOLTZMAN: Right. So, it seems to me that that's at least a good starting point for how to deal with the problem of identifying the problem of retaliation and documenting that it exists, how much it exists, and then also what the follow-up is. Because once you have a form reporting it, then I guess the SARC, or someplace on the form, you can say, "Well, it was reported at this case management meeting, and Commander XYZ said she was going to do ABC."

MS. CARSON: Or maybe it's a restricted report because of the fear of retaliation.

CHAIR HOLTZMAN: Right. But then if threats have been made, then what do you do about
that? I mean, you can't just sort of --

JUDGE JONES: The same thing. You
don't do anything to -- you don't investigate the
underlying assault, because it's restricted, so
you would know about it, but you wouldn't be able
to investigate the threats. I mean, you'd
obviously do what you had to do to protect the
person, if it was that serious, but --

MS. CARSON: And in the Air Force
guidance, it also says that the person reporting
the retaliation has the choice to file the
retaliation, whether or not they want that
brought to anyone's attention or anything done
about it.

So, we heard some testimony, I think,
from some SARC's who have said, just talking this
through with the SARC and allowing the SARC to go
talk to a commander, I mean, sometimes that takes
care of the problem, you know, when it's brought
to the attention of somebody who can do something
about it. Or they can resolve it if there is a
misunderstanding that took place, that made
someone feel that they were being retaliated against.

MR. TAYLOR: Just a point of clarification. I've taken a look at this March 2015 Air Force Directive that you referred to regarding setting up this process, and one interesting thing to me about it was that this memorandum said that the requirement, once in place, that the commander had to discuss retaliation with sexual assault victims prior to each case management group was being rescinded.

MS. CARSON: Yes.

MR. TAYLOR: So, they actually changed the requirement that had the commander in the loop to one that did not have the commander in the loop.

MS. CARSON: There's a reason for it, though. It's because there is no privilege with the commander, and so they changed that to have the SARC do it instead of the commander.

There is a requirement that the commander, within 72 hours after every case
management group, the commander has to tell the person who is reporting the sexual assault what's the status and the outcome of it. So, there is still a commander responsibility, it's just not asking them about the retaliation prior to the meeting.

And commanders are also mandatory reporters. So if they know about retaliation, they have to do something. I mean, it will become public in a way that, if a person reporting sexual assault doesn't want it to, that's why they wanted to protect them by allowing them to discuss it with a SARC and being able to maintain it privately if they want to.

MR. TAYLOR: But just to follow up on that, what I couldn't understand from this memo was whether there was any requirement within the Air Force, if we are looking at it as a potential model, to have the case management groups then send all the information back to headquarters, or if they just keep it locally with the case management groups, in which case big Air Force
and big DoD really have no idea what the scope of the problem is.

MS. CARSON: Right. There is no requirement for anything happening beyond that.

CHAIR HOLTZMAN: Right. Well, there is no -- if you don't have a form, and you don't have the follow-up on the form, there's no way to know what is going on.

JUDGE JONES: You know, based on what Admiral Tracey was saying, it doesn't sound like we are going to get data, as we would like to call it, out of a case management group conference that is held every so often.

I think we are going to start with -- at the beginning with an analysis of the reports and the -- and I would include the restricted reports, with the proper safeguards, and maybe have SARCs go back to those who filed restricted reports and say -- ask them, assuming we're not then accused of harassing a victim, but do it as diplomatically as possible, see if there are any more allegations that we can glean from there of
And then the question is -- and then that's real data. Or at least we have to figure out a way to capture it. And I guess that will be SAPRO, again, with their SARCs doing their reporting.

MR. STONE: And that's where this prior question and the chart comes in, because if a summary of the definitions of these and the elements of them are on the form, they ask them to check off which of these categories the person is reporting. Is it only the first one? Is it -- duh, duh, duh, duh, duh.

And that way at least they -- each of these people evaluating it are using the same scale, and we have something when we get it back that, you know, one unit didn't think it was only social retaliation. They thought it was criminal retribution. At least we have them on the same scale, and we've got some, you know, set of --

JUDGE JONES: And this could be this or some version of it. It could be very helpful.
to that SARC who is doing the questioning.

I would think victims' counsels would
be also reporting this. It might not be the
SARC, so they have to know that they have to --
maybe they get this form, too. I don't know.
But there needs to be a form that has to go into
a centralized location, that, yes, there was a
report, and this is the category it fell in.

The question I have is, doesn't the
IG's office keep records?

COL GREEN: Well, the IG is only
involved in the cases of reprisal. So --

JUDGE JONES: Right.

COL GREEN: -- I mean, their scope in
terms of what they are responsible for in
retaliation cases is only one piece of the entire
retaliation claim.

JUDGE JONES: Right. But these are
really important categories for victims.

COL GREEN: Right.

JUDGE JONES: And I just wonder what
kind of record keeping the IG's office does,
because that would be a third area where we would
definitely want to capture how many were there,
what types were they, what were the outcomes.

COL GREEN: Well, we heard from the IG
at the April meeting in terms of -- I mean, they
do a quarterly roll-up --

JUDGE JONES: Right.

COL GREEN: -- report of all reprisal
cases, and what we heard from them is very
limited tracking capability. They are improving
it, but I don't -- I don't know that anything is
tracked back to issues involving sexual assault
and reprisal based on that.

CHAIR HOLTZMAN: And I have some very
serious questions as to the whole IG process
itself.

COL GREEN: Yes.

CHAIR HOLTZMAN: And whether we want
in any way, shape, or form to harness them into a
solution, because they have been, in my judgment,
part of the problem. So --

VADM TRACEY: The first question is,
if that's really a possibility. In a well-run
command, the complaint is going to go to the
Master Chief, and the Master Chief is going to
get the problem solved. It is never going to
become a formal issue. It's going to be dealt
with at the lowest level of the chain of command,
dealt with positively at the lowest level of the
chain of command, never become a formal
complaint.

You might tell your SARC that -- in
your regular interview with the SARC, but the
commander is only going to know about that in the
case management process. So you can't do the top
one and be very confident in -- that you are
getting anything, the things that have become
formal reports to the commander.

So you're in the IG bucket or you're
in the commander's direct bucket. So there's a
top question here.

JUDGE JONES: I'm sorry. Which is the
top question?

VADM TRACEY: Whether reports and
associated outcomes of all retaliation complaints, regardless of type, investigative authority, or punishment, most of these are -- in any command that is remotely healthy, they are being dealt with, even below the commander level.

JUDGE JONES: Right. Right. So all is totally unrealistic.

VADM TRACEY: Yes.

JUDGE JONES: Right.

VADM TRACEY: So I was trying to lock down, where can you get to a place here that is actually executable and can give you meaningful data that lets you do anything with it. Just collecting data to be able to publicly report stuff is -- you could -- I don't know if the entire Department of Defense has been doing that and getting that much done.

So what is the outcome we are trying to get here? To sort out the current activity that we attribute to publishing UCMJ results?

That's a positive thing to do.

A bit of a temperature check of it, is
this getting better, or is it getting worse? You
don't have to have everything to judge whether
it's getting better or getting worse, to be -- to
target something that's actually achievable, and
it seems like -- at a starting point with what
the SARC's are supposed to be doing.

CHAIR HOLTZMAN: In the Air Force.

VADM TRACEY: Isn't that a model that
you might be able to apply --

CHAIR HOLTZMAN: Right. I'm not sure
I agree with you about not keeping track of
everything, because it seems to me that
retaliation is -- is a very, very serious
problem, since it is the major reason being given
for --

VADM TRACEY: I don't disagree.

CHAIR HOLTZMAN: Yes.

VADM TRACEY: I'm just thinking about
being practical.

CHAIR HOLTZMAN: No, no, no. I'm not
-- and so I'm just saying that, is there a way --
and I'm not -- and my reason for getting this
information is not necessarily to give monthly
reports or whatever this is. She would be giving
public reports, and so forth. That's, it seems
to me, less important than trying to solve the
problem.

But we don't even have a sense of the
whole dimension of the problem, the size of it or
anything. I don't know how difficult it is to
keep these records, to get the -- if the SARC is
calling anyway, how difficult it is for the SARC
to keep these records. And then, from the point
of view of the SARC, we can then figure out what
has happened, what kind of follow up has there
been, what remedial action has been taken, maybe
no remediation. Has the problem gone away?
Maybe it was addressed at the CM -- is that what
this is called? CMG?

VADM TRACEY: CMG.

CHAIR HOLTZMAN: Yes. It has been
addressed there, but the problem wasn't resolved.
So, I mean, I think there's a lot that we could
learn from this, but I don't want to burden the
commanders with keeping these records.

Absolutely not.

I think that -- I think the Air Force model sounds like a very good one, but I'd like to, first of all, hear from the Air Force and see how they feel it is working, and then maybe ask some of the other Services why they haven't done the same thing.

MR. STONE: And also ask the Air Force, if they have to put it -- do a little form that was electronic, and fill in a few boxes --

CHAIR HOLTZMAN: Correct.

MR. STONE: -- one box might be, "If you know, is this on its way, or has it been on its way to the CO? Is this, or has this, been on its way, or likely to be on its way, to the IG?"

If they pop some of those boxes, we will have data collection without people having to go through longhand reports where someone is describing a detail and it takes forever to get the data and analyze it as well. Let's use that first-line SARC to, you know, again take the
temperature, or whatever, and do it. I think
that sounds great.

MS. CARSON: Just to clarify for you,
the SecDef actually issued in its December
memorandum that all of the case management groups
are to be used to track this, or to determine --
the only difference with the Air Force is they
have put even more detailed guidance forth.

So all of the Services are doing this
in their case management groups. There is just
not guidance -- written guidance out there for --

CHAIR HOLTZMAN: Are they keeping
records of the number of cases and what is being
done on them?

MS. CARSON: I would imagine they are
all keeping some sort of records of some sort,
but there is no place they are required to send
it, other than that one data call that was done
by DoD that was not really successful. Nothing
since then has been done to try to pull all of
that up to a place where they --

MR. TAYLOR: Well, that was the point
to my second question to you, because it looked
like a good model, except that it stayed at the
installation level. So there was no way of
capturing the bigger picture, just based on what
I have seen, which is why I asked you that
question.

So in order to use that model, we
would have to add a layer of reporting that is
not there now, if we were trying to get a sense
of how big the problem is, which we know is
pretty big already from the 62 percent reporting
issue.

CHAIR HOLTZMAN: Right.

JUDGE JONES: Wouldn't the umbrella
for this statistical reporting, though, be SAPRO,
as it is with so many other things?

MS. CARSON: Would the what?

JUDGE JONES: Would it be SAPRO, the
umbrella for the statistical reporting? In other
words, there is a book every year that has got
statistics about everything relating to sexual
assault from SAPRO.
COL GREEN: I think, I mean, SAPRO --

I mean, again, not being from there, but SAPRO operates DSAID, and is responsible for the database to manage any issue associated with an unrestricted or restricted report of sexual assault. So there seems to be a framework there by which this could be linked or managed within existing systems. But we can certainly reach out to SAPRO and ask.

JUDGE JONES: And I think what we're -- I guess what we're looking for here is -- I think is, are they increasing? Are there more reports? You know, the same kind of data we are looking for with sexual assaults. Period.

CHAIR HOLTZMAN: Yes. And is this system working? I mean, the Secretary of Defense has said that this should be resolved -- what is this group called, the CMG?

COL GREEN: Yes. Case management group.

CHAIR HOLTZMAN: Okay. Is it being resolved? What are the results of this?
MR. STONE: Right. I think what you'll have to do is for the -- for the reports, a compilation of the information in the reports and what's being done. I think we just have to ask if they are doing it. That will generate them having to figure out how to collect the data in a useable way. Don't you think that will do it, if we just say --

MR. TAYLOR: Well, except I think it needs to be in a pooled system where headquarters pools the information up, not waiting for people to identify a problem and push it up.

CHAIR HOLTZMAN: Oh, yes. Of course. I agree. They have to every month send all of the reports up to whoever. Is it the head SARC -- I mean, the head SAPRO person? So they get the reports every month, and they compile it every three or four months and give it to the -- whoever it is. Under Secretary for Personnel or something like that, and they look and they see, oh, well, you know, there have been 10 complaints on this base, and the complaints are still
coming, and it's now six months later.

MR. STONE: Isn't that just--

CHAIR HOLTZMAN: Now what?

MR. STONE: -- a call for data from us, like we did in previous times? Yes. We'd like to see your monthly data.

CHAIR HOLTZMAN: No, no, no. I'm making a different point. I'm not saying what we want to see. I'm saying --

MR. STONE: Oh. You mean permanently and ongoing beyond us.

CHAIR HOLTZMAN: -- the system creates -- it could create a system where those reports go up to somebody who can say, "Hey, wait a minute, I'm looking at this. This problem, has it been solved on this case?" Or "This problem is really endemic in this area." Or something like that and what -- and is not being resolved. So let's get on it.

MR. TAYLOR: I actually think that the fourth question under that issue, whether retaliation data should be included in annual
SAPRO reports? I think that ties in there nicely. But this should be part of the responsibility, it seems to me, of that program.

CHAIR HOLTZMAN: Right. But it needs to be not just a general report to the public. That information needs to be given on a regular basis to whoever is over the various commanders and can say, "They're not doing enough on this base. They're doing a great job on that base."

But, you know, more has to be done where.

You know, that's the kind of thing that -- you can't just wait for an annual report to come out, in my view.

MR. TAYLOR: Yes. I didn't focus on annual when I said that.

CHAIR HOLTZMAN: Yes. I know. I'm not being critical. I'm just saying that I think we have to figure out a mechanism for, one, the annual reporting, but also for regular responses to what is going on.

MR. STONE: Wouldn't us asking,

though, for the data for us cause them to have to
think about what is a good way to format this for us? How is it not too burdensome? The JPP wants it every three months. Let's put something in place.

In other words, wouldn't we like kick it off by making the kind of request of the data that makes sense for us, but it then -- obviously, they will realize it also makes sense for supervisors and people up the chain, because I think if we ask, "Wouldn't you like to do this?" I think the answer is going to be, "We already have enough to do."

If we say, "We need some data, and we would like this," then they'll have to start moving in that direction.

CHAIR HOLTZMAN: Yes. But I don't think we can put ourselves in the position of replacing the military for its, you know --

MR. STONE: No, no, no.

CHAIR HOLTZMAN: -- its own mechanism of response. We can ask them for this information. We can ask them --
MR. STONE: Right.

CHAIR HOLTZMAN: -- about what forms they have, and we can ask them to show us what action has been taken with regard to these -- you know, give us a base or give us some -- some examples of what they have done with respect to retaliation complaints. You know, just take -- but I -- you can't do it system-wide.

MR. STONE: We can't ask them for their monthly breakdown of reports?

CHAIR HOLTZMAN: What?

MR. STONE: Of how many reports they have had by month or by three months? If they're keeping them.

CHAIR HOLTZMAN: But they're not. They don't have them. We know that. That's why I think -- I mean, maybe this is incorrect, but I would -- perhaps at our next meeting we should ask for the Services to respond to us, to come here and tell us what they are doing about keeping this data and collecting this data and why they shouldn't be having a form, so that when
we make a recommendation to Congress we at least
know what we're talking about.

    Why aren't they keeping forms? Why
aren't they keeping track of what is happening to
each complaint? And why isn't this going up the
chain, to the top, so that if nothing is
happening action can be taken? I mean, does that
make sense? I don't know. Mr. Taylor?

MR. TAYLOR: It does to me.

MR. STONE: I presume the IG would
love to have that, too, because then they'll know
he is doing his job.

CHAIR HOLTZMAN: Oh. They're not
doing their job.

MR. STONE: Well, but I mean, he could
say now it's because he's not getting stuff that
he has to act on and say, yes, I'm going to
pursue this as a -- or no. I mean, if he doesn't
get it, you know, you -- again, he has to go out
and find it as opposed to it coming in the door,
and then he's got to act on it. It's a yes or a
no, but he has to do something.
I think in a sense it's a relief to him not to be blamed for not proactively going out to try and find it. He then has a stream coming in. I mean, prosecutors get reports from investigative agents. In a sense, the SAPR is the one who gets the report to report it, and that's one way for --

CHAIR HOLTZMAN: But they don't even act on the reports they get. It takes, whatever, a year or two years. I mean, I wouldn't -- you know, maybe in some agencies the IGs work very well, but my impression from the testimony we've had is that it's catastrophic, a disaster. So, I mean, you can give them whatever report you want, but I don't know why they're not doing what they should be doing right now. My reaction. But, anyway, that's neither here nor there.

Barbara, what is your view about the request for -- I mean, asking them to -- the agencies to -- Services to come at our next meeting and explain their recordkeeping? Do you think that's a good approach?
JUDGE JONES: Yes. Well, you know, as we've been talking about this, every case that is reported, we have this universe of cases that are reported. Some of them also have retaliation. Some don't. And we have this universe of unrestricted or, I'm sorry, restricted, aren't reported, and through SARC we'll get information about whether anybody is willing to tell us there's threats or retaliation.

I just don't -- I think this is really difficult. We don't even have a good sense at the moment of how the statistics are being kept on sexual assault, let alone now this extra piece of retaliation. I mean, I might send this out to one CMG in each Service that would be -- I would call them a friendly -- who might be willing to take a look at this for us and see if this helped them in any way, to give us a report at the end of the month.

Or -- and I'm not opposed to asking the Services to come in and tell us how they view the CMG as working and whether it's the body
that can collect this. I just -- I'm just not --
I'm not sure.

JUDGE JONES: CMG can't collect
anything unless it is a piece of paper that --

CHAIR HOLTZMAN: I agree. I agree.

JUDGE JONES: So somebody has to be
creating a piece of paper. I don't mean piece of
-- and I mean piece of paper in a -- in the
broadest sense of whether it's a computer record
or a paper record.

So somebody at some point has to be
creating that document. I don't know how they --
what kind of records they keep at these CMG
meetings, and maybe it's -- maybe they keep
minutes, maybe they don't. But the point is, how
can -- I think the issue is not -- is not just
how CMG is doing and what they would do with our
chart, but what is the recordkeeping mechanism?
And we know that they do keep records of sexual
assaults, how many sexual -- they're reported. I
mean, where are these kept, the sexual assault
reports.
MS. CARSON: There are forms, and then they are entered into the DSAID database.

CHAIR HOLTZMAN: What is a DSAID database?

MS. CARSON: That's the database that collects the information about a sexual assault report.

CHAIR HOLTZMAN: Okay. So there's a dedicated --

MS. CARSON: Database.

CHAIR HOLTZMAN: -- computerized system.

MS. CARSON: Required by Congress.

JUDGE JONES: And how is that report generated? Once the victim makes the report?

MS. CARSON: The victim comes to a SARC. It has to be -- only the SARCs utilize these specific forms, the 2910 form, and that is your election of restricted or unrestricted report, and that is the only way your sexual assault is recorded as a statistic.

CHAIR HOLTZMAN: But once it's in that
system, it's in that system.

MS. CARSON: It's in that system.

CHAIR HOLTZMAN: And there's nothing comparable for the --

MS. CARSON: Well, in that report --

CHAIR HOLTZMAN: Yes. Okay.

MS. CARSON: -- there is only the one thing in that whole report that is actually about the sexual assault, and that is what you elect.

But then there is this whole list of boxes you check, that they have to be given notice they can have an SVC, they have to be given notice that -- one of the pieces of notice is that you -- if you are retaliated against or coerced or experience any of this, you know, you can report this to a -- it gives you a long list -- a SARC, IG. There's, you know, every reporting place you could report it. That is in the sexual assault report.

MR. STONE: Reading between the lines here, are we sort of -- I'm hearing that maybe on that form, instead of making a whole new system,
the form should say -- have a place down there, "I have already experienced retaliation," and collected at the same time. If I collect data on bank robberies, and then I want data on how many were done with a gun, I have it on the same page.

CHAIR HOLTZMAN: All right. But what happens -- that's day one. What happens day 10 when they have a retaliation --

MR. STONE: Well, the person -- they have a form in the system. You look up the form and you modify it.

CHAIR HOLTZMAN: They have to report it.

MS. CARSON: There is another form.

CHAIR HOLTZMAN: Okay.

MS. CARSON: It is the DSAID data form. And that is about five or six pages long of data that captures everything they are required to capture, essentially by Congress in the DSAID database. It's already a very long form, but it has -- what it doesn't have in it -- it could -- is if you are represented by a SVC or
if you've received retaliation.

It has about every other things you could possibly capture, and whether all those things are actually being captured and being entered in the DSAID database is another issue. But just as another data point for you, that is one -- those are the two forms that exist in the sexual assault realm.

There is another realm -- that is the equal opportunity organization -- that does sexual harassment and discrimination, which is all command, climate-type issues.

We put in your packet for you what their report form looks like as another option for an existing reporting mechanism that is out there and that is extensively reported and tracked and reported on.

To give you an idea of something that's looked at for social retaliation, when you have the command really driving this resolution of that issue, that is similar to what you'll see in a sexual harassment or discrimination issue,
which is more of a -- comparable to a civilian-
civil workplace complaint. So just as another
data point for you.

    MR. STONE: Do they cross-reference
each other? So, in other words -- they don't
cross-reference each other. So you could have
double-reporting. In other words, a person
reported it as an EEOC complaint, but also --

    MS. CARSON: But you can't report a
sexual assault as an EEOC complaint. You can
report a sexual harassment. If you go to EEOC
with sexual assault, they will refer you to the
SARC. If you go to the SARC with sexual
harassment, they will refer you to the MEO
people. So they're operating in each other's
universes, but they have their own training.

    MR. STONE: But the sexual harassment
could be a retaliation after the sexual assault,
is what I'm saying.

    MS. CARSON: They are required -- yes.
Sexual harassment could be retaliation.

    MR. STONE: So they could relate.
MS. CARSON: And you can have retaliation for reporting a sexual harassment, which they are specifically required to train the equal opportunity people about reprisal, which -- in which case if you are reprised against for reporting sexual harassment, you are trained that you go to the IG.

MR. STONE: So we are looking --

MS. CARSON: But they don't do anything about the social, because that's --

MR. STONE: We are looking for a little better integration. So what we --

MS. CARSON: These are two different -- created at different times for different things that cross over in a lot of ways.

CHAIR HOLTZMAN: Mr. Taylor, you were --

MR. TAYLOR: Yes. Thank you. Since Secretary Carter, back on May 1st, ordered all of the Services to have a plan -- a strategy to him by September 1st, one thing we could think about doing is inviting the DoD SAPRO to come in to our
next meeting.

    When General Snow was here back in
April, according to my calendar, with Dr.
Galbreath, who is his senior executive advisor,
they talked about findings and initiatives
regarding retaliation. And many of the questions
that we asked them at that time had to do with
this same sort of issue about, what are you doing
to get your arms around the problem?

    So maybe we could think about inviting
them back in September or October, as you think
best, to give us an update on, how are they
coming with these initiatives? And what did they
learn about the strategies that were going to
help them be able to answer some of the questions
that everybody has about retaliation?

    CHAIR HOLTZMAN: Yes. I think that's
a good idea, but I also would like to get the
Services or somebody to talk to us about how they
are recording the retaliation.

    MR. TAYLOR: Well, it doesn't have to
be -- we can invite the Services -- it could be a
panel composed of those two and the Service representatives, because each Service has someone who has a comparable job. So each Service -- the Air Force, I mean, we are looking at in a model right now. She could come, or her representative, I suppose. Something like that.

MR. STONE: It seems likely also that their strategy will include what they are doing and what they propose to do.

MR. TAYLOR: I would suspect that what they really don't want is a lot of help from us.

CHAIR HOLTZMAN: Yes. Right.

MR. TAYLOR: So if they --

JUDGE JONES: They don't want our chart?

MR. TAYLOR: So if they can come convince us that they are -- that they have a good plan, and that they are on top of it, then that may help us a lot in terms of formulating our own recommendations. Or it may encourage them to formulate theirs.

CHAIR HOLTZMAN: Correct. Okay. So
that's what we are going to -- that's how our --
that's going to be the answer to Number 3, which
is, what exactly are they doing and what do they
plan to do?

MR. TAYLOR: Right.

practices identified by subject matter experts
should be recommended for the military workplace,
whether DoD should adopt best practices from
civilian workplace sexual harassment studies and
practices for use in the military workplace? Any
comments or thoughts about this? Kyle, do you
want to expand on what -- on this subject,
please?

COL GREEN: At your April meeting, you
heard from academics and industry experts who
have talked about different practices and means
by which this is -- issues of harassment and
retaliation, and the like, are -- work within the
civilian sector. And so this is -- I think our
effort to start the conversation about whether
there are benchmark examples that you've heard
about or know about or methodologies by which DoD
should be looking for that type of information
from civilian environments, for implementation or
at least consideration within the military.

MR. TAYLOR: Just to state the
obvious, you know, I will jump in and say, you
have a totally different personnel system in the
civilian sector from what you have in the
military. You have the role of unions, you have
all sorts of other issues that come on board when
you are talking about the civilian workplace,
versus what you have in a typical military
environment.

So while I think you have to recognize
the differences -- we all do -- it doesn't mean
we can't learn from them. For example, when it
comes to training, I think that some of the
information we heard about training that takes
place in the civilian environment that has
sensitized people to some of the issues might be
portable into some sort of military context,
whereas others might not be.
I think we would have to proceed with caution in this area, I guess is what I would say.

CHAIR HOLTZMAN: Any other comments anybody wants to make?

MS. CARSON: I can point to one example that we heard from Dr. Harned with the Ethics -- I can't even remember the name of that organization -- Resource Center, which was -- they had done a lot of these studies on the workplace retaliation, and she reported in -- I mean, she presented to you that the most important things in reducing retaliation they have found in their studies are communications campaign, that effectively people are well aware of the resources available to them, and then publishing data, because that -- people believe what they hear is going to be done is actually done.

So that both gives people confidence to report, and it gives -- it deters the conduct, because people know what is going to happen to
them for it.

MS. TOKASH: There was another presenter, Dr. Cortina from the University of Michigan, who talked about voice strategies for resisting and reporting or protesting victimization. She made a distinction about retaliation as a psychological or behavioral experience for victims versus actual legal violations. So that is something to consider when you look at the chart also.

I know you already commented on what is actionable versus non-actionable. The academics and presenters who, from the civilian sector, came forward, you know, their point is that everything is actionable, which I think commanders would believe that as well.

It might not be criminally chargeable, but every violation of retaliation at any level -- in fact, that's what General Snow said in his remarks from the April meeting, is -- should be addressed.

MR. TAYLOR: It seemed to me like the
big crossover point between what Julie said and what many of the commanders said is that you've got to create a climate of trust. And those two factors that you identified and he identified -- or she identified were essential to creating trust. Because if they believe that they can file a report and then something will be done, and people will know about it, that will then build trust so that others will feel more comfortable bringing forth retaliation.

And during that same session, and the one afterwards, we talked to military commanders about trust, the importance of building trust. So, I mean, that's one element that it seems to me applies equally in both the civilian sector and the military sector.

I would defer to you, Admiral Tracey, on that.

VADM TRACEY: I thought that was true as well. Again, one of the things that I thought was eye-opening for me was the extent to which retaliation manifests itself in people just not
showing up, sort of a thing, and that's sort of a recalibration of how people think about victim isolation and that it may not be active behavior, it may in fact just be isolating people. And those are things that have been in my mind.

You know, I looked for the things that become criminalized and that was a very eye-opening discussion to your point about the psychological.

CHAIR HOLTZMAN: Well, is there something specific we can take? I mean, I think in a way the answer is obvious. You can look at the best practices. I mean, they ought to be looking at the best practices in the civilian workplace. But is there something specific that we should draw their attention to from what we've heard?

VADM TRACEY: So I think these -- to treat this kind of activity in the same way as you would UCMJ activity, use the -- kind of an anonymized reporting of incident so that people know that when something happens action is taken,
and that has both trust-building impact and we
take this seriously, and it has maybe a deterrent
effect. That's certainly a piece of this.

The sort of training around that
continuum, so that you build a ground-up
leadership awareness of what victims' experiences
are like, and, to your point, why those are
corrosive for the unit cohesion that everybody is
supposed to build.

MR. STONE: And I think that the -- my
fine tuning of this question is that it would be
-- to look at best practices from civilian
workplace situations that involve large
organizations, whether they're corporate or
university, because those are the ones that are a
little closer to the military.

They're a little more all-

encompassing. People want to stay in the
corporation, or they want to stay in the
university, and so both of those situations
include a component of the ongoing relationships
that will result, whether it's a professor they
don't want to fire because there are allegations, or whether it's a lead scientist in a big corporation who is important to their product.

You get a better feeling for the ongoing -- the way they have to deal with that ongoing effect. And I think those will be a little more helpful to us than just if we just look at universal general situations. It can include a lot of them where people don't worry about the ongoing effect on the whole organization and these people, neither who wants to leave their situation where they cross paths.

VADM TRACEY: One other observation. I didn't hear anybody who had this locked up and a ribbon tied around it. You know, everybody is struggling around this sort of very deeply embedded kind of --

MR. STONE: We know the universities are struggling.

VADM TRACEY: That's right. And so sort of an ongoing dialogue, to your point, with organizations who have similarities to the DoD
structure is probably a valuable thing to establish. Because this happens at such an intimate level of the organization it's really, really hard to govern from--

MR. STONE: Yes.

VADM TRACEY: -- one of the things that they --

MR. STONE: We have seen situations with some of the most prominent corporations in this country where there is a sexual relationship -- it may not be harassment -- between top people in the organization and someone at the next level, and people wind up having to resign because it just so disrupts the board and the operations, that even when it's consensual, but not open, that it disrupts the whole place.

And that's the issues that we're looking at. We have both things -- the military has to be able to function effectively, and the victim has to know that it isn't because they were ignored, you know. So two things to --

CHAIR HOLTZMAN: I wanted to ask a
question. Maybe this is a really silly question, but I don't know how the military functions. But one of the things that, as I recall, Chris Anders had talked about was the importance of an ethical -- high ethical standard in the organization.

And I know one of the things that corporations do to deal with that is to have a hotline, which is monitored, on ethics issues and improprieties. Does something like that exist for reporting retaliation? I mean, suppose you're not the victim, but you see retaliation ongoing in your unit, how does that work? Is there some way to report it? Do you report it to --

JUDGE JONES: It looks like there are hotlines all over the place, from --

MS. CARSON: There are so many different hotlines.

JUDGE JONES: I don't know if any of them are specifically dedicated to retaliation, but I got the impression some were.

MS. FRIED: I think the DoD Safe
Helpline captures that.

JUDGE JONES:  Pardon me?

MS. FRIED:  DoD Safe Helpline.


MS. FRIED:  And the IG has a website

for reprisal and then hotline for other

complaints.

VADM TRACEY:  But it's a whistleblower

site, isn't it?

MS. FRIED:  Yes. It is.

VADM TRACEY:  That was one of the

issues. People don't know that's where you would

go. Maybe you don't want to go to the IG because

they are part of the problem half the time. But

that's not a place that we would look for

personal reprisal, I think, in the same was as --

MS. CARSON:  But they can be a

clearinghouse. What we heard from the DoD IG was

when they receive from the hotline things that

don't qualify as reprisal, they refer them out to

the Services, out to the Service IGs, I think,

who then probably refer it to the command level.
CHAIR HOLTZMAN: But maybe that gets lost in the system?

MS. CARSON: Yes.

CHAIR HOLTZMAN: But, I mean, maybe there needs to be -- because this is such a serious problem, I mean, it is almost as serious as the sexual assault because it's a way of stopping people from reporting and dealing with the problems because they're so afraid of retaliation or reprisal.

I mean, maybe the issue of how you report it, whether you are the victim or just a bystander, ought to be clarified, made easy and simple, and maybe it's the SARC who gets that kind of complaint. Maybe it's -- I mean, maybe it's -- it's left with all kinds of other things. Will people really report? Do they really think it's important? I mean, if you can put the same sort of emphasis on reporting retaliation, for example, as you put on reporting the sexual assault, maybe people would start taking it more seriously. I don't know. I just throw that out.
JUDGE JONES: So a sexual assault and retaliation hotline. Something along those lines? Do we have that? Do installations have that now or not? The hotlines are just a --

MS. CARSON: The hotlines, they --

JUDGE JONES: -- very general.

MS. CARSON: -- military -- OneSource, which is a place where you can go with all kinds of questions, and then they have DoD hotlines, and then they have a sexual assault hotline. I mean, they have the IG hotlines, and then they have the sexual assault hotlines.

Just to point to the business practice that we heard about was the idea of ethics and compliance programs, and I think maybe a hotline -- that's where you might find an ethics hotline, and they look at it in the workplace in terms of code of ethics for a profession. You get fired if you breach that. It's not criminal, but you do lose your job.

And so they talked to us a little bit about, you look at this like a workplace. It's
something that may not be criminally actionable,
but maybe you should be fired for, is another way
to look at it, more like the civilian workforce.

MS. TOKASH: Right. Those are the
ERAs, the ethics requirements basically that Dr.
Harned talked about. And she also talked about
how, you know, each of the Services have, you
know, the Army values, the Air Force has their
own standards, and then within those Services you
have your own set of standards. You know, as
Judge Advocates, you have your standards of
conduct, and then you have your own state bar.

So it goes down, but there is nothing
really that talks about from a DoD perspective of
how every uniformed Servicemember should behave
ethically as a member of a workforce. And so the
ERAs that she talked about were supporting
ethical behavior, considering ethics, setting the
example, talking about the importance of ethics,
and then holding non-managers or, in the case of
the military, non-leaders, accountable for their
actions.
JUDGE JONES: I think the -- I mean, when you're in the military, the whole military is your workplace, right? I mean, of course you have assignments, but, I mean, you're an officer or not an officer, but in the military, 24 hours a day.

I guess all I'm trying to figure out is, what is the question? Do we need a designated hotline that permits people who don't even want to talk to a SARC or a chaplain or their best friend, but who will get on it and say, "This is what's going on. You need to know this. So-and-so is being retaliated against. She was sexually assaulted." You know, that's the bystander who saw something, or the person himself. Is that what we're looking for here?

COL GREEN: I think --

JUDGE JONES: I'm not sure.

COL GREEN: Judge Jones, I think the question is the DoD Safe Helpline, which is --

JUDGE JONES: Does that do that?

COL GREEN: -- the primary resource
for dealing with this --

MS. CARSON: I think the efforts are
to maybe start -- maybe get more -- you know, it
was established as a sexual assault hotline.

JUDGE JONES: Right.

MS. CARSON: I know that they are
looking at making that as a way that you could
actually do reporting, maybe do anonymous
reporting. So I think that is a vehicle.

JUDGE JONES: I mean, because if
people actually got on there and talked about
conditions, that could be helpful to these case
management groups. And, you know, it's not proof
beyond any kind of standard, but it's
information.

So, anyway, I apologize. I have to
leave, Madam Chair.

CHAIR HOLTZMAN: We will miss you.

JUDGE JONES: Thank you.

MS. FRIED: There is -- just so you
all know -- before you leave, Judge Jones --
there is a link to the DoD Safe Helpline to
Servicemembers. If you believe you experienced or witnessed retaliation, filed a report of sexual assault, please let the DoD Sexual Assault Prevention and Response Office know. And you click here and learn more. So there is already a tag on the DoD Safe Helpline.

JUDGE JONES: So maybe like every other thing, we decide whether we need an educational program that -- something that highlights retaliation and training. Maybe that's being done already, too.

MS. CARSON: That word is out at the force level about the DoD Helpline.

MS. FRIED: Yes. And there's a military feedback form where it tells -- for people to explain what's going on. And then gives options to whistleblower reprisal retaliation, report directly to the IG also, so -- and it has them identify who they are, status, date of incident. There's a whole gamut of information they are asking for the person to put in.
CHAIR HOLTZMAN: Well, maybe it needs
to be publicized more. Maybe the name needs to
be changed, but --

MS. FRIED: This is relatively new, by
the way. Julie is correct.

JUDGE JONES: And I don't know whether
any of it is sort of gone through to see if, wow,
these are conditions, if true, that maybe should
be brought to the attention of the case
management group. That's all.

MS. CARSON: Or a recommendation that
was made by the RSP. Most of the installations
have their own hotlines as well as the Safe
Helpline.

JUDGE JONES: Which would be more
helpful.

MS. CARSON: And so -- well, but
that's so many different hotlines that the
quality control on the Safe Helpline is it is
manned 24/7 by people who are trained and are
there. Where I think, you know, if there are
issues with the installation hotlines, of when
you can get someone -- I mean, there is less
ability to really ensure the quality controls
when you have it that decentralized. And people
will call their installation before they'll call
the Safe Helpline.

JUDGE JONES: All right. So maybe
they should be better staffed. But more -- some
information is better than none, I guess.

MR. STONE: And you also fractionalize
the data. You lose them or you double-count them
or you don't count them.

JUDGE JONES: Well, I don't know that
it would help for data collection at all. I
would think -- I would use it as intelligence, a
hotline. It's anonymous.

MR. TAYLOR: I suggest we take a short
break.

CHAIR HOLTZMAN: Okay. Five minutes.

(Whereupon, the above-entitled matter
went off the record at 2:57 p.m. and resumed at
3:02 p.m.)

CHAIR HOLTZMAN: Excuse me, can we --
we're trying to commence, if anybody's got things
to say, if they could please leave the room.

We were just going on the point that
I had raised, or maybe we left it, but I'd just
like to go back to the point about possibly
advertising more prominently this hotline that's
used -- that's available, I guess, for
retaliation complaints.

And how could we find out about the
Services' ideas about how to improve the
publicity around it?

MS. CARSON: How do we find out?

CHAIR HOLTZMAN: Yes, how could we
find out? Do they have -- I mean, do they think
that that hotline's being adequately used?
Accessed? Or what? Do we know, how long has it
been in existence?

MS. CARSON: Let's see, several years.

MS. FRIED: Yes, just after the
detailed SANs report.

MS. CARSON: So, 2010, currently?

MS. FRIED: But --
MS. CARSON: But, the actual Retaliation Reprisal Act was about two months?
CHAIR HOLTZMAN: Two months?
MS. FRIED: Yes.
MS. CARSON: Yes, it's brand new, so I mean I wouldn't think anybody in the Service actually -- you know, and the Services.
MS. FRIED: But, it's --
MS. CARSON: It's tracking it, yes.
MS. FRIED: Yes, not only on our website but on -- there's fliers that are being disbursed to the member installations.
CHAIR HOLTZMAN: Okay. So, I guess we go next to the training programs on retaliation prevention and response. Are adequate training programs in place? It's something, Mr. Taylor, you had mentioned.
But, I don't know what else we want to say about this subject.
MR. TAYLOR: Well, just to kick things off, based on the testimony we had, I thought there was pretty wide variety of approaches in
who conducts the training and the materials used.

   It seems to me that there was a general leadership and command acceptance of responsibility for doing this training.

   And, some of the examples we had included NCO leadership talking about the Not In My Squad program, Master Sergeant Johnson from the Army.

   Again, I think as with all training, the problem at some point becomes whether or not the people who are receiving the training are tuning it out. And, I think to that end, that the Services need to continue to think of innovative and fresh ways to present this training.

   But, I think some of the examples we saw with the slides and the videos that we were asked to review were really good examples of people talking about what had happened to them and also the outcomes.

   CHAIR HOLTZMAN: Mr. Stone, do you have any suggestions to make on this?
MR. STONE: Well, I know this is going to sound old-fashioned, but I've had tons of training both digital and live, and yet, when people say, gee, there's an issue is that am I getting paid the right amount of wages or workman's comp?

They go to the place in my organization where there's a bunch of posters stuck to the wall from the various places. When they need it, they remember there's a poster and they go look.

If you ask them what they were trained on two months ago, they can't remember it. But, if there's a poster, they find it, and especially if there's a phone number on it, it doesn't have to have every detail on the poster, that helps.

So, I actually think posting whether it's the hotline, you know, for sexual assaults and retaliation resulting from sexual assaults.

I think requiring something to be posted on a common bulletin board, even if it's not too large, it doesn't have to be a gigantic
poster, but I find that people know enough to go there. They don't have to have their iPhone, they don't have to have a code, they don't have to remember, you know, were they available for the training day.

There's so many training events, you can't -- even if you scribble down the name and a phone number, where do you have it now? And, you know, did you take those notes with you when you moved from place to place?

So, I actually think making sure -- we heard about lots of trainings and I think they're great, but I want to see, you know, a little thing posted just like they post probably EEOC issues and complaints. And that little poster, from my experience, gets people --

They also don't have to go confide in someone else. Gee, do you know the number for sexual harassment? They don't want to tell somebody else. They don't have to tell anybody locally to get the number. It's up there.

And so, I think that that's an
important component of this prevention stuff.

And, maybe the answer is, if you
wanted to get to dependents, you also have it
posted either on the bulletin board in the PX or
the post office or some place where the
dependents also go.

And, that way, get the person, if it
happens to them and they remember, they go back
to the PX, they remember on that bulletin board
there's a bunch of things.

So, that's, for what it's worth,
that's my non-electronic thoughts about the
matter.

CHAIR HOLTZMAN: I have a question
about this, in the sense that, when a victim --
you had mentioned these reports that are filed,
when a sexual assault report is made, is the
victim, at the time of the sexual assault or at
some point, shortly thereafter --

I mean, I know the question is, have
you experienced retaliation? But, is the victim
told what retaliation is? That it could be the
ostracism, that it could be the cold shoulder? I mean, do they know that?

MS. CARSON: Again, that's something that all of the Services have said that's going into their training. The Air Force, specifically, in their guidance says it is the SARC's responsibility to explain to anyone reporting.

CHAIR HOLTZMAN: Sort of following up on what Mr. Stone said --

MS. CARSON: Is there a handout?

CHAIR HOLTZMAN: Is there a handout that you could look at?

MS. CARSON: Not that we have seen. The Services may be developing them and have them, but we haven't -- it's not anything that we've seen.

CHAIR HOLTZMAN: That might be something very useful to give -- I mean to a sexual assault victim, you might give them, you know, here are the telephone numbers, medical care, emergency this and whatever, you know.
But, here's also what your rights are. And there should be something like that and, you know, who do you call.

MS. CARSON: And, there is a form that they receive when they make a sexual assault report that gives them information that is a very standardized form.

We've seen from sexual assault crisis centers, rape crisis centers, booklets and brochures and things that they've put together that are extremely good and helpful that would be good models for the Services.

Things like that aren't done, that I've seen, by any of the Services. But --

CHAIR HOLTZMAN: Well, that might be something --

MS. CARSON: -- and retaliation included in that would be a helpful thing. You could put that with the posters.

MR. STONE: Yes, right. But, I think what the Chair is saying is, you know, it's sort of like, you know, being frozen out or, what are
some of the next ones, you know, or excluded or
harassed or worse. Those are incidents you can -
you should report.

In other words, where's their
consciousness that just being frozen out of
things consciously --

MS. CARSON: And that can be part of
the communication campaign, you know, as --

CHAIR HOLTZMAN: But I think that that
should be given. I mean, it may not happen right
away, the retaliation, so, the person might not -
- the sexual assault victim, you know, the stuff
may go in and out of his or her ear, but if they
have a piece of paper and they get a chance to
look at it later and say, oh yes, okay, I qualify
and this is where I go.

They could stick it up on their
refrigerator or whatever. I think something like
that would be very useful.

Any other thoughts on this subject?

Okay, victim support resources,
whether adequate victim support resources are in
place to assist Servicemembers, civilians and/or
dependents from a superior's retaliation after
making a report of sexual assault.

   Well, we just identified one. Is
there some other victim support resources that we
need?

   MR. STONE: Kyle, the SVCs and the
VLCs, they do this, right? They continue along
from the sexual assault if there's the follow up
retaliation? Oh, and now they're retaliating me
from that, though that client is still theirs,
isn't it?

   COL GREEN: Yes, the SVCs, this is a
key point of assistance that they are able to
provide. Also, in addition, I mean the SARCs and
VAs, the -- and others.

   The RFI responses that were received
from the Services highlights the responses we
received talking about the SARCs and VAs,
 victims' counsels, VWAP personnel and trial
counsels, obviously the Service IGs and their
role, the MCIOs, the criminal investigators, the
case management groups.

So, I think those are the principal categories that we ask the Services about. And they described the different roles. I think those are the major categories of resources that are available.

MS. CARSON: One point of distinction, all of the SVC/VLC programs have responded to the JPP's request for information that they can help with all of these retaliation type issues and complaints.

However, the Air Force, this was raised in the Human Rights Watch Report, and if you look at the Air Force Charter for their SVC program, it says they cannot help with IG reports and those are looked at as conflict of interest.

So, they may be changing their position on that and we don't have clarification in any written policy form that that's the case.

CHAIR HOLTZMAN: Well, we should try to get that for sure.

COL GREEN: My understanding is --
CHAIR HOLTZMAN: And maybe --- I'm sorry.

COL GREEN: My understanding is that has been updated and it's currently implemented according to allow the Air Force -- okay.

CHAIR HOLTZMAN: Can you send us whatever policy that is? That would be very --

COL GREEN: I was aware a couple of months ago that I knew that that was an update. Again, the issue being that this falls under the legal assistance purview and so, assisting in the IG process within the Air Force parameters, legal assistance was not something that you were permitted to do. And so, it's just been an evolution of the SVC program within in the Air Force to permit the specific representation to victims.

CHAIR HOLTZMAN: Just a question, going back to my point about a brochure. I mean, seems to me, knowing your rights as a sexual assault victim, how is a person told about the SVC? Is that just an oral communication to the
1 victim?

   MS. CARSON: SARC is required to tell
2 them.

   CHAIR HOLTZMAN: Tell them? But this
3 is not -- you don't have like a little brochure
4 that says --

   MS. CARSON: We don't see one.

   CHAIR HOLTZMAN: Well, okay. So,
5 maybe that would be something that would be
6 really, you know, what are your --

   MS. FRIED: I think it's going to be
7 --

   CHAIR HOLTZMAN: What?

   MS. FRIED: I think it's going to be
8 on the 2910 and 2911 form.

   CHAIR HOLTZMAN: I'm not talking about
9 a form, I'm talking like a brochure, Know Your
10 Rights or, you know, you walk into a hospital,
11 your rights as a patient. Of course, a lot of it
12 is exaggerated or may not be actually
13 implemented, but it's right up there and it seems
14 to me that that might be something.
MR. STONE: Well, I think after the event that is the 2710 form. I think that's all in there. But, it's after the event when I see you and I say, oh, you were a victim, here, and I hand you something. I don't know that it's routine training when they're -- before anything has ever happened.

CHAIR HOLTZMAN: Well, I still think ---

MS. CARSON: I am wondering ---

CHAIR HOLTZMAN: After the event --

MR. STONE: And which one you were looking for.

MS. CARSON: It said in the training, the SVC Army training last August, and in that training, they showed us a public service announcement. They encouraged the SVCs to do things on their own to publicize their services. So, I mean I think there's efforts but I don't know that there's anything --

CHAIR HOLTZMAN: But what I'm talking about is when the person -- when the victim
reports, there ought to be something that's given to the victim, Know Your Rights. Maybe they don't want an SVC at that point.

But, there's something that says, you're entitled to an SVC. You're entitled to be free from retaliation. Here's what retaliation is. Here's a number call. You want an SVC? Here's a number to call.

I don't know, you need medical help?

You're entitled to medical help. This is, you know, whatever.

MS. CARSON: There is a form. The 2701 form.

CHAIR HOLTZMAN: Well, what does it look like? I mean --

MS. TOKASH: It's a tri-fold brochure that --

CHAIR HOLTZMAN: It's a brochure?

MS. TOKASH: Yes. But it's basic information for victims and witnesses of crime and then the second form in the series is information about the court-martial process and
the third one is information about the post-trial process.

But it needs to be updated. I mean I don't know the last time the 2701 was updated. I don't know if it includes --

MS. CARSON: It doesn't include SVCs.

MS. TOKASH: -- SVCs or retaliation.

MR. STONE: And, it roughly parallels the form that Assistant U.S. Attorneys give out in every district or their investigators to victims at the scene which, again, is a page and it's folded in three and it tells them who the contacts are and there's a place on the front for the investigator to write his name and his number and they hand it out to every victim.

And, this -- it's not exactly the same, but the idea is the same. A victim on the scene is going to get this thing and they won't be totally at sea. They can read it when they go home and they finally calm down.

CHAIR HOLTZMAN: Right. But, I'm just saying that it would be useful if this form had
something about retaliation in it. But she said --

MR. STONE: Well, that I don't know.

CHAIR HOLTZMAN: -- it doesn't have retaliation in it. That's why I frame it in terms of what's your right as a victim.

MR. STONE: Yes, that's a good --

CHAIR HOLTZMAN: And you have a right to be free from retaliation and here and the, you know, free from whatever, it's cold shoulder or threatening, whatever.

MS. CARSON: It lists the victim rights in it as they have existed in DoD policy. I don't know that it's even been updated since this --

MR. STONE: Typically, they say you have a right to be protected from harm.

CHAIR HOLTZMAN: Right, okay.

MR. STONE: Which means you call if something's happened. And, in a loose way, I'm sure that they would say, how else can that be understood except retaliation? The event has
occurred, if it's you has a right to protection from harm, they're talking about intimidation or retaliation.

So, I mean -- but, I don't think -- I don't know if they use the word retaliation.

MS. TOKASH: It looks like the 2013 version has been updated.

MR. STONE: Okay.

MS. TOKASH: It says, "If you have problems at work because of the crime or the investigation, we can contact your employer or commanding officer." But, that's probably more about, you know, court arrangements and things like that.

But it still does not list anything regarding the victim's counsel. It does list the Federal Crimes Victim Bill of Rights on it.

MR. STONE: And the first one of those is protection from harm.

MS. TOKASH: It's the 2013 --- correct.

MR. TAYLOR: I have a slightly different question, if it's okay to move to a
slightly different question.

That has to do with the adequacy of our support resources for civilians and/or dependents.

You might recall that we had some very compelling testimony from the spouse of a Servicemember who had been assaulted and the ostracism that she experienced as a member of the community in which she operated, in terms of not being invited, included in a lot of different activities.

I think it's a particular problem for people outside the work environment because the question of whether she was receiving the right kind of mental health support or counseling or, you know, it was very difficult in terms of how to do that.

So, I'm not sure that we have quite got a good handle on how we can help people like her.

And also, I was thinking of civilian contractors, in particular, who are on an
installation. There are more and more contractors in the workplace. And, if you're a civilian contractor and happen to be a victim of one of these crimes, then it seems to me that the support safety net falls apart at some point unless you have the backing of your employer, whoever that might be. And that's going to be whoever's got the contract.

And the contractor may or may not be willing to extend the same kind of courtesies that a Department of the Army or Air Force or Navy Supervisor would be required to extend because they're a federal employee.

So, I just wonder if anybody had any thoughts? And, those of you who've looked at this, have you come across any ideas about how to address either of these two sets of problems?

MS. CARSON: I think it's not been looked at sufficiently, probably.

MR. STONE: If you work for a contractor and the contractor's been not necessarily the cause, but negligent in putting
you in that position, you'd be able to sue them in a way that you couldn't sue the military because there wouldn't be a Federal Tort Claims Act bar.

It's not a good solution, but the circumstances are a little bit different.

MR. TAYLOR: Well, yes, so that's a very good point, but in most situations like this, that's probably not the case.

MR. STONE: No.

MR. TAYLOR: The case is probably that you are doing some sort of, preferably appropriate job for a contractor to do and you become the unwilling, unwitting victim of a sexual assault and then where's the safety net for that person?

I just don't think we've talked about it and maybe it's something we should at least acknowledge that we need to think about just a little bit more before we just assume that we've answered the question by dealing with the gaps issue. Because this is different from the gaps
issue.

MR. STONE: This goes to the nexus we spoke about. I think that we want to include civilian contractors maybe. That's the question that should be put out there for us to decide if we're going to include civilian contractors.

MS. FRIED: I think it depends on what context, because you've got to make sure it's in the scope of what the JPP's tasked to do.

MR. STONE: Sure. I totally agree.

MS. FRIED: So, presumably, the perpetrator would have to be subject to the UCMJ.

MR. TAYLOR: Sure. I mean that's part of my hypothetical.

MS. FRIED: Yes.

MR. STONE: I do know that on a lot of questions of -- like Federal Tort Claims Act, they don't include contractors. It specifically excludes contractors. Like, for example, contract doctors in prisons, they don't get any federal government backing if they commit malpractice as occasionally happens. You see law
suits like that.

So, it's very tricky where the contract thing begins and ends. But, that doesn't mean we can't treat them as victims for discretionary help.

CHAIR HOLTZMAN: Well, the question is also, do they -- if it's on the military base, first of all, what support services are sexual assault victims entitled to if they're not military?

MS. CARSON: Dependents of families get SARC's.

CHAIR HOLTZMAN: Okay. And --

MS. CARSON: The SARC will refer anyone else I think to community resources.

CHAIR HOLTZMAN: Okay.

MR. TAYLOR: Excuse me. I think that our testimony showed that -- our testimony we received showed that they are entitled to emergency care at the medical treatment center.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: But, then once the in
processing is done, the forensic exam, they're immediately handed off into the civilian community or whatever structure is there for both mental and mental health -- excuse me -- physical and mental health type, is that correct?

MS. CARSON: I believe that's correct.

MR. STONE: Which could be nothing.

MR. TAYLOR: Yes. So, I guess the question is, do we want to say or do or think a little bit more about the support services for that category, that class of individuals?

Or are we going to say that well, to the extent that we don't have a safety net for them now, this compensation board that we're talking about would be another argument, if you will, for having a compensation board to help them, to acknowledge to them some responsibility to help them get their lives back in order.

Just a thought.

CHAIR HOLTZMAN: Well, I mean I think that's a valid question whether contractors should be subsumed in terms of these other
services. I don't know, is that part of our --

MS. FRIED: I think that is RSP --

CHAIR HOLTZMAN: Okay, fine.

MS. FRIED: -- aspect.

CHAIR HOLTZMAN: Okay, if it's not in our jurisdiction, then --

MS. FRIED: But we can certainly go look and -- look at the charter again. I'm just trying to pull it up, but I think it's a little bit beyond the scope, whatever you deem worthy.

CHAIR HOLTZMAN: Okay, well, let's keep -- Mr. Taylor, why don't you keep that in the back of your mind and let's see if it's within our charter. Then, of course, we can take a look at it.

Now, here, I think we've just been through this whether --

MR. STONE: If I may just before we leave it?

CHAIR HOLTZMAN: Yes?

MR. STONE: The reason it's within the charter is, and this goes back to the -- some of
the material that I learned when I went down to that training conference is that the vast majority of sex assault offenders tend to be habitual offenders, tend to be repeat offenders.

So, if the offender is in the military, today he might have victimized a contractor, but yesterday and tomorrow, it may well affect the ability of that Service to do their job right.

That's all.

CHAIR HOLTZMAN: Okay, let's go on to Issue 6.

COL GREEN: Ms. Holtzman, it's about 26 after.

CHAIR HOLTZMAN: Oh, okay, fine. Sorry, we have to stop now because we have to get a report on the data management. So, we will pick this up at our next meeting.

I hope in the next meeting we can conclude the restitution and compensation issue and then, I don't know, make more progress on this.
Okay, who's giving us our report on
the --

COL GREEN: Let me -- I'll kick this
off while Matt and Meghan, if you guys want to go
over and get the slides set up.

CHAIR HOLTZMAN: Thank you very much
to the Staff and for your help on this. Thank you.

COL GREEN: I've provided you -- I
turn your attention to the tasks and timeline
planning document that I provided you. It's --
replicates something that we gave you last fall
that just, again, for planning purposes and
helping the Staff focus our energies provide you
a list of meetings between now and into the near
future primarily until February 2016 when a JPP
annual report is due.

As a reminder, the Statute for the JPP
required an initial report within 180 days. And
then, the subsequent reporting requirements is
that you have reports due annually during fiscal
years afterwards until the Panel concludes.
And, based on that, the next report of
the Panel is due in early February of 2016.
You've obviously spent a lot of time
talking about restitution and compensation and
retaliation. We had this deliberation session
today that we hoped, which is obviously, not a
great strategy, but hoped we might get through
these two topics and be able to turn to it, but,
we have planned the next three sessions to focus
on the judicial proceeding trends and analysis
for Article 120 cases.

And, the primary focus of that is the
Statute for the JPP does require an annual report
on trends and analysis cases. And, as you'll see
from the Staff in terms of our gathering of this
information, an annual report on that is possible
and I think due from the Panel by February.

And so, in order to give sufficient
time for you to address that issue and then
deliberate on it and report on it by the February
deadline, I think September through October --
September, October and November, it's going to
take that amount of time to adequately cover it as a Panel.

And so, that's the planning time line that the Staff is going towards now. Obviously, we'll need to consider, or you'll need to consider in terms of your deliberations on these two topics and whether we want to continue with that or whether we want to push those off and focus on the trends and analysis materials.

But, maybe before even that discussion, if we could have Matt and Meghan provide you a brief, and you have copies of these slides as well, that will help you see what the Staff has been doing and we can make sure that we're working according to your intent.

Go ahead, Matt.

MR. OSBORN: All right, so, Meghan Peters and I are going to give you a quick breakdown of what we've been doing with the trends and statistics and kind of where we see the project going.

The first part, and you have in front
of you the taskings that we have, the three that are related to the trends and analysis piece of the JPP taskings.

The first one kind of being the all encompassing one in terms of reviewing and evaluating current trends for sexual assault crimes whether by court martial, non-judicial punishment or administrative action and looking at the number of types of punishment and the consistency and appropriateness of the actions in those cases.

The second one then turns to focusing on the punishments rendered by courts. So, at first, it kind of talks about the courts and non-judicial punishment and administrative action.

The second narrows in on military courts whether by general, special or summary and, particularly, the punishments that were rendered in those courts looking at the numbers, the consistency and then adding in, comparing those with punishments rendered in the federal and state criminal courts.
And then, the last is looking at court martial convictions within a specific year and centering on the appellate process.

So, seeing when those punishments were reduced and set aside upon appeal and then the instances in which the defendant appealed following a plea agreement.

So, those are the taskings and, like I said, the second two are a little narrower.

The first one's a pretty broad deal.

So, the first thing we wanted to do in terms of the trends and analysis was figure out the data piece because that's going to be all part of the deal.

When I first came on in August, our team went and the first thing we did is review some of the past DoD SAPRO reports for FY11, 12, 13. Since that time, 14's come out, so we certainly looked at that.

And then we went and met with a lot of the players in the system. The DoD SAPRO personnel, the Services, MCIOs, the investigators
down in Quantico, a variety of the military justice offices and then the appellate courts, too, just trying to get an idea of what their current tracking systems are able to do, the capabilities.

Because the main thing that we were looking for, in my view, was three things, the completeness of their data, the accuracy of their data and, most importantly, since we're looking DoD wide, the uniformity of the data across the Services.

And, what we found was, for the issues that we were looking at, the specifics of sexual assault is that the current reports and the current systems could not do what we needed them to do.

Certainly, within the Services, the uniformity of the tracking we found became an issue. There would be some Services that would track a certain thing, but another Service system could not do that.

You know, one of the things we
certainly found and kept in mind throughout this is, many of these systems were not exactly designed to be data tracking trend analysis systems. They were designed to work cases in the field, to manage cases, the administration of military justice along the way.

But, for the purposes for which we need them, which was data for tracking, these were the issues that we found with uniformity.

And then also, the ability to perform complex search queries that we were interested in.

Things such as comparing when a convening authority, when they're making a referral decision, followed the advice of their legal officer from the pre-trial advice or when they followed the recommendations of the investigating officer.

Other things such as in a pre-trial agreement, how often are sex assault 120 offenses being tied to assault 128 offenses that take it out of the sexual assault realm.
So, these are the type of things that we were interested in and, like I said, some of the systems could do part of that, but then across DoD and across all the systems that we were looking at, they just couldn't do exactly what we were looking for.

Those were the systems. Now, for DoD SAPRO, they, of course have their annual report. And so, we looked at that to see what information we could glean from the charts and the data that they have.

What we found is the data that they receive is very comprehensive in terms of the demographics. They used rank, offender, victim, gender, status, those type of things.

But, once it got to the adjudication part, the specificity in the amount of information we needed started to drop off.

For instance, in their charts, they list the most serious offense charged, the most serious offense that was found guilty and then they would show a sentence. And then, sometimes
would have a court type.

The problem became the things that
were not included. There we go. When we're
looking at things, particularly the punishments,
we are interested in all of the offenses that
were charged. And, more importantly, for
convictions, all of the offenses that were found
guilty.

Because, in the military when we're
talking about unitary sentencing, we've got to
know every thing they're found guilty of because
there's only one sentence.

Also, we were -- the SAPRO report only
gave us one sentence. It might have been the
approved sentence or the adjudged sentence. The
adjudged sentence being what the military judge
or the panel gave the court-martial. The
approved sentence being what the convening
authority actually approved after the clemency
and post-trial processes.

And these, of course, are interesting
and things that we want to know in terms of the
clemency process and how the sentences and
certainly the findings are being adjusted in that
clemency process.

And then the court type as well for
all cases whether it's a summary court, special
or general.

And then, there are other things that
we're interested in as well.

You know, one of the problems with --
we would get most serious offense charged which
might be rape, but then most serious offense
guilty might be, you know, assault or, you know,
some other offense.

And so, what we were interested in is, well, what happened to that rape charge? Was it
dismissed or were they acquitted of it? Those
type of things and that report just didn't have
in it.

The pleas and findings, you know,
whether the accused plead guilty or whether this
was a litigated trial, the forum, a military
judge versus members being the forum both for the
findings and the sentence as well, motions and
certain pre-trial agreements, which is a specific
part of one of our tasks, and then the clemency
process as well.

So, these were the reasons that we
looked around and saw the data that was already
out there and realized that the current systems
and what we needed just wasn't exactly there.

So, we then turned to look at the
civilian systems to see what kind of processes
they may have. And, about that time is when I
went to the annual seminar for the United States
Sentencing Commission back in September and I had
an opportunity to run into the Director of the
Office of Research and Data for them.

I talked to them about how they get
their data. And what he said is they have a
Statute that requires the District Chief Judge
within 30 days of a judgment entered in federal
court to send those documents to the Offices of
Research and Data at the Sentencing Commission.

Every year, they get about 400,000
documents, 80,000 new cases, about 13,000 ongoing cases that have been resentenced or appealed or anything like that, so about 93,000 cases a year they get with these documents and they have their own database and are able to make data presumptions based on that.

So, their data is not based on any kind of hand jamming, any forms or anything like that. They are focused on getting the court documents.

And so, what we came back after that is started to figure out how we could do that. Because, in our eyes, the uniformity among the Services are the forms and the documents that are in a record of trial, DD forms, pre-trial advice is required from the Uniform Code of Military Justice, things that are the same among the Services to get that uniformity, that completeness and, certainly, the accuracy as well.

So then, we took the information we needed and started trying to figure out where
that was in each of the documents that we knew that each record of trial would have, depending on how far into a trial each case went.

And so, that's where we came up with the listing of documents that's on the Executive Summary that you all have on the second page.

So, from there, we tried to figure out, all right, now we've got to kind of limit the cases, or figure out what kind of case pool we're going to look at.

In a perfect world, it would have been every case that was preferred in FY12, FY13, FY14.

Our problem was, we were going back in time. If we were starting now and going forward, it might have been a different picture, but when we're having to do an annual report and look at trends and analysis, we're going to have to go back a few years to see what those trends are.

So, what we did is go back and we used the SAPRO report for FY12, FY13, FY14. We started with the FY12 because that was the year
in which the latest sexual assault statute came into effect.

And from there, we looked at the charts that were included in that SAPRO report and all of the cases in those charts that were listed as having a sexual assault charge preferred, we went to the Services and asked not only for the name of that case but for those documents that were in that prior slide and that are on your Executive Summary.

And, you can see below kind of the numbers on how that kind of played out.

Now, using the SAPRO report did limit us a bit. One, because, note in the first part there, the Coast Guard is not included in that. We were able to get around that easily by just going straight to the Coast Guard asking them the similar question.

Also, as you've heard a little bit about today, the SAPRO reporting numbers don't include certainly all sexual assault offenses or reports. They don't include the Family Advocacy
cases, so, you know, there is that limitation as well.

Also, as we have found out, and you can kind of look along the numbers that you can see the number of cases that we requested from the Services sometimes doesn't necessarily add up to the number that were eventually identified by the Services. And that is something that you will hear about more in the coming months from the Service personnel as to the reasons for that.

But, all that aside, we were able to end up -- we identified 2,360 cases to date. Since February, we've received documents for 2,115 of those cases, so we have been able to acquire a good bit of data.

And the next part of that was now that we've got this mountain of data, what in the world are we going to do with it?

And we brainstormed in terms of how to set up a system that will be able to give us those complex searches and filtering capabilities. And, as I have explained it to a
bunch of folks, I compare it to the Trulia or Zillow real estate apps. All right?

So, I am looking for a three bedroom condo that's oceanfront that has two bathrooms and a pool. And, when I do that, it gives me a list of six places that are available for a specific date.

And now we've got to going to decide what we want to do. Right?

The same thing here. What I'm interested in is to be able to, in a matter of seconds, click for FY13 in the Army. I want all cases that have had a rape charge that had a PTA that resulted in a conviction. And I want those cases.

Because right now, the systems that are currently available aren't able to do that. All right? So, those are the type of things.

Another is in FY13 for the Air Force I want the number of times that a convening authority did not follow their advice of their legal officer when deciding the disposition of
Those are the type of things that we envisioned when we built this system.

So, winter of 2014 and '15 is when we identified those requirements. April of this year is when the development of the database began. Yesterday, I had the final conversation with our developers. Everything is complete and we are now in the process of entering those cases in the database.

So, here's a quick screen shot of the front page of the database. You see -- you can kind of see the Service, fiscal year, the case number we assigned to it, disposition year, case location, accused rank and gender.

We're able to list out if the case has multiple victims, we're able to pop that out and also capture both the gender and the status of each of those victims.

So, this is, again, you know, when we're looking at punishments, we want to see, all right, why was this set of cases so much more?
Well, maybe it's because there is multiple victims or multiple specifications of sexual assault.

And it's, as I said, kind of gives us the ability to filter by those pieces of information.

Same idea with the inputting of offenses. One of the other challenges we had is, you know, going back, we were looking at cases that, you know, certainly could have ended in FY12 that might have started who knows when in terms of when the offense was reported.

So, there's a possibility that any of these cases could very well have offenses from three different Article 120 Statutes. So we had to figure out how to properly catalogue and get those.

But, that will have the full listing. So, when we input a case, we're not just inputting the sexual assault offenses, but every offense that's on that charge sheet. And we're also then able to identify it by how it's listed.
on the charge sheet as the number charge and the
number specification that it has.

And, again, this will be able to help
us tie in when we're looking at Article 32
investigating officer recommendations and legal
officer pre-trial advice to tie specifically to
each charge what their advice was on that
particular offense.

And, again, so that gives us the
ability to analyze all of the offenses charged
and not just sexual assault under the umbrella or
not just Article 120, those type of things, but
down to the specific subsections of the Articles
and also to filter by those.

The other thing we were able to do is
with the now-mandatory discharge provisions that
went into effect, we're able to click in there
whether or not the offense occurred before or
after that date to break those out.

So then, after we get through the
charging part, we then built the system to kind
of walk through exactly how the court martial
process goes as well. With the referral part
certainly bringing the offenses but then going
through the Article 32, the pre-trial advice and
the convening authority, disposition or the
referral part.

Now, this is where, for the Sentencing
Commission, you know, they're only working with
cases that have a conviction, right? So, they
are a small subset of a full court process. Of
course, they have a great deal many more cases,
we don't know that they're starting at referral
and there are, you know, so many different ways
the cases can go once the case has been referred.

So, some cases will have an Article
32, some might not, depending on the type of case
that it is, if it's going to a general court or
to a summary court martial or a special court
martial.

The same thing for pre-trial advice.
That's only required for a general court martial.
That's not required for a summary court martial,
a special court martial or any other disposition
of court martial charges.

So, and once you get to this disposition, you know, there are certainly ways that things can go forth at that point. It's when the charges can be dismissed by the convening authority, they can be discharged -- the accused can be discharged in lieu of court martial. Those are alternate dispositions, or it can move forward and be referred to actually go to trial.

And then, once we get into the trial part, once arraignment and all that thing starts, then we're then looking at the forum, whether it's military judge or Members as the jury panel.

Motions, how pre-trial agreements are involved and then going through both the pleas and the findings in terms of, you know, plead guilty or not guilty to the specific offenses and then the findings to those as well.

And then, of course, there, it can either be a full acquittal or we can go into the sentencing piece. You've got, you know,
certainly it would be adjudged sentence. Of course, the accused will get a trial, then going through the clemency process to the action where the convening authority either approves the sentence as adjudged or can adjust it as needed. And then, also into the appeal part as well.

So, we then took that -- how that process works kind of the streamline of it and put that into our database tabs.

So, we've got Article 32, pre-trial advice, pre-trial agreement on along the way.

Like I said, you know, some of these cases that were dismissed, in that case, sometimes we only received the charge sheet because that's the only court document that's in that file.

For the larger cases that went all the way to trial, that were convicted and went through the post-trial process and clemency, they had many more documents to go through.

So, and not all cases will we use all of these tabs, but the database was built in a
way to filter out those cases as they dropped, as
they go through the system.

So, that is the database and how that
will work. And there's kind of the highlights of
the other tabs there.

All right, and then these are just the
various parts of the trial, the Article 32 pre-
trial investigation, like I said, the ability to
filter out the IO recommendations for specific
offenses.

Also, with the new Article 32 rules
that went into place last year, we're able to
filter out the hearings that took place before
then and after then and see if we can see if
there's any difference in the way in which some
of those cases are recommended from the
investigating officer.

Pre-trial advice, the ability to
filter by the legal advice on specific offenses,
but also be able to compare that legal advice to
the investigating officer from the Article 32.

Pre-trial agreements, you know, one of
the things to ask is, all right, how many times
in the last year has an Article 120 offense been
plead down from a PTA to a 128 to take it out of
the sexual assault and its range? Very hard to
get that answer but now, we'll be able to get
that, so, incidents where that's dropped down.

Also, certainly it's been discussed
today, the incidents when restitution was
included as a term in the pre-trial agreement,
we'll be able to parse that out as well because
we have the actual pre-trial agreement to look
through all those terms.

Also, sentence caps, caps on punitive
discharges, all those type of things as well on
the punishment side.

And then, referral, like I said, go
back to the referral of specific offenses, the
command decisions compared to the recommendations
of the IO and then legal advice as well.

So, those are just a few of the things
of the filters that we'll be able to look at
these cases and pare them down as opposed to the
larger group or the clump of sexual assault offenses that has been reported in the past.

And, with that, I'll turn it over to Meghan to talk a little bit about how we'll do the meetings and also how we'll do them now.

VADM TRACEY: Can I ask first a question?

MR. OSBORN: Yes.

VADM TRACEY: You say that you don't have data on what ends up happening to a case that's not preferred, or is not preferred, correct?

MR. OSBORN: Not?

VADM TRACEY: Preferred to trial?

MR. OSBORN: Not referred to trial?

VADM TRACEY: Yes.

MR. OSBORN: If it was included in that SAPRO report and it was preferred with at least one sexual assault offense, we will have some documents for most of those. You know, the problem is with FY12 and FY13, some of the files have met their kind of case disposition date to
where they can now be destroyed because of case records or whatnot.

But, we have the SAPRO report in terms of what the outcome was for some of those cases. So, we will have that piece.

So, in all of the cases that we have, we're going to know what the disposition of that was.

Now, we are limited a little bit because, you know, for cases that were linked to a 32 at pre-trial advice and then went to the convening authority, if those are dismissed, well then, we at least know what the legal officer recommended or whatnot.

If there was a case that was dismissed before an Article 32 or after an Article 32, we might, for that case, just have the charge sheet and the Article 32 investigative report. We won't know what the legal advice was for that case.

So, what the, you know, the overall rationale for dismissing that case was but we'll
certainly know the outcome of it.

MS. PETERS: Okay, well, good afternoon.

I'd like to give you our proposal for a framework within which we can analyze all of this data. And, the data, again, that we're talking about is this.

The decision points along the legal processing of the case where you can identify a characteristic of the offense, the offender or the victim that you're interested in tracking and, again, find out what the legal disposition is and ultimately come to a descriptive picture of these case outcomes.

And, I think our first step was to go back to the congressional taskings, and it looks like a lot of the taskings center on a process drive approach here.

What are the decision points that a case goes through involving a charge of sexual assault or a report of sexual assault? How is it ultimately disposed of?
The taskings also relate to: how are cases disposed of on appeal? Should it reach an appeal, the appellate level? And, how could we compare punishments rendered in the military with punishments in the civilian system at both the federal and state level?

So, these are a lot of broad taskings and after we figured out how to cull this data and the documents behind it, we said we need the framework to give you this information in some reliable, you know, statistically sort of sound process.

And that's what the database will give us a starting point for.

Mr. Stone?

MR. STONE: I didn't hear in the data collection before one piece of data which I know the Sentencing Commission keeps which is: how many actual days did the person serve in custody? Because a sentence -- there's all kinds of reasons that people get out early from good time to medical discharges to later commutations.
Are you collecting the actual days to the end of the sentence in these cases?

MR. OSBORN: In terms of the actual days that they serve?

MR. STONE: Serve, that's right.

MR. OSBORN: Not just the sentence?

No.

MR. STONE: I mean that's a crucial thing that needs to be collected on, I'm afraid to say. Because otherwise, when you get all done, you only know what was pronounced. And I will tell you, there is no sentencing situation in this entire country with a sentence that's pronounced is the what the individual does. It varies between 85 percent in some jurisdictions to way less in others.

And, one of the things that's very helpful when you collect all this data, especially the sentencing judges is for them to know which sentencing -- that's not the sentence the Commission came up with its guidelines, it's real offense sentencing. They looked at actual
days to help people realize that just because a
tough sentence was pronounced, that is not
necessarily what happens if those keep getting
commuted.

So, I just wonder if you have a box
left to put in the number of days actually served
in your data at some point?

COL GREEN: Mr. Stone, our starting
point for sources of data is records of trial.

MR. STONE: No, I realize that.

COL GREEN: So, obviously, and what
you're talking about is the administrative
records of the confinement system in terms of
that.

So, we don't have those documents.
They're not part of the same record as to a case.
I guess the question and what the Panel would
need to decide is if we need to seek that
information and request information in all the
cases that we have that where confinement was
imposed, whether we want to go back to the
confinement administrators to get that
information.

And, certainly, that's a data point that if the Panel were to decide that they want to look at that, we could add that to the system.

MR. STONE: Okay. Because you, as Sentencing Commissioner, would not have been authorized in 1984 and go into business in 1986 except for the people involved in the system wanting to know, tell me how many days for this offense or that offense, this conviction or that conviction, the person actually served. And it's a really crucial data point.

MS. PETERS: And, Mr. Stone, your excellent question brings me to the next part of my presentation which is: how does the Panel drive the feedback for the trends that it wants to analyze?

So, I proposed in here on this slide I just laid out our proposal to you that we bring in expert criminologists, we consult with them. In fact, the JPP has already -- we have brought on to our Staff Dr. Cassia Spohn, a criminology
chair, department chair, I think, at the
University of Arizona. And she has actually
worked with the RSP in some of their survey
analysis.

And, she's done a lot of very relevant
studies with regard to not just crime incidence
and prevalence, but prosecution trends.

There's a well known study in the LA
County that she primarily worked from the
beginning to end and issued a very lengthy report
about prosecutorial decisions.

So, we've actually brought her on
board to help the Staff and the Panel to do
higher level analysis of all this data and
identify any other predictors or issues and
figure out how to track those things should the
Panel be interested in tracking additional data
beyond our baseline or in looking at something
that maybe -- and finding a way that we can
already track it with the existing information
that we have.

So, we want to bring her on board and
bring her to you in the coming months, at the
September and October meeting so that you can
have an ongoing conversation with her and other
criminologists and, again, the Panel to say, what
is it you're interested in? How can we study
that? Let's figure out a plan to provide
statistically sound results and find the data
set, if needed.

And, I think those experts that we are
going to -- we plan to bring to you can give you
some sense of how we can do that to the extent
that that's feasible. And also some information
about similar studies being done in the civilian
world to the extent that information is already
collected and analyzed.

So, after consulting another
criminologist -- and we have already started
talking with other statisticians as well -- we'll
be looking at things mentioned in our database
and producing it at a higher level analysis.

If you have to look at multiple
variables in a case for predictors and figure
out: how does that relate to the punishment if at all in this case? They can do that for us and, you know, assist in the process, whereas our database can do a lot of that simple number crunching about number of case outcomes along the way, I think these criminologists can take the results to a higher level.

The plan is to have them analyze the data and present an analysis to you in November. And that is our tentative plan subject to the direction of the Panel.

And what we're going to do along the way is bring Dr. Spohn and other experts in in September so that you can have the conversation and, I'll note, to the staff, again about what is it you want to know beyond, again, the just simple case outcomes, the taskings and identified trends. You know, and that is rather broad.

And so, I think we need direction from the Panel as to where do your interests lie? What questions do you have about case outcomes with regard to sexual assaults in the Military?
So, I think we work together with these experts, find out what is feasible and how we can accomplish the issues that you want to analyze.

And, that's our process here that I tried to lay out and I think some of the issues that come into play along the way, when we get to the point of having analysis to you or a report to you to deliberate on, you can then cull out for your recommendations, based on relevant trends.

Maybe any gaps in the data where you wanted to study something and it may not have been feasible for one reason or another or there are some results out there that have a lot of caveats based on record keeping or just types of issues that you want to look at that may be hard to come by with the existing data.

All of those things are within the Panel's, I think, framework here to look at.

And there are also might be, you know, through this process, issues that you identify
for future analysis because this database is in
its very early stage and this framework is the
first of its kind from this Panel but it
certainly can continue in the future according to
your direction, for future deliberations you can
redevelop it over time.

So, this is sort of the way the staff
and the experts would look to work with you, the
Panel, and receive feedback from you about where
we go with all this information that we have.

Okay, Mr. Stone?

MR. STONE: Is the data actually, as
you put it in, able to in pulling it back, find
us repeat offenders? In other words, is there
some kind of a unique identifier that's going to
pull up the same defendant when he has three
convictions?

MS. PETERS: If he has been court
martialed multiple times within the time frame of
the cases that we've pulled, we will be able to
find that name.

In the reality, when you look at the
military processing, the likelihood of a
discharge -- if there are multiple offenses, we
can find it if it resulted in a court martial.

    MR. STONE: Okay.

    MS. PETERS: If a previous offense,

let's say, resulted in an administrative action
in 2012 where the record no longer exists, we may
not be able to trace that, find that record and
say exactly what happened.

    But, generally, some of the
information we have, we'll be able to tell you if
there was a previous offense if it's of the level
of a court-martial or a significant legal
process.

    MR. STONE: And this --

    MS. PETERS: Generally, most Soldiers
or Servicemembers are kicked out of the military,
so they're mostly first time offenders in the
whole.

    MR. STONE: And will your data --
because there are charges be able to tell us
cases where use of the weapon was charged?
In other words, it was not just sexual assault, but it was sexual assault that involves a weapons charge?

MS. PETERS: The information in the charge sheet, if that being an aggravating circumstance, it usually has to be pled in the charge sheet itself.

MR. STONE: Right.

MS. PETERS: We can break those things down, and that's the kind of issue that should we get a list from you to do that, again, we have a basic framework for identifying the charges with specificity. Those circumstances, should you want us to parse them out, we can go take that back and work on it for you.

MR. STONE: And then, the last question I have was, do we have data in here or an idea where we can be able to pull back the -- and I don't know if it's rank or paygrade of defendant and so that we'll be able to see, if it's always going to be how common it will be that a person in a higher grade victimizes a
person in a lower grade?

MS. PETERS: Absolutely. We do have that information. Some of the basic descriptors of offender, victim, offense, that's covered by all of these documents.

MR. STONE: Great, great.

MS. PETERS: Some more definite descriptors will require going back to the record in some cases, but anything basic like that, we have.

So, again, this is a proposal and it's subject to a lot of the things that the Panel has under its consideration right now, so that in September, we would devote the meeting to bringing in the civilian agencies that deal with crime data, primarily the Bureau of Justice Statistics and the Sentencing Commission, Office of Research and Data as well as a State Sentencing Commission or a state agency that has the expertise of dealing with crime data at the state level just to give you a picture of civilian crime data collection.
Because what we're talking about is the available information out there, what we can get our hands on to analyze.

Secondly, we'd like to bring in officials at the Department of Defense level and at the Service levels to give you a picture of military data collection.

Matt already highlighted the variety of ways in which information is reported and tracked and we heard some of that in some of the retaliation discussion.

And the connection here is that these taskings were a little bit different, and every time you ask a different question you might need different data.

But, there is an immense amount of data and number crunching being done. We all know about the SAPRO report and the 24-page annex with a line item list of characteristics tracked and numbers aggregated at the DoD level.

But, to give you a good picture of that, we wanted to invite basically the DoD and
the Services to talk about what SARCs and the investigative agencies, the legal officers and the DoD program level personnel are doing to collect and report this data in its existing form.

Because understanding the data there is sort of -- that is available about these cases is the building block, I think, for the Panel's understanding of what you can do going forward and what we would need to maybe shape the process in the future.

Lastly, in September, those criminologists, specifically, we considered reaching out to -- well, we'll have Dr. Spohn as a member of the staff and Professor Jim Lynch from the University of Maryland Criminology Department come and speak to you again about the theories behind criminology, the theories of how data analysis can be used to assess the health of the justice system.

Essentially, they can talk about the ways that their numbers modeling and their
studies have been used to inform public policy, how they produce reliable, repeatable sort of results and just talk to you about the theoretical approaches behind the Panel's taskings.

That's why we brought in a researcher, a statistician and a criminologist to the staff to inform these numbers and help give us an idea of how we got to these numbers, can you put a why behind these numbers, and how do they correlate, if at all?

So, we wanted to bring all of those people to you in September to discuss the project.

Ma'am?

CHAIR HOLTZMAN: I'm curious as to whether you've identified any kinds of key data that the Military is not recording in these cases?

MS. PETERS: Each Service, in its various organizations that deal with a particular part of a sexual assault report, investigation
and prosecution or appeal have a data system for managing those cases, if nothing else. There is a system to track it.

Do those systems talk to one another? Do they overlap? Does the Department of Defense have a way to immediately sort of pull up that data? Those are questions that we want to bring people in to answer for you.

Because, I guess part of the reason we built a database is because: is there an existing structure where you can find out charges filed in the current legal disposition of everything and the military? No.

Can you do that by Service? In some ways yes and in some ways no. There were gaps in trying to answer these congressional taskings. So, we absolutely did find gaps for our purposes.

But, again, when you -- I would bring in and I would defer to the Services and DoD as far as what they have been asked to do by Congress, how the Department of Defense interprets those mandates and brings information
up to their level to report back to Congress.

    But, yes, if you want to study legal
processing outcomes, there might be some gaps in
readily identifiable data.

    And I think the experts in the
civilian system are going to tell you where those
gaps are as well in the federal and state level.

    MR. STONE: Are you collecting whether
or not in each case if there was pre-trial
detention? I know that it's rare in the Military
because people are confined to base and that's
detention.

    MS. PETERS: Right.

    MR. STONE: But I also know that
that's a key component that victims want to know
about whether this is the kind of case, you know,
show me the set of cases even if its small, where
pre-trial detention was ordered vis-a-vis the
vast majority where it's not. Do we have that
captured?

    MS. PETERS: When it's on the charge
sheet and it's supposed to be noted on every
charge sheet, we would have that information and
through our database, here with us, it is
currently in there. I believe it's trackable but
whether it's -- I'll have to check -- that we're
going to aggregate.

MR. OSBORN: Right. That's not
something that's currently on there in terms of
whether or not the accused was in pre-trial
confinement or not. But, again, that's certainly
something easily --

MR. STONE: It can be added?

MR. OSBORN: It can be, sure.

MS. PETERS: So, just getting back to
our timeline here, the one other issue that we've
spent a lot of time talking about, how we might
get -- preparing for a trend analysis to give you
resources within which to do that.

One of the taskings was compare
military and civilian punishments. And that
unique tasking for that, we'd like to bring you
military and civilian practitioners at the state
and federal level to discuss their sentencing
regimes, the similarities and the differences and
the, you know, issues that might arise in trying
to make that direct comparison.

Because that was a specific tasking
and we want to bring some, you know, people of
the military, federal and state expertise to just
inform that deliberation requirement.

And then September just sounds like
it's going to be a busy day, so we reserved some
time for that in October, subject to your final
plans. And that's why we have markings for other
deliberations on those days.

And then, finally, in November, once
again, Dr. Spohn can come to you with an analysis
based on your guidance, based on the capabilities
of our database and try to answer the taskings
and, at some point, then for the future, you can
deliberate on the findings of that.

So, those are sort of our plans for
you to provide you resources along the way.

We're happy to receive your feedback and guidance
at the staff level and with our experts and our
presenters in the coming months because I think that will shape your -- analysis. When you get it in November. We need to know from you exactly what we need to look at.

So, I thank you for your attention today, and we look forward to the Panel's comments and questions on these issues and for any further scheduling issues and how to handle this, I defer to Colonel Green and return it back to him for anything else you want to discuss.

COL GREEN: As Matt mentioned, these guys have been working really hard and the Services as well, our Service reps. I mean hundreds of hours involved in obtaining all these case records, as you might imagine, and building the system in order to provide the analysis.

We got the system yesterday afternoon, and so we've entered the first case in. We're doing the beta testing with that now. But the plan right now is to devote, starting next week, the staff to enter data from these cases.

And so the 2,300 cases, we'll enter
all those in and then the hope is that by mid-
September/October, we can hand that data off to
the criminologists and to Dr. Spohn and then
present it to you in order to be able to start to
analyze it and get some help in terms of what are
the key trends that that data might show.

One of the things that I think is
important with this is this system is really
designed as a data analysis, not a fact analysis
system. So, it can tell you the key data points
in a case, it's not necessarily going to tell you
the why or the specifics about a case.

If we can narrow it down to specific
type of case that you might be interested in, a
particular type of a conviction before Members
that involves, hypothetically, a very small
amount of confinement and wanting to really dive
into those to understand if there's trends in
terms of those cases as to why those cases
produce that type of an outcome, we can ask the
Services for the complete record in that case and
do that sort of more in depth analysis after
that, subject to whatever you think might be
appropriate and helpful for your analysis and
then helpful, obviously, in terms of DoD and in
terms of any recommendations you might make.

So, that's really what we've set up
and subject to your considerations.

CHAIR HOLTZMAN: I just have another
question. Are these cases kept in a format in
the computerized format that makes it easy to
extract information, or is this all handwritten
out? Is that the same as the federal criminal
system, or do they have a different system?

MR. STONE: Before it gets to you.

MR. OSBORN: The documents before they
get to us?

MR. STONE: Yes.

MR. OSBORN: Well, how we've obtained
the documents that were in the area is we
actually went to --

CHAIR HOLTZMAN: No, I'm not asking
you how you obtained them; I want to know whether
the Department of Defense keeps its records in a
computer -- excuse me -- an easy, accessible, computerized format and is that format similar to the ones used in the federal systems or state systems?

MR. OSBORN: So, the --

MR. STONE: Are you keypunching everything, or is it coming to you electronically?

MR. OSBORN: Well, two things, so, the mostly FY12, FY13 cases from all the Services, when we receive them, that they were in the Washington area, we went to get them and they were in brick hard copies. And so, we scanned those into PDF documents and OCR'd them to make them to make a more searchable listing.

For the Services, probably I'm betting it's the same deal, hard copies that were scanned in. Now, what some of the Services are starting to do is do e-copies of their entire record of trial. So, instead of it being bricks record of trial, they have that still, but it's also on a CD that's electronic as well.
So --

CHAIR HOLTZMAN: And how does it work in our federal system?

MR. OSBORN: In terms of -- ma'am?

CHAIR HOLTZMAN: And how does it work in the federal system? The federal criminal justice system, how do they keep their records? Also the same way, only hard copies?

MR. OSBORN: I am not sure about the -- I know with the Sentencing Commission, they get electronic copies of everything and then they have about 20 data processors there who, from those, input into their system, hand jamming from my understanding, and that's certainly how we are going to be doing it into our system as well.

MR. STONE: The Administrative Office of U.S. Courts requires certain a lot of data points from every federal district court around the country; they always have. And they put out an annual report. They'll tell you how many cases. They'll tell you what Statute was charged, what was convicted. They have stuff
like that.

They probably don't have as many data points as this, but they do have basic information that they print out, in effect, every year.

The field may not like it, but they have to input it electronically in certain categories, but they have a Probation and Parole Office to do it. I mean I'm not sure that the court-martials, after they're concluded have a follow up office that would easily do that.

And then, actually, my question relates to that which is: I can't believe that the places that the defendants are incarcerated, whether it's Leavenworth under the -- with the assistance of the Federal Bureau of Prisons, which I know keeps electronic records, or some other federal military prisons that are not run by the BOP, I don't know if they're keeping electronic records, but I'm sure they must be because they're always worried about discharging a person on the right date, so they need a system
that warns them his release date's coming up and you have to figure that as against how much good time he's earning every single month. And it'd be crazy to hand-calculate it, you'd never get it right or you'd have to have a million people.

And so, they have machines that work it out what his good time is, how it advances his presumptive release date, what he did. So, they have it in there.

And so, to the extent there's that date, it may be that -- and you'll know whether we would foresee any difficulty getting them, since they incarcerate people from all Services, to give us some kind of data dump so you could get easily the cases where you have some case identifier, how much time the person is doing or has done.

Because, ultimately, that question that was mentioned before, since every state is so hard to compare data, that's why the U.S. Sentencing Commission wanted to see what they call the "real offense data," real time served.
If they knew how many days a person served, they could compare it against how many days they served somewhere else. They didn't have to worry about all those intangible of you have parole, you don't have parole, you got commuted, you didn't get commuted, you get twice as much good time in this locale for this offense as that one, and it all comes out in the wash.

How many days did the person do for that offense and then they can average it, and you have at least apples and apples.

COL GREEN: I mean I will tell you that the rules -- DoD rules for good time credit and administrative time credit and the likes in the confinement system are standardized across DoD for all confinees.

The parole rules, when somebody is first eligible for parole is a standardized point in time for all offenders.

So, those types of things are standardized across all of DoD.

I guess the one issue that you would
probably what to think about is like a third of
cases are from 2014 and so, obviously, with sex
offenses and presumably a lot of long sentences,
you're going to get currently serving, so you're
not going to get completed and to know what the
total confinement time is and so --

MR. STONE: No, I understand.

COL GREEN: -- you know, the value of
that information, I mean if you go across the
board and look at it, we would just -- it may not
be as valuable because you're not going to get
full sentence to be able to really know what the
final numbers would be.

MR. STONE: But, if we start to see
people who were sentenced and getting out in 2011
and 2012, that's going to tell us a lot. And,
even though they have uniform rules, you don't
know which of those guys are getting extra good
time, which you can get for drug programs, for
special work programs.

There's so many permutations even
within the federal system that unless you know
how many days are served, you're dealing -- you
can't measure apples and apples.

VADM TRACEY: We're looking at cases
that were done is my thought, right? The
earliest cases we're looking at are 2012?

COL GREEN: That's correct.

VADM TRACEY: So, this --

MR. STONE: It's three years old at
this point.

COL GREEN: In terms of the data, Mr.
Stone, the confinement system does keep an
earliest release date and a maximum release date
and so, all of that -- and I've worked with the
system -- it does -- all that's maintained
electronically.

So, if the Panel determines that this
is something that you want us to go and pursue,
we can track that --

MR. STONE: I know they have an
absolute release date because they've got to
notify the victims ahead of time. You can't
release a defendant without notifying the
victims. They have to have an actual release date.

CHAIR HOLTZMAN: Well, are we looking only -- I'm sorry.

VADM TRACEY: Have we thought about how we're doing the evaluation of consistency of decisions based on the facts of the individual cases?

MR. OSBORN: We have, and that's where it's going to get a little fun, right? Because everything is, you know, one case is so fact-specific to another case or whatnot.

Certainly, when you're looking at punishments and you're like this person was convicted of rape and they got four years; this person was convicted of rape and they got 15 years. And then you look at the charge sheet and you realize, well, that's because this one had a ten-page charge sheet and that one had a one spec charge sheet. Right?

So, that way we built the system is to be able to filter down the cases so to at least
give us a starting point. And then, from there, if we've got a find that case, it's kind of like when you're doing the real estate, I'm down to six properties, I can go look at the specifics of each one of those and see why those are the outliers or see what's different about those cases.

We've got the documents from each of those. So, the 32 report, in some cases, a pre-trial agreement, certainly the charge sheets and we can see exactly what the -- if there were any, you know, aggravators in that piece or not to be able to get a little bit more into the facts of that.

MR. STONE: And, just so you understand, the Sentencing Commission has a two- well, they call it a four factor table, whatever, but they have a whole set of factors that are not only the offense across one axis, but the offender across the other axis before they even get to a range, which is usually what they call the heartland of the sentencing that
should be imposed, which is often a two-year window.

Because the difference between things that can affect it are: did the defendant pick on a vulnerable person? A person in a wheelchair that they sexually assaulted? Totally different sentence because of the -- that affects, the you know, the crime. It won't be showing up in the charge sheet. Is this offender somebody who was previously reprimanded, or is he brand new to the Service?

So, there's factors that go down the offender as well as the charge. And, expecting all of that is a lot. So, you're going to see discrepancies.

But, the federal judges have that precisely so that they have comparison of offenders and crimes and have an idea about where they want to be within the window.

And, they can still go above and below that sentencing guideline range, but at least they have what they call "the heartland" and an
idea of what the average sentence is across the
country in that situation with that kind of
offender. That's what gives them --

MR. OSBORN: And then, if I could just
go back to your question. I think if it was
whether or not the Services at the base level
office are tracking or managing these cases
electronically --

CHAIR HOLTZMAN: I'm not asking about
management; I'm asking about the data in the
cases. Is this data being collected on an
electronic basis, or are they keeping records --
are all their records hard copy, or is it a
mixture of both?

MR. OSBORN: It's both. It's both.

So, the records aren't necessarily
stored in the case management systems, but, you
know, if the trial and the sentence was adjudged
X, Y, Z, they'd denote in their case management
system and input that into their system.

CHAIR HOLTZMAN: But the records of
the case are in hard copy?
COL GREEN: That's correct.

CHAIR HOLTZMAN: And my question was:

and how is that done in the federal system, criminal justice system?

MS. PETERS: We understand that most of that is electronic, but how it is processed and sent to the Sentencing Commission, how automated the system is for collecting and aggregating that data, I would still have to defer to the Office of Research and Data because the biggest issue that they have is statutes demanding that the judges send it to them; how that is accomplished, again, I would have to defer to the experts that will come to you.

CHAIR HOLTZMAN: But the Sentencing Commission is only looking at the Sentencing issues.

MS. PETERS: Correct, and so --

CHAIR HOLTZMAN: And we have a little bit broader mandate than just the sentence.

MS. PETERS: Right, and what we have --
CHAIR HOLTZMAN: And, I mean, for example, the consistency and appropriateness of the decision, is that on every motion?

MR. OSBORN: Well, and that's --

CHAIR HOLTZMAN: I don't know what that means. So, I mean how do we even go about doing -- I'm sorry?

COL GREEN: Well, I would go back to Admiral Tracey's question. And, ma'am, we've dealt with -- obviously, the first thing the staff did was start scratching our heads with these things and figure out what we can do to get you information on that.

And I think we've cracked some nuts and not others. I would say that, and so these ones talking about based on the facts of the case, you know, as trial practitioners, I think we realize the devil is in the details in so many of these things, and so I don't know that we've got a clean answer for that one yet.

MR. TAYLOR: So, a question that I have, just a fundamental question: when we're
talking about the FY12, '13 and '14 cases requested and identified, are these cases that are completed as of those dates so you have a complete record of the trial, meaning that the actual incident happened, perhaps, 2009, 2010, whenever the incident happened?

MR. OSBORN: So, that is an interesting piece and something that we certainly invite you when the -- when our military folks come and talk about that and certainly the DoD, you know, SAPRO personnel as well.

There's a little bit of a disconnect that we found from that, and that, in point, kind of talks to the difference in numbers that we have.

For instance, in FY12, in those charts that have all those, it's Service-specific. So, in every Service but the Army, all of the cases in that FY12 report were complete at that point. And, when I say complete, I'm talking about either dismissed, discharged in lieu of a court-martial as a finding in trial. So, not
through the appellate process, but completely the
trial.

The Army for FY12 and FY13 as well
listed pending cases in addition to their
completed cases.

So, that is a disconnect in terms of,
you know, the guidance given to the Services and
then how the Services chose to answer that.

So, the answers as to why that is, I
think, would probably be better for those folks
to talk about.

FY14 is a little different because
this is the first year that they've used the
DSAIDs database system to kind of pull that
information out. And in FY14, all of the cases
listed in those charts were all completed.

So, for everyone but the Army in FY12
and FY13, that's when the case ended. So, in
some of those, absolutely; the initial report
could very well have been FY10, FY11, but it was
listed in the FY12 report, and that's when the
case was, you know, disposed of certainly after
trial.

MR. TAYLOR: Well, and as we all know, the standards, the legal standards changed during that period of time a couple of times.

MR. OSBORN: And that's the fun part of what we were able to work into the system because, you know, if it happened before 2012, you know, was it between 2007 or 2012, or was it pre-2007?

So, since we have the charge sheet, we're able to see when the act occurred to then be able to figure out, all right, which version of the 120 Statute were they used, and then we've been able to build that in the system.

So, we can pick pre-2007 Article 120, and then once you click that one, the next subcategory are the provision under the pre-2007 120. If we pick 2007 to 2012, we've got those statutes and then 2012 on.

So, because we have the charge sheet, we know when the offense occurred and then can tell what statute framework that was used.
So, that's the other part, too, is we'll be able to break down, all right, did the changing in the Statutes in terms of convictions or pleas -- certainly punishments, those type of things -- how did those change along the way? So, that should be an interesting piece.

MR. TAYLOR: And that's people's --

MR. OSBORN: Yes, sir.

MS. PETERS: And we interpreted consistency and appropriateness applied to not just the sentence, but, again, the decision points at which a case was resolved. You can associate maybe a charge with a result, you know, or a finding at the Article 32 with the results at referral.

With the caveat that our gap might be just the fact that the military's unitary sentencing does not come with a list of the factors that the Judge used in determining a sentence. And that there is one sentence adjudged for all crimes at once and you can't parse out, from the Judge's mind or the Panel's
mind how much was the aggravated sexual assault
worth? How much was the false official statement
worth?

So, we're left with that gap based on
the system.

MR. STONE: And you can't parse that
out in a federal sentence either because the
Judge typically, the sentences -- and he runs all
kinds of sentences concurrently and he's
considering all the factors at once because,
under the guidelines, it's an aggregated sentence
anyway.

So, I mean that's where, if you count
the number of days, you have some apples and
apples.

I just want to make one comment in
response to the Chair's question. It goes back
to a comment that I made I guess almost a year
ago and that was: does the federal system keep
this on paper as well -- federal non-military
system?

The answer to that is driven, I think
-- the answer is no. And the answer was driven
by the fact that there is a right to see the
documents in every publically filed case.

So, people -- not only the lawyers
involved, but also the public --- wanted to see
the documents, and they wanted access. And,
before you knew it, the docket sheets are
electronic; the docket sheets list every Motion
that's filed. You can click on the Motion that's
filed; you can click on the Judge's Order --
they're all uploaded -- and when a transcript is
ordered, you can click after the first 30 days --
you can click on the transcript. You don't even
have to pay the Court Reporter.

And, when appeals briefs are filed --
and I recently filed two in the 9th Circuit and
one in the 10th Circuit -- they had me file them
electronically. They didn't -- used to be, you
had to file hard copies.

So, they're going completely
electronic, and when I said I needed access to
this or that, you know, I was given my PIN code
or whatever, download it and print your own transcript.

Don't get the hard copies of the other side's brief; print them off.

So, because they were trying to have a public docket for the lawyers and the public, they started to go electronic. And, so, they found that it saves a heck of a lot of paper and, you know, file rooms and finding stuff, they have a huge amount of stuff that's electronic.

That goes back to the fact that I mentioned at the beginning that the Military Services don't have a similar electronic docket even for the lawyers in the case, and they often need -- I think one Service does, if I remember correctly, I'm not sure which one it was but I was involved in some military cases and at least one had some semblance of an electronic docket.

But, a lot of the military Judges are asking you to file with them electronically; you literally have to serve them at their email address and copy the other sides.
Because they also -- given where they are, they don't want a room full of paper. But, it hasn't -- but there isn't, as yet, an electronic docket for all these cases which would encourage them to go electronic and ultimately, while it might not be surgical for data points, it is word searchable in a universal fashion like we do with anything else.

CHAIR HOLTZMAN: Right. That was the reason for my question because ultimately, if everything is electronically recorded at some point -- whether it's a word search or other kind of search -- you can basically get a lot of data that you would have to read through tons of paper to find. And so, that was my question.

MR. STONE: Right.

CHAIR HOLTZMAN: And --

MR. STONE: And you know, you don't have to go out and hand collect it either; get them to send it to you.

CHAIR HOLTZMAN: Right. So, if Congress really wants this information, they're need to
spend some money to get this all digitized.

MR. STONE: Or just get the electronic database company, which is -- currently exists for all the federal courts, all of them -- bankruptcy, District, Courts of Appeals, it's all out there -- have their company take on as a separate little --

CHAIR HOLTZMAN: Yes, but they someone has to pay them for it. That's what I'm saying.

MR. STONE: Yes.

CHAIR HOLTZMAN: Congress wants it.

MR. STONE: That's right.

CHAIR HOLTZMAN: They've got to put up the money for it, and if they're going to really want the trends and the basic information that they want here, that's what's going to have to happen.

Do we have any other questions? Okay, Maria?

MS. FRIED: Are we done, ma'am?

CHAIR HOLTZMAN: Yes, I think -- oh wait.
COL GREEN: Can I just -- I mean in terms for the planning purposes among the Members, obviously, we -- this presupposes that next month we will turn to the data trends and analysis and start on that.

We left, obviously, I know restitution compensation and retaliation remain still in work. And I mean, we've been working with some of the experts. We know that they are -- we have people lined up and available for the September meeting. I mean, if the Panel wishes to delay that and move out then we certainly can. My recommendation would be to look at --- at least proceed to get this started in September.

CHAIR HOLTZMAN: Yes, but I think we should save some time on the schedule for finishing up. I don't think we have that much more time that we need to finish up the restitution issue.

COL GREEN: Okay.

CHAIR HOLTZMAN: And particularly, if the staff does some of the work and sends it to
us before the meeting, I think we can try to abbreviate that or make that discussion concise and short. But, I think we should try to finish the restitution and maybe leave ourselves a little bit more time on retaliation, too. I don't know that we need to spend the whole meeting on this.

COL GREEN: Okay.

CHAIR HOLTZMAN: But I think we should try to make some progress on or finish up restitution if we can and make some more progress on retaliation.

COL GREEN: Okay.

CHAIR HOLTZMAN: That would be my suggestion for how we proceed and then do as much of this as we can.

COL GREEN: Okay.

MS. FRIED: The meeting's closed.

CHAIR HOLTZMAN: Thank you very much, and thank you to the Panel Members.

(Whereupon, the above-entitled matter went off the record at 4:32 p.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 08-06-15

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

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Court Reporter