

## UNITED STATES DEPARTMENT OF DEFENSE

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## JUDICIAL PROCEEDINGS PANEL

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## PUBLIC MEETING

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THURSDAY  
AUGUST 6, 2015

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

(9:04 a.m.)

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](http://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

1 Taylor, and Mr. Victor Stone.

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

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

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

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

22 The Judicial Proceedings Panel was

1 created by the National Defense Authorization Act  
2 for FY2013 as amended by the NDAA for FY2014 and  
3 2015. Our mandate is to conduct an independent  
4 review and assessment of judicial proceedings  
5 conducted under the Uniform Code of Military  
6 Justice involving adult sexual assault and  
7 related offenses since the most recent amendment  
8 to Article 120 of the UCMJ in 2012.

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

16 We will devote most of today to Panel  
17 discussion and deliberations on these two topics.  
18 We briefly deliberated on restitution and  
19 compensation issues at our April meeting, but  
20 today will be the first time we've deliberated  
21 about retaliation, assuming we get there and I  
22 hope we do.

1           Our Staff has prepared materials to  
2 assist our deliberations. They developed a list  
3 of issues and an initial draft report on  
4 restitution and compensation that summarizes what  
5 we've learned and heard about the topic.

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

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

15           The agenda for today has been updated  
16 from the initial schedule posted in the Federal  
17 Register Notice for this meeting. We have moved  
18 the time for the Panel and Staff to discuss  
19 current and planned topics of February 2016 to  
20 the last session of the afternoon. As indicated  
21 in the Federal Register Notice, all meeting  
22 agenda updates are posted to the JPP website.

1                   Finally, each public meeting of the  
2                   Judicial Proceedings Panel includes time to  
3                   receive comments and input from the public. The  
4                   Panel received no comments or requests from the  
5                   public for today's meeting.

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

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

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

1 and restitution including consideration of three  
2 options.

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

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

20 And so today the Staff has prepared  
21 what we believe, based on your deliberations and  
22 discussion, encompass the major issues for your

1 consideration on this topic. And so we provided  
2 you that issues list of ten issues, obviously  
3 subject to anything else that the Panel Members  
4 might want to discuss.

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

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

15 CHAIR HOLTZMAN: Sure. Okay, well we  
16 have this booklet that we received which, it's  
17 called Judicial Proceedings Panel and it's dated  
18 6 of August 2015. And I think that we turn to  
19 Page 1 which is under Tab 5. It gives us the  
20 lists of the issues through Page 4. And we could  
21 go through them one by one.

22 Issue number 1 is "whether the

1 convening authority and parole board's power to  
2 grant the accused's request to pay the victim's  
3 expenses are sufficient restitution mechanisms  
4 throughout the military judicial process."

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

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

14 Again, and the key point here is,  
15 currently restitution is not an authorized form  
16 of punishment under the UCMJ. And the only way  
17 that restitution can be directed through the  
18 military judicial process currently is through a  
19 pre-trial agreement, an agreement between the  
20 accused and the convening authority, which isn't  
21 a term ----- you heard from presenters that is a  
22 term that's used rather infrequently. And I

1 don't believe any presenters indicated that they  
2 were aware of a restitution provision in a pre-  
3 trial agreement involving a sexual assault  
4 offense.

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

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

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

21           CHAIR HOLTZMAN: Well, I guess what is  
22 confusing to me is what's the difference between

1 Issue 1 and Issue 2 on our sheet? And do we need  
2 to answer Issue 1 separately, or can we just go  
3 to Issue 2?

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

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

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

18 VADM TRACEY: So in terms of our  
19 analysis of this first issue, is there some value  
20 in understanding that there are some differences  
21 between a civilian victim in a civilian court in  
22 terms of what is already covered because an

1 active duty person is covered by some things in  
2 the active duty system, and that those same  
3 situations don't apply to other categories of  
4 victims.

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

9 COL GREEN: Yes, ma'am.

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

16 COL GREEN: Differentiate.

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

21 MR. STONE: Before we jump there, if  
22 I may just comment on the question that the Chair

1 asked, I think that Issue 1 is simply a threshold  
2 to which we give a yes or a no because if we  
3 think it's adequate, then the rest is obviated  
4 and it just punctuates that we need to move on to  
5 the details of what we're going to do next  
6 because without a no the current authority is not  
7 enough, we wouldn't get to any of the other  
8 questions.

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

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

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

22           CHAIR HOLTZMAN: Well, I don't know

1 that it's restitution that varies. It's the what  
2 the existing system can pick up in terms of  
3 paying for expenses. So that's a slight  
4 difference from what you're talking about, but I  
5 think it's an extremely important point.

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

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

15 VADM TRACEY: So that's the only one.

16 CHAIR HOLTZMAN: But it doesn't say  
17 that.

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

22 CHAIR HOLTZMAN: So it's only at the

1 request, right now, just to clarify, right now  
2 the only way in which restitution can be paid,  
3 even as part of a pre-trial agreement, is at the  
4 request of the accused?

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

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

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

21 MR. STONE: No, but I think if I can  
22 just --

1 CHAIR HOLTZMAN: Maybe I --

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

7 CHAIR HOLTZMAN: Is that how it's  
8 formulated?

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

12 CHAIR HOLTZMAN: Okay, so is that  
13 correct?

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

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

22 COL GREEN: Well, that's right.

1 MR. STONE: That's what it is.

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

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

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

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

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

21 We're trying to decide whether there  
22 should be a mechanism within a court-martial to

1 order it. Who would make that decision, the  
2 panel? Would they decide what the restitution  
3 should be, or would the military judge order it  
4 and decide what the number was?

5 Or do we not know because there is no  
6 such system yet? I'm worried about the  
7 practicality of this. And I don't think  
8 restitution in this situation is as complicated  
9 as, I mean, it's been my experience and I'm sure  
10 yours, Mr. Stone, in a large-scale federal case.

11 But I'm still worried about how you  
12 get either the judge or the panel gets the  
13 information about what actual restitution to  
14 order. And I also don't know, does the victim  
15 offer to pay X number in a pre-trial agreement?

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

22 COL GREEN: Well, right. I think

1 probably the starting point is just a reminder  
2 that the testimony the Panel heard was that there  
3 are no examples of restitution being ordered in a  
4 sexual assault case.

5 CHAIR HOLTZMAN: Right.

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

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

17 JUDGE JONES: So the bargain is  
18 finished --

19 COL GREEN: Correct.

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

22 COL GREEN: Yes, ma'am. That's not

1 required, and certainly there could be a term  
2 that requires restitution just at some point.  
3 There's no mandate for that. So when it's used,  
4 again typically in property crimes that's  
5 typically the form that it takes.

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

10 JUDGE JONES: They have an idea to do  
11 what?

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

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

20 JUDGE JONES: Then whose bailiwick is  
21 it for the restitution sentence? Would it be a  
22 panel decision? Or we don't know? Or would it

1 be the military judge? That's what's up in the  
2 air.

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

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

15 JUDGE JONES: Right.

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

22 JUDGE JONES: So I guess my last

1 question is simply this, who would help whoever  
2 the sentencing authority turned out to be for the  
3 restitution part to decide what the number is?

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

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

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

21 I think you heard some testimony from  
22 presenters and the like about concern about that

1 because obviously information gathered about a  
2 victim pre-trial and how or if that information  
3 could be used perhaps to the victim's detriment,  
4 you know, providing that information, just either  
5 try to portray the victim in a negative light or  
6 provide information that the victim might not  
7 want out in the course of the trial.

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

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

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

19 But I thought he was saying when they  
20 do that, and they have a handful of sexual  
21 assault cases where they've had to do it, I  
22 thought he said it was more like a liquidated

1 damages number like \$15,000 or something.

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

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

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

21 MR. STONE: Well, he said it was to  
22 settle the cases. He didn't say it was

1 gratuitous. But I would love to see what he had  
2 to send in. I have one, and I guess this is sort  
3 of a just a language issue as we talk about  
4 restitution that I would like to bring forth and  
5 surface because I really feel very strongly about  
6 it.

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

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

20 State could say, "I'm not interested  
21 in it, I don't care." But if the victim wants it  
22 because the victim can show you a bill that

1 hasn't been paid, the victim gets it and it's to  
2 restore them to the position they were in. It's  
3 not to rap the defendant at that point on the  
4 back of the hands.

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

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

14 And I will probably, you know, I would  
15 hope that even if we loosely talk about it here,  
16 that in our report we stick with disposition  
17 because otherwise later it has all kinds of  
18 enormous consequences when defendants start  
19 saying, "I've already been punished," implying  
20 that they don't have to have restitution as a  
21 separate issue. And it is definitely a separate  
22 issue with a separate movant, the victim.

1           CHAIR HOLTZMAN: Can I just make one  
2 point about that? I mean, I think your  
3 distinction is very important, but I'm not sure  
4 that the distinction in fact is carried out in  
5 terms of those people who are advocating for  
6 increased restitution.

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

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

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

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

21           MR. STONE: I think that when you hear  
22 that, what we're hearing is something of

1 confusion between hoping that the Service member  
2 forfeits his pay or is fined as compared with the  
3 restitution where you only get it for a bill  
4 that's of a certain kind and there's no pain and  
5 suffering.

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

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

19 So I mean, it carries many different  
20 consequences. And so in order to keep our  
21 process on the right line as to restitution, I  
22 just hope we will not, you know, even though a

1 victim may be happy to see that it comes out of  
2 the pocket of the defendant, so does the fine or  
3 the forfeiture of their salary even if there's no  
4 restitution request.

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

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

22 And so I think that's why you have to

1 remember this is a, it's not part of the  
2 punishment, it's part of allowing the victim to  
3 heal. And anyway, I just wanted to sort of lay  
4 that out there because it gets lost a little bit.

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

7 CHAIR HOLTZMAN: Yes, of course.

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

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

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

22 MR. STONE: Yes. And then in Maryland

1 and I think in the federal system there's a  
2 requirement that the unsatisfied restitution be  
3 filed as a civil judgment as well. That piece,  
4 not the fine, just the restitution if there is  
5 unpaid restitution.

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

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

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

1 we pay to them.

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

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

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

21 I'm just curious in Maryland, how many  
22 restitution cases do you have, or sexual assault

1 cases do you have a restitution order that's  
2 actually paid? Do you have any idea, are we  
3 talking about --

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

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

14 CHAIR HOLTZMAN: But the property  
15 damage we already have covered under, what is it,  
16 139?

17 COL GREEN: You just make a 139 claim.

18 CHAIR HOLTZMAN: Right, so there's a  
19 mechanism for recovering, for dealing with  
20 property loss outside of the court-martial.  
21 Isn't it correct? It's outside the court-martial  
22 system, the 139.

1 COL GREEN: Correct. It is not tied  
2 to the case.

3 CHAIR HOLTZMAN: Okay.

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

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

13 MR. STONE: Yes.

14 CHAIR HOLTZMAN: If we have a small  
15 number of claims for restitution, and probably  
16 even a smaller number of cases in which  
17 restitution is actually awarded, and we have  
18 alternative systems to provide at least for  
19 property damage in the military, what we would  
20 have to do in order to have a restitution program  
21 that passes constitutional muster, because you've  
22 got to have due process.

1           You can't order restitution without  
2 showing that there's a bill, I mean, for bodily  
3 damage or unless you show some actual bill.

4           MR. STONE: Hospital bills come in.

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

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

19           We would have to create an opportunity  
20 for there to be some way to present evidence on  
21 the loss and challenge that loss within the  
22 court-martial system. We would have to figure

1 out who is going to, how the sentence is going to  
2 be imposed, when it's going to be imposed.

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

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

17 MR. STONE: I think your question  
18 presupposes the answer. I don't think there are  
19 major changes. I think that from some of the  
20 discussions we had last month and my own  
21 background knowledge, if we're going to give  
22 victims a voice at all, it probably is going to

1 require something like the sentencing being  
2 delayed until the next day, at least overnight.

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

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

16 And I don't think I've ever seen  
17 anybody challenge the hospital bill or the lost  
18 wages information, which if they are not a  
19 military person, if they're an off-base civilian  
20 they may have both, a hospital bill and a lost  
21 compensation from work bill. Those are the two  
22 typical kinds.

1           But they're certainly available to do  
2 that. The judge passes it around, everybody  
3 looks. If they have any questions they can ask.  
4 And the judge makes the initial ruling right  
5 there and then.

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

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

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

21           If we're going to have to delay some  
22 of that until the next morning, we can fold the

1 time for a restitution request right into that.  
2 You are correct, I don't think there will be a  
3 huge number of restitution requests because most  
4 of the victims are military.

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

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

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

18 CHAIR HOLTZMAN: What would be  
19 mandatory?

20 MR. STONE: Restitution. If a  
21 restitution request is made, and if the  
22 restitution request is backed up by evidentiary

1 support, a restitution order is mandatory with  
2 only two exceptions typically.

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

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

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

16 MR. STONE: Right, it's mandatory.  
17 Exactly.

18 JUDGE JONES: I just wanted to clarify  
19 that, which means you're going to have  
20 restitution orders, if we use that model, as a  
21 part of every sentence if we make it mandatory in  
22 sexual assault cases.

1                   And then we're going to have what I  
2 think you've also alluded to which is virtually,  
3 I don't know what the percentage is but a very  
4 high percent of totally uncollectable restitution  
5 orders.

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

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

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

22                   JUDGE JONES: But we would still need

1 a system for enforcement, right, of the orders?

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

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

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

17 (Simultaneous speaking.)

18 COL GREEN: What's that?

19 VADM TRACEY: For Article 120 cases.

20 COL GREEN: That's correct.

21 VADM TRACEY: It is pretty --

22 JUDGE JONES: For sexual assault? But

1 other cases it is?

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

4 JUDGE JONES: Okay.

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

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

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

20 Some examples of expenses not normally  
21 covered had to do with putting a security system  
22 in or putting a fence around a house or buying a

1 guard dog or doing other things that would not be  
2 covered through normal compensation systems. So  
3 it seems to me that there is a piece of this  
4 that's pretty important that goes into weighing  
5 where we decide to come out on this.

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

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

20 I guess the third piece, for me at  
21 least, is that while I'm still leaning in favor  
22 of thinking this is a good idea, I don't know

1 that I would make it mandatory.

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

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

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

19 MR. TAYLOR: Right. And that would be  
20 an additional burden, if you will, on the  
21 prosecution to do things ahead of time. But  
22 listen, every requirement we give to prosecutors

1 is always an additional burden, so that's not an  
2 unusual complaint from those who are  
3 administering the system.

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

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

18 So it's not as if they're not able to  
19 compensate, particularly lower level junior  
20 officers and enlisted people who are the subjects  
21 of whatever abuse took place or whatever offense  
22 took place, it's not as if they don't have the

1 means to help those people along, send them back  
2 to school, perhaps do something else with their  
3 careers.

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

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

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

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

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

21 MR. STONE: Well we have to be careful  
22 when we discuss the two.

1 MR. TAYLOR: Well that's right.

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

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

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

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

21 And that, in some ways, that's like a  
22 big company. You're in a big corporation and

1 there's a sexual assault by a manager on an  
2 employee.

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

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

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

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

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

22 MR. STONE: Well that's what we were

1 hearing in testimony in some of the prior  
2 sessions from individuals who said, you know, it  
3 took an extraordinary effort and intervention on  
4 a one-on-one basis for someone to finally re-  
5 designate them to a new military --

6 JUDGE JONES: I just don't --

7 MR. STONE: -- occupation --

8 JUDGE JONES: Yes.

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

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

17 MR. STONE: Yes.

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

20 MR. STONE: Yes.

21 JUDGE JONES: But not within trying to  
22 fix it within the military in terms of, as part

1 of a criminal case. Ordering the military to,  
2 you know, fix this. Get this person back into  
3 their specialty.

4 I don't see that. But I --

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

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

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

20 I mean one of these gap situations  
21 that we identified. But the notion that  
22 restitution be a part of the disposition and not

1 be something the defendant decides whether or not  
2 is going to happen. It seems to me, I don't have  
3 any trouble with that.

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

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

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

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

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

1 CHAIR HOLTZMAN: Taxi.

2 MR. STONE: -- parking fees. Right.  
3 Right, taxi fees.

4 JUDGE JONES: Money to make you whole.  
5 If this hadn't happened. Right?

6 CHAIR HOLTZMAN: Right. Up to the  
7 past.

8 JUDGE JONES: Yes.

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

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

17 But an expert had to come in and offer  
18 testimony that this person was so messed up that,  
19 you know, the lost wages would continue and the  
20 psychological counseling would continue. But  
21 that was a specific of that program that allowed  
22 it, and then they got a projection of the cost.

1 CHAIR HOLTZMAN: Okay.

2 MR. STONE: It depends how we define  
3 it.

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

8 MR. STONE: Sure.

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

17 MR. STONE: Well we do --

18 CHAIR HOLTZMAN: Am I wrong in --

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

21 CHAIR HOLTZMAN: Well I want to get to  
22 that example.

1 MR. STONE: -- you didn't have a cell  
2 phone and you bought a cell phone --

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

5 MR. STONE: -- for protection.

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

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

14 CHAIR HOLTZMAN: Right.

15 MR. STONE: I have seen that covered.

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

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

20 CHAIR HOLTZMAN: Right. So I guess --

21 JUDGE JONES: Any claim, like "I'm  
22 going to need a fence," or "I have a guard dog

1 that's really working out well and I'm going to  
2 need this guard dog well into the future," that  
3 would be an argument. And, you know, and the  
4 judge would have to decide. I mean, that's how I  
5 looked at it.

6 CHAIR HOLTZMAN: Right.

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

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

1 MR. TAYLOR: Yes.

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

4 CHAIR HOLTZMAN: Right.

5 JUDGE JONES: -- on it.

6 CHAIR HOLTZMAN: Right, a dollar  
7 amount.

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

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

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

1 typical restitution.

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

12 MR. STONE: Right. Because the theory  
13 is, and the true life example is, we see plenty  
14 of victims in Maryland who didn't have proper  
15 medical insurance. They have a \$10,000 bill at  
16 the local hospital, which they've never paid.  
17 They're trying to get restitution because in the  
18 next emergency, when they come by ambulance to  
19 that emergency room, they're going to look up  
20 their ID and say, "I'm sorry, you need to go to  
21 the next closest hospital." Because this person  
22 has a \$10,000 unpaid bill.

1                   And they will try and push that person  
2                   to -- in other words, they're not welcome at that  
3                   hospital, because the hospital has a very large  
4                   outstanding claim that they can't settle. And  
5                   they don't want that. Most of them want to  
6                   settle that, because God forbid there's an  
7                   emergency, they need to go to that closest  
8                   facility. They don't want to be ambulated  
9                   around.

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

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

15                   MS. FRIED: Yes.

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

18                   MS. FRIED: Right.

19                   MR. STONE: Private doctors, you want  
20                   to go to your local doctor and he says I can't do  
21                   it because, you know, whatever. Sorry. You're  
22                   right. Big public hospitals that get federal

1 funding can't do that. But a lot of these rural  
2 communities don't have a big public hospital.

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

14 COL GREEN: There is a provision under  
15 the UCMJ for automatic forfeitures of pay when  
16 certain sentence levels are imposed. So if I --  
17 if the accused is sentenced to more than six  
18 months' confinement or a punitive discharge, then  
19 under Article 58 they are -- automatic  
20 forfeitures are imposed, and so their pay is  
21 forfeited. If it's at a general court-martial,  
22 all of it's forfeited. If it's at a special

1 court-martial then the jurisdictional maximum is  
2 two-thirds. And so that portion of the pay would  
3 automatically be forfeited.

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

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

11 CHAIR HOLTZMAN: Okay.

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

22 So two forms of forfeitures of pay.

1 There's either that the court itself can impose  
2 forfeitures, or if the certain levels of sentence  
3 are reached in terms of confinement or punitive  
4 discharge, then automatic forfeitures  
5 automatically kick in. But either -- all right,  
6 those automatic forfeitures can be waived by the  
7 convening authority, at the request of the  
8 accused.

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

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

14 JUDGE JONES: It's only post-?

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

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

1 accused for their support?

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

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

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

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

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

20 JUDGE JONES: Right.

21 COL GREEN: -- which order would be --

22 JUDGE JONES: Right.

1 COL GREEN: -- would trump the other,  
2 in terms of priority.

3 JUDGE JONES: Right.

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

10 MR. STONE: But that's in place now.  
11 If the family members, the dependents of the  
12 convicted defendant, if you think they have some  
13 --

14 CHAIR HOLTZMAN: But that's outside --

15 MR. STONE: -- right and --

16 CHAIR HOLTZMAN: But that's out --

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

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

21 MR. STONE: Yes.

22 CHAIR HOLTZMAN: Itself.

1 MR. STONE: Correct.

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

4 MR. STONE: I don't think so.

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

7 MR. STONE: The restitution is inside.

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

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

13 CHAIR HOLTZMAN: Obviously. That's my  
14 point.

15 MR. STONE: Yes.

16 CHAIR HOLTZMAN: That's my whole  
17 point.

18 MR. STONE: Yes.

19 CHAIR HOLTZMAN: So if they have, if  
20 they're going to be injured "possibly" by the --  
21 so that's what I'm asking, if they could be  
22 injured as a result of the restitution situation,

1 will they have a right someplace in this process  
2 to be heard? And if so, how and when?

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

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

18 And the defendant pled guilty and he  
19 waived his right to appeal. And then he didn't  
20 make the payments. And he lied to the probation  
21 officer by saying, check is in the mail. So it  
22 was a probation revocation hearing.

1                   And he said, "I can't make these  
2                   payments and also have my own apartment, and my  
3                   car, and pay my child support, and take care of  
4                   my family." And the judge said, "those things  
5                   are really not, you know, those are going to be  
6                   in the discretion of what we think you have to  
7                   pay. But now I'm going to, having heard that,  
8                   I'm going to reduce it to eight percent of your  
9                   take-home salary -- it's going to be  
10                  restitution."

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

22                  JUDGE JONES: I like Mr. Taylor's idea

1 very much. That if we were to propose something  
2 here, beyond what we already have, which is not  
3 much, I agree, that it be a system where it would  
4 be discretionary, not mandatory. And that  
5 probably, to make things even more efficient, it  
6 would be in the bailiwick of the military judge.

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

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

21 COL GREEN: Judge Jones, can I --

22 JUDGE JONES: That's my two cents.

1 COL GREEN: I'm sorry, I didn't mean  
2 to --

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

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

9 JUDGE JONES: Right.

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

18 JUDGE JONES: Right.

19 COL GREEN: One of the issues going to  
20 Mr. Stone's point, about the modification of an  
21 order post-trial by a judge, based on a defendant  
22 showing family need that was impacted by that

1 restitution order that I think is important, is  
2 courts-martial are of limited jurisdiction, and  
3 close at the conclusion of the case.

4 And so we don't have standing courts.  
5 And so that type of modification by the judicial  
6 system, and I know Mr. Taylor said, you know, the  
7 details work those -- but the one thing that's  
8 just for you to know, currently there is no  
9 standing court by which that case could be  
10 reexamined, in terms of a restitution order based  
11 on a modification.

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

18 And so I guess post-trial there, until  
19 the convening authority's final action and the  
20 case is done, you would have the convening  
21 authority opportunity to perhaps modify a  
22 restitution order. If you all would recommend

1 that. Or rather than being completely within the  
2 purviews --

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

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

18 JUDGE JONES: Right.

19 COL GREEN: Because again, in our  
20 system, the sentencing authority makes -- imposes  
21 a sentence, but essentially that's a -- this is a  
22 loose word, but it's a recommendation to the

1 convening authority. And the convening authority  
2 can modify that sentence to reduce it down.

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

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

22 So I think that would put us in line

1 with the way the system is evolving over time.  
2 And I would trust, I would trust the military  
3 judge to look at all the facts and circumstances,  
4 as Judge Jones said, and to evaluate what would  
5 be fair in a particular case.

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

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

1 profile cases over the years.

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

9 MR. TAYLOR: My --

10 JUDGE JONES: -- or any felony?

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

13 JUDGE JONES: Okay.

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

18 JUDGE JONES: Let it --

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

20 JUDGE JONES: -- play. Yes.

21 MR. STONE: And I would tell you that,  
22 from the week-long training session that this

1 Panel sent me to last summer, there was presented  
2 at that training session, a panel of five  
3 victims. And my recollection is that two of the  
4 victims were people who had been the equivalent  
5 of special assistants to high ranking officers.  
6 And it was a high ranking officer who used his  
7 position to wind up sexually assaulting them.

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

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

1 non-military criminal cases in this country.

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

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

20 And that problem is gone when it's a  
21 mandatory restitution decision. And the victim  
22 knows they got a restitution order. They know

1 that they may wind up having to get the  
2 compensation commission to back it up and pay.

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

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

17 CHAIR HOLTZMAN: Yes. But you see,  
18 the point you made was that the compensation  
19 system is a system of last resort. And if you  
20 change that, or made the compensation system more  
21 robust, and the question wasn't what you've done  
22 about restitution, you'd have a different, you

1 might have a different outcome. So it depends on  
2 how these things are structured, and they are  
3 interdependent in some way. And I feel very  
4 strongly the victims should be compensated, very  
5 strongly.

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

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

20 I'm just -- I'm not objecting in any  
21 way, shape or form to the objective here, which  
22 is to help victims. In fact I feel very strongly

1 about that. I'm just trying to make a system  
2 that's really going to be effective and work.  
3 And just getting an order, as Barbara said, as  
4 Judge Jones said, we have billions and billions  
5 of unpaid restitutions orders. I mean, that's  
6 just creating a bureaucratic nightmare. We don't  
7 need that. We don't need that red tape. We  
8 don't need those orders sitting around. What we  
9 need is to get the money into the hands of the  
10 victims so they can pay their bills.

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

16 Avoid it having to be during the  
17 criminal case, although dependent on a guilty  
18 verdict, and a victim who's been identified by  
19 the guilty verdict, and then have the victim  
20 impact statement by the victim, who wants to see  
21 accountability by the defendant, ask for a fine,  
22 you know, or forfeiture of pay to the government,

1 because they didn't have to worry about their own  
2 restitution.

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

12 And you also have experts, that way,  
13 deciding on the compensation question, because  
14 they're people who are appointed to do that every  
15 day, they're not somebody who's plucked to be a  
16 military judge or a panel member or a convening  
17 authority who sees it so rarely that if they only  
18 see it once a year, they don't have any  
19 experience with it. You'll have people who have  
20 experience with it every day. So that's another  
21 advantage of your ultimate scenario, which I  
22 think is absolutely plausible.

1 MR. TAYLOR: But, Mr. Stone, if I  
2 could ask, are you saying that that should be in  
3 addition to restitution option, or in lieu of?

4 MR. STONE: Well --

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

15 MR. STONE: I think what I'm saying  
16 is, and I think this is along the lines of what  
17 the Chair is saying, is that it would be in place  
18 of a restitution system and that the victim, who  
19 felt that they wanted to see the defendant show  
20 responsibility, or to have his pay forfeited  
21 and/or order to be fined maybe in addition. That  
22 that would be, you know, that he would recognize

1 that forfeiture of pay and fine would run to the  
2 government, and it's the same government who's  
3 paying them their compensation.

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

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

17 And again, they're going to want to  
18 say that, I think, even if they do have military  
19 health insurance for the rest of their life, they  
20 may say, "he deserves the fine as well, because  
21 although my medical bills are going to be paid, I  
22 still have to go to a psychologist once a week

1 for the next five years because I can't sleep at  
2 night, because I keep having these terrible  
3 dreams of being sexually assaulted." So I mean,  
4 they're going to want to say that, with or  
5 without the bill, you know, for the Services, I  
6 think.

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

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

22 MR. STONE: Okay, the --

1                   VADM TRACEY:  If --

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

6                   VADM TRACEY:  Okay.

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

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

1 lower officer who didn't have anything.

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

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

19 MR. TAYLOR: Well the issue for me,  
20 with that, is that what you're doing really, it  
21 seems to me, is letting the perpetrator off the  
22 hook, in terms of personal accountability to the

1 victims. Which was one of the main reasons that  
2 I was in favor of giving the judge, I think I'm  
3 in favor, of giving the judge discretionary  
4 authority to make that call in appropriate cases.

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

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

20 MR. STONE: Well, and we have to sort  
21 of jump for a minute back to the practical side  
22 here. A lot of states operate exactly the way

1 you are saying, even if they call it mandatory  
2 restitution, because they want the judge to say  
3 it, the victim may want to hear it at sentencing.

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

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

19 MR. STONE: Sure, that's fine.

20 JUDGE JONES: In a state -- in many  
21 state, or all compensation programs, if you have  
22 a forfeiture order from a court, do they wait a

1 certain amount of time before they are willing to  
2 take your case and compensate you, is that what  
3 happens? So it could actually block you getting  
4 compensation?

5 MR. STONE: Well this --

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

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

13 JUDGE JONES: Yes.

14 MR. STONE: And they don't make you  
15 file an independent separate civil suit, because  
16 even though you have a judgment against the guy -  
17 -

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

21 MR. STONE: No, you don't.

22 JUDGE JONES: You can just go in and

1 ask for compensation --

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

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

6 MR. STONE: Sometimes states do --

7 JUDGE JONES: And if we're doing this  
8 --

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

12 JUDGE JONES: All right.

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

15 JUDGE JONES: Right. So --

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

20 JUDGE JONES: All right. So in the  
21 military, which is a closed system, we could have  
22 a military judge who must examine whether

1 compensation or restitution should be required,  
2 and then has the discretion to say, yes or no.  
3 And then that would fudge the mandatory versus  
4 discretionary a little bit. Because these judges  
5 are going to be under tremendous amount of  
6 pressure.

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

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

21 And if we were to create -- this is  
22 all so much, so many pieces of the same, you

1 know, question that have to work together. It  
2 would give some restitution to the victims  
3 directly out of the court-martial. Some would  
4 get it, some wouldn't. It would be considered,  
5 if it didn't look like it was ever going to  
6 happen, the judge could simply say, "I'm not  
7 ordering restitution, although I think you  
8 deserve it," or something along those lines.

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

16 On the other hand, I think we have to  
17 be -- as I think about it, I am a little  
18 concerned about it being totally discretionary to  
19 the poor military judge who's going to be asked  
20 in every case to make a restitution order. Maybe  
21 he just has to make a restitution decision right  
22 then and there. And there are ways to streamline

1 it to get right to the compensation board. I  
2 don't know. I'm talking --

3 MR. TAYLOR: What I would, Judge  
4 Jones, what I would expect would happen would be  
5 that the Benchbook would come up with guidelines  
6 --

7 JUDGE JONES: Right.

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

11 JUDGE JONES: Right.

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

15 JUDGE JONES: Right.

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

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

19 MR. TAYLOR: Right.

20 JUDGE JONES: Yes.

21 MR. TAYLOR: Right.

22 MR. STONE: In the states --

1 (Simultaneously speaking.)

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

6 JUDGE JONES: And we could have that  
7 here too.

8 MR. STONE: Yes.

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

11 MR. STONE: Yes --

12 JUDGE JONES: -- also reduce the  
13 paperwork.

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

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

20 JUDGE JONES: To actually --

21 VADM TRACEY: -- ultimate action by  
22 some sort of guidelines to help them decide, to

1 make those decisions. Vector the decision as to  
2 whether it is able to be paid by the accused, or  
3 it has to be paid somewhere else --

4 JUDGE JONES: Right.

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

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

22 I just had something in Maryland court

1 and the lawyer came running up to me, before the  
2 sentencing, in the courtroom and said, he  
3 whispered to me, "how much is the restitution  
4 your client, the victim is going to be standing  
5 up and asking for?" We said \$2,500. He said,  
6 "Wait a second."

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

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

21 VADM TRACEY: So they're making it a  
22 mandatory consideration, you do give the victim

1 an opportunity to come prepared, right? So that  
2 it's not a --

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

5 VADM TRACEY: Yes.

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

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

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

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

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

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

1 related to and they have to --

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

4 MR. STONE: Well --

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

7 JUDGE JONES: You --

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

11 MR. STONE: Right. Right.

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

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

16 MR. TAYLOR: Yes.

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

20 JUDGE JONES: Well we don't know, if  
21 it's a panel, what they've convicted on anyway,  
22 right? Or do we? Which ones?

1 MR. STONE: Yes, I think we know what  
2 counts the panel convicts on.

3 COL GREEN: Yes, you know what they --

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

7 COL GREEN: Sure. Absolutely.

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

9 COL GREEN: And the sentencing --

10 (Simultaneously speaking.)

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

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

17 JUDGE JONES: Sure. How about ten?

18 CHAIR HOLTZMAN: Thank you.

19 (Whereupon, the above-entitled matter  
20 went off the record at 10:35 a.m. and resumed at  
21 10:51 a.m.)

22 CHAIR HOLTZMAN: I think before we go

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

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

17 The clemency process post-trial is  
18 twofold. For one, the convening authority takes  
19 the action in the sentence imposed by the court,  
20 and then ultimately makes final action, and can  
21 reduce the sentence that's imposed by a court,  
22 and so it can modify that.

1           So, restitution that's made post-  
2 trial, obviously, an accused can bring that  
3 forward to the attention of the convening  
4 authority, and the convening authority would have  
5 the discretion to reduce the sentence imposed  
6 based on an indication of restitution.

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

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

21           CHAIR HOLTZMAN: Wait a minute. Now  
22 I'm really confused.

1 COL. GREEN: Okay.

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

6 COL. GREEN: That's correct.

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

13 CHAIR HOLTZMAN: Right.

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

18 CHAIR HOLTZMAN: Well, I thought it  
19 was mandatory. Maybe I misunderstood entirely  
20 what you said. You said it's mandatory for the  
21 Clemency Board, and for the convening authority  
22 to consider restitution.

1 COL. GREEN: Well, it's not mandatory  
2 for the convening ---

3 CHAIR HOLTZMAN: Okay.

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

9 CHAIR HOLTZMAN: No, no ----

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

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

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

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

1       that they must consider restitution.

2                   COL. GREEN:   That's correct.

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

6                   COL. GREEN:   That's correct.

7                   CHAIR HOLTZMAN:   How does it ---

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

17                   COL. GREEN:   That's correct.

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

20                   COL. GREEN:   I think, Judge, probably  
21 the hypothetical would be that a military judge  
22 would determine that a financial loss --- and,

1 again, I think in most of these cases, it would  
2 be property-type cases where there's a  
3 demonstrated financial loss.

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

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

20 MR. STONE: Been voluntarily paid.

21 CHAIR HOLTZMAN: So, in other words,  
22 the sentence --- there's no separate enforcement

1 procedure or order for restitution, but to obtain  
2 restitution it's conditioned on some action.

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

9 COL. GREEN: That's correct.

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

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

14 CHAIR HOLTZMAN: Quote, unquote,  
15 voluntary.

16 COL. GREEN: --- of the accused.

17 JUDGE JONES: Right.

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

20 VADM TRACEY: And there's no  
21 mechanism, I think, under what you said for ----  
22 about restitution to be something that is

1 sufficient that it has to get paid over time, or  
2 would have you assume -- in that instance that  
3 you suggested where it's a ---- you know, pay for  
4 recurring medical visits for some period of time  
5 that, that would need to be paid in a lump sum  
6 because there's no mechanism for anyone to make  
7 sure it gets paid ---

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

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

18 MR. STONE: And his lawyer could come  
19 up with a confession of judgment, say, and he is  
20 --- "I agree for them to attach my wages,"  
21 whatever. "I'm going to pay them X amount per  
22 year, and here's a confession of judgment, should

1 I ever not pay it, that they can just go run in  
2 and get a judgment against me."

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

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

11 MR. STONE: Who wants to do it.

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

17 COL. GREEN: Cannot, no.

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

22 COL. GREEN: There's not really a

1 bargaining process involved where the convening  
2 authority would have sort of a time and say, "I'm  
3 going to evaluate this case, and if you do this,  
4 then I will reduce it by X." I mean, it's really  
5 a one-time assessment of the case in the action,  
6 and the approval of the findings and sentence.

7 CHAIR HOLTZMAN: Okay.

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

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

20 CHAIR HOLTZMAN: But the point I was  
21 trying to bring out is that there is an  
22 opportunity, even though it's conditional on

1 reducing sentences, or it sort of works that way,  
2 that there is authority in the present system,  
3 limited as it is, for the convening authority to  
4 grant restitution.

5 MR. STONE: Well, no, to accept.

6 CHAIR HOLTZMAN: Not grant, to accept  
7 restitution.

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

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

12 MR. STONE: Yes.

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

16 I'm just --- the reason I'm raising  
17 this is because I'm trying to be practical in the  
18 sense of, if we can figure out a system that's  
19 not --- the least disruptive system of --- for  
20 getting restitution or compensation into the  
21 hands of the victim is something that I think is  
22 to be desired. But everything would require some

1 kind of tinkering, but there is some kind of  
2 restitution component in these various bodies  
3 now.

4 MR. STONE: So when you mean --

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

13 They're not designed around the issue  
14 that Mr. Taylor raised of contributing to giving  
15 the victim some satisfaction. They are around a  
16 ---

17 MR. STONE: But as long as the victim  
18 gets to speak, there could be a box put on the  
19 judgment and commitment form that says:  
20 restitution, court recommends X amount; defendant  
21 has paid, agrees to pay, or has not agreed to pay  
22 it, and you check it off as part of the current

1 system without doing too much.

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

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

21 CHAIR HOLTZMAN: So, you're ---

22 MR. STONE: --- get voluntarily taken

1 care of.

2 CHAIR HOLTZMAN: So, your suggestion,  
3 Mr. Stone, would be --- how would that work, this  
4 box? What is the sheet of paper? Who does it go  
5 to? When does it go? To whom does it go?

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

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

21 I mean, I guess he would first get a  
22 chance to say, "I do think that looks right," or

1 "I don't. I'd like to say that, you know, for  
2 some reason I want to change the number." I've  
3 never seen that happen usually when they come in  
4 with numbers on a piece of paper, but he'd have a  
5 chance to look at it.

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

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

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

1 ones that negotiated in a plea.

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

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

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

16 JUDGE JONES: I was just going to say  
17 ---

18 CHAIR HOLTZMAN: Judge Jones.

19 JUDGE JONES: Just to put a little  
20 finer point on this, I don't think we want a  
21 system where a defendant is forced to say yes or  
22 no, particularly no, and then get sentenced

1 because it will look as though --- that's the  
2 flip side of the problem.

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

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

19 JUDGE JONES: That would always go,  
20 right.

21 CHAIR HOLTZMAN: Okay, so that could  
22 go, but not the negative.

1 JUDGE JONES: I think.

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

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

18 And the details will have to be worked  
19 out and assuaged by those who can take into  
20 account all the financial implications, and it  
21 will obviously require a greater effort than this  
22 committee, I think, is able to put together

1 beyond just the broad outlines.

2 JUDGE JONES: I agree.

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

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

20 MR. TAYLOR: Right.

21 CHAIR HOLTZMAN: I mean, not at the  
22 finest details, but ---

1 MR. TAYLOR: Excuse me, yes, but how  
2 would the enforcement of that order be different  
3 from an order for a fine or forfeiture? Why  
4 wouldn't it be in the same category?

5 CHAIR HOLTZMAN: I don't know.  
6 Colonel Green?

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

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

13 COL. GREEN: Yes, sir.

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

17 COL. GREEN: Right.

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

1 what I assume would happen.

2 MR. STONE: Except that the fine ---  
3 the forfeiture is easy because you've already  
4 got the property.

5 COL. GREEN: Right, right.

6 MR. STONE: It's --- you got a hold of  
7 something and you're going to keep it, whether  
8 you're forfeiting a car, or whatever you're  
9 forfeiting, so that part --- or if it's the  
10 salary, he never gets it. You've got it, you're  
11 not letting it go. That part is easy.

12 The fine is a little --- is a tiny bit  
13 different because when it's a fine owed to the  
14 U.S. government, they probably can take it out of  
15 taxes or tax returns and stuff like that;  
16 whereas, when it's restitution to a private  
17 person you can give it priority but it's not  
18 quite the same. It's not the government's money,  
19 which a fine is.

20 But, again, those are details, and I  
21 think those details could be addressed. And I  
22 think you're right; essentially, there is

1 somebody who's got to follow and collect that  
2 forfeiture and fine, and be able to write off  
3 that it's been done so that person could just  
4 pick up another collateral duty.

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

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

19 MS. FRIED: Ms. Holtzman, if I may.  
20 Just from what I hear of the Panel discussion, we  
21 talked about mandatory -- or you all talked about  
22 mandatory and discretionary authority. We have

1 what's called the --- we have the authorized  
2 punishments under every offense, so right there  
3 you have a range of punishments that could be  
4 imposed, but not necessarily imposed.

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

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

22           MR. STONE: That gets back to my

1 statement at the beginning, it's called a  
2 disposition. It's not a punishment, it's making  
3 --- helping the person who was injured become  
4 whole. Because if it turns out you are  
5 completely without assets as a defendant, it  
6 doesn't matter what gets ordered, you're never  
7 going to pay.

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

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

22 CHAIR HOLTZMAN: It seems to me that

1 what you'd have to do ---- because restitution  
2 theoretically is not a punishment -- is that  
3 you'd have to amend that language to say  
4 authorized punishments and dispositions, then you  
5 would have this as a disposition. Am I --- does  
6 that sound right?

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

11  
12 CHAIR HOLTZMAN: Yes, because it can't  
13 be a punishment. I mean, it's not a punishment  
14 theoretically.

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

20 MS. FRIED: Right.

21 JUDGE JONES: --- restitution shall be  
22 considered in these, and you pick out what you

1 want. I mean, that's ---

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

11 JUDGE JONES: We might know what we  
12 meant.

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

19 JUDGE JONES: I think my own  
20 preference would be to talk about whether we're  
21 going to have a compensation system, freestanding  
22 compensation system, the other piece that we've

1 sort of been talking about.

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

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

17 That there should not be a  
18 circumstance in which the accused is put in the  
19 position of having to say yes or no to  
20 restitution before the sentence is adjudged, that  
21 those are separate issues. Restitution is not a  
22 punishment.

1           You know, there's some --- a handful  
2 of things I think that we articulated here that  
3 have changed to the system to enable restitution  
4 as a way to make a victim whole, needs to fit as  
5 readily into the existing system as it can be,  
6 and still be able to achieve the objectives that  
7 we've indicated.

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

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

20           I mean, I guess what Judge Jones is  
21 saying is that she wants to sort of skip the  
22 whole question about restitution for the moment -

1 --- or hold it in abeyance, go to compensation,  
2 see how that would work. Is that what you're  
3 saying?

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

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

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

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

22 VADM TRACEY: I think collectively

1 we've sort of given some answers to Issue 2. We  
2 don't believe the UCMJ should be amended to add  
3 restitution as an authorized punishment.

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

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

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

19 And that I think is a very important  
20 exercise, that if we took --- I guess --- am I  
21 wrong? Maybe there's a consensus here that the  
22 judge have --- that there be some opportunity in

1 the court-martial system for there to be a  
2 discretionary decision on restitution.

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

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

13 CHAIR HOLTZMAN: Okay.

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

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

19 VADM TRACEY: Yes.

20 CHAIR HOLTZMAN: --- had articulated.

21 VADM TRACEY: Yes.

22 CHAIR HOLTZMAN: I thought that was on

1 the ---

2 MR. STONE: And ---

3 CHAIR HOLTZMAN: ---- overarching  
4 principles listed ---

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

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

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

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

21 JUDGE JONES: ---- and see how the  
22 pieces fit, if they fit.

1           So, I think Admiral Tracey has sort of  
2 gone through the principles. I think we've had a  
3 lot of conversation where it's pretty clear the  
4 sort of directions we want to take, so I ---

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

9 Right?

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

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

20           COL. GREEN: If I could just  
21 summarize, I think the Panel reached some  
22 consensus on the modification of Article 139

1 under Issue 3 as to whether Article 139 should be  
2 amended to include claims for bodily injury. And  
3 as we noted, the four of you who were here in  
4 April said that you should recommend that Article  
5 139 not be expanded to cover bodily harm.

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

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

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

22 MR. TAYLOR: Right. I agree with

1 Judge Jones. I think that's a very good summary.

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

5 Okay. Issue 4 ---

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

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

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

20 There are provisions to allow either  
21 postponement of forfeitures or redirecting of  
22 forfeitures under the UCMJ currently, either to

1 the family members of the accused, as we  
2 discussed, or to delay the imposition of  
3 automatic forfeitures which usually occur 14 days  
4 after trial.

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

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

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

21 CHAIR HOLTZMAN: Okay. So, skipping to  
22 5, there are other gaps in compensation for

1 military members, active duty, or veterans who  
2 are victims of sexual assault. Does the Panel  
3 wish to make any recommendations regarding  
4 compensation for medical expenses, lost income,  
5 travel expenses during the judicial process," et  
6 cetera?

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

1 to be spoken to or addressed through a  
2 compensation system.

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

7 CHAIR HOLTZMAN: Okay, so you ---

8 MR. STONE: You know, I didn't think  
9 that --- and maybe I'm repeating the Chair's  
10 concern about the first question. I didn't think  
11 5, 6, and 7 were really controversial. I thought  
12 that those were what we've been discussing all  
13 along, that we've picked up some gaps, some are  
14 little, some are big. And if medical insurance  
15 which is under a lot of scrutiny by Congress  
16 generally changes even a little bit in the  
17 military, some of those gaps might close, some  
18 might get bigger, but we just wanted to be sure  
19 we covered gaps in all three of them in a  
20 compensation program beyond --- and this goes  
21 right to Question 8 in a compensation program  
22 beyond what the states and locals are doing,

1 because those vary all over the map as to all  
2 kinds of little prerequisites that people fall in  
3 a hole, haven't been a citizen of the state long  
4 enough or, you know, the period is very short and  
5 they're overseas, or whatever it was that we want  
6 the program that didn't --- that we didn't have  
7 to go --- they didn't have to know at least 50  
8 different programs. So, I kind of saw 5, 6, 7,  
9 and 8 as something we sort of --- I thought we  
10 were not finding they're controversial. Right?

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

20 COL. GREEN: And I guess the Staff's  
21 reasons for articulating these separately from  
22 the compensation system is you heard testimony,

1 for example, from the VA about how benefits  
2 continue post-service, or how a former Service  
3 member can make a claim for care under the VA.  
4 And, obviously, I think what you're talking about  
5 now is that can be dealt with potentially through  
6 a compensation system to fill that gap, or does  
7 the Panel say that that's a gap in the VA, and we  
8 recommend independently that the VA's system be  
9 corrected to provide for that particular aspect  
10 of care or need. And I use the VA only as an  
11 example, or is there something else you heard  
12 about that you think that should be corrected, or  
13 should it just be maintained as the status quo  
14 and really just be dealt with through some type  
15 of a compensation coverage that recognizes those  
16 gaps and provides that independently. So, that's  
17 really the only reason that we've articulated  
18 this separately, is to offer the Panel an  
19 opportunity to comment.

20 MR. STONE: In the non-military  
21 situation, that can happen with state workmen's  
22 comp programs, and they say, "are you getting it

1       there?" If the answer is no, they fill the gap.  
2       They don't say, "now we're going to change every  
3       state workmen's comp program." I think it would  
4       be an extraordinary burden if we were to go ahead  
5       and say we're going to change the VA program,  
6       we're going to change this, we're going to change  
7       that. I think we just say if there's a gap, and  
8       the applicant shows the gap, that they haven't  
9       been able to get compensation, then we try and  
10      fill it; because, otherwise, it would be reaching  
11      out into all kinds of areas that I think are  
12      beyond our original charge.

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

22                   Also, under future losses, that's

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

15 MR. STONE: Right, because you might  
16 say pain and suffering --- we're going to give  
17 \$5,000 pain and suffering. We're going to call it  
18 liquidated damages to every victim of a sexual  
19 assault. You could say that. I mean, I don't know  
20 if they will, but in other words you could  
21 denominate and that wouldn't necessarily cover  
22 any of the future doctor visits, that would be a

1 separate thing.

2 CHAIR HOLTZMAN: It's not the same  
3 thing.

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

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

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

17 JUDGE JONES: Right.

18 MR. STONE: --- and, typically, they  
19 are not going to agree unless they're paid up  
20 front to take the case, because they know how  
21 long it's going to take in the civil system until  
22 the case gets decided. And if they win, they're

1 going to worry they're never going to collect, so  
2 that they'll never get their contingency fee. So,  
3 they're going to ask the victim to have --- the  
4 victim's going to have to (a) find them and pay  
5 them up front.

6 JUDGE JONES: I'm just saying ---

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

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

13 MR. STONE: The ones listed here?

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

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

19 JUDGE JONES: Travel, relocation,  
20 personal property loss.

21 MR. STONE: Yes.

22 JUDGE JONES: Do they do pain and

1 suffering, which is typically a civil tort?

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

6 JUDGE JONES: Okay.

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

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

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

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

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

19 MR. STONE: Yes. Right.

20 CHAIR HOLTZMAN: Right, so I think ---

21 JUDGE JONES: So, I'm leaning towards  
22 a recommendation we not put those types of

1 damages in the restitution system, so we ---

2 CHAIR HOLTZMAN: You mean the  
3 compensation system?

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

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

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

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

19 JUDGE JONES: Right. Right.

20 MR. STONE: And they do that even for  
21 some of these others. Like I said, funeral  
22 expenses, Maryland just gives you \$5,000. That's

1 the way they do it, you know.

2 JUDGE JONES: Right. Yes.

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

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

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

17 COL. GREEN: Judge Jones, I found it.  
18 The draft report on page 29, footnote 211, one  
19 state CVC Program covers pain and suffering, and  
20 what we heard from Mr. Eddy in his written  
21 testimony was that the Tennessee program covers  
22 up to \$3,000 in pain and suffering experienced by

1 sexual assault victims. So, it's capped, and  
2 that's the only program that does.

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

5 CHAIR HOLTZMAN: Right.

6 MR. STONE: It recognizes it ---

7 JUDGE JONES: Right, but it doesn't ---  
8 it sets a count ---

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

13 JUDGE JONES: Right.

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

20 VADM TRACEY: Reserve and National  
21 Guard.

22 CHAIR HOLTZMAN: Reserve and National

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

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

8 CHAIR HOLTZMAN: Correct.

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

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

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

16 CHAIR HOLTZMAN: Right.

17 MR. STONE: It's such a tough thing to  
18 ---

19 MR. TAYLOR: I think what we can take  
20 from it is that, as you said, some unrealistic  
21 rules like the 72-hour reporting period when we  
22 know that sometimes the trauma doesn't really hit

1       until after that. And the cooperation with the  
2       local police, and what that can do to be a  
3       disincentive for people to report. So, I think we  
4       can look at those practices and say we don't want  
5       to do any of those. So, I think that's what we've  
6       learned from it.

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

19                   Do we --- going to Issue 9, do we  
20      "recommend the establishment of a DoD  
21      Compensation Board Program for sexual assault  
22      victims? If the Panel does recommend that a

1 program be established, does it wish to make any  
2 recommendations with regard to the structure,  
3 eligibility requirements, funding sources, et  
4 cetera?"

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

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

1 victims of sexual assaults, even if that's not  
2 the ultimate conviction. I don't know, does that  
3 get to where you ---

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

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

1 of some military-related event, then it would be  
2 nice to cover them so people, you know, are  
3 covered when they're hurt.

4 MR. TAYLOR: I was really thinking more  
5 like violent crime, because ---

6 JUDGE JONES: That's what I was  
7 thinking.

8 MR. TAYLOR: --- the government doesn't  
9 really do that. I mean, that's --- even though  
10 there are credit unions located on military  
11 installations, they operate through the National  
12 Credit Union Association. That's not the  
13 responsibility of the individual command or the  
14 U.S. government.

15 MR. STONE: I just think that some of  
16 those --- again, we have to craft our words  
17 carefully because some of those violent crimes  
18 intentionally get pled down to something that  
19 doesn't --- could qualify as a violent felony.  
20 That's the whole point of the plea ---

21 MR. TAYLOR: On the other hand, you had  
22 a robbery during the course of which people

1 suffered physical injury, then they should be  
2 eligible for compensation from ---

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

5 MR. TAYLOR: The devil is in the  
6 details.

7 MR. STONE: Yes.

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

21 I mean, I guess the question that's  
22 raised for me, though, is what happens when

1 there's an acquittal?

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

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

18 JUDGE JONES: Send somebody to jail.

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

22 MR. STONE: And you had that in the

1 O.J. Simpson case where the Goldman family  
2 brought a civil suit after the acquittal and got  
3 a judgment against O.J. Simpson based on wrongful  
4 death because it was a civil judgment under that  
5 standard.

6 MR. TAYLOR: Right.

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

10 MR. STONE: No.

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

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

1 -----

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

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

7 CHAIR HOLTZMAN: Right.

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

10 CHAIR HOLTZMAN: Right.

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

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

22 JUDGE JONES: You know, you make a good

1 point about the money, though. I mean, I'm under  
2 the assumption --- I don't have the numbers, and  
3 I would like those --- I'm sorry, Kyle. How many  
4 victims are already --- are military victims? And  
5 one can assume that they're going to have very  
6 few needs or requirements by way of, call it  
7 restitution, call it something from the  
8 compensation board. I mean, I would like to know  
9 if we're talking --- sort of how much money we're  
10 talking about here.

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

20 COL. GREEN: Judge Jones, the numbers  
21 we looked at from the unrestricted reports from  
22 the SAPR reports for 2012, '13, and '14, it was

1 between 15 and 18 percent ---

2 JUDGE JONES: Are civilians.

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

5 JUDGE JONES: Okay.

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

9 JUDGE JONES: Right, right.

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

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

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

22 MR. STONE: The states are all last

1 resort. The state, if there's a federal program,  
2 would say you've got to go there first.

3 JUDGE JONES: Right. Okay.

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

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

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

14 MR. STONE: Well ---

15 JUDGE JONES: It's not really that  
16 important.

17 MR. STONE: In theory, they could, if  
18 you went to --- like if you went to Workmen's  
19 Comp first, and they said we'd only give you this  
20 little bit on that injury, sorry. And they said  
21 well, no, we give a higher number, they'd give  
22 you the difference.

1           CHAIR HOLTZMAN: In some states --- I  
2 mean, this is a point that I think we need to  
3 look at additionally. I mean, Feinberg himself  
4 recommended that we consider a bunch of criteria,  
5 which we haven't really --- we don't really have  
6 that set out for us, and we should look at that.

7           COL. GREEN: You do, ma'am. They're in  
8 46 and 47 of the draft report. We've provided ---

9  
10          CHAIR HOLTZMAN: Oh, it's not in our  
11 issues.

12          COL. GREEN: No, it's not.

13          CHAIR HOLTZMAN: Okay. Well, let me  
14 just make sure --- but, you know, we need to look  
15 at that, and we need to look at whether this  
16 should be among that. Many of the states have a  
17 cap on the amount of money that can go to any  
18 person. I mean, that may be something --- I don't  
19 know that we want to make a recommendation about  
20 that. If we do, what the amount should be, or if  
21 we don't, you know, then we leave it to the  
22 Congress, we leave it to DoD. But, you know,

1 these are questions that I think have to be  
2 addressed. Whether we want to in the end address  
3 them or not, we need to look at that.

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

8 CHAIR HOLTZMAN: Right.

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

11 MR. STONE: Right.

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

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

19 MR. TAYLOR: Whether civilian,  
20 military.

21 CHAIR HOLTZMAN: Oh, yes, right. Okay.

22 MR. TAYLOR: Right. Whether the person

1 filed a restricted or unrestricted report should  
2 make no difference, and that the standard of  
3 proof for whatever action, has got to be the  
4 administrative civil standard of proof ---

5 CHAIR HOLTZMAN: Right.

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

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

15 MR. STONE: Sure.

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

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

20 CHAIR HOLTZMAN: Sorry.

21 JUDGE JONES: If you remember.

22 MR. TAYLOR: The second was, it was not

1 important whether you filed a restricted or an  
2 unrestricted report.

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

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

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

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

12 MR. TAYLOR: Right.

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

15 MR. TAYLOR: Okay.

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

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

21 JUDGE JONES: Yes.

22 CHAIR HOLTZMAN: Well, there could also

1 be a private proceeding.

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

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

7 MR. STONE: Exactly.

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

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

13 CHAIR HOLTZMAN: All right.

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

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

18 JUDGE JONES: The other two are fine.

19 CHAIR HOLTZMAN: Okay. What do we have  
20 as 10? "Does the Panel wish to make any overall  
21 assessment to the adequacy of compensation and  
22 restitution for victims in the military" --- I

1 think we've dealt with this Issue 10.

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

3 CHAIR HOLTZMAN: Okay.

4 (Simultaneous speaking)

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

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

17 COL. GREEN: Pages 46 and 47.

18 CHAIR HOLTZMAN: Okay, should we go  
19 through these?

20 COL. GREEN: He provided five overall  
21 categories of issues that he thought were  
22 essential to the establishment of any national

1 compensation program; that being funding sources,  
2 eligibility, the methodology for examining, the  
3 proof requirements, and then the due process  
4 principles of the program, and under due process  
5 he provided a number of specific questions under  
6 due process that he thought needed to be  
7 considered in the course of establishing a  
8 program. I think what Mr. Taylor just spoke to  
9 were some of the --- some of the issues spoke  
10 directly to the questions Mr. Feinberg asks, and  
11 it's a matter of whether there are others the  
12 Panel wishes to speak, or leave those to  
13 formative details.

14 CHAIR HOLTZMAN: Well, how do we want  
15 to proceed with regard to this? Do we want to go  
16 through these one by one? Maybe we should try to  
17 do that. What do you think? I mean, I guess we  
18 started to address the issue of how much will the  
19 program cost? And we can kind of get a better  
20 answer if we get clearer figures of who would be  
21 covered under this. And then we can --- I guess,  
22 if we're going to have a cap, we could figure

1 what a maximum cost might be. So, for example, if  
2 we had a \$25,000 cap which may be --- somebody  
3 might know, how many states have caps on the  
4 total amount? Most of them.

5 MR. STONE: Yes, virtually all.

6 CHAIR HOLTZMAN: Okay. So, let's just  
7 say there's a \$20,000, maybe we would go to  
8 \$50,000. I don't know, but just say \$25,000, so  
9 we could get a rough idea, if you took \$25,000  
10 times the number --- assuming they would get the  
11 maximum ---

12 MR. STONE: But do we really want to  
13 make the funding tail wag the dog of what's  
14 appropriate? I mean, it seems to me that if  
15 there's a lot of claims, or a little claim --- a  
16 few claims --- we should maybe look at the  
17 various states' averages and say they've had more  
18 experience, and let's stick within them. I mean,  
19 we're replacing them because of their complexity,  
20 not because we think they're really wrong or bad.  
21 I hate to worry about how many. I, frankly, think  
22 there's going to be very few, but I'd still like

1 the numbers to sort of reflect the consensus of  
2 what the 50 states are doing, rather than: how  
3 much do you think we can get into the fund right  
4 now? I want to leave that to somebody else. In  
5 other words, I'd rather us just say initially put  
6 this amount in, and if you have to defer claims  
7 -- the payment of some claims to the next funding  
8 year initially, let's do it. But let's give  
9 people approximately what the consensus of the  
10 whole country is.

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

22 And we have gone through some of

1 these. I think we agree on the burden of proof.  
2 It should be the civil standard. And, Madam  
3 Chair, I guess on page 47 we have all these  
4 bullets.

5 CHAIR HOLTZMAN: Right.

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

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

17 I think the more we do their own work  
18 for them, the better it is. I mean, I've seen  
19 that in just being in Congress. If you have a  
20 bill ready and nobody else has got --- has given  
21 any thought to it, and they like the idea,  
22 chances are they're just going to take that. So,

1 I do think that we should do as much as we can  
2 that's reasonable in terms of answering these  
3 questions. And I think, also, it would be helpful  
4 to have ----to be able to say that these are the  
5 issues that Mr. Feinberg raised, and we've ---  
6 you know, in terms of how funds are operated,  
7 and this is what we've done, and also give some  
8 comparison with some of the state systems, so  
9 that it looks like we've done our own homework  
10 here, as opposed to just dumping it on them.  
11 That's my own preference.

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

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

1 point.

2 JUDGE JONES: Well, an easy one is: may  
3 or must the claimant be represented by counsel?  
4 Certainly, "must" doesn't work; no claimant  
5 should have to be represented by counsel.

6 CHAIR HOLTZMAN: Right.

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

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

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

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

21 CHAIR HOLTZMAN: What are you reading?

22 JUDGE JONES: I'm sorry, you know what,

1 I skipped right to one, two, three, four, five,  
2 bullet five, because I think that one is easy.

3 CHAIR HOLTZMAN: Oh, represented by  
4 counsel.

5 JUDGE JONES: Right.

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

9 JUDGE JONES: Who would be doing it for  
10 nothing.

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

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

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

1 problem with it. But if this is going to  
2 undermine their ability to handle those cases ---

3  
4 COL. GREEN: And I think what we heard  
5 was that --- I mean, fundamentally, the Special  
6 Victims' Counsel Programs are organized under 10  
7 U.S.C. 1044, the legal assistance provision. And  
8 one of the intents of the program is to assist  
9 victims with Legal Assistance needs, so landlord-  
10 tenant issues, financial issues, those types of  
11 things. That's within the purview of the Special  
12 Victims' Counsel programs now, and so --- and we  
13 did hear some testimony ---

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

17 COL. GREEN: Yes, as needed. I mean,  
18 they're able to assist their clients with those  
19 issues. And you've heard testimony that they  
20 routinely do. And I think you heard testimony  
21 from Special Victims' Counsel that they do have a  
22 working knowledge of these things. I mean, I

1 think you, sir, when you went to the training,  
2 this was a point of coverage of the training  
3 course?

4 MR. STONE: Yes.

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

9 MR. TAYLOR: Legal Assistance.

10 JUDGE JONES: Legal Assistance Office.

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

12 COL. GREEN: But in the Army ---

13 JUDGE JONES: Yes.

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

16 JUDGE JONES: But they still can do  
17 this.

18 COL. GREEN: Yes.

19 JUDGE JONES: Right.

20 MR. STONE: And, typically, if ---  
21 especially if it's been an unrestricted case,  
22 the Special Victims' Counsel already has the

1 report and has already examined all the issues.  
2 He can help that person who --- it's like tax  
3 forms. They'll tell you it'll take me a week to  
4 fill out the application, and he does it in 20  
5 minutes because he is used to the application,  
6 and he knows their situation. So, I think,  
7 typically, it doesn't eat up a lot of additional  
8 time. We help people with compensation claims to  
9 be filed in the Maryland Criminal Injuries  
10 Compensation Board all the time because we can  
11 help them get through the thing in an hour.

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

15 JUDGE JONES: Yes.

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

18 VADM TRACEY: At minimum, I would want  
19 the Special Victims' Counsel to help the victim  
20 navigate the Legal Assistance system if that's  
21 the right way to do this. None of these are  
22 transparent systems to a seaman, so not having to

1 have to get a whole new lawyer, start all over  
2 again, and figure out how to navigate that  
3 system, so some nexus between the Special  
4 Victims' Counsel role and getting the counsel  
5 that you need for this claims process ought to be  
6 allowed.

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

9 VADM TRACEY: Correct.

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

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

18 VADM TRACEY: Is an avenue ---

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

22 MR. STONE: And assist, if possible,

1 something like that.

2 CHAIR HOLTZMAN: Yes, right.

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

7 CHAIR HOLTZMAN: Right.

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

11 CHAIR HOLTZMAN: Okay, so they ---

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

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

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

1 MR. STONE: Yes, they could make an  
2 audio tape.

3 CHAIR HOLTZMAN: Is it necessary?

4 JUDGE JONES: Well, I mean, there's  
5 going to be cases where you may want to have a  
6 hearing. I try to decide these as often as  
7 possible without a hearing. I mean, and nobody is  
8 going to ask for one, if you give them the \$1,800  
9 based on the packet they've given you, and you --  
10 -

11 CHAIR HOLTZMAN: Right.

12 JUDGE JONES: I mean, I think that's a  
13 detail. I would say I think the fewer hearings  
14 the better, and --- but, you know, that would be  
15 something where it would be nice to know what was  
16 really going on with compensation, other  
17 compensation programs. The idea of starting to  
18 transcribe these and everything else, I mean  
19 again, it's all about volume. If these are pretty  
20 cut and dry, I think you won't need hearings  
21 because they're going to be approved, and  
22 there'll be a check. Then there'll be a smaller

1 population where you may need a hearing -- could  
2 be one officer who sits and listens and gets an  
3 explanation. I just vary it so that the most  
4 complicated situation would occur almost never.

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

18 JUDGE JONES: After you made your  
19 decision.

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

21 JUDGE JONES: So, you mean after you  
22 made the decision.

1 MR. STONE: But what a lot of these  
2 decisions do ---

3 JUDGE JONES: Or before?

4 MR. TAYLOR: Before.

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

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

22 MR. STONE: Oh, well, what happens is

1 there's an appeal. It's not that they're sued.

2 JUDGE JONES: Right.

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

19 MR. TAYLOR: I would just add that  
20 based on my own experience, it works pretty much  
21 the way Mr. Stone said. Before each of these  
22 cases were brought to the Board, an examiner

1 reviewed the files, we circulated them all before  
2 the Board hearing, and sometimes in cases where  
3 the hearing examiner recommended let's say to  
4 deny the request for a hearing, or to deny the  
5 relief granted, the Board would say no, we really  
6 need to have it. And then on an exceptional  
7 basis, there would be a hearing. And then once  
8 the Board made the decision, the appeal in the  
9 Army at that time was to the Assistant Secretary  
10 for Manpower and Reserve Affairs. You know, a  
11 senior-level political appointee who could make  
12 the final call on behalf of the Department. So, I  
13 could envision something like that working.

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

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

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

22 CHAIR HOLTZMAN: Yes, I think would be

1 very helpful.

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

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

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

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

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

15 MR. STONE: Yes.

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

21 MR. TAYLOR: And I would say, also, to  
22 your point that the more it mirrors something

1 that Members of Congress have bought into and  
2 understand ---

3 CHAIR HOLTZMAN: Right.

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

6 CHAIR HOLTZMAN: Correct.

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

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

1 may try to say that.

2 MR. STONE: Oh, yes. They will say  
3 that, for sure.

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

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

22 JUDGE JONES: If you were in Nevada,

1 you would not want to have to go to the military  
2 system first. Right? Or be told that once you  
3 went there, you weren't going to get any more.  
4 So, that's my only point. Thank you for that  
5 example.

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

9 JUDGE JONES: Right.

10 CHAIR HOLTZMAN: Let's say you got  
11 \$10,000 from the military; there's nothing to  
12 stop you from going to your state system and  
13 seeing if you could get the extra \$15 or \$35.

14 JUDGE JONES: Right.

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

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

21 VADM TRACEY: It may depend on the  
22 state.

1 JUDGE JONES: Yes.

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

4 CHAIR HOLTZMAN: Exactly.

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

7 JUDGE JONES: Right.

8 CHAIR HOLTZMAN: Right. And it  
9 couldn't.

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

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

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

22 CHAIR HOLTZMAN: They may.

1 MR. STONE: --- before you come back to  
2 us.

3 CHAIR HOLTZMAN: They may, but they may  
4 not.

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

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

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

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

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

16 CHAIR HOLTZMAN: Yes. I think so.

17 MR. STONE: Yes.

18 JUDGE JONES: Yes.

19 CHAIR HOLTZMAN: Right.

20 MR. STONE: It doesn't have anything to  
21 do with the court-martial because a restricted  
22 claim could go to it.

1 MS. FRIED: I'm thinking ---

2 JUDGE JONES: Because this is not ---

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

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

17 MR. TAYLOR: I agree.

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

21 JUDGE JONES: Oh, yes. Of course.

22 MR. STONE: Most of the systems say

1 that you have to declare what restitution you've  
2 gotten to date, and then it says, and if any  
3 further restitution for any of these items is  
4 forthcoming, you're obligated to notify us  
5 because they now --- it becomes theirs. It goes  
6 back to the fund, because they're paying you ---

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

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

10 JUDGE JONES: No, no.

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

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

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

21 CHAIR HOLTZMAN: Yes.

22 MR. TAYLOR: --- and follow the normal

1 procedure to sue the sovereign.

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

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

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

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

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

17 CHAIR HOLTZMAN: Right.

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

22 CHAIR HOLTZMAN: Right.

1 MR. TAYLOR: Yes. I'm not even sure  
2 that would be an appropriate thing to do.

3 JUDGE JONES: Right. Right.

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

9 JUDGE JONES: Right.

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

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

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

19 JUDGE JONES: You're going to ---

20 (Simultaneous speaking)

21 CHAIR HOLTZMAN: Yes, let's take a look  
22 at 46 and see how far we can get on some of these

1 issues. "Funding: how much will the program  
2 cost?" We talked about kind of doing --- getting  
3 some idea from various states about what the  
4 state systems cost, and maybe doing some minor  
5 arithmetic on, you know, on taking the numbers of  
6 dependents, I mean, of civilians and giving ---  
7 multiplying that by, I don't know, either  
8 \$25,000 or \$50,000 to get maximum amount.

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

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

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

19 MR. STONE: Yes.

20 CHAIR HOLTZMAN: So, there's some money

21 ---

22 MR. STONE: Office of Victims of Crime,

1 and ---

2 CHAIR HOLTZMAN: Right. They also use  
3 some from their fines. I mean, that's a question  
4 we might want to say here, but then we get into  
5 the fine issue, aren't the fines used for that --  
6 -

7 VADM TRACEY: Yes, forfeitures.

8 (Simultaneous speaking)

9 MR. STONE: Start to invade their other

10 ----

11 CHAIR HOLTZMAN: Yes, so I would just

12 ---

13 MR. STONE: --- decisions.

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

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

22 COL. GREEN: Right. I think what you

1 heard from the state programs was that the  
2 majority of funding for state programs comes from  
3 state criminal court fees and fines, and the  
4 remainder comes from federal sources, such as  
5 Crime Victims Funds, and through VOCA. Obviously,  
6 the issue with the military system is without any  
7 system of court fees or fines.

8 CHAIR HOLTZMAN: Right.

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

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

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

17 CHAIR HOLTZMAN: Okay, so if we took  
18 away --- if we used fines and forfeitures, took  
19 it away from the Army Home or whatever it's  
20 called, Retirement Home, I mean, there would be a  
21 lot of people screaming. I would recommend that  
22 we just not deal with that issue. We could point

1 out in a footnote that states have used these  
2 funds to fund their programs, but that those  
3 funds, fines and forfeitures, are already  
4 allocated to this nursing, you now, this  
5 retirement facility.

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

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

1       gigantic fraud settlements, so it's not a good  
2       parallel.

3               MR. TAYLOR: Well, even though ---

4               MR. STONE: From the run of the mill,  
5       \$2,000 here and \$3 here.

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

22              VADM TRACEY: No, I agree with you.

1 MR. TAYLOR: I mean, I think there are  
2 funds out there to deal with this kind of  
3 problem. I don't think we're going to be talking  
4 about a humongous amount of money when you're  
5 talking about the Defense Department's budget.  
6 So, I'm not trying to wish the problem away, but  
7 I'm just saying that I've seen other unusual  
8 circumstances where these contingency funds could  
9 be used.

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

15 MR. STONE: Unrestricted?

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

19 MR. STONE: I guess I wouldn't  
20 necessarily exclude them, because they might say,  
21 "I didn't file those because a lot of time  
22 passed," but then you'd still require proof. And,

1 typically, it's going to be you've got to give us  
2 some proof, and usually that means a doctor or a  
3 hospital who saw you and said yes, look at these  
4 injuries, you know, saw you close to the time  
5 enough to document that there was an injury.

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

9 MS. FRIED: Once they make the report.

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

11 ---

12 COL. GREEN: 2005.

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

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

22 MR. TAYLOR: I think that's a really

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

15 MR. STONE: Well, we had a woman here  
16 testify in front of us at the last hearing who  
17 said that it occurred --- well, it was more than  
18 20 years ago, maybe 30 years ago.

19 COL. GREEN: 1970s.

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

22 MR. TAYLOR: Yes.

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

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

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

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

16 MR. STONE: I wouldn't require it, but  
17 it would obviously be easier for them to meet  
18 their burden of proof of corroboration that it  
19 occurred, if they filed one or the other report.  
20 It would just be much harder for them. They might  
21 say, "I was out --- you know, I was on the front  
22 lines or wherever it was in some hotspot, and I

1 just didn't file a report, and then said the heck  
2 with it." I mean, they're going to have a tougher  
3 time corroborating their request.

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

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

17 JUDGE JONES: Ten years, or ---

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

21 COL. GREEN: Well, and actually ---

22 CHAIR HOLTZMAN: --- of the incident.

1 And there may also be a statute of limitations.

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

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

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

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

18 COL. GREEN: That's correct. The police  
19 report requirement and what the presentation of a  
20 legitimate claim, what the requirements are, they  
21 indicated that they are very liberal with that  
22 requirement in trying to provide compensation.

1           CHAIR HOLTZMAN: But there are still  
2 some states that do require that. I mean, you  
3 should give us some of that information. I mean,  
4 I guess --- I mean, I am very open to the idea.  
5 First of all, states have had these compensation  
6 systems in effect for a long time, so a lot of  
7 people may know about them, but the military  
8 hasn't had that. So, we're starting a brand new  
9 system, and it's not as though people have had  
10 the opportunity to make these claims before, they  
11 haven't, particularly not people from Korea,  
12 Vietnam, or whatever.

13           JUDGE JONES: Right, right, right.

14           CHAIR HOLTZMAN: Unless --- I am  
15 concerned, though, about --- well, I don't know.  
16 I guess if it's not going to open floodgates it's  
17 okay, we could just try it. But I do --- for more  
18 recent times when the military has been --- oh,  
19 yes, and the other reason people might not report  
20 is because they just said, what's the point? And  
21 we know that. But more recently, I think, we are  
22 getting reporting, so maybe there --- maybe it

1 would be justified to put some requirement, at  
2 least a restrictive report, but I ---

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

7 CHAIR HOLTZMAN: Right.

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

12 CHAIR HOLTZMAN: Right.

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

15 CHAIR HOLTZMAN: I agree.

16 COL. GREEN: One of the other issues  
17 that I would recommend needs consideration is the  
18 --- when I --- you can file an unrestricted or a  
19 restricted report for a pre-Service incident, or  
20 for an incident that occurred to me elsewhere.  
21 So, if I'm a military member and I was assaulted  
22 downtown by a civilian, I can file a report. If

1 I'm a person just coming into the Service and I  
2 was assaulted in high school prior to coming into  
3 the Service, I can file a report. So, I guess the  
4 question is ---

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

7 COL. GREEN: That's a different ---  
8 exactly.

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

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

16 JUDGE JONES: Yes, okay.

17 MR. STONE: And I would think ---

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

1 then file a report?

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

4 JUDGE JONES: Yes.

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

9 JUDGE JONES: I see.

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

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

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

19 JUDGE JONES: Yes.

20 MR. STONE: Is what we're saying.

21 JUDGE JONES: Correct.

22 MR. STONE: And I ---

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

6 JUDGE JONES: Right.

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

8 JUDGE JONES: Oh, absolutely.

9 MR. STONE: Yes.

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

12 JUDGE JONES: That's --- yes.

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

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

18 MR. TAYLOR: Yes.

19 MR. STONE: --- to be sure we cover  
20 what we need to cover. And on some of those other  
21 questions, I wouldn't be surprised if Mr. Eddy  
22 doesn't either have a model, or a common example

1 that he uses for states when they talk about  
2 changing their current legislative model, and  
3 maybe the Staff can request if he has such a  
4 thing, that he'll send it in for us to use. And  
5 it'll go into the record, and that'll give us  
6 what he considers to be their current best  
7 practices for these questions. It may not be  
8 exactly applicable to the military, but at least  
9 we'll know the best practices that he sees from  
10 that whole association.

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

1 good look at what the states do on statutes of  
2 limitations.

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

7 CHAIR HOLTZMAN: Yes, and I think that  
8 that's a --- sure that could be done, but then  
9 I'm thinking about the fact that even though you  
10 had the opportunity to file the restricted  
11 report, even the most recent statistics show that  
12 only one in four reports, so we really have a  
13 huge number of unreported cases even now, even  
14 after all the publicity, and after all the  
15 Special Victims' Programs, and after all the  
16 military has tried to do, we still are not  
17 getting full reporting. And if those people have  
18 suffered some damage, of course, there's going to  
19 be an issue about how they ever prove that.  
20 Should they be precluded if it's within, you  
21 know, like the last 10 years, or should they be  
22 precluded at all? I mean, so I'm torn a little

1 bit about that, because I just don't know what  
2 the numbers are going to be. And I think Judge  
3 Jones raises a really important question about  
4 raising people's expectations because the  
5 likelihood they're going to be able to prove the  
6 stuff even more than five years ago is going to  
7 be very limited. But maybe we'll feel a little  
8 more on solid ground if we get some better sense  
9 of what the states are doing in this area.

10 JUDGE JONES: I agree.

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

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

22 MR. STONE: Military guy that gets you

1 drunk and his buddy who has no connection to  
2 military commits the sexual assault. You know,  
3 something like that.

4 JUDGE JONES: Another example.

5 MR. STONE: Yes. And I think some of  
6 those will have to see what the state ---

7 CHAIR HOLTZMAN: Or you're fleeing ---

8 MR. STONE: --- standards are.

9 CHAIR HOLTZMAN: You're fleeing the  
10 scene and you get into a car accident.

11 MR. STONE: That's not quite --- for  
12 sexual assault that's not really going to be ---

13 JUDGE JONES: Well, that's what we're  
14 talking about ---

15 CHAIR HOLTZMAN: Yes, that's what we're  
16 talking about. Should we let that ---

17 JUDGE JONES: Yes. I could think of a  
18 million scenarios.

19 CHAIR HOLTZMAN: Yes. I think that  
20 that's just too fact-specific.

21 JUDGE JONES: Yes.

22 CHAIR HOLTZMAN: "Methodology: how is

1 the amount of compensation calculated for each  
2 victim? Does the methodology allow for varying  
3 amounts based on tort concepts, such as pain and  
4 suffering, and emotional distress? Is it a  
5 simpler methodology allowing flat amounts for  
6 certain defined eligible injuries regardless of  
7 the extent of lost wages, pain and suffering? The  
8 chosen method must be transparent, should not  
9 take into account supplemental compensation that  
10 the victims may or may not receive from other  
11 sources." It should not take into account  
12 supplemental compensation? These are all --- I  
13 mean, I think this is a question, as opposed to a  
14 statement.

15 So, rather than starting with the  
16 first question, does the methodology of having  
17 varying amounts based on tort concepts, such as  
18 pain and suffering, and emotional distress? Are  
19 we suggesting that people be compensated for pain  
20 and suffering?

21 MR. STONE: I think there should be a  
22 flat amount, if it's \$3,000 or whatever. I think

1 it's appropriate to recognize it.

2 CHAIR HOLTZMAN: Any other reaction to  
3 this?

4 JUDGE JONES: If we decided to include  
5 it, I would definitely do a flat amount, as Mr.  
6 Stone suggests. And it wouldn't waive your  
7 ability to go to court, which is where normally  
8 this kind of claim would be raised.

9 MR. STONE: But there would certainly  
10 be a setoff if they went to court.

11 JUDGE JONES: Oh, sure.

12 MR. STONE: Say, well, they got \$3,000,  
13 so they only get anything above that, which will  
14 also discourage some of those claims. But I think  
15 that we want to acknowledge the pain and  
16 suffering of someone who's been sexually  
17 assaulted.

18 JUDGE JONES: Well, you're going to let  
19 us know how many compensation systems ---

20 COL. GREEN: Right. And, ma'am, this  
21 question goes back to --- the example Mr.  
22 Feinberg used was the Boston --- the One Fund

1 Boston protocol where they established clear  
2 rules in terms of what was covered, what was not  
3 recovered, different categories of injuries, and  
4 basically rather than requiring individual  
5 demonstration of damage, or financial loss  
6 associated with that injury, if it was --- I  
7 mean, not to get too graphic, but if it was a  
8 one-limb amputation, then it was eligible for  
9 this amount of compensation.

10 JUDGE JONES: Right.

11 COL. GREEN: And that's what he was  
12 talking about in the course of the different  
13 methodologies. So, I don't know that the --- I  
14 believe the state programs, correct me if I'm  
15 wrong, go more of a demonstrated expense, and  
16 they want to see that rather than a framework --

17 JUDGE JONES: I think most of this  
18 compensation will come from the bills they bring  
19 in ---

20 MR. STONE: Correct.

21 JUDGE JONES: --- for what was not  
22 covered by their insurance. And it'll be sort of

1 the kind of thing that you can count, you can see  
2 it, it'll be numbers. And then the only question  
3 is: do we want to have a category where we give a  
4 flat amount for pain and suffering? I have to  
5 think about that; I don't know.

6 COL. GREEN: Maybe ---

7 JUDGE JONES: I don't disagree with  
8 you, that you certainly want victims to --- have  
9 to be acknowledged for a victim's sake.

10 COL. GREEN: I think we have some  
11 testimony that we can gather about --- obviously,  
12 we have in terms of only one jurisdiction does  
13 that, and we can either get some information from  
14 Mr. Eddy, or pull up what we have in terms of why  
15 states have not done that, or why Tennessee  
16 changed it.

17 MR. STONE: And, remember, we're  
18 operating in a closed system where there's at  
19 least a feeling that the military has trained  
20 everybody there, so they have a little bit more  
21 responsibility, you know, to see that it doesn't  
22 happen. I can't leave and quit because I don't

1 like that the comments are getting nastier and  
2 nastier, and I'm going to go take another job.  
3 I'm sort of stuck there for my enlistment period,  
4 so there's a little more responsibility from the  
5 military custodian than you do in most other  
6 situations.

7 COL. GREEN: Okay. Doug pointed out,  
8 Mr. Eddy in his written statement to you from the  
9 June meeting talked about the history of pain and  
10 suffering and how states have dealt with that.  
11 Rhode Island initially offered a \$25,000 payment  
12 for pain and suffering, and after a couple of  
13 decades of operation found itself bankrupt with  
14 claims waiting up to 12 years for payment. The  
15 Rhode Island legislature ended the benefit,  
16 reverting to an out-of-pocket model, and the same  
17 thing happened in Delaware. And Hawaii has a  
18 recognition award that --- of up to \$800 that it  
19 can make in some cases. So, those are the other  
20 examples ---

21 CHAIR HOLTZMAN: What's the recognition  
22 award?

1 COL. GREEN: It doesn't really  
2 describe. You ---

3 MR. TAYLOR: I think it means for some  
4 pain and suffering, recognition that you've ---

5 COL. GREEN: But only --- those are the  
6 examples where, why states have not, and then  
7 only Tennessee offers the \$3,000 cap.

8 JUDGE JONES: Which is like just a  
9 recognition --- a flat-fee recognition award.

10 MR. TAYLOR: Well, the document you  
11 gave us said it offers up to \$3,000, and suggests  
12 that there is some sort of a judgment that goes  
13 into it, which I think would be very difficult in  
14 sexual assault cases to determine the degree of  
15 sexual assault, you put a monetary value on it.  
16 So, I think for that reason if we're going to do  
17 it, there should be a set fee, whatever it is.

18 JUDGE JONES: Yes. No, I don't  
19 disagree. Trying to say you had more pain and  
20 suffering than you did would be very difficult.  
21 But, again, I'm not sure we should do it at all.

22 MR. TAYLOR: Right.

1                   CHAIR HOLTZMAN: Because if you have  
2                   that and you have no other bills, assume that  
3                   case, how many applications are there going to be  
4                   for the \$3,000 fee? So, I don't know. Anyway, I'm  
5                   going to take a closer look at that, because I  
6                   think that that's going to be an important point  
7                   and we'll be questioned on it, particularly since  
8                   very few states do that.

9                   On the other hand, we have the  
10                  opportunity to do something since we're starting  
11                  from scratch, doing something that, you know ---  
12                  is really much more thought through.

13                  Okay. "Proof requirements: what  
14                  documentation" -- I don't think we need to go  
15                  into that. I think we've already set the standard  
16                  of proof. Right?

17                  MR. TAYLOR: Yes.

18                  CHAIR HOLTZMAN: Okay. So, I think we  
19                  still haven't solved this issue, but we're  
20                  getting closer.

21                  MR. TAYLOR: Madam Chair, if I may, I  
22                  would just like to compliment the author of this

1 report, which I thought was exceptionally well  
2 done, well documented, well footnoted. Thank you  
3 very much.

4 COL. GREEN: Doug is a good asset ---

5 CHAIR HOLTZMAN: Yes, great. Thanks.  
6 Should we break for lunch?

7 COL. GREEN: Yes, ma'am.

8 CHAIR HOLTZMAN: That was good.

9 (Whereupon, the above-entitled matter  
10 went off the record at 12:38 p.m. and resumed at  
11 1:23 p.m.)

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1 they brought it to our session a few months ago,  
2 and I thought this was quite useful to sort of  
3 get your head around what is the spectrum of  
4 issues that can occur here. And I thought this  
5 entire piece might -- it might be beneficial to  
6 bring that entire piece into a more formal  
7 construct that the Department would use.

8 COL GREEN: In addition to the three  
9 terms that we ask about in the issue, but also  
10 the other terms as well?

11 VADM TRACEY: I thought so, yeah.

12 JUDGE JONES: And because everything  
13 here is a form of retaliation.

14 VADM TRACEY: And even more than just  
15 the definitions, which are helpful, just sort of  
16 the whole message communicated by this continuum  
17 and the thought process that it reflects I  
18 thought was useful.

19 CHAIR HOLTZMAN: I guess my only  
20 concern -- I think it's a good idea, but the  
21 criminal retribution, isn't it that some of the -  
22 - it's just maybe the terminology, but couldn't

1 some of the other items be considered criminal,  
2 such as promotion interference? So, maybe we can  
3 clarify that last bar, or at least the  
4 terminology.

5 JUDGE JONES: Well, do we think that's  
6 right, or are these just civil violations, under  
7 reprisal? I don't know. Maybe the -- I don't  
8 know the answer to that.

9 MS. TOKASH: Well, some of them, like  
10 maltreatment, is actually a violation under the  
11 Code, the UCMJ. So that could be a criminal  
12 violation, too.

13 JUDGE JONES: But under professional  
14 retaliation. I'm just curious, are any of these  
15 -- would some of them also come under the  
16 criminal code?

17 MS. FRIED: If there is a separate  
18 quid pro quo, under maltreatment, if you --

19 JUDGE JONES: I'm sorry. I can't hear  
20 you.

21 MS. FRIED: If there is a separate  
22 quid pro quo it would be punishable under Article

1 93. But it has to be done by someone in position  
2 of a superior --

3 JUDGE JONES: Right. Right.

4 CHAIR HOLTZMAN: But if a negative  
5 performance evaluation is given in retaliation  
6 for someone reporting something, is that  
7 criminal?

8 MS. CARSON: It's an employment  
9 matter. I mean, I think you have Article 92 that  
10 is now claimed to be usable, but nobody has  
11 provided us even a case where that's actually  
12 happened.

13 MS. FRIED: The purpose of Article 92,  
14 in order for it to be punishable, it has to be  
15 done with the intent to deter reporting or  
16 obstruct justice. So, if your intent to give  
17 this negative report is to chill someone from  
18 coming forward, that could be potentially  
19 prosecuted under Article 92.

20 MS. CARSON: As obstruction.

21 MS. FRIED: As retaliation.

22 MS. CARSON: Or retaliation.

1 MS. FRIED: Correct.

2 MS. CARSON: As the Services have  
3 defined it. That's specifically defined by the  
4 Services, the intent requirement. Their concern  
5 was it wouldn't survive constitutional scrutiny  
6 if it didn't have intent in the social  
7 retaliation.

8 MR. STONE: I wonder if we could close  
9 the door halfway?

10 CHAIR HOLTZMAN: Sure, yeah, alright.  
11 Thank you.

12 MR. TAYLOR: Just to comment on the  
13 original question that you asked, it seems to me  
14 that in comparing the regulations that we had on  
15 a previous handout -- or maybe we've got it on  
16 this one, too, the regulatory provisions among  
17 the three Services -- it looked to me as if the  
18 Army had formulated its definitions differently  
19 from the Air Force and Navy, which were more or  
20 less the same.

21 And what I was hoping to find out from  
22 the Staff is whether there was any reason they --

1 or rationale they got from the Army about why  
2 they chose to use a different formulation.

3 MS. CARSON: What we got from the  
4 report that DoD made to Congress, that they were  
5 required to make -- to tell Congress what their  
6 position was on whether or not there should be a  
7 punitive article for retaliation, and they made  
8 the point in that report that the Air Force, and  
9 I think then the Navy followed, with this intent  
10 requirement, that the Army has not spoken to it  
11 at all.

12 So, what the NDAA has required is that  
13 the Department of Defense, the SecDef, define  
14 these terms. SecDef has not done it, so the  
15 Services have done it in the absence and it's  
16 different. And we don't know -- that's a  
17 question we haven't asked the Army.

18 MR. STONE: It makes it a little bit  
19 difficult not to have uniformity, it seems to me.

20 MR. TAYLOR: That was my point. I  
21 mean, unless there is a really good reason to  
22 have a different definition for something like

1 this, which they intend to be punitive -- make no  
2 mistake about that, so that you can actually take  
3 criminal action against someone -- then it seems  
4 to me that at a minimum, within the Department,  
5 there ought to be uniformity as to the  
6 definition.

7 CHAIR HOLTZMAN: Where are the  
8 different definitions? Where do we find them?

9 MS. CARSON: They are in that  
10 regulation chart.

11 CHAIR HOLTZMAN: Where is the chart?

12 MR. STONE: What tab is that one?

13 MR. TAYLOR: Well, I brought this from  
14 a previous session.

15 MS. CARSON: I thought it was in the  
16 materials.

17 MR. STONE: Was it distributed in --

18 MS. CARSON: The materials have the  
19 RFI -- a chart that has got the RFIs broken down,  
20 but they are slightly different than the  
21 regulation chart we sent out earlier.

22 MR. TAYLOR: This was March 27. I

1 brought this one from March 27th.

2 JUDGE JONES: Well, I mean, I think  
3 your point is completely right, and the very next  
4 issue is about data collecting. So, if we are  
5 going to try to collect data in this area, like  
6 we do everywhere else, or try -- this was a huge  
7 issue with the RSP, too. Everybody should have  
8 the same definitions. I don't know what the  
9 difference is between the definitions, but I'm  
10 for the same definition among the four Services.

11 MR. STONE: Well, and taking that to  
12 the next step, if we are going to be comparing it  
13 against non-military data, we've got to look at  
14 their definitions, because it's crazy to compare  
15 data that describes something one way against  
16 something that is not covered in the other data  
17 that we are getting from whatever, the Sentencing  
18 Commission.

19 MS. CARSON: But it's not criminal.  
20 In the civilian world, it's a civil employment  
21 issue, retaliation.

22 MR. STONE: Well, whatever it is, we

1 want to look at their definitions and try and at  
2 least be able to say, "Compared to that data we  
3 have this data." Otherwise, we are going to have  
4 different categories and people are going to say,  
5 "We don't understand what you're telling us," and  
6 they are going to be right.

7 MS. FRIED: So, the Air Force, if it  
8 helps, has a policy that is punishable under  
9 Article 92-134, and defines retaliation as,  
10 "taking or threatening to take an adverse  
11 personnel action, or withholding or threatening  
12 to withhold a favorable personnel action with  
13 respect to a military members, because the  
14 members reported a criminal offense."

15 It then defines ostracism as, "a form  
16 of retaliation with the intent to exclude or not  
17 have social..." -- well, let me read it. Is,  
18 "the exclusion from social acceptance, privilege  
19 or friendship, with the intent to discourage  
20 reporting of a criminal offense or otherwise  
21 discourage the administration of justice."

22 Maltreatment, "is treatment by peers

1 or by other persons that, when viewed objectively  
2 under all of the circumstances, is abusive or  
3 otherwise unnecessary for any local purpose, that  
4 is done with the intent to discourage reporting  
5 of a criminal offense."

6 This is different than the Article 93  
7 one, because this doesn't require superior-  
8 subordinate relationship. Again, "with the  
9 intent to interfere with the administration of  
10 justice and result in physical or mental harm or  
11 suffering or reasonable -- or reasonably could  
12 cause such."

13 Personnel action, "any action taken on  
14 a military member that affects or has potential  
15 to affect the member's current position or  
16 career. Such actions include promotion,  
17 disciplinary or otherwise, a transfer or  
18 reassignment, a performance evaluation, a  
19 decision on paid benefits, award to training, and  
20 any other significant change in the duties  
21 inconsistent with a military member's grade or  
22 rank."

1           So that is how they define it for  
2 purposes of retaliation. I can read you the Army  
3 one also.

4           CHAIR HOLTZMAN: But that becomes a  
5 criminal offense, right, under that definition.

6           MS. FRIED: Correct.

7           CHAIR HOLTZMAN: So, the reprisal in  
8 this chart, the fourth red bar, becomes under  
9 some definition, at least the Air Force  
10 definition, criminal conduct.

11          MS. FRIED: And I think it's very  
12 similar in the Army.

13          CHAIR HOLTZMAN: So, I mean, that's  
14 why I was concerned about the headings of these  
15 two bars.

16          MR. STONE: How do you want the  
17 headings to read? What do you think they should  
18 be? Retribution crimes and reprisal crimes? I  
19 mean, how --

20          CHAIR HOLTZMAN: Yeah. Maybe. I  
21 mean, I don't know the difference between  
22 reprisal and retribution, frankly. You know,

1 it's just a different word, but they basically  
2 mean the same thing.

3 So, I don't know. I don't have a  
4 suggestion, but I just don't think that -- I  
5 think it's confusing and maybe inaccurate to  
6 suggest that only the last bar is criminal --  
7 consistent with criminal conduct, and that it's  
8 not the other.

9 So, what else do we have to do on  
10 Issue Number 1, aside from saying that they need  
11 to be uniform? Do we want to pick among these  
12 various proposals which definitions we prefer?  
13 Of course, I don't have it in front of me. Mr.  
14 Taylor?

15 MR. TAYLOR: I would suggest that we  
16 simply refer it back to the Department. I mean,  
17 they were supposed to do it in the first place,  
18 but they punted it to the Services. In other  
19 words, the Defense Department was required by law  
20 to come up with a uniform definition, right? And  
21 rather than do that, they gave it out to the  
22 Services. So, you end up with two that are

1       pretty similar -- the Air Force and Navy -- and  
2       the Army, which is pretty dissimilar. At least  
3       in one of the definitions, of ostracism.

4               So, it seems to me that, as part of  
5       their oversight, it would be the responsibility  
6       of the Secretary of Defense's Office to make  
7       these consistent.

8               COL GREEN: One point just to bring to  
9       the Panel's attention is that the Secretary of  
10      Defense levied a requirement by the 1st of  
11      September for the Services and DoD to present to  
12      the Under Secretary of Defense for Personnel and  
13      Readiness their strategic plan for addressing  
14      retaliation.

15              So, the Department internally is  
16      working right now to develop that plan. We're  
17      not privy to that. Obviously, it's internal at  
18      this point. So, I mean, it's possible that DoD  
19      is looking at standardizing some of these things.

20              But I think what we've seen is the  
21      evolution since the POTUS report in December of  
22      last year, and so what the Panel's information is

1 on is sort of the Services' responses since the  
2 POTUS report. And then there is this ongoing  
3 effort across DoD to develop a strategic policy  
4 for dealing with this.

5 CHAIR HOLTZMAN: Let me get my dates  
6 clear. In the FY14 NDAA, the Secretary of  
7 Defense is required to set up uniform standards.  
8 When was the FY14 NDAA passed? When was that  
9 enacted?

10 MS. CARSON: I think it was December  
11 2013.

12 CHAIR HOLTZMAN: December of 2013.  
13 And we are a year and a half later and there are  
14 no uniform standards. Isn't that --

15 MS. FRIED: I think part of the  
16 problem, Ms. Holtzman, is they have -- based on  
17 what I'm reading here, it looks like the purposes  
18 of a UCMJ definition for criminal retaliation,  
19 ostracism, those that rise to the level of  
20 obstructing justice or intent to influence the  
21 administrative justice process, it looks to me  
22 the Services are pretty close together in their

1 definition.

2 And, yes, I guess there is not a  
3 uniform standard umbrella definition, but they  
4 seem very, very close, and I'd have to sit here  
5 word by word to kind of see where the difference  
6 is.

7 I think the problem comes in with how  
8 do we define ostracism or social retaliation that  
9 it's actually prosecutable. I think some of the  
10 concerns the Department has run into has to do  
11 with First Amendment protections, you know, and I  
12 think that's what they're struggling with, if  
13 that helps.

14 CHAIR HOLTZMAN: Well, it doesn't  
15 really help, because they were required by law --  
16 it was passed in December 2013 -- we are now in  
17 July 2015, and these terms were supposed to be  
18 uniformly defined.

19 Or, wait a minute, was there -- as I  
20 read this -- maybe I'm wrong. So, there was no  
21 requirement that there be uniformity? Maybe the  
22 question for us is whether there should be

1 uniformity, but not that the DoD was mandated to  
2 have a uniform requirement -- a uniform  
3 definition.

4 MR. STONE: I also don't think that,  
5 in the context of the military, military members  
6 can't be more restrictive in their First  
7 Amendment rights, for all kinds of reasons, like  
8 unit cohesion. And there's not just restrictions  
9 based on security; there's all kinds of team and  
10 organizational reasons that there's a limit on  
11 behavior that you wouldn't find in the military.

12 So, I think that whatever the reason  
13 is, I agree we've got to see uniform definitions.  
14 And if they want to get to them by September,  
15 that's great. Maybe the simple answer is -- if  
16 the question is whether they should uniformly  
17 define, the simple answer is yes, and we hope to  
18 see it by September, or whatever the date is.  
19 Let's encourage them.

20 MR. TAYLOR: I was just going to -- to  
21 your question, Madam Chair, in Section 1709 of  
22 that Act, it says, "For purposes of this

1 regulation, required by subsection 8, the SecDef  
2 shall define retaliation to include, as a  
3 minimum," and then it says, "a) taking or  
4 threatening to take an adverse personnel action,  
5 withholding or threatening to withhold, with  
6 respect to a member of the Armed Forces, because  
7 the member reported a criminal offense, and  
8 b) ostracism and such acts of maltreatment as  
9 designated by the Secretary of Defense, committed  
10 by peers, by a member of" -- and so for and so  
11 on. So, it seems to me like the ball was in  
12 their court.

13 CHAIR HOLTZMAN: For a year and a  
14 half?

15 MR. TAYLOR: And what we've got are  
16 three different Service regulations implementing  
17 it slightly differently. That's just the way I  
18 see it, but I could be missing something.

19 CHAIR HOLTZMAN: Well, you know, I  
20 don't know that we have to wait until February to  
21 issue a report. We could just issue a letter to  
22 the Secretary of Defense now, or a report to

1       whomever, Congress and the Secretary of Defense,  
2       indicating that this requirement, you know, was  
3       adopted by law and it hasn't been implemented.  
4       Period. And should be. That's all. Promptly.  
5       And so, like, one paragraph.

6               MS. CARSON: A letter to the DoD while  
7       they are working on their policy now would be  
8       helpful.

9               JUDGE JONES: And I guess the only  
10       other thing we might say is, regardless of the  
11       law, because of our efforts to actually get good  
12       statistics, uniformity is really important, and  
13       just emphasize that, too.

14              MR. STONE: I guess I would rather  
15       say, "In addition to the law."

16              CHAIR HOLTZMAN: Okay. So, any  
17       objection to that? Can we officially designate  
18       that as a report?

19              MS. FRIED: Well, I think the report  
20       has to be made to the Secretary and Congress.

21              CHAIR HOLTZMAN: So if we send a copy  
22       to Congress, can it be a report? I guess we could

1 send the letter and then include it in a report  
2 to Congress and to the Secretary of Defense, and  
3 send the Secretary of Defense a copy -- I don't  
4 know. You'll figure it out.

5 But do we need to do anymore -- I  
6 mean, I know we have this chart, but I think the  
7 chart, as I said, we have to figure out new  
8 language for it. I mean, the headings. Why do  
9 we have them in different sizes? Are they just -  
10 - do you have them as more serious? I mean, how  
11 do you --

12 COL GREEN: Do you mean the escalation  
13 from left to right in the chart?

14 CHAIR HOLTZMAN: Yes.

15 COL GREEN: I think the issue is just  
16 trying to create a graphic. This is modeled  
17 after -- this is the Staff's attempt to model  
18 something after a response to sexual harassment,  
19 a chart that DoD SAPR has created. And so it was  
20 the Staff's attempt to graphically represent the  
21 escalation of issues associated with retaliation  
22 from the most minor up to, obviously, the most

1 severe in terms of clear violations of the UCMJ  
2 on their face, not even just regulatory  
3 violations.

4 So, I mean, obviously, if the Panel  
5 has specifics that you want us to focus on, or  
6 issues that we can address, we can do that. The  
7 other thing is that the Staff can go back and  
8 continue to work on this according to your  
9 guidance.

10 VADM TRACEY: I look at this much from  
11 a commander, who has to train people, hold people  
12 accountable, short of taking them to trial. And  
13 this was a useful visual for me as a commander to  
14 get my mid-level leadership focused on the fact  
15 that all of the things in the left-hand side are  
16 a precursor to the things on the right-hand side.  
17 And if you don't do something to address the  
18 left-hand side as it emerges, you will march up  
19 the chain if you're not paying attention.

20 So, it's less about how we are going  
21 to court-martial people than it is about how you  
22 do things so you don't have to court-martial

1 people. And so I thought this was a useful  
2 visual which would benefit from, you know,  
3 precision in the language, to your point. But  
4 this was a pretty useful way to do this for just  
5 plain folks who are not lawyers.

6 JUDGE JONES: And it was helpful to  
7 me, too, because you see which group takes care  
8 of which types of violations.

9 VADM TRACEY: Yes, yes.

10 MR. STONE: Well, I would like to see,  
11 in the ostracism, "unsupported by members and  
12 unit." That needs to be amplified, because it  
13 isn't just -- when you perceive -- when you think  
14 you are being unsupported, but you're going out  
15 on a mission and everybody has weapons, you're  
16 worried that you are going to be thrown to the  
17 wolves one way or another. I mean, that's not  
18 just -- unsupported is a little -- you know, you  
19 need the team support sometimes to get through a  
20 mission.

21 So, it's not just social retaliation.  
22 It goes beyond that. It goes to the cohesion of

1 the unit and your ability to function in it  
2 confidently and not be in fear that when the  
3 going gets tough you're going to get abandoned.

4 You know, so I think that that's  
5 correct, but it's more. It's the deterioration  
6 in the morale, the necessary morale that a unit  
7 has. It's got a duty component to it, I guess.  
8 It's not just social; there's a duty component.

9 I mean, when they have a party in the  
10 barracks, it isn't just they're having a party  
11 among friends. It's all of those things have a  
12 morale component.

13 VADM TRACEY: But an instance in which  
14 a member of a unit is concerned that they are  
15 going to be -- that they can have friendly fire  
16 or they're going to be uncovered, that's on the  
17 right-hand side of this chart. That's not social  
18 ostracism.

19 MR. STONE: Well, no, no. That's a  
20 different -- if it happens, on the right-hand  
21 side. If they fear it, and it detracts from  
22 their ability to function in that unit --

1 MS. CARSON: But that would come from  
2 a threat, right? A threat would be something  
3 that is on the far side.

4 MR. STONE: Well, and it may even be  
5 an unexpressed threat. It's just they see that  
6 in the social ostracism. How far is this going  
7 to go? "I can't sleep now because I don't know  
8 how far this is going to go." Again, it's not  
9 the group of college friends and they say, "Well,  
10 they're excluding me from the party, but I'm just  
11 going to do other things today." You have to do  
12 things with the group.

13 VADM TRACEY: I think this device is  
14 built from the lens of the behaviors, not of  
15 perceptions. You're right that the social  
16 ostracism category of things could lead to a  
17 victim perception that, "I'm going to be  
18 abandoned in the field." That's not what this  
19 is. This is, what are the behaviors?

20 MR. STONE: Okay. I guess the  
21 behavior I'm looking for here is, you know,  
22 destruction of morale, group morale. It's a

1 deterioration of group morale. That's the --

2 JUDGE JONES: It's the deterioration  
3 of the victim's morale, certainly, but --

4 MR. STONE: Yeah. Right.

5 JUDGE JONES: And I think this covers  
6 it.

7 MR. STONE: You think that covers it?

8 JUDGE JONES: Yeah.

9 MS. TOKASH: So, we built this off of  
10 the sexual harassment/sexual assault continuum.  
11 And actually on the far left, it started out with  
12 a healthy workplace environment. So, really,  
13 maybe we want to consider whether we start with a  
14 healthy reporting environment in terms of  
15 retaliation. I mean, that's really the  
16 escalation of --

17 CHAIR HOLTZMAN: I think it's good the  
18 way it is, frankly.

19 VADM TRACEY: I like it the way it is.  
20 But in terms of a training tool, I think you've  
21 described the right device, that starts with,  
22 what's a healthy reporting environment? But I

1 think for what this was intending to do, I really  
2 liked this.

3 MR. TAYLOR: I do, too. I sort of  
4 interpreted your X-axis here as a healthy  
5 environment, right?

6 VADM TRACEY: That's right.

7 MR. TAYLOR: So, that's your X-axis  
8 here, and then you escalate up in terms of less  
9 healthy environments.

10 CHAIR HOLTZMAN: Yeah. And I would  
11 add also, you know, it may be easier to put an  
12 asterisk next to them, but some of these items  
13 can, in certain circumstances, be criminal. So,  
14 maybe, you know, you put that, you know, with an  
15 intent -- I don't know how to do that visually --  
16 but with an intent to stop them from reporting,  
17 or with an intent to -- something or other, that  
18 this could become a violation of the UCMJ or the  
19 regulations. I don't know. You know, but  
20 somehow it should be indicated.

21 MS. CARSON: I think part of the  
22 intent of putting that together is you would

1 expect, as you see the increasing severity of the  
2 behavior, retaliatory behavior, you expect to see  
3 an increasing severity of punishments. So,  
4 that's the question. At what point should it be  
5 criminal? At what point should it be a command  
6 environment or non-criminal --

7 CHAIR HOLTZMAN: Right. But I think  
8 the point I'm making is that even from what I --  
9 because Maria was saying that, as she read the  
10 definition, that even some kind of ostracism can  
11 be criminal. So, I think that even though this  
12 seems to be, like, well, moderately bad but not  
13 the worst, it still could be criminal even though  
14 it's over there on the left side.

15 I don't know if that helps your need,  
16 Admiral Tracey, to indicate the criminality.

17 MS. CARSON: The question is, how does  
18 a commander know? What are the examples of --

19 CHAIR HOLTZMAN: Well, that's a  
20 different story. All I'm saying is that some of  
21 this behavior could be criminal, in any of these  
22 boxes except maybe the one all the way on the

1 left.

2 COL GREEN: Ms. Holtzman, the attempt  
3 to indicate that is each of those arrows down  
4 below indicates UCMJ, just in terms of the  
5 response made to --

6 CHAIR HOLTZMAN: But that's not clear  
7 to me. The labels aren't clear.

8 COL GREEN: No, I understand. And we  
9 can try to make that more apparent.

10 CHAIR HOLTZMAN: And also threats. I  
11 mean, I think you need to elaborate on what is a  
12 threat. What kind of threats are we talking  
13 about? It's too vague.

14 JUDGE JONES: What's the purpose of  
15 this chart? It was very helpful to me in just  
16 sort of getting an idea about, what are examples  
17 of the kind of conduct that you would label  
18 ostracism or reprisal. Are we putting this in  
19 our next report?

20 COL GREEN: Judge Jones, when the  
21 Staff started to look at this -- and I think it  
22 goes back to the definitions of terms and that

1 they are somewhat varied, and the like, and so as  
2 the Staff struggled to even present to you how to  
3 frame this issue, one of the first things we  
4 realized is that some type of a graphic  
5 demonstration of this is appropriate.

6 So, I think we sort of considered this  
7 as sort of the touchstone by which a whole lot of  
8 other things are defined and explained throughout  
9 your report.

10 JUDGE JONES: Right. And what I love  
11 about it is it's got real examples in it, as  
12 opposed to just verbiage. You know, it's not  
13 charging language. It's examples. And that was  
14 very helpful to me, and I think to anyone who --  
15 really, it doesn't matter whether you're a lawyer  
16 or a prosecutor or anything. I think this is  
17 very helpful.

18 So, I mean, I like it. I don't know  
19 what we would want to do with it, frankly.

20 MR. STONE: I do think that on the  
21 little box on the bottom under negative  
22 reactions, which says "not actionable," I mean,

1 that is not criminally actionable, it should say.  
2 I think if I was a commander and I saw the unit  
3 all giving somebody the cold shoulder, I would  
4 say, "Whoa, I have a situation here that I have  
5 to address. It may not be criminally actionable,  
6 but I don't want to take this unit into combat  
7 that way."

8 MS. TOKASH: Well, that's a good  
9 point, because the DoD is using the term  
10 "actionable" as UCMJ action. And your point is  
11 right, because you have heard from several  
12 presenters, like Dr. Harmon, talk about how even  
13 commanders have a responsibility to address even  
14 negative reactions, because it's an environment.  
15 It's a climate sort of a thing. So --

16 MR. STONE: Like people walking around  
17 with automatic weapons. And if a guy has a bad  
18 day, that's how you get these incidents where  
19 they express it in an unacceptable way.

20 MS. TOKASH: Everything is actionable.  
21 It might not be chargeable under the UCMJ.

22 MR. STONE: Right. So, that's why --

1 MS. TOKASH: So, it's a terminology  
2 issue.

3 JUDGE JONES: So, maybe just not UCMJ  
4 actionable is what you're talking about for  
5 negative reactions?

6 MS. TOKASH: Or just put the command  
7 arrow all the way to the left, because the  
8 command in the military has that power --

9 JUDGE JONES: Always to take care of  
10 that.

11 MS. TOKASH: -- to always take action,  
12 no matter what.

13 CHAIR HOLTZMAN: That's not only  
14 against offenders, but it's also to remedy the  
15 situation.

16 MS. TOKASH: Yes, ma'am. Right.

17 CHAIR HOLTZMAN: Okay. Well, we'll  
18 figure out what we want to use this for when we,  
19 you know, fine-tune the chart.

20 I guess we can go to our next issue,  
21 which is data collection. Would be Issue Number  
22 2. Is that where we are? Data collecting and

1 reporting requirements: Whether the reports and  
2 associated outcomes of all retaliation  
3 complaints, regardless of type of retaliation,  
4 investigative authority, and punishment involved  
5 should be collectively tracked and reported?

6 So, I mean, it seems that the answer  
7 to that is obvious. Anybody disagree?

8 COL GREEN: Just as a background for  
9 this, the DoD, in response to the POTUS report,  
10 did try to create, in the spring, a standardized  
11 reporting form, and asked all of the Services to  
12 provide an accounting for all issues of  
13 retaliation. And there were a lot of -- I mean,  
14 again, I think it is one of those cases that the  
15 devil's in the details in terms of what qualified  
16 as a reportable incident. And so currently there  
17 is no centralized means.

18 A victim has the ability to make a  
19 restricted or unrestricted report, and there's a  
20 formalized procedure for that. There is no such  
21 thing for retaliation.

22 And so the sub-question is whether

1       there should be a standardized process by which  
2       someone can report retaliation and whether -- and  
3       regardless of the answer to the question, whether  
4       or not there should be a requirement to  
5       centralize, report and manage reports of  
6       retaliation, either from a centralized reporting  
7       process or from different methodologies by which  
8       retaliation is learned.

9               The Services have taken steps to use  
10       the case management groups at the installation  
11       levels to oversee issues of retaliation at the  
12       installation. And I think it's varied how those  
13       are implemented, and the management of those is  
14       really decentralized at this point.

15              MS. CARSON: The procedures for that  
16       were due January 2015, and we have procedures  
17       from -- the Army has issued guidance on it, and  
18       the Air Force has issued guidance on it. We have  
19       not received any guidance from the other Services  
20       on how the case management groups are to  
21       function. And none of them identify a form or  
22       any very specific criteria on what is being

1 reported, only in kind of a general sense that a  
2 commander is required to ask about it and see  
3 that it is investigated and continue to follow  
4 up.

5 CHAIR HOLTZMAN: But in other words,  
6 if you don't have an official reporting form, how  
7 do they know there has been any follow-up?

8 MS. CARSON: Exactly.

9 CHAIR HOLTZMAN: So, we don't have  
10 that. That doesn't exist. In other words, we  
11 have a good system at least in place for  
12 reporting a sexual assault. You can report it  
13 through all these various people who then have to  
14 report it. There's a form and it's tracked and  
15 it's kept in a -- no longer in a file cabinet,  
16 but in some kind of repository, and that  
17 information is accessible.

18 And so we can track how many  
19 complaints were made, and then we can find out  
20 what happened to them. But the retaliation  
21 reports, there's no formal complaint form, and  
22 there is no formal, therefore, requirement of

1 retention of the information that a complaint has  
2 been filed.

3 MS. CARSON: That's right.

4 CHAIR HOLTZMAN: And there is no  
5 responsibility for -- well, then, how can you  
6 track whether it has been followed up? Right?

7 MS. CARSON: Well, they do have --  
8 this was sent out one time by DoD Personnel  
9 Readiness, which was a spreadsheet that asked all  
10 of these questions, these retaliation questions.  
11 That was to be done at the March 2015 Case  
12 Management Group meetings, and the Services came  
13 back with responses, but it was on a very short  
14 timeframe for the Services to turn that around,  
15 and there wasn't a lot of clarity on what would  
16 happen next.

17 It has never been asked again from the  
18 Services, and it's still not a form. It's just a  
19 spreadsheet that each Service is supposed to fill  
20 in and send to Personnel Readiness to determine  
21 what's happening.

22 CHAIR HOLTZMAN: Well, how did they

1 fill in the spreadsheet?

2 MS. CARSON: Pardon?

3 CHAIR HOLTZMAN: How could they fill  
4 in the spreadsheet if they don't have some  
5 documentation of the complaint?

6 MS. CARSON: Right. That was --

7 MR. STONE: Well, they can only fill  
8 it in if there was actually, what, an Article 92  
9 offense charged. In other words, if it rose to a  
10 certain level of a criminal offense, then you  
11 might find it that way. But of that page we were  
12 looking at, that's probably only less than a  
13 quarter of everything on the page.

14 MS. CARSON: It's just all very vague,  
15 what is --

16 COL GREEN: But the data request was  
17 broader than that, Mr. Stone.

18 MR. STONE: Right.

19 COL GREEN: It was not something that  
20 triggered a UCMJ violation, and therefore would  
21 establish that baseline for it. It was broader  
22 than that, and I think it even asked for issues

1 of social ostracism.

2 MS. CARSON: They just wanted  
3 allegations of retaliation, whatever form.

4 MR. STONE: Okay. And the question  
5 that I, then, have about that question, and also  
6 about us talking about a form is, did it request  
7 information on retaliation following an  
8 allegation of sexual assault? Or did it just  
9 request information on retaliation in the unit?

10 Because it seems to me you won't  
11 always be able to nail down an allegation of a  
12 sexual assault that was threatened or didn't take  
13 place, but there might be retaliation because it  
14 was rebuffed in the bar, for example. But then  
15 also you have retaliation just because maybe they  
16 don't like somebody for some other, I don't know,  
17 religious, racial, or social reasons.

18 And so I guess the question I'm sort  
19 of asking is, are we looking to get a measure of  
20 retaliation for things inappropriate on this  
21 scale, regardless of the origin, or only if we  
22 think it comes out of a sexual assault attempt?

1 And how do we distinguish those two exactly?

2 I mean, some of those are going to be  
3 discouraged so early, the attempted sexual  
4 harassment, that you see the retaliation, but you  
5 may not even know why because the person simply  
6 turned on their heel and walked away from  
7 somebody and now that other person is going to  
8 get back at them. I mean, I just don't know how  
9 you --

10 MS. CARSON: Well, starting at a place  
11 of zero knowledge, the direction from this  
12 initial data collection was for unrestricted  
13 reports of sexual assault. Those are the only  
14 cases that are discussed in Case Management  
15 Groups.

16 MR. STONE: Okay.

17 MS. CARSON: So, this would be  
18 retaliation that is related to an unrestricted  
19 report of sexual assault.

20 MR. STONE: Okay. The question I'm  
21 asking is, does it need to be a little broader?

22 CHAIR HOLTZMAN: Well, let's just

1 maybe start with that. I mean, that's pretty  
2 obvious. I mean --

3 MR. STONE: Well, you have a couple of  
4 categories. That's the easiest category to  
5 identify on the form.

6 CHAIR HOLTZMAN: It is, you're right.  
7 But it seems to me that if they don't have a  
8 form, I don't know -- if they don't have a form,  
9 and they don't have a regularized system for  
10 making complaints, how will they ever be able to  
11 track them, much less respond to them?

12 MR. STONE: It's going to be  
13 anecdotal. It'll be what somebody remembers when  
14 you ask them a question.

15 VADM TRACEY: So, the case management  
16 process, though, a lot of it is oral, right? A  
17 lot of it is oral. It's the SAPR and the SVC, if  
18 they can be there, and what have you, in a review  
19 with the commander of how those cases are going.  
20 And so in that process, presumably the SAPR will  
21 have some awareness of the victim as saying that  
22 they are being retaliated against in some way,

1 shape or form. But that's what is going to come  
2 out of that, because of the way that process is  
3 intended to work.

4 MS. CARSON: The Air Force guidance is  
5 that the SARC is required -- that they're the  
6 only ones that have really very extensive  
7 guidance. And that is that the SARC is supposed  
8 to speak with every restricted report reporter  
9 before the case management group and find that  
10 out ahead of time, and then that will be  
11 discussed in the case management.

12 VADM TRACEY: So, does the case  
13 management process -- I've forgotten this -- do  
14 they require any roll-up on a quarterly or annual  
15 basis to any sort of headquarters level of the  
16 case management?

17 MS. CARSON: This is the first  
18 request. That's what was just sent --

19 VADM TRACEY: So there is no other  
20 report, no other --

21 MS. CARSON: There is no other  
22 requirement.

1           CHAIR HOLTZMAN: But let me go back to  
2 this issue about the SARC. So, the SARC, that's  
3 when -- when no complaint has been filed, the  
4 SARC has to reach out proactively in every  
5 unrestricted case and find out at the outset --

6           MS. CARSON: For the Air Force.

7           CHAIR HOLTZMAN: Right. For the Air  
8 Force. And do they have to do it every -- how  
9 often do they have to do it, just once?

10          MS. CARSON: Every month.

11          CHAIR HOLTZMAN: They have to do it  
12 every month. And how do they record that they  
13 have done that?

14          MS. CARSON: There is no specific  
15 guidance on how that's done.

16          CHAIR HOLTZMAN: Well, I guess our  
17 question, first -- I mean, the Air Force model  
18 seems like not a bad approach. I mean, this  
19 seems like a very logical person, the SARC, to be  
20 asking this question.

21                 So, I mean, maybe we need to know more  
22 about how that's working and what the Air Force

1 thinks about it, and maybe why the other agencies  
2 haven't adopted it. But that seems to me a  
3 pretty useful system.

4 But still, don't you think there  
5 should be some kind of formal document reporting  
6 that such an inquiry was made and there was no  
7 report of retaliation? Or there was report of  
8 retaliation?

9 Now, the SARCs would also know,  
10 wouldn't they, about the unrestricted reports?  
11 Who would know about the -- going to your point  
12 about --

13 MS. CARSON: You mean the restricted  
14 reports.

15 CHAIR HOLTZMAN: I mean the restricted  
16 reports.

17 MS. CARSON: Correct.

18 CHAIR HOLTZMAN: The SARC would know  
19 about those restricted reports.

20 MS. CARSON: Yes. And they can ask --  
21 I mean, you would presume there isn't going to be  
22 retaliation because it's restricted, but they can

1 certainly inquire.

2 MR. STONE: I don't think you can make  
3 that presumption. I think that the person who  
4 was -- I mean, the incident occurred, they're so  
5 scared of the retaliation, that's part of the  
6 reason they may not be reporting it. So they are  
7 trying to --

8 CHAIR HOLTZMAN: Right. So, it seems  
9 to me that that's at least a good starting point  
10 for how to deal with the problem of identifying  
11 the problem of retaliation and documenting that  
12 it exists, how much it exists, and then also what  
13 the follow-up is. Because once you have a form  
14 reporting it, then I guess the SARC, or someplace  
15 on the form, you can say, "Well, it was reported  
16 at this case management meeting, and Commander  
17 XYZ said she was going to do ABC."

18 MS. CARSON: Or maybe it's a  
19 restricted report because of the fear of  
20 retaliation.

21 CHAIR HOLTZMAN: Right. But then if  
22 threats have been made, then what do you do about

1 that? I mean, you can't just sort of --

2 JUDGE JONES: The same thing. You  
3 don't do anything to -- you don't investigate the  
4 underlying assault, because it's restricted, so  
5 you would know about it, but you wouldn't be able  
6 to investigate the threats. I mean, you'd  
7 obviously do what you had to do to protect the  
8 person, if it was that serious, but --

9 MS. CARSON: And in the Air Force  
10 guidance, it also says that the person reporting  
11 the retaliation has the choice to file the  
12 retaliation, whether or not they want that  
13 brought to anyone's attention or anything done  
14 about it.

15 So, we heard some testimony, I think,  
16 from some SARCs who have said, just talking this  
17 through with the SARC and allowing the SARC to go  
18 talk to a commander, I mean, sometimes that takes  
19 care of the problem, you know, when it's brought  
20 to the attention of somebody who can do something  
21 about it. Or they can resolve it if there is a  
22 misunderstanding that took place, that made

1 someone feel that they were being retaliated  
2 against.

3 MR. TAYLOR: Just a point of  
4 clarification. I've taken a look at this March  
5 2015 Air Force Directive that you referred to  
6 regarding setting up this process, and one  
7 interesting thing to me about it was that this  
8 memorandum said that the requirement, once in  
9 place, that the commander had to discuss  
10 retaliation with sexual assault victims prior to  
11 each case management group was being rescinded.

12 MS. CARSON: Yes.

13 MR. TAYLOR: So, they actually changed  
14 the requirement that had the commander in the  
15 loop to one that did not have the commander in  
16 the loop.

17 MS. CARSON: There's a reason for it,  
18 though. It's because there is no privilege with  
19 the commander, and so they changed that to have  
20 the SARC do it instead of the commander.

21 There is a requirement that the  
22 commander, within 72 hours after every case

1 management group, the commander has to tell the  
2 person who is reporting the sexual assault what's  
3 the status and the outcome of it. So, there is  
4 still a commander responsibility, it's just not  
5 asking them about the retaliation prior to the  
6 meeting.

7 And commanders are also mandatory  
8 reporters. So if they know about retaliation,  
9 they have to do something. I mean, it will  
10 become public in a way that, if a person  
11 reporting sexual assault doesn't want it to,  
12 that's why they wanted to protect them by  
13 allowing them to discuss it with a SARC and being  
14 able to maintain it privately if they want to.

15 MR. TAYLOR: But just to follow up on  
16 that, what I couldn't understand from this memo  
17 was whether there was any requirement within the  
18 Air Force, if we are looking at it as a potential  
19 model, to have the case management groups then  
20 send all the information back to headquarters, or  
21 if they just keep it locally with the case  
22 management groups, in which case big Air Force

1 and big DoD really have no idea what the scope of  
2 the problem is.

3 MS. CARSON: Right. There is no  
4 requirement for anything happening beyond that.

5 CHAIR HOLTZMAN: Right. Well, there  
6 is no -- if you don't have a form, and you don't  
7 have the follow-up on the form, there's no way to  
8 know what is going on.

9 JUDGE JONES: You know, based on what  
10 Admiral Tracey was saying, it doesn't sound like  
11 we are going to get data, as we would like to  
12 call it, out of a case management group  
13 conference that is held every so often.

14 I think we are going to start with --  
15 at the beginning with an analysis of the reports  
16 and the -- and I would include the restricted  
17 reports, with the proper safeguards, and maybe  
18 have SARCs go back to those who filed restricted  
19 reports and say -- ask them, assuming we're not  
20 then accused of harassing a victim, but do it as  
21 diplomatically as possible, see if there are any  
22 more allegations that we can glean from there of

1       retaliation.

2                   And then the question is -- and then  
3       that's real data. Or at least we have to figure  
4       out a way to capture it. And I guess that will  
5       be SAPRO, again, with their SARCs doing their  
6       reporting.

7                   MR. STONE: And that's where this  
8       prior question and the chart comes in, because if  
9       a summary of the definitions of these and the  
10      elements of them are on the form, they ask them  
11      to check off which of these categories the person  
12      is reporting. Is it only the first one? Is it -  
13      - duh, duh, duh, duh, duh.

14                   And that way at least they -- each of  
15      these people evaluating it are using the same  
16      scale, and we have something when we get it back  
17      that, you know, one unit didn't think it was only  
18      social retaliation. They thought it was criminal  
19      retribution. At least we have them on the same  
20      scale, and we've got some, you know, set of --

21                   JUDGE JONES: And this could be this  
22      or some version of it. It could be very helpful

1 to that SARC who is doing the questioning.

2 I would think victims' counsels would  
3 be also reporting this. It might not be the  
4 SARC, so they have to know that they have to --  
5 maybe they get this form, too. I don't know.  
6 But there needs to be a form that has to go into  
7 a centralized location, that, yes, there was a  
8 report, and this is the category it fell in.

9 The question I have is, doesn't the  
10 IG's office keep records?

11 COL GREEN: Well, the IG is only  
12 involved in the cases of reprisal. So --

13 JUDGE JONES: Right.

14 COL GREEN: -- I mean, their scope in  
15 terms of what they are responsible for in  
16 retaliation cases is only one piece of the entire  
17 retaliation claim.

18 JUDGE JONES: Right. But these are  
19 really important categories for victims.

20 COL GREEN: Right.

21 JUDGE JONES: And I just wonder what  
22 kind of record keeping the IG's office does,

1 because that would be a third area where we would  
2 definitely want to capture how many were there,  
3 what types were they, what were the outcomes.

4 COL GREEN: Well, we heard from the IG  
5 at the April meeting in terms of -- I mean, they  
6 do a quarterly roll-up --

7 JUDGE JONES: Right.

8 COL GREEN: -- report of all reprisal  
9 cases, and what we heard from them is very  
10 limited tracking capability. They are improving  
11 it, but I don't -- I don't know that anything is  
12 tracked back to issues involving sexual assault  
13 and reprisal based on that.

14 CHAIR HOLTZMAN: And I have some very  
15 serious questions as to the whole IG process  
16 itself.

17 COL GREEN: Yes.

18 CHAIR HOLTZMAN: And whether we want  
19 in any way, shape, or form to harness them into a  
20 solution, because they have been, in my judgment,  
21 part of the problem. So --

22 VADM TRACEY: The first question is,

1 if that's really a possibility. In a well-run  
2 command, the complaint is going to go to the  
3 Master Chief, and the Master Chief is going to  
4 get the problem solved. It is never going to  
5 become a formal issue. It's going to be dealt  
6 with at the lowest level of the chain of command,  
7 dealt with positively at the lowest level of the  
8 chain of command, never become a formal  
9 complaint.

10 You might tell your SARC that -- in  
11 your regular interview with the SARC, but the  
12 commander is only going to know about that in the  
13 case management process. So you can't do the top  
14 one and be very confident in -- that you are  
15 getting anything, the things that have become  
16 formal reports to the commander.

17 So you're in the IG bucket or you're  
18 in the commander's direct bucket. So there's a  
19 top question here.

20 JUDGE JONES: I'm sorry. Which is the  
21 top question?

22 VADM TRACEY: Whether reports and

1 associated outcomes of all retaliation  
2 complaints, regardless of type, investigative  
3 authority, or punishment, most of these are -- in  
4 any command that is remotely healthy, they are  
5 being dealt with, even below the commander level.

6 JUDGE JONES: Right. Right. So all  
7 is totally unrealistic.

8 VADM TRACEY: Yes.

9 JUDGE JONES: Right.

10 VADM TRACEY: So I was trying to lock  
11 down, where can you get to a place here that is  
12 actually executable and can give you meaningful  
13 data that lets you do anything with it. Just  
14 collecting data to be able to publicly report  
15 stuff is -- you could -- I don't know if the  
16 entire Department of Defense has been doing that  
17 and getting that much done.

18 So what is the outcome we are trying  
19 to get here? To sort out the current activity  
20 that we attribute to publishing UCMJ results?  
21 That's a positive thing to do.

22 A bit of a temperature check of it, is

1 this getting better, or is it getting worse? You  
2 don't have to have everything to judge whether  
3 it's getting better or getting worse, to be -- to  
4 target something that's actually achievable, and  
5 it seems like -- at a starting point with what  
6 the SARCs are supposed to be doing.

7 CHAIR HOLTZMAN: In the Air Force.

8 VADM TRACEY: Isn't that a model that  
9 you might be able to apply --

10 CHAIR HOLTZMAN: Right. I'm not sure  
11 I agree with you about not keeping track of  
12 everything, because it seems to me that  
13 retaliation is -- is a very, very serious  
14 problem, since it is the major reason being given  
15 for --

16 VADM TRACEY: I don't disagree.

17 CHAIR HOLTZMAN: Yes.

18 VADM TRACEY: I'm just thinking about  
19 being practical.

20 CHAIR HOLTZMAN: No, no, no. I'm not  
21 -- and so I'm just saying that, is there a way --  
22 and I'm not -- and my reason for getting this

1 information is not necessarily to give monthly  
2 reports or whatever this is. She would be giving  
3 public reports, and so forth. That's, it seems  
4 to me, less important than trying to solve the  
5 problem.

6 But we don't even have a sense of the  
7 whole dimension of the problem, the size of it or  
8 anything. I don't know how difficult it is to  
9 keep these records, to get the -- if the SARC is  
10 calling anyway, how difficult it is for the SARC  
11 to keep these records. And then, from the point  
12 of view of the SARC, we can then figure out what  
13 has happened, what kind of follow up has there  
14 been, what remedial action has been taken, maybe  
15 no remediation. Has the problem gone away?  
16 Maybe it was addressed at the CM -- is that what  
17 this is called? CMG?

18 VADM TRACEY: CMG.

19 CHAIR HOLTZMAN: Yes. It has been  
20 addressed there, but the problem wasn't resolved.  
21 So, I mean, I think there's a lot that we could  
22 learn from this, but I don't want to burden the

1 commanders with keeping these records.

2 Absolutely not.

3 I think that -- I think the Air Force  
4 model sounds like a very good one, but I'd like  
5 to, first of all, hear from the Air Force and see  
6 how they feel it is working, and then maybe ask  
7 some of the other Services why they haven't done  
8 the same thing.

9 MR. STONE: And also ask the Air  
10 Force, if they have to put it -- do a little form  
11 that was electronic, and fill in a few boxes --

12 CHAIR HOLTZMAN: Correct.

13 MR. STONE: -- one box might be, "If  
14 you know, is this on its way, or has it been on  
15 its way to the CO? Is this, or has this, been on  
16 its way, or likely to be on its way, to the IG?"

17 If they pop some of those boxes, we  
18 will have data collection without people having  
19 to go through longhand reports where someone is  
20 describing a detail and it takes forever to get  
21 the data and analyze it as well. Let's use that  
22 first-line SARC to, you know, again take the

1 temperature, or whatever, and do it. I think  
2 that sounds great.

3 MS. CARSON: Just to clarify for you,  
4 the SecDef actually issued in its December  
5 memorandum that all of the case management groups  
6 are to be used to track this, or to determine --  
7 the only difference with the Air Force is they  
8 have put even more detailed guidance forth.

9 So all of the Services are doing this  
10 in their case management groups. There is just  
11 not guidance -- written guidance out there for --

12 CHAIR HOLTZMAN: Are they keeping  
13 records of the number of cases and what is being  
14 done on them?

15 MS. CARSON: I would imagine they are  
16 all keeping some sort of records of some sort,  
17 but there is no place they are required to send  
18 it, other than that one data call that was done  
19 by DoD that was not really successful. Nothing  
20 since then has been done to try to pull all of  
21 that up to a place where they --

22 MR. TAYLOR: Well, that was the point

1 to my second question to you, because it looked  
2 like a good model, except that it stayed at the  
3 installation level. So there was no way of  
4 capturing the bigger picture, just based on what  
5 I have seen, which is why I asked you that  
6 question.

7 So in order to use that model, we  
8 would have to add a layer of reporting that is  
9 not there now, if we were trying to get a sense  
10 of how big the problem is, which we know is  
11 pretty big already from the 62 percent reporting  
12 issue.

13 CHAIR HOLTZMAN: Right.

14 JUDGE JONES: Wouldn't the umbrella  
15 for this statistical reporting, though, be SAPRO,  
16 as it is with so many other things?

17 MS. CARSON: Would the what?

18 JUDGE JONES: Would it be SAPRO, the  
19 umbrella for the statistical reporting? In other  
20 words, there is a book every year that has got  
21 statistics about everything relating to sexual  
22 assault from SAPRO.

1 COL GREEN: I think, I mean, SAPRO --  
2 I mean, again, not being from there, but SAPRO  
3 operates DSAID, and is responsible for the  
4 database to manage any issue associated with an  
5 unrestricted or restricted report of sexual  
6 assault. So there seems to be a framework there  
7 by which this could be linked or managed within  
8 existing systems. But we can certainly reach out  
9 to SAPRO and ask.

10 JUDGE JONES: And I think what we're  
11 -- I guess what we're looking for here is -- I  
12 think is, are they increasing? Are there more  
13 reports? You know, the same kind of data we are  
14 looking for with sexual assaults. Period.

15 CHAIR HOLTZMAN: Yes. And is this  
16 system working? I mean, the Secretary of Defense  
17 has said that this should be resolved -- what is  
18 this group called, the CMG?

19 COL GREEN: Yes. Case management  
20 group.

21 CHAIR HOLTZMAN: Okay. Is it being  
22 resolved? What are the results of this?

1 MR. STONE: Right. I think what  
2 you'll have to do is for the -- for the reports,  
3 a compilation of the information in the reports  
4 and what's being done. I think we just have to  
5 ask if they are doing it. That will generate  
6 them having to figure out how to collect the data  
7 in a useable way. Don't you think that will do  
8 it, if we just say --

9 MR. TAYLOR: Well, except I think it  
10 needs to be in a pooled system where headquarters  
11 pools the information up, not waiting for people  
12 to identify a problem and push it up.

13 CHAIR HOLTZMAN: Oh, yes. Of course.  
14 I agree. They have to every month send all of  
15 the reports up to whoever. Is it the head SARC -  
16 - I mean, the head SAPRO person? So they get  
17 the reports every month, and they compile it  
18 every three or four months and give it to the --  
19 whoever it is. Under Secretary for Personnel or  
20 something like that, and they look and they see,  
21 oh, well, you know, there have been 10 complaints  
22 on this base, and the complaints are still

1 coming, and it's now six months later.

2 MR. STONE: Isn't that just--

3 CHAIR HOLTZMAN: Now what?

4 MR. STONE: -- a call for data from  
5 us, like we did in previous times? Yes. We'd  
6 like to see your monthly data.

7 CHAIR HOLTZMAN: No, no, no. I'm  
8 making a different point. I'm not saying what we  
9 want to see. I'm saying --

10 MR. STONE: Oh. You mean permanently  
11 and ongoing beyond us.

12 CHAIR HOLTZMAN: -- the system creates  
13 -- it could create a system where those reports  
14 go up to somebody who can say, "Hey, wait a  
15 minute, I'm looking at this. This problem, has  
16 it been solved on this case?" Or "This problem  
17 is really endemic in this area." Or something  
18 like that and what -- and is not being resolved.  
19 So let's get on it.

20 MR. TAYLOR: I actually think that the  
21 fourth question under that issue, whether  
22 retaliation data should be included in annual

1       SAPRO reports? I think that ties in there  
2       nicely. But this should be part of the  
3       responsibility, it seems to me, of that program.

4               CHAIR HOLTZMAN: Right. But it needs  
5       to be not just a general report to the public.  
6       That information needs to be given on a regular  
7       basis to whoever is over the various commanders  
8       and can say, "They're not doing enough on this  
9       base. They're doing a great job on that base."  
10      But, you know, more has to be done where.

11              You know, that's the kind of thing  
12      that -- you can't just wait for an annual report  
13      to come out, in my view.

14              MR. TAYLOR: Yes. I didn't focus on  
15      annual when I said that.

16              CHAIR HOLTZMAN: Yes. I know. I'm  
17      not being critical. I'm just saying that I think  
18      we have to figure out a mechanism for, one, the  
19      annual reporting, but also for regular responses  
20      to what is going on.

21              MR. STONE: Wouldn't us asking,  
22      though, for the data for us cause them to have to

1 think about what is a good way to format this for  
2 us? How is it not too burdensome? The JPP wants  
3 it every three months. Let's put something in  
4 place.

5 In other words, wouldn't we like kick  
6 it off by making the kind of request of the data  
7 that makes sense for us, but it then --  
8 obviously, they will realize it also makes sense  
9 for supervisors and people up the chain, because  
10 I think if we ask, "Wouldn't you like to do  
11 this?" I think the answer is going to be, "We  
12 already have enough to do."

13 If we say, "We need some data, and we  
14 would like this," then they'll have to start  
15 moving in that direction.

16 CHAIR HOLTZMAN: Yes. But I don't  
17 think we can put ourselves in the position of  
18 replacing the military for its, you know --

19 MR. STONE: No, no, no.

20 CHAIR HOLTZMAN: -- its own mechanism  
21 of response. We can ask them for this  
22 information. We can ask them --

1 MR. STONE: Right.

2 CHAIR HOLTZMAN: -- about what forms  
3 they have, and we can ask them to show us what  
4 action has been taken with regard to these -- you  
5 know, give us a base or give us some -- some  
6 examples of what they have done with respect to  
7 retaliation complaints. You know, just take --  
8 but I -- you can't do it system-wide.

9 MR. STONE: We can't ask them for  
10 their monthly breakdown of reports?

11 CHAIR HOLTZMAN: What?

12 MR. STONE: Of how many reports they  
13 have had by month or by three months? If they're  
14 keeping them.

15 CHAIR HOLTZMAN: But they're not.  
16 They don't have them. We know that. That's why  
17 I think -- I mean, maybe this is incorrect, but I  
18 would -- perhaps at our next meeting we should  
19 ask for the Services to respond to us, to come  
20 here and tell us what they are doing about  
21 keeping this data and collecting this data and  
22 why they shouldn't be having a form, so that when

1 we make a recommendation to Congress we at least  
2 know what we're talking about.

3 Why aren't they keeping forms? Why  
4 aren't they keeping track of what is happening to  
5 each complaint? And why isn't this going up the  
6 chain, to the top, so that if nothing is  
7 happening action can be taken? I mean, does that  
8 make sense? I don't know. Mr. Taylor?

9 MR. TAYLOR: It does to me.

10 MR. STONE: I presume the IG would  
11 love to have that, too, because then they'll know  
12 he is doing his job.

13 CHAIR HOLTZMAN: Oh. They're not  
14 doing their job.

15 MR. STONE: Well, but I mean, he could  
16 say now it's because he's not getting stuff that  
17 he has to act on and say, yes, I'm going to  
18 pursue this as a -- or no. I mean, if he doesn't  
19 get it, you know, you -- again, he has to go out  
20 and find it as opposed to it coming in the door,  
21 and then he's got to act on it. It's a yes or a  
22 no, but he has to do something.

1           I think in a sense it's a relief to  
2 him not to be blamed for not proactively going  
3 out to try and find it. He then has a stream  
4 coming in. I mean, prosecutors get reports from  
5 investigative agents. In a sense, the SAPR is  
6 the one who gets the report to report it, and  
7 that's one way for --

8           CHAIR HOLTZMAN: But they don't even  
9 act on the reports they get. It takes, whatever,  
10 a year or two years. I mean, I wouldn't -- you  
11 know, maybe in some agencies the IGs work very  
12 well, but my impression from the testimony we've  
13 had is that it's catastrophic, a disaster. So, I  
14 mean, you can give them whatever report you want,  
15 but I don't know why they're not doing what they  
16 should be doing right now. My reaction. But,  
17 anyway, that's neither here nor there.

18           Barbara, what is your view about the  
19 request for -- I mean, asking them to -- the  
20 agencies to -- Services to come at our next  
21 meeting and explain their recordkeeping? Do you  
22 think that's a good approach?

1           JUDGE JONES: Yes. Well, you know, as  
2 we've been talking about this, every case that is  
3 reported, we have this universe of cases that are  
4 reported. Some of them also have retaliation.  
5 Some don't. And we have this universe of  
6 unrestricted or, I'm sorry, restricted, aren't  
7 reported, and through SARC we'll get information  
8 about whether anybody is willing to tell us  
9 there's threats or retaliation.

10           I just don't -- I think this is really  
11 difficult. We don't even have a good sense at  
12 the moment of how the statistics are being kept  
13 on sexual assault, let alone now this extra piece  
14 of retaliation. I mean, I might send this out to  
15 one CMG in each Service that would be -- I would  
16 call them a friendly -- who might be willing to  
17 take a look at this for us and see if this helped  
18 them in any way, to give us a report at the end  
19 of the month.

20           Or -- and I'm not opposed to asking  
21 the Services to come in and tell us how they view  
22 the CMG as working and whether it's the body

1 that can collect this. I just -- I'm just not --  
2 I'm not sure.

3 JUDGE JONES: CMG can't collect  
4 anything unless it is a piece of paper that --

5 CHAIR HOLTZMAN: I agree. I agree.

6 JUDGE JONES: So somebody has to be  
7 creating a piece of paper. I don't mean piece of  
8 -- and I mean piece of paper in a -- in the  
9 broadest sense of whether it's a computer record  
10 or a paper record.

11 So somebody at some point has to be  
12 creating that document. I don't know how they --  
13 what kind of records they keep at these CMG  
14 meetings, and maybe it's -- maybe they keep  
15 minutes, maybe they don't. But the point is, how  
16 can -- I think the issue is not -- is not just  
17 how CMG is doing and what they would do with our  
18 chart, but what is the recordkeeping mechanism?  
19 And we know that they do keep records of sexual  
20 assaults, how many sexual -- they're reported. I  
21 mean, where are these kept, the sexual assault  
22 reports.

1 MS. CARSON: There are forms, and then  
2 they are entered into the DSAID database.

3 CHAIR HOLTZMAN: What is a DSAID  
4 database?

5 MS. CARSON: That's the database that  
6 collects the information about a sexual assault  
7 report.

8 CHAIR HOLTZMAN: Okay. So there's a  
9 dedicated --

10 MS. CARSON: Database.

11 CHAIR HOLTZMAN: -- computerized  
12 system.

13 MS. CARSON: Required by Congress.

14 JUDGE JONES: And how is that report  
15 generated? Once the victim makes the report?

16 MS. CARSON: The victim comes to a  
17 SARC. It has to be -- only the SARCs utilize  
18 these specific forms, the 2910 form, and that is  
19 your election of restricted or unrestricted  
20 report, and that is the only way your sexual  
21 assault is recorded as a statistic.

22 CHAIR HOLTZMAN: But once it's in that

1 system, it's in that system.

2 MS. CARSON: It's in that system.

3 CHAIR HOLTZMAN: And there's nothing  
4 comparable for the --

5 MS. CARSON: Well, in that report --

6 CHAIR HOLTZMAN: Yes. Okay.

7 MS. CARSON: -- there is only the one  
8 thing in that whole report that is actually about  
9 the sexual assault, and that is what you elect.

10 But then there is this whole list of  
11 boxes you check, that they have to be given  
12 notice they can have an SVC, they have to be  
13 given notice that -- one of the pieces of notice  
14 is that you -- if you are retaliated against or  
15 coerced or experience any of this, you know, you  
16 can report this to a -- it gives you a long list  
17 -- a SARC, IG. There's, you know, every  
18 reporting place you could report it. That is in  
19 the sexual assault report.

20 MR. STONE: Reading between the lines  
21 here, are we sort of -- I'm hearing that maybe on  
22 that form, instead of making a whole new system,

1 the form should say -- have a place down there,  
2 "I have already experienced retaliation," and  
3 collected at the same time. If I collect data on  
4 bank robberies, and then I want data on how many  
5 were done with a gun, I have it on the same page.

6 CHAIR HOLTZMAN: All right. But what  
7 happens -- that's day one. What happens day 10  
8 when they have a retaliation --

9 MR. STONE: Well, the person -- they  
10 have a form in the system. You look up the form  
11 and you modify it.

12 CHAIR HOLTZMAN: They have to report  
13 it.

14 MS. CARSON: There is another form.

15 CHAIR HOLTZMAN: Okay.

16 MS. CARSON: It is the DSAID data  
17 form. And that is about five or six pages long  
18 of data that captures everything they are  
19 required to capture, essentially by Congress in  
20 the DSAID database. It's already a very long  
21 form, but it has -- what it doesn't have in it --  
22 it could -- is if you are represented by a SVC or

1 if you've received retaliation.

2 It has about every other things you  
3 could possibly capture, and whether all those  
4 things are actually being captured and being  
5 entered in the DSAID database is another issue.  
6 But just as another data point for you, that is  
7 one -- those are the two forms that exist in the  
8 sexual assault realm.

9 There is another realm -- that is the  
10 equal opportunity organization -- that does  
11 sexual harassment and discrimination, which is  
12 all command, climate-type issues.

13 We put in your packet for you what  
14 their report form looks like as another option  
15 for an existing reporting mechanism that is out  
16 there and that is extensively reported and  
17 tracked and reported on.

18 To give you an idea of something  
19 that's looked at for social retaliation, when you  
20 have the command really driving this resolution  
21 of that issue, that is similar to what you'll see  
22 in a sexual harassment or discrimination issue,

1 which is more of a -- comparable to a civilian-  
2 civil workplace complaint. So just as another  
3 data point for you.

4 MR. STONE: Do they cross-reference  
5 each other? So, in other words -- they don't  
6 cross-reference each other. So you could have  
7 double-reporting. In other words, a person  
8 reported it as an EEOC complaint, but also --

9 MS. CARSON: But you can't report a  
10 sexual assault as an EEOC complaint. You can  
11 report a sexual harassment. If you go to EEOC  
12 with sexual assault, they will refer you to the  
13 SARC. If you go to the SARC with sexual  
14 harassment, they will refer you to the MEO  
15 people. So they're operating in each other's  
16 universes, but they have their own training.

17 MR. STONE: But the sexual harassment  
18 could be a retaliation after the sexual assault,  
19 is what I'm saying.

20 MS. CARSON: They are required -- yes.  
21 Sexual harassment could be retaliation.

22 MR. STONE: So they could relate.

1 MS. CARSON: And you can have  
2 retaliation for reporting a sexual harassment,  
3 which they are specifically required to train the  
4 equal opportunity people about reprisal, which --  
5 in which case if you are reprimed against for  
6 reporting sexual harassment, you are trained that  
7 you go to the IG.

8 MR. STONE: So we are looking --

9 MS. CARSON: But they don't do  
10 anything about the social, because that's --

11 MR. STONE: We are looking for a  
12 little better integration. So what we --

13 MS. CARSON: These are two different  
14 -- created at different times for different  
15 things that cross over in a lot of ways.

16 CHAIR HOLTZMAN: Mr. Taylor, you  
17 were --

18 MR. TAYLOR: Yes. Thank you. Since  
19 Secretary Carter, back on May 1st, ordered all of  
20 the Services to have a plan -- a strategy to him  
21 by September 1st, one thing we could think about  
22 doing is inviting the DoD SAPRO to come in to our

1 next meeting.

2 When General Snow was here back in  
3 April, according to my calendar, with Dr.  
4 Galbreath, who is his senior executive advisor,  
5 they talked about findings and initiatives  
6 regarding retaliation. And many of the questions  
7 that we asked them at that time had to do with  
8 this same sort of issue about, what are you doing  
9 to get your arms around the problem?

10 So maybe we could think about inviting  
11 them back in September or October, as you think  
12 best, to give us an update on, how are they  
13 coming with these initiatives? And what did they  
14 learn about the strategies that were going to  
15 help them be able to answer some of the questions  
16 that everybody has about retaliation?

17 CHAIR HOLTZMAN: Yes. I think that's  
18 a good idea, but I also would like to get the  
19 Services or somebody to talk to us about how they  
20 are recording the retaliation.

21 MR. TAYLOR: Well, it doesn't have to  
22 be -- we can invite the Services -- it could be a

1 panel composed of those two and the Service  
2 representatives, because each Service has someone  
3 who has a comparable job. So each Service -- the  
4 Air Force, I mean, we are looking at in a model  
5 right now. She could come, or her  
6 representative, I suppose. Something like that.

7 MR. STONE: It seems likely also that  
8 their strategy will include what they are doing  
9 and what they propose to do.

10 MR. TAYLOR: I would suspect that what  
11 they really don't want is a lot of help from us.

12 CHAIR HOLTZMAN: Yes. Right.

13 MR. TAYLOR: So if they --

14 JUDGE JONES: They don't want our  
15 chart?

16 MR. TAYLOR: So if they can come  
17 convince us that they are -- that they have a  
18 good plan, and that they are on top of it, then  
19 that may help us a lot in terms of formulating  
20 our own recommendations. Or it may encourage  
21 them to formulate theirs.

22 CHAIR HOLTZMAN: Correct. Okay. So

1 that's what we are going to -- that's how our --  
2 that's going to be the answer to Number 3, which  
3 is, what exactly are they doing and what do they  
4 plan to do?

5 MR. TAYLOR: Right.

6 CHAIR HOLTZMAN: Okay. Issue 3: What  
7 practices identified by subject matter experts  
8 should be recommended for the military workplace,  
9 whether DoD should adopt best practices from  
10 civilian workplace sexual harassment studies and  
11 practices for use in the military workplace? Any  
12 comments or thoughts about this? Kyle, do you  
13 want to expand on what -- on this subject,  
14 please?

15 COL GREEN: At your April meeting, you  
16 heard from academics and industry experts who  
17 have talked about different practices and means  
18 by which this is -- issues of harassment and  
19 retaliation, and the like, are -- work within the  
20 civilian sector. And so this is -- I think our  
21 effort to start the conversation about whether  
22 there are benchmark examples that you've heard

1 about or know about or methodologies by which DoD  
2 should be looking for that type of information  
3 from civilian environments, for implementation or  
4 at least consideration within the military.

5 MR. TAYLOR: Just to state the  
6 obvious, you know, I will jump in and say, you  
7 have a totally different personnel system in the  
8 civilian sector from what you have in the  
9 military. You have the role of unions, you have  
10 all sorts of other issues that come on board when  
11 you are talking about the civilian workplace,  
12 versus what you have in a typical military  
13 environment.

14 So while I think you have to recognize  
15 the differences -- we all do -- it doesn't mean  
16 we can't learn from them. For example, when it  
17 comes to training, I think that some of the  
18 information we heard about training that takes  
19 place in the civilian environment that has  
20 sensitized people to some of the issues might be  
21 portable into some sort of military context,  
22 whereas others might not be.

1           I think we would have to proceed with  
2 caution in this area, I guess is what I would  
3 say.

4           CHAIR HOLTZMAN: Any other comments  
5 anybody wants to make?

6           MS. CARSON: I can point to one  
7 example that we heard from Dr. Harned with the  
8 Ethics -- I can't even remember the name of that  
9 organization -- Resource Center, which was --  
10 they had done a lot of these studies on the  
11 workplace retaliation, and she reported in -- I  
12 mean, she presented to you that the most  
13 important things in reducing retaliation they  
14 have found in their studies are communications  
15 campaign, that effectively people are well aware  
16 of the resources available to them, and then  
17 publishing data, because that -- people believe  
18 what they hear is going to be done is actually  
19 done.

20           So that both gives people confidence  
21 to report, and it gives -- it deters the conduct,  
22 because people know what is going to happen to

1       them for it.

2                   MS. TOKASH:  There was another  
3       presenter, Dr. Cortina from the University of  
4       Michigan, who talked about voice strategies for  
5       resisting and reporting or protesting  
6       victimization.  She made a distinction about  
7       retaliation as a psychological or behavioral  
8       experience for victims versus actual legal  
9       violations.  So that is something to consider  
10      when you look at the chart also.

11                   I know you already commented on what  
12      is actionable versus non-actionable.  The  
13      academics and presenters who, from the civilian  
14      sector, came forward, you know, their point is  
15      that everything is actionable, which I think  
16      commanders would believe that as well.

17                   It might not be criminally chargeable,  
18      but every violation of retaliation at any level -  
19      - in fact, that's what General Snow said in his  
20      remarks from the April meeting, is -- should be  
21      addressed.

22                   MR. TAYLOR:  It seemed to me like the

1 big crossover point between what Julie said and  
2 what many of the commanders said is that you've  
3 got to create a climate of trust. And those two  
4 factors that you identified and he identified --  
5 or she identified were essential to creating  
6 trust. Because if they believe that they can  
7 file a report and then something will be done,  
8 and people will know about it, that will then  
9 build trust so that others will feel more  
10 comfortable bringing forth retaliation.

11 And during that same session, and the  
12 one afterwards, we talked to military commanders  
13 about trust, the importance of building trust.  
14 So, I mean, that's one element that it seems to  
15 me applies equally in both the civilian sector  
16 and the military sector.

17 I would defer to you, Admiral Tracey,  
18 on that.

19 VADM TRACEY: I thought that was true  
20 as well. Again, one of the things that I thought  
21 was eye-opening for me was the extent to which  
22 retaliation manifests itself in people just not

1 showing up, sort of a thing, and that's sort of a  
2 recalibration of how people think about victim  
3 isolation and that it may not be active behavior,  
4 it may in fact just be isolating people. And  
5 those are things that have been in my mind.

6 You know, I looked for the things that  
7 become criminalized and that was a very eye-  
8 opening discussion to your point about the  
9 psychological.

10 CHAIR HOLTZMAN: Well, is there  
11 something specific we can take? I mean, I think  
12 in a way the answer is obvious. You can look at  
13 the best practices. I mean, they ought to be  
14 looking at the best practices in the civilian  
15 workplace. But is there something specific that  
16 we should draw their attention to from what we've  
17 heard?

18 VADM TRACEY: So I think these -- to  
19 treat this kind of activity in the same way as  
20 you would UCMJ activity, use the -- kind of an  
21 anonymized reporting of incident so that people  
22 know that when something happens action is taken,

1 and that has both trust-building impact and we  
2 take this seriously, and it has maybe a deterrent  
3 effect. That's certainly a piece of this.

4 The sort of training around that  
5 continuum, so that you build a ground-up  
6 leadership awareness of what victims' experiences  
7 are like, and, to your point, why those are  
8 corrosive for the unit cohesion that everybody is  
9 supposed to build.

10 MR. STONE: And I think that the -- my  
11 fine tuning of this question is that it would be  
12 -- to look at best practices from civilian  
13 workplace situations that involve large  
14 organizations, whether they're corporate or  
15 university, because those are the ones that are a  
16 little closer to the military.

17 They're a little more all-  
18 encompassing. People want to stay in the  
19 corporation, or they want to stay in the  
20 university, and so both of those situations  
21 include a component of the ongoing relationships  
22 that will result, whether it's a professor they

1 don't want to fire because there are allegations,  
2 or whether it's a lead scientist in a big  
3 corporation who is important to their product.

4 You get a better feeling for the  
5 ongoing -- the way they have to deal with that  
6 ongoing effect. And I think those will be a  
7 little more helpful to us than just if we just  
8 look at universal general situations. It can  
9 include a lot of them where people don't worry  
10 about the ongoing effect on the whole  
11 organization and these people, neither who wants  
12 to leave their situation where they cross paths.

13 VADM TRACEY: One other observation.  
14 I didn't hear anybody who had this locked up and  
15 a ribbon tied around it. You know, everybody is  
16 struggling around this sort of very deeply  
17 embedded kind of --

18 MR. STONE: We know the universities  
19 are struggling.

20 VADM TRACEY: That's right. And so  
21 sort of an ongoing dialogue, to your point, with  
22 organizations who have similarities to the DoD

1 structure is probably a valuable thing to  
2 establish. Because this happens at such an  
3 intimate level of the organization it's really,  
4 really hard to govern from--

5 MR. STONE: Yes.

6 VADM TRACEY: -- one of the things  
7 that they --

8 MR. STONE: We have seen situations  
9 with some of the most prominent corporations in  
10 this country where there is a sexual relationship  
11 -- it may not be harassment -- between top people  
12 in the organization and someone at the next  
13 level, and people wind up having to resign  
14 because it just so disrupts the board and the  
15 operations, that even when it's consensual, but  
16 not open, that it disrupts the whole place.

17 And that's the issues that we're  
18 looking at. We have both things -- the military  
19 has to be able to function effectively, and the  
20 victim has to know that it isn't because they  
21 were ignored, you know. So two things to --

22 CHAIR HOLTZMAN: I wanted to ask a

1 question. Maybe this is a really silly question,  
2 but I don't know how the military functions. But  
3 one of the things that, as I recall, Chris Anders  
4 had talked about was the importance of an ethical  
5 -- high ethical standard in the organization.

6 And I know one of the things that  
7 corporations do to deal with that is to have a  
8 hotline, which is monitored, on ethics issues and  
9 improprieties. Does something like that exist  
10 for reporting retaliation? I mean, suppose  
11 you're not the victim, but you see retaliation  
12 ongoing in your unit, how does that work? Is  
13 there some way to report it? Do you report it to  
14 --

15 JUDGE JONES: It looks like there are  
16 hotlines all over the place, from --

17 MS. CARSON: There are so many  
18 different hotlines.

19 JUDGE JONES: I don't know if any of  
20 them are specifically dedicated to retaliation,  
21 but I got the impression some were.

22 MS. FRIED: I think the DoD Safe

1 Helpline captures that.

2 JUDGE JONES: Pardon me?

3 MS. FRIED: DoD Safe Helpline.

4 JUDGE JONES: Safeline. Yes. Okay.

5 MS. FRIED: And the IG has a website  
6 for reprisal and then hotline for other  
7 complaints.

8 VADM TRACEY: But it's a whistleblower  
9 site, isn't it?

10 MS. FRIED: Yes. It is.

11 VADM TRACEY: That was one of the  
12 issues. People don't know that's where you would  
13 go. Maybe you don't want to go to the IG because  
14 they are part of the problem half the time. But  
15 that's not a place that we would look for  
16 personal reprisal, I think, in the same was as --

17 MS. CARSON: But they can be a  
18 clearinghouse. What we heard from the DoD IG was  
19 when they receive from the hotline things that  
20 don't qualify as reprisal, they refer them out to  
21 the Services, out to the Service IGs, I think,  
22 who then probably refer it to the command level.

1                   CHAIR HOLTZMAN: But maybe that gets  
2 lost in the system?

3                   MS. CARSON: Yes.

4                   CHAIR HOLTZMAN: But, I mean, maybe  
5 there needs to be -- because this is such a  
6 serious problem, I mean, it is almost as serious  
7 as the sexual assault because it's a way of  
8 stopping people from reporting and dealing with  
9 the problems because they're so afraid of  
10 retaliation or reprisal.

11                   I mean, maybe the issue of how you  
12 report it, whether you are the victim or just a  
13 bystander, ought to be clarified, made easy and  
14 simple, and maybe it's the SARC who gets that  
15 kind of complaint. Maybe it's -- I mean, maybe  
16 it's -- it's left with all kinds of other things.  
17 Will people really report? Do they really think  
18 it's important? I mean, if you can put the same  
19 sort of emphasis on reporting retaliation, for  
20 example, as you put on reporting the sexual  
21 assault, maybe people would start taking it more  
22 seriously. I don't know. I just throw that out.

1           JUDGE JONES: So a sexual assault and  
2 retaliation hotline. Something along those  
3 lines? Do we have that? Do installations have  
4 that now or not? The hotlines are just a --

5           MS. CARSON: The hotlines, they --

6           JUDGE JONES: -- very general.

7           MS. CARSON: -- military -- OneSource,  
8 which is a place where you can go with all kinds  
9 of questions, and then they have DoD hotlines,  
10 and then they have a sexual assault hotline. I  
11 mean, they have the IG hotlines, and then they  
12 have the sexual assault hotlines.

13           Just to point to the business practice  
14 that we heard about was the idea of ethics and  
15 compliance programs, and I think maybe a hotline  
16 -- that's where you might find an ethics hotline,  
17 and they look at it in the workplace in terms of  
18 code of ethics for a profession. You get fired  
19 if you breach that. It's not criminal, but you  
20 do lose your job.

21           And so they talked to us a little bit  
22 about, you look at this like a workplace. It's

1 something that may not be criminally actionable,  
2 but maybe you should be fired for, is another way  
3 to look at it, more like the civilian workforce.

4 MS. TOKASH: Right. Those are the  
5 ERAs, the ethics requirements basically that Dr.  
6 Harned talked about. And she also talked about  
7 how, you know, each of the Services have, you  
8 know, the Army values, the Air Force has their  
9 own standards, and then within those Services you  
10 have your own set of standards. You know, as  
11 Judge Advocates, you have your standards of  
12 conduct, and then you have your own state bar.

13 So it goes down, but there is nothing  
14 really that talks about from a DoD perspective of  
15 how every uniformed Servicemember should behave  
16 ethically as a member of a workforce. And so the  
17 ERAs that she talked about were supporting  
18 ethical behavior, considering ethics, setting the  
19 example, talking about the importance of ethics,  
20 and then holding non-managers or, in the case of  
21 the military, non-leaders, accountable for their  
22 actions.

1           JUDGE JONES: I think the -- I mean,  
2 when you're in the military, the whole military  
3 is your workplace, right? I mean, of course you  
4 have assignments, but, I mean, you're an officer  
5 or not an officer, but in the military, 24 hours  
6 a day.

7           I guess all I'm trying to figure out  
8 is, what is the question? Do we need a  
9 designated hotline that permits people who don't  
10 even want to talk to a SARC or a chaplain or  
11 their best friend, but who will get on it and  
12 say, "This is what's going on. You need to know  
13 this. So-and-so is being retaliated against.  
14 She was sexually assaulted." You know, that's  
15 the bystander who saw something, or the person  
16 himself. Is that what we're looking for here?

17           COL GREEN: I think --

18           JUDGE JONES: I'm not sure.

19           COL GREEN: Judge Jones, I think the  
20 question is the DoD Safe Helpline, which is --

21           JUDGE JONES: Does that do that?

22           COL GREEN: -- the primary resource

1 for dealing with this --

2 MS. CARSON: I think the efforts are  
3 to maybe start -- maybe get more -- you know, it  
4 was established as a sexual assault hotline.

5 JUDGE JONES: Right.

6 MS. CARSON: I know that they are  
7 looking at making that as a way that you could  
8 actually do reporting, maybe do anonymous  
9 reporting. So I think that is a vehicle.

10 JUDGE JONES: I mean, because if  
11 people actually got on there and talked about  
12 conditions, that could be helpful to these case  
13 management groups. And, you know, it's not proof  
14 beyond any kind of standard, but it's  
15 information.

16 So, anyway, I apologize. I have to  
17 leave, Madam Chair.

18 CHAIR HOLTZMAN: We will miss you.

19 JUDGE JONES: Thank you.

20 MS. FRIED: There is -- just so you  
21 all know -- before you leave, Judge Jones --  
22 there is a link to the DoD Safe Helpline to

1 Servicemembers. If you believe you experienced  
2 or witnessed retaliation, filed a report of  
3 sexual assault, please let the DoD Sexual Assault  
4 Prevention and Response Office know. And you  
5 click here and learn more. So there is already a  
6 tag on the DoD Safe Helpline.

7 JUDGE JONES: So maybe like every  
8 other thing, we decide whether we need an  
9 educational program that -- something that  
10 highlights retaliation and training. Maybe  
11 that's being done already, too.

12 MS. CARSON: That word is out at the  
13 force level about the DoD Helpline.

14 MS. FRIED: Yes. And there's a  
15 military feedback form where it tells -- for  
16 people to explain what's going on. And then  
17 gives options to whistleblower reprisal  
18 retaliation, report directly to the IG also, so -  
19 - and it has them identify who they are, status,  
20 date of incident. There's a whole gamut of  
21 information they are asking for the person to put  
22 in.

1 CHAIR HOLTZMAN: Well, maybe it needs  
2 to be publicized more. Maybe the name needs to  
3 be changed, but --

4 MS. FRIED: This is relatively new, by  
5 the way. Julie is correct.

6 JUDGE JONES: And I don't know whether  
7 any of it is sort of gone through to see if, wow,  
8 these are conditions, if true, that maybe should  
9 be brought to the attention of the case  
10 management group. That's all.

11 MS. CARSON: Or a recommendation that  
12 was made by the RSP. Most of the installations  
13 have their own hotlines as well as the Safe  
14 Helpline.

15 JUDGE JONES: Which would be more  
16 helpful.

17 MS. CARSON: And so -- well, but  
18 that's so many different hotlines that the  
19 quality control on the Safe Helpline is it is  
20 manned 24/7 by people who are trained and are  
21 there. Where I think, you know, if there are  
22 issues with the installation hotlines, of when

1 you can get someone -- I mean, there is less  
2 ability to really ensure the quality controls  
3 when you have it that decentralized. And people  
4 will call their installation before they'll call  
5 the Safe Helpline.

6 JUDGE JONES: All right. So maybe  
7 they should be better staffed. But more -- some  
8 information is better than none, I guess.

9 MR. STONE: And you also fractionalize  
10 the data. You lose them or you double-count them  
11 or you don't count them.

12 JUDGE JONES: Well, I don't know that  
13 it would help for data collection at all. I  
14 would think -- I would use it as intelligence, a  
15 hotline. It's anonymous.

16 MR. TAYLOR: I suggest we take a short  
17 break.

18 CHAIR HOLTZMAN: Okay. Five minutes.

19 (Whereupon, the above-entitled matter  
20 went off the record at 2:57 p.m. and resumed at  
21 3:02 p.m.)

22 CHAIR HOLTZMAN: Excuse me, can we --

1 we're trying to commence, if anybody's got things  
2 to say, if they could please leave the room.

3 We were just going on the point that  
4 I had raised, or maybe we left it, but I'd just  
5 like to go back to the point about possibly  
6 advertising more prominently this hotline that's  
7 used -- that's available, I guess, for  
8 retaliation complaints.

9 And how could we find out about the  
10 Services' ideas about how to improve the  
11 publicity around it?

12 MS. CARSON: How do we find out?

13 CHAIR HOLTZMAN: Yes, how could we  
14 find out? Do they have -- I mean, do they think  
15 that that hotline's being adequately used?  
16 Accessed? Or what? Do we know, how long has it  
17 been in existence?

18 MS. CARSON: Let's see, several years.

19 MS. FRIED: Yes, just after the  
20 detailed SANs report.

21 MS. CARSON: So, 2010, currently?

22 MS. FRIED: But --

1 MS. CARSON: But, the actual  
2 Retaliation Reprisal Act was about two months?

3 CHAIR HOLTZMAN: Two months?

4 MS. FRIED: Yes.

5 MS. CARSON: Yes, it's brand new, so  
6 I mean I wouldn't think anybody in the Service  
7 actually -- you know, and the Services.

8 MS. FRIED: But, it's --

9 MS. CARSON: It's tracking it, yes.

10 MS. FRIED: Yes, not only on our  
11 website but on -- there's fliers that are being  
12 disbursed to the member installations.

13 CHAIR HOLTZMAN: Okay. So, I guess we  
14 go next to the training programs on retaliation  
15 prevention and response. Are adequate training  
16 programs in place? It's something, Mr. Taylor,  
17 you had mentioned.

18 But, I don't know what else we want to  
19 say about this subject.

20 MR. TAYLOR: Well, just to kick things  
21 off, based on the testimony we had, I thought  
22 there was pretty wide variety of approaches in

1 who conducts the training and the materials used.

2 It seems to me that there was a  
3 general leadership and command acceptance of  
4 responsibility for doing this training.

5 And, some of the examples we had  
6 included NCO leadership talking about the Not In  
7 My Squad program, Master Sergeant Johnson from  
8 the Army.

9 Again, I think as with all training,  
10 the problem at some point becomes whether or not  
11 the people who are receiving the training are  
12 tuning it out. And, I think to that end, that  
13 the Services need to continue to think of  
14 innovative and fresh ways to present this  
15 training.

16 But, I think some of the examples we  
17 saw with the slides and the videos that we were  
18 asked to review were really good examples of  
19 people talking about what had happened to them  
20 and also the outcomes.

21 CHAIR HOLTZMAN: Mr. Stone, do you  
22 have any suggestions to make on this?

1                   MR. STONE: Well, I know this is going  
2 to sound old-fashioned, but I've had tons of  
3 training both digital and live, and yet, when  
4 people say, gee, there's an issue is that am I  
5 getting paid the right amount of wages or  
6 workman's comp?

7                   They go to the place in my  
8 organization where there's a bunch of posters  
9 stuck to the wall from the various places. When  
10 they need it, they remember there's a poster and  
11 they go look.

12                  If you ask them what they were trained  
13 on two months ago, they can't remember it. But,  
14 if there's a poster, they find it, and especially  
15 if there's a phone number on it, it doesn't have  
16 to have every detail on the poster, that helps.

17                  So, I actually think posting whether  
18 it's the hotline, you know, for sexual assaults  
19 and retaliation resulting from sexual assaults.

20                  I think requiring something to be  
21 posted on a common bulletin board, even if it's  
22 not too large, it doesn't have to be a gigantic

1 poster, but I find that people know enough to go  
2 there. They don't have to have their iPhone,  
3 they don't have to have a code, they don't have  
4 to remember, you know, were they available for  
5 the training day.

6 There's so many training events, you  
7 can't -- even if you scribble down the name and a  
8 phone number, where do you have it now? And, you  
9 know, did you take those notes with you when you  
10 moved from place to place?

11 So, I actually think making sure -- we  
12 heard about lots of trainings and I think they're  
13 great, but I want to see, you know, a little  
14 thing posted just like they post probably EEOC  
15 issues and complaints. And that little poster,  
16 from my experience, gets people -- gives them --

17 They also don't have to go confide in  
18 someone else. Gee, do you know the number for  
19 sexual harassment? They don't want to tell  
20 somebody else. They don't have to tell anybody  
21 locally to get the number. It's up there.

22 And so, I think that that's an

1 important component of this prevention stuff.

2 And, maybe the answer is, if you  
3 wanted to get to dependents, you also have it  
4 posted either on the bulletin board in the PX or  
5 the post office or some place where the  
6 dependents also go.

7 And, that way, get the person, if it  
8 happens to them and they remember, they go back  
9 to the PX, they remember on that bulletin board  
10 there's a bunch of things.

11 So, that's, for what it's worth,  
12 that's my non-electronic thoughts about the  
13 matter.

14 CHAIR HOLTZMAN: I have a question  
15 about this, in the sense that, when a victim --  
16 you had mentioned these reports that are filed,  
17 when a sexual assault report is made, is the  
18 victim, at the time of the sexual assault or at  
19 some point, shortly thereafter --

20 I mean, I know the question is, have  
21 you experienced retaliation? But, is the victim  
22 told what retaliation is? That it could be the

1 ostracism, that it could be the cold shoulder? I  
2 mean, do they know that?

3 MS. CARSON: Again, that's something  
4 that all of the Services have said that's going  
5 into their training. The Air Force,  
6 specifically, in their guidance says it is the  
7 SARC's responsibility to explain to anyone  
8 reporting.

9 CHAIR HOLTZMAN: Sort of following up  
10 on what Mr. Stone said --

11 MS. CARSON: Is there a handout?

12 CHAIR HOLTZMAN: Is there a handout  
13 that you could look at?

14 MS. CARSON: Not that we have seen.  
15 The Services may be developing them and have  
16 them, but we haven't -- it's not anything that  
17 we've seen.

18 CHAIR HOLTZMAN: That might be  
19 something very useful to give -- I mean to a  
20 sexual assault victim, you might give them, you  
21 know, here are the telephone numbers, medical  
22 care, emergency this and whatever, you know.

1           But, here's also what your rights are.  
2           And there should be something like that and, you  
3           know, who do you call.

4           MS. CARSON:   And, there is a form that  
5           they receive when they make a sexual assault  
6           report that gives them information that is a very  
7           standardized form.

8           We've seen from sexual assault crisis  
9           centers, rape crisis centers, booklets and  
10          brochures and things that they've put together  
11          that are extremely good and helpful that would be  
12          good models for the Services.

13          Things like that aren't done, that  
14          I've seen, by any of the Services.   But --

15          CHAIR HOLTZMAN:   Well, that might be  
16          something --

17          MS. CARSON:   -- and retaliation  
18          included in that would be a helpful thing.   You  
19          could put that with the posters.

20          MR. STONE:   Yes, right.   But, I think  
21          what the Chair is saying is, you know, it's sort  
22          of like, you know, being frozen out or, what are

1 some of the next ones, you know, or excluded or  
2 harassed or worse. Those are incidents you can -  
3 - you should report.

4 In other words, where's their  
5 consciousness that just being frozen out of  
6 things consciously --

7 MS. CARSON: And that can be part of  
8 the communication campaign, you know, as --

9 CHAIR HOLTZMAN: But I think that that  
10 should be given. I mean, it may not happen right  
11 away, the retaliation, so, the person might not -  
12 - the sexual assault victim, you know, the stuff  
13 may go in and out of his or her ear, but if they  
14 have a piece of paper and they get a chance to  
15 look at it later and say, oh yes, okay, I qualify  
16 and this is where I go.

17 They could stick it up on their  
18 refrigerator or whatever. I think something like  
19 that would be very useful.

20 Any other thoughts on this subject?

21 Okay, victim support resources,  
22 whether adequate victim support resources are in

1 place to assist Servicemembers, civilians and/or  
2 dependents from a superior's retaliation after  
3 making a report of sexual assault.

4 Well, we just identified one. Is  
5 there some other victim support resources that we  
6 need?

7 MR. STONE: Kyle, the SVCs and the  
8 VLCs, they do this, right? They continue along  
9 from the sexual assault if there's the follow up  
10 retaliation? Oh, and now they're retaliating me  
11 from that, though that client is still theirs,  
12 isn't it?

13 COL GREEN: Yes, the SVCs, this is a  
14 key point of assistance that they are able to  
15 provide. Also, in addition, I mean the SARCs and  
16 VAs, the -- and others.

17 The RFI responses that were received  
18 from the Services highlights the responses we  
19 received talking about the SARCs and VAs,  
20 victims' counsels, VWAP personnel and trial  
21 counsels, obviously the Service IGs and their  
22 role, the MCIOs, the criminal investigators, the

1 case management groups.

2 So, I think those are the principal  
3 categories that we ask the Services about. And  
4 they described the different roles. I think  
5 those are the major categories of resources that  
6 are available.

7 MS. CARSON: One point of distinction,  
8 all of the SVC/VLC programs have responded to the  
9 JPP's request for information that they can help  
10 with all of these retaliation type issues and  
11 complaints.

12 However, the Air Force, this was  
13 raised in the Human Rights Watch Report, and if  
14 you look at the Air Force Charter for their SVC  
15 program, it says they cannot help with IG reports  
16 and those are looked at as conflict of interest.

17 So, they may be changing their  
18 position on that and we don't have clarification  
19 in any written policy form that that's the case.

20 CHAIR HOLTZMAN: Well, we should try  
21 to get that for sure.

22 COL GREEN: My understanding is --

1 CHAIR HOLTZMAN: And maybe --- I'm  
2 sorry.

3 COL GREEN: My understanding is that  
4 has been updated and it's currently implemented  
5 according to allow the Air Force -- okay.

6 CHAIR HOLTZMAN: Can you send us  
7 whatever policy that is? That would be very --

8 COL GREEN: I was aware a couple of  
9 months ago that I knew that that was an update.  
10 Again, the issue being that this falls under the  
11 legal assistance purview and so, assisting in the  
12 IG process within the Air Force parameters, legal  
13 assistance was not something that you were  
14 permitted to do. And so, it's just been an  
15 evolution of the SVC program within in the Air  
16 Force to permit the specific representation to  
17 victims.

18 CHAIR HOLTZMAN: Just a question,  
19 going back to my point about a brochure. I mean,  
20 seems to me, knowing your rights as a sexual  
21 assault victim, how is a person told about the  
22 SVC? Is that just an oral communication to the

1 victim?

2 MS. CARSON: SARC is required to tell  
3 them.

4 CHAIR HOLTZMAN: Tell them? But this  
5 is not -- you don't have like a little brochure  
6 that says --

7 MS. CARSON: We don't see one.

8 CHAIR HOLTZMAN: Well, okay. So,  
9 maybe that would be something that would be  
10 really, you know, what are your --

11 MS. FRIED: I think it's going to be  
12 --

13 CHAIR HOLTZMAN: What?

14 MS. FRIED: I think it's going to be  
15 on the 2910 and 2911 form.

16 CHAIR HOLTZMAN: I'm not talking about  
17 a form, I'm talking like a brochure, Know Your  
18 Rights or, you know, you walk into a hospital,  
19 your rights as a patient. Of course, a lot of it  
20 is exaggerated or may not be actually  
21 implemented, but it's right up there and it seems  
22 to me that that might be something.

1 MR. STONE: Well, I think after the  
2 event that is the 2710 form. I think that's all  
3 in there. But, it's after the event when I see  
4 you and I say, oh, you were a victim, here, and I  
5 hand you something. I don't know that it's  
6 routine training when they're -- before anything  
7 has ever happened.

8 CHAIR HOLTZMAN: Well, I still think  
9 ---

10 MS. CARSON: I am wondering ---

11 CHAIR HOLTZMAN: After the event --

12 MR. STONE: And which one you were  
13 looking for.

14 MS. CARSON: It said in the training,  
15 the SVC Army training last August, and in that  
16 training, they showed us a public service  
17 announcement. They encouraged the SVCs to do  
18 things on their own to publicize their services.  
19 So, I mean I think there's efforts but I don't  
20 know that there's anything --

21 CHAIR HOLTZMAN: But what I'm talking  
22 about is when the person -- when the victim

1 reports, there ought to be something that's given  
2 to the victim, Know Your Rights. Maybe they  
3 don't want an SVC at that point.

4 But, there's something that says,  
5 you're entitled to an SVC. You're entitled to be  
6 free from retaliation. Here's what retaliation  
7 is. Here's a number call. You want an SVC?  
8 Here's a number to call.

9 I don't know, you need medical help?  
10 You're entitled to medical help. This is, you  
11 know, whatever.

12 MS. CARSON: There is a form. The  
13 2701 form.

14 CHAIR HOLTZMAN: Well, what does it  
15 look like? I mean --

16 MS. TOKASH: It's a tri-fold brochure  
17 that --

18 CHAIR HOLTZMAN: It's a brochure?

19 MS. TOKASH: Yes. But it's basic  
20 information for victims and witnesses of crime  
21 and then the second form in the series is  
22 information about the court-martial process and

1 the third one is information about the post-trial  
2 process.

3 But it needs to be updated. I mean I  
4 don't know the last time the 2701 was updated. I  
5 don't know if it includes --

6 MS. CARSON: It doesn't include SVCs.

7 MS. TOKASH: -- SVCs or retaliation.

8 MR. STONE: And, it roughly parallels  
9 the form that Assistant U.S. Attorneys give out  
10 in every district or their investigators to  
11 victims at the scene which, again, is a page and  
12 it's folded in three and it tells them who the  
13 contacts are and there's a place on the front for  
14 the investigator to write his name and his number  
15 and they hand it out to every victim.

16 And, this -- it's not exactly the  
17 same, but the idea is the same. A victim on the  
18 scene is going to get this thing and they won't  
19 be totally at sea. They can read it when they go  
20 home and they finally calm down.

21 CHAIR HOLTZMAN: Right. But, I'm just  
22 saying that it would be useful if this form had

1 something about retaliation in it. But she said

2 --

3 MR. STONE: Well, that I don't know.

4 CHAIR HOLTZMAN: -- it doesn't have  
5 retaliation in it. That's why I frame it in  
6 terms of what's your right as a victim.

7 MR. STONE: Yes, that's a good --

8 CHAIR HOLTZMAN: And you have a right  
9 to be free from retaliation and here and the, you  
10 know, free from whatever, it's cold shoulder or  
11 threatening, whatever.

12 MS. CARSON: It lists the victim  
13 rights in it as they have existed in DoD policy.  
14 I don't know that it's even been updated since  
15 this --

16 MR. STONE: Typically, they say you  
17 have a right to be protected from harm.

18 CHAIR HOLTZMAN: Right, okay.

19 MR. STONE: Which means you call if  
20 something's happened. And, in a loose way, I'm  
21 sure that they would say, how else can that be  
22 understood except retaliation? The event has

1 occurred, if it's you has a right to protection  
2 from harm, they're talking about intimidation or  
3 retaliation.

4 So, I mean -- but, I don't think -- I  
5 don't know if they use the word retaliation.

6 MS. TOKASH: It looks like the 2013  
7 version has been updated.

8 MR. STONE: Okay.

9 MS. TOKASH: It says, "If you have  
10 problems at work because of the crime or the  
11 investigation, we can contact your employer or  
12 commanding officer." But, that's probably more  
13 about, you know, court arrangements and things  
14 like that.

15 But it still does not list anything  
16 regarding the victim's counsel. It does list the  
17 Federal Crimes Victim Bill of Rights on it.

18 MR. STONE: And the first one of those  
19 is protection from harm.

20 MS. TOKASH: It's the 2013 --- correct.

21 MR. TAYLOR: I have a slightly  
22 different question, if it's okay to move to a

1 slightly different question.

2 That has to do with the adequacy of  
3 our support resources for civilians and/or  
4 dependents.

5 You might recall that we had some very  
6 compelling testimony from the spouse of a  
7 Servicemember who had been assaulted and the  
8 ostracism that she experienced as a member of the  
9 community in which she operated, in terms of not  
10 being invited, included in a lot of different  
11 activities.

12 I think it's a particular problem for  
13 people outside the work environment because the  
14 question of whether she was receiving the right  
15 kind of mental health support or counseling or,  
16 you know, it was very difficult in terms of how  
17 to do that.

18 So, I'm not sure that we have quite  
19 got a good handle on how we can help people like  
20 her.

21 And also, I was thinking of civilian  
22 contractors, in particular, who are on an

1 installation. There are more and more  
2 contractors in the workplace. And, if you're a  
3 civilian contractor and happen to be a victim of  
4 one of these crimes, then it seems to me that the  
5 support safety net falls apart at some point  
6 unless you have the backing of your employer,  
7 whoever that might be. And that's going to be  
8 whoever's got the contract.

9 And the contractor may or may not be  
10 willing to extend the same kind of courtesies  
11 that a Department of the Army or Air Force or  
12 Navy Supervisor would be required to extend  
13 because they're a federal employee.

14 So, I just wonder if anybody had any  
15 thoughts? And, those of you who've looked at  
16 this, have you come across any ideas about how to  
17 address either of these two sets of problems?

18 MS. CARSON: I think it's not been  
19 looked at sufficiently, probably.

20 MR. STONE: If you work for a  
21 contractor and the contractor's been not  
22 necessarily the cause, but negligent in putting

1 you in that position, you'd be able to sue them  
2 in a way that you couldn't sue the military  
3 because there wouldn't be a Federal Tort Claims  
4 Act bar.

5 It's not a good solution, but the  
6 circumstances are a little bit different.

7 MR. TAYLOR: Well, yes, so that's a  
8 very good point, but in most situations like  
9 this, that's probably not the case.

10 MR. STONE: No.

11 MR. TAYLOR: The case is probably that  
12 you are doing some sort of, preferably  
13 appropriate job for a contractor to do and you  
14 become the unwilling, unwitting victim of a  
15 sexual assault and then where's the safety net  
16 for that person?

17 I just don't think we've talked about  
18 it and maybe it's something we should at least  
19 acknowledge that we need to think about just a  
20 little bit more before we just assume that we've  
21 answered the question by dealing with the gaps  
22 issue. Because this is different from the gaps

1 issue.

2 MR. STONE: This goes to the nexus we  
3 spoke about. I think that we want to include  
4 civilian contractors maybe. That's the question  
5 that should be put out there for us to decide if  
6 we're going to include civilian contractors.

7 MS. FRIED: I think it depends on what  
8 context, because you've got to make sure it's in  
9 the scope of what the JPP's tasked to do.

10 MR. STONE: Sure. I totally agree.

11 MS. FRIED: So, presumably, the  
12 perpetrator would have to be subject to the UCMJ.

13 MR. TAYLOR: Sure. I mean that's part  
14 of my hypothetical.

15 MS. FRIED: Yes.

16 MR. STONE: I do know that on a lot of  
17 questions of -- like Federal Tort Claims Act,  
18 they don't include contractors. It specifically  
19 excludes contractors. Like, for example,  
20 contract doctors in prisons, they don't get any  
21 federal government backing if they commit  
22 malpractice as occasionally happens. You see law

1 suits like that.

2 So, it's very tricky where the  
3 contract thing begins and ends. But, that  
4 doesn't mean we can't treat them as victims for  
5 discretionary help.

6 CHAIR HOLTZMAN: Well, the question is  
7 also, do they -- if it's on the military base,  
8 first of all, what support services are sexual  
9 assault victims entitled to if they're not  
10 military?

11 MS. CARSON: Dependents of families  
12 get SARCs.

13 CHAIR HOLTZMAN: Okay. And --

14 MS. CARSON: The SARC will refer  
15 anyone else I think to community resources.

16 CHAIR HOLTZMAN: Okay.

17 MR. TAYLOR: Excuse me. I think that  
18 our testimony showed that -- our testimony we  
19 received showed that they are entitled to  
20 emergency care at the medical treatment center.

21 CHAIR HOLTZMAN: Right.

22 MR. TAYLOR: But, then once the in

1 processing is done, the forensic exam, they're  
2 immediately handed off into the civilian  
3 community or whatever structure is there for both  
4 mental and mental health -- excuse me -- physical  
5 and mental health type, is that correct?

6 MS. CARSON: I believe that's correct.

7 MR. STONE: Which could be nothing.

8 MR. TAYLOR: Yes. So, I guess the  
9 question is, do we want to say or do or think a  
10 little bit more about the support services for  
11 that category, that class of individuals?

12 Or are we going to say that well, to  
13 the extent that we don't have a safety net for  
14 them now, this compensation board that we're  
15 talking about would be another argument, if you  
16 will, for having a compensation board to help  
17 them, to acknowledge to them some responsibility  
18 to help them get their lives back in order.

19 Just a thought.

20 CHAIR HOLTZMAN: Well, I mean I think  
21 that's a valid question whether contractors  
22 should be subsumed in terms of these other

1 services. I don't know, is that part of our --

2 MS. FRIED: I think that is RSP --

3 CHAIR HOLTZMAN: Okay, fine.

4 MS. FRIED: -- aspect.

5 CHAIR HOLTZMAN: Okay, if it's not in  
6 our jurisdiction, then --

7 MS. FRIED: But we can certainly go  
8 look and -- look at the charter again. I'm just  
9 trying to pull it up, but I think it's a little  
10 bit beyond the scope, whatever you deem worthy.

11 CHAIR HOLTZMAN: Okay, well, let's  
12 keep -- Mr. Taylor, why don't you keep that in  
13 the back of your mind and let's see if it's  
14 within our charter. Then, of course, we can take  
15 a look at it.

16 Now, here, I think we've just been  
17 through this whether --

18 MR. STONE: If I may just before we  
19 leave it?

20 CHAIR HOLTZMAN: Yes?

21 MR. STONE: The reason it's within the  
22 charter is, and this goes back to the -- some of

1 the material that I learned when I went down to  
2 that training conference is that the vast  
3 majority of sex assault offenders tend to be  
4 habitual offenders, tend to be repeat offenders.

5 So, if the offender is in the  
6 military, today he might have victimized a  
7 contractor, but yesterday and tomorrow, it may  
8 well affect the ability of that Service to do  
9 their job right.

10 That's all.

11 CHAIR HOLTZMAN: Okay, let's go on to  
12 Issue 6.

13 COL GREEN: Ms. Holtzman, it's about  
14 26 after.

15 CHAIR HOLTZMAN: Oh, okay, fine.  
16 Sorry, we have to stop now because we have to get  
17 a report on the data management. So, we will  
18 pick this up at our next meeting.

19 I hope in the next meeting we can  
20 conclude the restitution and compensation issue  
21 and then, I don't know, make more progress on  
22 this.

1                   Okay, who's giving us our report on  
2                   the --

3                   COL GREEN: Let me -- I'll kick this  
4                   off while Matt and Meghan, if you guys want to go  
5                   over and get the slides set up.

6                   CHAIR HOLTZMAN: Thank you very much  
7                   to the Staff and for your help on this. Thank  
8                   you.

9                   COL GREEN: I've provided you -- I  
10                  turn your attention to the tasks and timeline  
11                  planning document that I provided you. It's --  
12                  replicates something that we gave you last fall  
13                  that just, again, for planning purposes and  
14                  helping the Staff focus our energies provide you  
15                  a list of meetings between now and into the near  
16                  future primarily until February 2016 when a JPP  
17                  annual report is due.

18                  As a reminder, the Statute for the JPP  
19                  required an initial report within 180 days. And  
20                  then, the subsequent reporting requirements is  
21                  that you have reports due annually during fiscal  
22                  years afterwards until the Panel concludes.

1           And, based on that, the next report of  
2 the Panel is due in early February of 2016.

3           You've obviously spent a lot of time  
4 talking about restitution and compensation and  
5 retaliation. We had this deliberation session  
6 today that we hoped, which is obviously, not a  
7 great strategy, but hoped we might get through  
8 these two topics and be able to turn to it, but,  
9 we have planned the next three sessions to focus  
10 on the judicial proceeding trends and analysis  
11 for Article 120 cases.

12           And, the primary focus of that is the  
13 Statute for the JPP does require an annual report  
14 on trends and analysis cases. And, as you'll see  
15 from the Staff in terms of our gathering of this  
16 information, an annual report on that is possible  
17 and I think due from the Panel by February.

18           And so, in order to give sufficient  
19 time for you to address that issue and then  
20 deliberate on it and report on it by the February  
21 deadline, I think September through October --  
22 September, October and November, it's going to

1 take that amount of time to adequately cover it  
2 as a Panel.

3 And so, that's the planning time line  
4 that the Staff is going towards now. Obviously,  
5 we'll need to consider, or you'll need to  
6 consider in terms of your deliberations on these  
7 two topics and whether we want to continue with  
8 that or whether we want to push those off and  
9 focus on the trends and analysis materials.

10 But, maybe before even that  
11 discussion, if we could have Matt and Meghan  
12 provide you a brief, and you have copies of these  
13 slides as well, that will help you see what the  
14 Staff has been doing and we can make sure that  
15 we're working according to your intent.

16 Go ahead, Matt.

17 MR. OSBORN: All right, so, Meghan  
18 Peters and I are going to give you a quick  
19 breakdown of what we've been doing with the  
20 trends and statistics and kind of where we see  
21 the project going.

22 The first part, and you have in front

1 of you the taskings that we have, the three that  
2 are related to the trends and analysis piece of  
3 the JPP taskings.

4 The first one kind of being the all  
5 encompassing one in terms of reviewing and  
6 evaluating current trends for sexual assault  
7 crimes whether by court martial, non-judicial  
8 punishment or administrative action and looking  
9 at the number of types of punishment and the  
10 consistency and appropriateness of the actions in  
11 those cases.

12 The second one then turns to focusing  
13 on the punishments rendered by courts. So, at  
14 first, it kind of talks about the courts and non-  
15 judicial punishment and administrative action.

16 The second narrows in on military  
17 courts whether by general, special or summary  
18 and, particularly, the punishments that were  
19 rendered in those courts looking at the numbers,  
20 the consistency and then adding in, comparing  
21 those with punishments rendered in the federal  
22 and state criminal courts.

1           And then, the last is looking at court  
2 martial convictions within a specific year and  
3 centering on the appellate process.

4           So, seeing when those punishments were  
5 reduced and set aside upon appeal and then the  
6 instances in which the defendant appealed  
7 following a plea agreement.

8           So, those are the taskings and, like  
9 I said, the second two are a little narrower.  
10 The first one's a pretty broad deal.

11           So, the first thing we wanted to do in  
12 terms of the trends and analysis was figure out  
13 the data piece because that's going to be all  
14 part of the deal.

15           When I first came on in August, our  
16 team went and the first thing we did is review  
17 some of the past DoD SAPRO reports for FY11, 12,  
18 13. Since that time, 14's come out, so we  
19 certainly looked at that.

20           And then we went and met with a lot of  
21 the players in the system. The DoD SAPRO  
22 personnel, the Services, MCIOs, the investigators

1 down in Quantico, a variety of the military  
2 justice offices and then the appellate courts,  
3 too, just trying to get an idea of what their  
4 current tracking systems are able to do, the  
5 capabilities.

6 Because the main thing that we were  
7 looking for, in my view, was three things, the  
8 completeness of their data, the accuracy of their  
9 data and, most importantly, since we're looking  
10 DoD wide, the uniformity of the data across the  
11 Services.

12 And, what we found was, for the issues  
13 that we were looking at, the specifics of sexual  
14 assault is that the current reports and the  
15 current systems could not do what we needed them  
16 to do.

17 Certainly, within the Services, the  
18 uniformity of the tracking we found became an  
19 issue. There would be some Services that would  
20 track a certain thing, but another Service system  
21 could not do that.

22 You know, one of the things we

1 certainly found and kept in mind throughout this  
2 is, many of these systems were not exactly  
3 designed to be data tracking trend analysis  
4 systems. They were designed to work cases in the  
5 field, to manage cases, the administration of  
6 military justice along the way.

7 But, for the purposes for which we  
8 need them, which was data for tracking, these  
9 were the issues that we found with uniformity.

10 And then also, the ability to perform  
11 complex search queries that we were interested  
12 in.

13 Things such as comparing when a  
14 convening authority, when they're making a  
15 referral decision, followed the advice of their  
16 legal officer from the pre-trial advice or when  
17 they followed the recommendations of the  
18 investigating officer.

19 Other things such as in a pre-trial  
20 agreement, how often are sex assault 120 offenses  
21 being tied to assault 128 offenses that take it  
22 out of the sexual assault realm.

1           So, these are the type of things that  
2 we were interested in and, like I said, some of  
3 the systems could do part of that, but then  
4 across DoD and across all the systems that we  
5 were looking at, they just couldn't do exactly  
6 what we were looking for.

7           Those were the systems. Now, for DoD  
8 SAPRO, they, of course have their annual report.  
9 And so, we looked at that to see what  
10 information we could glean from the charts and  
11 the data that they have.

12           What we found is the data that they  
13 receive is very comprehensive in terms of the  
14 demographics. They used rank, offender, victim,  
15 gender, status, those type of things.

16           But, once it got to the adjudication  
17 part, the specificity in the amount of  
18 information we needed started to drop off.

19           For instance, in their charts, they  
20 list the most serious offense charged, the most  
21 serious offense that was found guilty and then  
22 they would show a sentence. And then, sometimes

1 would have a court type.

2 The problem became the things that  
3 were not included. There we go. When we're  
4 looking at things, particularly the punishments,  
5 we are interested in all of the offenses that  
6 were charged. And, more importantly, for  
7 convictions, all of the offenses that were found  
8 guilty.

9 Because, in the military when we're  
10 talking about unitary sentencing, we've got to  
11 know every thing they're found guilty of because  
12 there's only one sentence.

13 Also, we were -- the SAPRO report only  
14 gave us one sentence. It might have been the  
15 approved sentence or the adjudged sentence. The  
16 adjudged sentence being what the military judge  
17 or the panel gave the court-martial. The  
18 approved sentence being what the convening  
19 authority actually approved after the clemency  
20 and post-trial processes.

21 And these, of course, are interesting  
22 and things that we want to know in terms of the

1 clemency process and how the sentences and  
2 certainly the findings are being adjusted in that  
3 clemency process.

4 And then the court type as well for  
5 all cases whether it's a summary court, special  
6 or general.

7 And then, there are other things that  
8 we're interested in as well.

9 You know, one of the problems with --  
10 we would get most serious offense charged which  
11 might be rape, but then most serious offense  
12 guilty might be, you know, assault or, you know,  
13 some other offense.

14 And so, what we were interested in is,  
15 well, what happened to that rape charge? Was it  
16 dismissed or were they acquitted of it? Those  
17 type of things and that report just didn't have  
18 in it.

19 The pleas and findings, you know,  
20 whether the accused plead guilty or whether this  
21 was a litigated trial, the forum, a military  
22 judge versus members being the forum both for the

1 findings and the sentence as well, motions and  
2 certain pre-trial agreements, which is a specific  
3 part of one of our tasks, and then the clemency  
4 process as well.

5 So, these were the reasons that we  
6 looked around and saw the data that was already  
7 out there and realized that the current systems  
8 and what we needed just wasn't exactly there.

9 So, we then turned to look at the  
10 civilian systems to see what kind of processes  
11 they may have. And, about that time is when I  
12 went to the annual seminar for the United States  
13 Sentencing Commission back in September and I had  
14 an opportunity to run into the Director of the  
15 Office of Research and Data for them.

16 I talked to them about how they get  
17 their data. And what he said is they have a  
18 Statute that requires the District Chief Judge  
19 within 30 days of a judgment entered in federal  
20 court to send those documents to the Offices of  
21 Research and Data at the Sentencing Commission.

22 Every year, they get about 400,000

1 documents, 80,000 new cases, about 13,000 ongoing  
2 cases that have been resentenced or appealed or  
3 anything like that, so about 93,000 cases a year  
4 they get with these documents and they have their  
5 own database and are able to make data  
6 presumptions based on that.

7 So, their data is not based on any  
8 kind of hand jamming, any forms or anything like  
9 that. They are focused on getting the court  
10 documents.

11 And so, what we came back after that  
12 is started to figure out how we could do that.  
13 Because, in our eyes, the uniformity among the  
14 Services are the forms and the documents that are  
15 in a record of trial, DD forms, pre-trial advice  
16 is required from the Uniform Code of Military  
17 Justice, things that are the same among the  
18 Services to get that uniformity, that  
19 completeness and, certainly, the accuracy as  
20 well.

21 So then, we took the information we  
22 needed and started trying to figure out where

1 that was in each of the documents that we knew  
2 that each record of trial would have, depending  
3 on how far into a trial each case went.

4 And so, that's where we came up with  
5 the listing of documents that's on the Executive  
6 Summary that you all have on the second page.

7 So, from there, we tried to figure  
8 out, all right, now we've got to kind of limit  
9 the cases, or figure out what kind of case pool  
10 we're going to look at.

11 In a perfect world, it would have been  
12 every case that was preferred in FY12, FY13,  
13 FY14.

14 Our problem was, we were going back in  
15 time. If we were starting now and going forward,  
16 it might have been a different picture, but when  
17 we're having to do an annual report and look at  
18 trends and analysis, we're going to have to go  
19 back a few years to see what those trends are.

20 So, what we did is go back and we used  
21 the SAPRO report for FY12, FY13, FY14. We  
22 started with the FY12 because that was the year

1 in which the latest sexual assault statute came  
2 into effect.

3 And from there, we looked at the  
4 charts that were included in that SAPRO report  
5 and all of the cases in those charts that were  
6 listed as having a sexual assault charge  
7 preferred, we went to the Services and asked not  
8 only for the name of that case but for those  
9 documents that were in that prior slide and that  
10 are on your Executive Summary.

11 And, you can see below kind of the  
12 numbers on how that kind of played out.

13 Now, using the SAPRO report did limit  
14 us a bit. One, because, note in the first part  
15 there, the Coast Guard is not included in that.  
16 We were able to get around that easily by just  
17 going straight to the Coast Guard asking them the  
18 similar question.

19 Also, as you've heard a little bit  
20 about today, the SAPRO reporting numbers don't  
21 include certainly all sexual assault offenses or  
22 reports. They don't include the Family Advocacy

1 cases, so, you know, there is that limitation as  
2 well.

3 Also, as we have found out, and you  
4 can kind of look along the numbers that you can  
5 see the number of cases that we requested from  
6 the Services sometimes doesn't necessarily add up  
7 to the number that were eventually identified by  
8 the Services. And that is something that you  
9 will hear about more in the coming months from  
10 the Service personnel as to the reasons for that.

11 But, all that aside, we were able to  
12 end up -- we identified 2,360 cases to date.  
13 Since February, we've received documents for  
14 2,115 of those cases, so we have been able to  
15 acquire a good bit of data.

16 And the next part of that was now that  
17 we've got this mountain of data, what in the  
18 world are we going to do with it?

19 And we brainstormed in terms of how to  
20 set up a system that will be able to give us  
21 those complex searches and filtering  
22 capabilities. And, as I have explained it to a

1 bunch of folks, I compare it to the Trulia or  
2 Zillow real estate apps. All right?

3 So, I am looking for a three bedroom  
4 condo that's oceanfront that has two bathrooms  
5 and a pool. And, when I do that, it gives me a  
6 list of six places that are available for a  
7 specific date.

8 And now we've got to going to decide  
9 what we want to do. Right?

10 The same thing here. What I'm  
11 interested in is to be able to, in a matter of  
12 seconds, click for FY13 in the Army. I want all  
13 cases that have had a rape charge that had a PTA  
14 that resulted in a conviction. And I want those  
15 cases.

16 Because right now, the systems that  
17 are currently available aren't able to do that.  
18 All right? So, those are the type of things.

19 Another is in FY13 for the Air Force  
20 I want the number of times that a convening  
21 authority did not follow their advice of their  
22 legal officer when deciding the disposition of

1 the case.

2 Those are the type of things that we  
3 envisioned when we built this system.

4 So, winter of 2014 and '15 is when we  
5 identified those requirements. April of this  
6 year is when the development of the database  
7 began. Yesterday, I had the final conversation  
8 with our developers. Everything is complete and  
9 we are now in the process of entering those cases  
10 in the database.

11 So, here's a quick screen shot of the  
12 front page of the database. You see -- you can  
13 kind of see the Service, fiscal year, the case  
14 number we assigned to it, disposition year, case  
15 location, accused rank and gender.

16 We're able to list out if the case has  
17 multiple victims, we're able to pop that out and  
18 also capture both the gender and the status of  
19 each of those victims.

20 So, this is, again, you know, when  
21 we're looking at punishments, we want to see, all  
22 right, why was this set of cases so much more?

1 Well, maybe it's because there is multiple  
2 victims or multiple specifications of sexual  
3 assault.

4 And it's, as I said, kind of gives us  
5 the ability to filter by those pieces of  
6 information.

7 Same idea with the inputting of  
8 offenses. One of the other challenges we had is,  
9 you know, going back, we were looking at cases  
10 that, you know, certainly could have ended in  
11 FY12 that might have started who knows when in  
12 terms of when the offense was reported.

13 So, there's a possibility that any of  
14 these cases could very well have offenses from  
15 three different Article 120 Statutes. So we had  
16 to figure out how to properly catalogue and get  
17 those.

18 But, that will have the full listing.  
19 So, when we input a case, we're not just  
20 inputting the sexual assault offenses, but every  
21 offense that's on that charge sheet. And we're  
22 also then able to identify it by how it's listed

1 on the charge sheet as the number charge and the  
2 number specification that it has.

3 And, again, this will be able to help  
4 us tie in when we're looking at Article 32  
5 investigating officer recommendations and legal  
6 officer pre-trial advice to tie specifically to  
7 each charge what their advice was on that  
8 particular offense.

9 And, again, so that gives us the  
10 ability to analyze all of the offenses charged  
11 and not just sexual assault under the umbrella or  
12 not just Article 120, those type of things, but  
13 down to the specific subsections of the Articles  
14 and also to filter by those.

15 The other thing we were able to do is  
16 with the now-mandatory discharge provisions that  
17 went into effect, we're able to click in there  
18 whether or not the offense occurred before or  
19 after that date to break those out.

20 So then, after we get through the  
21 charging part, we then built the system to kind  
22 of walk through exactly how the court martial

1 process goes as well. With the referral part  
2 certainly bringing the offenses but then going  
3 through the Article 32, the pre-trial advice and  
4 the convening authority, disposition or the  
5 referral part.

6 Now, this is where, for the Sentencing  
7 Commission, you know, they're only working with  
8 cases that have a conviction, right? So, they  
9 are a small subset of a full court process. Of  
10 course, they have a great deal many more cases,  
11 we don't know that they're starting at referral  
12 and there are, you know, so many different ways  
13 the cases can go once the case has been referred.

14 So, some cases will have an Article  
15 32, some might not, depending on the type of case  
16 that it is, if it's going to a general court or  
17 to a summary court martial or a special court  
18 martial.

19 The same thing for pre-trial advice.  
20 That's only required for a general court martial.  
21 That's not required for a summary court martial,  
22 a special court martial or any other disposition

1 of court martial charges.

2 So, and once you get to this  
3 disposition, you know, there are certainly ways  
4 that things can go forth at that point. It's  
5 when the charges can be dismissed by the  
6 convening authority, they can be discharged --  
7 the accused can be discharged in lieu of court  
8 martial. Those are alternate dispositions, or it  
9 can move forward and be referred to actually go  
10 to trial.

11 And then, once we get into the trial  
12 part, once arraignment and all that thing starts,  
13 then we're then looking at the forum, whether  
14 it's military judge or Members as the jury panel.

15 Motions, how pre-trial agreements are  
16 involved and then going through both the pleas  
17 and the findings in terms of, you know, plead  
18 guilty or not guilty to the specific offenses and  
19 then the findings to those as well.

20 And then, of course, there, it can  
21 either be a full acquittal or we can go into the  
22 sentencing piece. You've got, you know,

1 certainly it would be adjudged sentence. Of  
2 course, the accused will get a trial, then going  
3 through the clemency process to the action where  
4 the convening authority either approves the  
5 sentence as adjudged or can adjust it as needed.  
6 And then, also into the appeal part as well.

7 So, we then took that -- how that  
8 process works kind of the streamline of it and  
9 put that into our database tabs.

10 So, we've got Article 32, pre-trial  
11 advice, pre-trial agreement on along the way.

12 Like I said, you know, some of these  
13 cases that were dismissed, in that case,  
14 sometimes we only received the charge sheet  
15 because that's the only court document that's in  
16 that file.

17 For the larger cases that went all the  
18 way to trial, that were convicted and went  
19 through the post-trial process and clemency, they  
20 had many more documents to go through.

21 So, and not all cases will we use all  
22 of these tabs, but the database was built in a

1 way to filter out those cases as they dropped, as  
2 they go through the system.

3 So, that is the database and how that  
4 will work. And there's kind of the highlights of  
5 the other tabs there.

6 All right, and then these are just the  
7 various parts of the trial, the Article 32 pre-  
8 trial investigation, like I said, the ability to  
9 filter out the IO recommendations for specific  
10 offenses.

11 Also, with the new Article 32 rules  
12 that went into place last year, we're able to  
13 filter out the hearings that took place before  
14 then and after then and see if we can see if  
15 there's any difference in the way in which some  
16 of those cases are recommended from the  
17 investigating officer.

18 Pre-trial advice, the ability to  
19 filter by the legal advice on specific offenses,  
20 but also be able to compare that legal advice to  
21 the investigating officer from the Article 32.

22 Pre-trial agreements, you know, one of

1 the things to ask is, all right, how many times  
2 in the last year has an Article 120 offense been  
3 plead down from a PTA to a 128 to take it out of  
4 the sexual assault and its range? Very hard to  
5 get that answer but now, we'll be able to get  
6 that, so, incidents where that's dropped down.

7 Also, certainly it's been discussed  
8 today, the incidents when restitution was  
9 included as a term in the pre-trial agreement,  
10 we'll be able to parse that out as well because  
11 we have the actual pre-trial agreement to look  
12 through all those terms.

13 Also, sentence caps, caps on punitive  
14 discharges, all those type of things as well on  
15 the punishment side.

16 And then, referral, like I said, go  
17 back to the referral of specific offenses, the  
18 command decisions compared to the recommendations  
19 of the IO and then legal advice as well.

20 So, those are just a few of the things  
21 of the filters that we'll be able to look at  
22 these cases and pare them down as opposed to the

1 larger group or the clump of sexual assault  
2 offenses that has been reported in the past.

3 And, with that, I'll turn it over to  
4 Meghan to talk a little bit about how we'll do  
5 the meetings and also how we'll do them now.

6 VADM TRACEY: Can I ask first a  
7 question?

8 MR. OSBORN: Yes.

9 VADM TRACEY: You say that you don't  
10 have data on what ends up happening to a case  
11 that's not preferred, or is not preferred,  
12 correct?

13 MR. OSBORN: Not?

14 VADM TRACEY: Preferred to trial?

15 MR. OSBORN: Not referred to trial?

16 VADM TRACEY: Yes.

17 MR. OSBORN: If it was included in  
18 that SAPRO report and it was preferred with at  
19 least one sexual assault offense, we will have  
20 some documents for most of those. You know, the  
21 problem is with FY12 and FY13, some of the files  
22 have met their kind of case disposition date to

1 where they can now be destroyed because of case  
2 records or whatnot.

3 But, we have the SAPRO report in terms  
4 of what the outcome was for some of those cases.  
5 So, we will have that piece.

6 So, in all of the cases that we have,  
7 we're going to know what the disposition of that  
8 was.

9 Now, we are limited a little bit  
10 because, you know, for cases that were linked to  
11 a 32 at pre-trial advice and then went to the  
12 convening authority, if those are dismissed, well  
13 then, we at least know what the legal officer  
14 recommended or whatnot.

15 If there was a case that was dismissed  
16 before an Article 32 or after an Article 32, we  
17 might, for that case, just have the charge sheet  
18 and the Article 32 investigative report. We  
19 won't know what the legal advice was for that  
20 case.

21 So, what the, you know, the overall  
22 rationale for dismissing that case was but we'll

1 certainly know the outcome of it.

2 MS. PETERS: Okay, well, good  
3 afternoon.

4 I'd like to give you our proposal for  
5 a framework within which we can analyze all of  
6 this data. And, the data, again, that we're  
7 talking about is this.

8 The decision points along the legal  
9 processing of the case where you can identify a  
10 characteristic of the offense, the offender or  
11 the victim that you're interested in tracking  
12 and, again, find out what the legal disposition  
13 is and ultimately come to a descriptive picture  
14 of these case outcomes.

15 And, I think our first step was to go  
16 back to the congressional taskings, and it looks  
17 like a lot of the taskings center on a process  
18 drive approach here.

19 What are the decision points that a  
20 case goes through involving a charge of sexual  
21 assault or a report of sexual assault? How is it  
22 ultimately disposed of?

1           The taskings also relate to: how are  
2 cases disposed of on appeal? Should it reach an  
3 appeal, the appellate level? And, how could we  
4 compare punishments rendered in the military with  
5 punishments in the civilian system at both the  
6 federal and state level?

7           So, these are a lot of broad taskings  
8 and after we figured out how to cull this data  
9 and the documents behind it, we said we need the  
10 framework to give you this information in some  
11 reliable, you know, statistically sort of sound  
12 process.

13           And that's what the database will give  
14 us a starting point for.

15           Mr. Stone?

16           MR. STONE: I didn't hear in the data  
17 collection before one piece of data which I know  
18 the Sentencing Commission keeps which is: how  
19 many actual days did the person serve in custody?  
20 Because a sentence -- there's all kinds of  
21 reasons that people get out early from good time  
22 to medical discharges to later commutations.

1           Are you collecting the actual days to  
2 the end of the sentence in these cases?

3           MR. OSBORN: In terms of the actual  
4 days that they serve?

5           MR. STONE: Serve, that's right.

6           MR. OSBORN: Not just the sentence?  
7 No.

8           MR. STONE: I mean that's a crucial  
9 thing that needs to be collected on, I'm afraid  
10 to say. Because otherwise, when you get all  
11 done, you only know what was pronounced. And I  
12 will tell you, there is no sentencing situation  
13 in this entire country with a sentence that's  
14 pronounced is the what the individual does. It  
15 varies between 85 percent in some jurisdictions  
16 to way less in others.

17           And, one of the things that's very  
18 helpful when you collect all this data,  
19 especially the sentencing judges is for them to  
20 know which sentencing -- that's not the sentence  
21 the Commission came up with its guidelines, it's  
22 real offense sentencing. They looked at actual

1 days to help people realize that just because a  
2 tough sentence was pronounced, that is not  
3 necessarily what happens if those keep getting  
4 commuted.

5 So, I just wonder if you have a box  
6 left to put in the number of days actually served  
7 in your data at some point?

8 COL GREEN: Mr. Stone, our starting  
9 point for sources of data is records of trial.

10 MR. STONE: No, I realize that.

11 COL GREEN: So, obviously, and what  
12 you're talking about is the administrative  
13 records of the confinement system in terms of  
14 that.

15 So, we don't have those documents.  
16 They're not part of the same record as to a case.  
17 I guess the question and what the Panel would  
18 need to decide is if we need to seek that  
19 information and request information in all the  
20 cases that we have that where confinement was  
21 imposed, whether we want to go back to the  
22 confinement administrators to get that

1 information.

2 And, certainly, that's a data point  
3 that if the Panel were to decide that they want  
4 to look at that, we could add that to the system.

5 MR. STONE: Okay. Because you, as  
6 Sentencing Commissioner, would not have been  
7 authorized in 1984 and go into business in 1986  
8 except for the people involved in the system  
9 wanting to know, tell me how many days for this  
10 offense or that offense, this conviction or that  
11 conviction, the person actually served. And it's  
12 a really crucial data point.

13 MS. PETERS: And, Mr. Stone, your  
14 excellent question brings me to the next part of  
15 my presentation which is: how does the Panel  
16 drive the feedback for the trends that it wants  
17 to analyze?

18 So, I proposed in here on this slide  
19 I just laid out our proposal to you that we bring  
20 in expert criminologists, we consult with them.  
21 In fact, the JPP has already -- we have brought  
22 on to our Staff Dr. Cassia Spohn, a criminology

1 chair, department chair, I think, at the  
2 University of Arizona. And she has actually  
3 worked with the RSP in some of their survey  
4 analysis.

5 And, she's done a lot of very relevant  
6 studies with regard to not just crime incidence  
7 and prevalence, but prosecution trends.

8 There's a well known study in the LA  
9 County that she primarily worked from the  
10 beginning to end and issued a very lengthy report  
11 about prosecutorial decisions.

12 So, we've actually brought her on  
13 board to help the Staff and the Panel to do  
14 higher level analysis of all this data and  
15 identify any other predictors or issues and  
16 figure out how to track those things should the  
17 Panel be interested in tracking additional data  
18 beyond our baseline or in looking at something  
19 that maybe -- and finding a way that we can  
20 already track it with the existing information  
21 that we have.

22 So, we want to bring her on board and

1 bring her to you in the coming months, at the  
2 September and October meeting so that you can  
3 have an ongoing conversation with her and other  
4 criminologists and, again, the Panel to say, what  
5 is it you're interested in? How can we study  
6 that? Let's figure out a plan to provide  
7 statistically sound results and find the data  
8 set, if needed.

9 And, I think those experts that we are  
10 going to -- we plan to bring to you can give you  
11 some sense of how we can do that to the extent  
12 that that's feasible. And also some information  
13 about similar studies being done in the civilian  
14 world to the extent that information is already  
15 collected and analyzed.

16 So, after consulting another  
17 criminologist -- and we have already started  
18 talking with other statisticians as well -- we'll  
19 be looking at things mentioned in our database  
20 and producing it at a higher level analysis.

21 If you have to look at multiple  
22 variables in a case for predictors and figure

1 out: how does that relate to the punishment if at  
2 all in this case? They can do that for us and,  
3 you know, assist in the process, whereas our  
4 database can do a lot of that simple number  
5 crunching about number of case outcomes along the  
6 way, I think these criminologists can take the  
7 results to a higher level.

8 The plan is to have them analyze the  
9 data and present an analysis to you in November.  
10 And that is our tentative plan subject to the  
11 direction of the Panel.

12 And what we're going to do along the  
13 way is bring Dr. Spohn and other experts in in  
14 September so that you can have the conversation  
15 and, I'll note, to the staff, again about what is  
16 it you want to know beyond, again, the just  
17 simple case outcomes, the taskings and identified  
18 trends. You know, and that is rather broad.

19 And so, I think we need direction from  
20 the Panel as to where do your interests lie?  
21 What questions do you have about case outcomes  
22 with regard to sexual assaults in the Military?

1           So, I think we work together with  
2           these experts, find out what is feasible and how  
3           we can accomplish the issues that you want to  
4           analyze.

5           And, that's our process here that I  
6           tried to lay out and I think some of the issues  
7           that come into play along the way, when we get to  
8           the point of having analysis to you or a report  
9           to you to deliberate on, you can then cull out  
10          for your recommendations, based on relevant  
11          trends.

12          Maybe any gaps in the data where you  
13          wanted to study something and it may not have  
14          been feasible for one reason or another or there  
15          are some results out there that have a lot of  
16          caveats based on record keeping or just types of  
17          issues that you want to look at that may be hard  
18          to come by with the existing data.

19          All of those things are within the  
20          Panel's, I think, framework here to look at.

21          And there are also might be, you know,  
22          through this process, issues that you identify

1 for future analysis because this database is in  
2 its very early stage and this framework is the  
3 first of its kind from this Panel but it  
4 certainly can continue in the future according to  
5 your direction, for future deliberations you can  
6 redevelop it over time.

7 So, this is sort of the way the staff  
8 and the experts would look to work with you, the  
9 Panel, and receive feedback from you about where  
10 we go with all this information that we have.

11 Okay, Mr. Stone?

12 MR. STONE: Is the data actually, as  
13 you put it in, able to in pulling it back, find  
14 us repeat offenders? In other words, is there  
15 some kind of a unique identifier that's going to  
16 pull up the same defendant when he has three  
17 convictions?

18 MS. PETERS: If he has been court  
19 martialed multiple times within the time frame of  
20 the cases that we've pulled, we will be able to  
21 find that name.

22 In the reality, when you look at the

1 military processing, the likelihood of a  
2 discharge -- if there are multiple offenses, we  
3 can find it if it resulted in a court martial.

4 MR. STONE: Okay.

5 MS. PETERS: If a previous offense,  
6 let's say, resulted in an administrative action  
7 in 2012 where the record no longer exists, we may  
8 not be able to trace that, find that record and  
9 say exactly what happened.

10 But, generally, some of the  
11 information we have, we'll be able to tell you if  
12 there was a previous offense if it's of the level  
13 of a court-martial or a significant legal  
14 process.

15 MR. STONE: And this --

16 MS. PETERS: Generally, most Soldiers  
17 or Servicemembers are kicked out of the military,  
18 so they're mostly first time offenders in the  
19 whole.

20 MR. STONE: And will your data --  
21 because there are charges be able to tell us  
22 cases where use of the weapon was charged?

1           In other words, it was not just sexual  
2 assault, but it was sexual assault that involves  
3 a weapons charge?

4           MS. PETERS: The information in the  
5 charge sheet, if that being an aggravating  
6 circumstance, it usually has to be pled in the  
7 charge sheet itself.

8           MR. STONE: Right.

9           MS. PETERS: We can break those things  
10 down, and that's the kind of issue that should we  
11 get a list from you to do that, again, we have a  
12 basic framework for identifying the charges with  
13 specificity. Those circumstances, should you  
14 want us to parse them out, we can go take that  
15 back and work on it for you.

16           MR. STONE: And then, the last  
17 question I have was, do we have data in here or  
18 an idea where we can be able to pull back the --  
19 and I don't know if it's rank or paygrade of  
20 defendant and so that we'll be able to see, if  
21 it's always going to be how common it will be  
22 that a person in a higher grade victimizes a

1 person in a lower grade?

2 MS. PETERS: Absolutely. We do have  
3 that information. Some of the basic descriptors  
4 of offender, victim, offense, that's covered by  
5 all of these documents.

6 MR. STONE: Great, great.

7 MS. PETERS: Some more definite  
8 descriptors will require going back to the record  
9 in some cases, but anything basic like that, we  
10 have.

11 So, again, this is a proposal and it's  
12 subject to a lot of the things that the Panel has  
13 under its consideration right now, so that in  
14 September, we would devote the meeting to  
15 bringing in the civilian agencies that deal with  
16 crime data, primarily the Bureau of Justice  
17 Statistics and the Sentencing Commission, Office  
18 of Research and Data as well as a State  
19 Sentencing Commission or a state agency that has  
20 the expertise of dealing with crime data at the  
21 state level just to give you a picture of  
22 civilian crime data collection.

1           Because what we're talking about is  
2           the available information out there, what we can  
3           get our hands on to analyze.

4           Secondly, we'd like to bring in  
5           officials at the Department of Defense level and  
6           at the Service levels to give you a picture of  
7           military data collection.

8           Matt already highlighted the variety  
9           of ways in which information is reported and  
10          tracked and we heard some of that in some of the  
11          retaliation discussion.

12          And the connection here is that these  
13          taskings were a little bit different, and every  
14          time you ask a different question you might need  
15          different data.

16          But, there is an immense amount of  
17          data and number crunching being done. We all  
18          know about the SAPRO report and the 24-page annex  
19          with a line item list of characteristics tracked  
20          and numbers aggregated at the DoD level.

21          But, to give you a good picture of  
22          that, we wanted to invite basically the DoD and

1 the Services to talk about what SARCs and the  
2 investigative agencies, the legal officers and  
3 the DoD program level personnel are doing to  
4 collect and report this data in its existing  
5 form.

6 Because understanding the data there  
7 is sort of -- that is available about these cases  
8 is the building block, I think, for the Panel's  
9 understanding of what you can do going forward  
10 and what we would need to maybe shape the process  
11 in the future.

12 Lastly, in September, those  
13 criminologists, specifically, we considered  
14 reaching out to -- well, we'll have Dr. Spohn as  
15 a member of the staff and Professor Jim Lynch  
16 from the University of Maryland Criminology  
17 Department come and speak to you again about the  
18 theories behind criminology, the theories of how  
19 data analysis can be used to assess the health of  
20 the justice system.

21 Essentially, they can talk about the  
22 ways that their numbers modeling and their

1 studies have been used to inform public policy,  
2 how they produce reliable, repeatable sort of  
3 results and just talk to you about the  
4 theoretical approaches behind the Panel's  
5 taskings.

6 That's why we brought in a researcher,  
7 a statistician and a criminologist to the staff  
8 to inform these numbers and help give us an idea  
9 of how we got to these numbers, can you put a why  
10 behind these numbers, and how do they correlate,  
11 if at all?

12 So, we wanted to bring all of those  
13 people to you in September to discuss the  
14 project.

15 Ma'am?

16 CHAIR HOLTZMAN: I'm curious as to  
17 whether you've identified any kinds of key data  
18 that the Military is not recording in these  
19 cases?

20 MS. PETERS: Each Service, in its  
21 various organizations that deal with a particular  
22 part of a sexual assault report, investigation

1 and prosecution or appeal have a data system for  
2 managing those cases, if nothing else. There is  
3 a system to track it.

4 Do those systems talk to one another?  
5 Do they overlap? Does the Department of Defense  
6 have a way to immediately sort of pull up that  
7 data? Those are questions that we want to bring  
8 people in to answer for you.

9 Because, I guess part of the reason we  
10 built a database is because: is there an existing  
11 structure where you can find out charges filed in  
12 the current legal disposition of everything and  
13 the military? No.

14 Can you do that by Service? In some  
15 ways yes and in some ways no. There were gaps in  
16 trying to answer these congressional taskings.  
17 So, we absolutely did find gaps for our purposes.

18 But, again, when you -- I would bring  
19 in and I would defer to the Services and DoD as  
20 far as what they have been asked to do by  
21 Congress, how the Department of Defense  
22 interprets those mandates and brings information

1 up to their level to report back to Congress.

2 But, yes, if you want to study legal  
3 processing outcomes, there might be some gaps in  
4 readily identifiable data.

5 And I think the experts in the  
6 civilian system are going to tell you where those  
7 gaps are as well in the federal and state level.

8 MR. STONE: Are you collecting whether  
9 or not in each case if there was pre-trial  
10 detention? I know that it's rare in the Military  
11 because people are confined to base and that's  
12 detention.

13 MS. PETERS: Right.

14 MR. STONE: But I also know that  
15 that's a key component that victims want to know  
16 about whether this is the kind of case, you know,  
17 show me the set of cases even if its small, where  
18 pre-trial detention was ordered vis-a-vis the  
19 vast majority where it's not. Do we have that  
20 captured?

21 MS. PETERS: When it's on the charge  
22 sheet and it's supposed to be noted on every

1 charge sheet, we would have that information and  
2 through our database, here with us, it is  
3 currently in there. I believe it's trackable but  
4 whether it's -- I'll have to check -- that we're  
5 going to aggregate.

6 MR. OSBORN: Right. That's not  
7 something that's currently on there in terms of  
8 whether or not the accused was in pre-trial  
9 confinement or not. But, again, that's certainly  
10 something easily --

11 MR. STONE: It can be added?

12 MR. OSBORN: It can be, sure.

13 MS. PETERS: So, just getting back to  
14 our timeline here, the one other issue that we've  
15 spent a lot of time talking about, how we might  
16 get -- preparing for a trend analysis to give you  
17 resources within which to do that.

18 One of the taskings was compare  
19 military and civilian punishments. And that  
20 unique tasking for that, we'd like to bring you  
21 military and civilian practitioners at the state  
22 and federal level to discuss their sentencing

1 regimes, the similarities and the differences and  
2 the, you know, issues that might arise in trying  
3 to make that direct comparison.

4 Because that was a specific tasking  
5 and we want to bring some, you know, people of  
6 the military, federal and state expertise to just  
7 inform that deliberation requirement.

8 And then September just sounds like  
9 it's going to be a busy day, so we reserved some  
10 time for that in October, subject to your final  
11 plans. And that's why we have markings for other  
12 deliberations on those days.

13 And then, finally, in November, once  
14 again, Dr. Spohn can come to you with an analysis  
15 based on your guidance, based on the capabilities  
16 of our database and try to answer the taskings  
17 and, at some point, then for the future, you can  
18 deliberate on the findings of that.

19 So, those are sort of our plans for  
20 you to provide you resources along the way.  
21 We're happy to receive your feedback and guidance  
22 at the staff level and with our experts and our

1 presenters in the coming months because I think  
2 that will shape your -- analysis. When you get  
3 it in November. We need to know from you exactly  
4 what we need to look at.

5 So, I thank you for your attention  
6 today, and we look forward to the Panel's  
7 comments and questions on these issues and for  
8 any further scheduling issues and how to handle  
9 this, I defer to Colonel Green and return it back  
10 to him for anything else you want to discuss.

11 COL GREEN: As Matt mentioned, these  
12 guys have been working really hard and the  
13 Services as well, our Service reps. I mean  
14 hundreds of hours involved in obtaining all these  
15 case records, as you might imagine, and building  
16 the system in order to provide the analysis.

17 We got the system yesterday afternoon,  
18 and so we've entered the first case in. We're  
19 doing the beta testing with that now. But the  
20 plan right now is to devote, starting next week,  
21 the staff to enter data from these cases.

22 And so the 2,300 cases, we'll enter

1 all those in and then the hope is that by mid-  
2 September/October, we can hand that data off to  
3 the criminologists and to Dr. Spohn and then  
4 present it to you in order to be able to start to  
5 analyze it and get some help in terms of what are  
6 the key trends that that data might show.

7 One of the things that I think is  
8 important with this is this system is really  
9 designed as a data analysis, not a fact analysis  
10 system. So, it can tell you the key data points  
11 in a case, it's not necessarily going to tell you  
12 the why or the specifics about a case.

13 If we can narrow it down to specific  
14 type of case that you might be interested in, a  
15 particular type of a conviction before Members  
16 that involves, hypothetically, a very small  
17 amount of confinement and wanting to really dive  
18 into those to understand if there's trends in  
19 terms of those cases as to why those cases  
20 produce that type of an outcome, we can ask the  
21 Services for the complete record in that case and  
22 do that sort of more in depth analysis after

1 that, subject to whatever you think might be  
2 appropriate and helpful for your analysis and  
3 then helpful, obviously, in terms of DoD and in  
4 terms of any recommendations you might make.

5 So, that's really what we've set up  
6 and subject to your considerations.

7 CHAIR HOLTZMAN: I just have another  
8 question. Are these cases kept in a format in  
9 the computerized format that makes it easy to  
10 extract information, or is this all handwritten  
11 out? Is that the same as the federal criminal  
12 system, or do they have a different system?

13 MR. STONE: Before it gets to you.

14 MR. OSBORN: The documents before they  
15 get to us?

16 MR. STONE: Yes.

17 MR. OSBORN: Well, how we've obtained  
18 the documents that were in the area is we  
19 actually went to --

20 CHAIR HOLTZMAN: No, I'm not asking  
21 you how you obtained them; I want to know whether  
22 the Department of Defense keeps its records in a

1 computer -- excuse me -- an easy, accessible,  
2 computerized format and is that format similar to  
3 the ones used in the federal systems or state  
4 systems?

5 MR. OSBORN: So, the --

6 MR. STONE: Are you keypunching  
7 everything, or is it coming to you  
8 electronically?

9 MR. OSBORN: Well, two things, so, the  
10 mostly FY12, FY13 cases from all the Services,  
11 when we receive them, that they were in the  
12 Washington area, we went to get them and they  
13 were in brick hard copies. And so, we scanned  
14 those into PDF documents and OCR'd them to make  
15 them to make a more searchable listing.

16 For the Services, probably I'm betting  
17 it's the same deal, hard copies that were scanned  
18 in. Now, what some of the Services are starting  
19 to do is do e-copies of their entire record of  
20 trial. So, instead of it being bricks record of  
21 trial, they have that still, but it's also on a  
22 CD that's electronic as well.

1                   So --

2                   CHAIR HOLTZMAN:   And how does it work  
3                   in our federal system?

4                   MR. OSBORN:   In terms of -- ma'am?

5                   CHAIR HOLTZMAN:   And how does it work  
6                   in the federal system?   The federal criminal  
7                   justice system, how do they keep their records?  
8                   Also the same way, only hard copies?

9                   MR. OSBORN:   I am not sure about the  
10                  -- I know with the Sentencing Commission, they  
11                  get electronic copies of everything and then they  
12                  have about 20 data processors there who, from  
13                  those, input into their system, hand jamming from  
14                  my understanding, and that's certainly how we are  
15                  going to be doing it into our system as well.

16                  MR. STONE:   The Administrative Office  
17                  of U.S. Courts requires certain a lot of data  
18                  points from every federal district court around  
19                  the country; they always have.   And they put out  
20                  an annual report.   They'll tell you how many  
21                  cases.   They'll tell you what Statute was  
22                  charged, what was convicted.   They have stuff

1       like that.

2                       They probably don't have as many data  
3 points as this, but they do have basic  
4 information that they print out, in effect, every  
5 year.

6                       The field may not like it, but they  
7 have to input it electronically in certain  
8 categories, but they have a Probation and Parole  
9 Office to do it. I mean I'm not sure that the  
10 court-martials, after they're concluded have a  
11 follow up office that would easily do that.

12                      And then, actually, my question  
13 relates to that which is: I can't believe that  
14 the places that the defendants are incarcerated,  
15 whether it's Leavenworth under the -- with the  
16 assistance of the Federal Bureau of Prisons,  
17 which I know keeps electronic records, or some  
18 other federal military prisons that are not run  
19 by the BOP, I don't know if they're keeping  
20 electronic records, but I'm sure they must be  
21 because they're always worried about discharging  
22 a person on the right date, so they need a system

1 that warns them his release date's coming up and  
2 you have to figure that as against how much good  
3 time he's earning every single month. And it'd  
4 be crazy to hand-calculate it, you'd never get it  
5 right or you'd have to have a million people.

6 And so, they have machines that work  
7 it out what his good time is, how it advances his  
8 presumptive release date, what he did. So, they  
9 have it in there.

10 And so, to the extent there's that  
11 date, it may be that -- and you'll know whether  
12 we would foresee any difficulty getting them,  
13 since they incarcerate people from all Services,  
14 to give us some kind of data dump so you could  
15 get easily the cases where you have some case  
16 identifier, how much time the person is doing or  
17 has done.

18 Because, ultimately, that question  
19 that was mentioned before, since every state is  
20 so hard to compare data, that's why the U.S.  
21 Sentencing Commission wanted to see what they  
22 call the "real offense data," real time served.

1           If they knew how many days a person  
2 served, they could compare it against how many  
3 days they served somewhere else. They didn't  
4 have to worry about all those intangible of you  
5 have parole, you don't have parole, you got  
6 commuted, you didn't get commuted, you get twice  
7 as much good time in this locale for this offense  
8 as that one, and it all comes out in the wash.

9           How many days did the person do for  
10 that offense and then they can average it, and  
11 you have at least apples and apples.

12           COL GREEN: I mean I will tell you  
13 that the rules -- DoD rules for good time credit  
14 and administrative time credit and the likes in  
15 the confinement system are standardized across  
16 DoD for all confinees.

17           The parole rules, when somebody is  
18 first eligible for parole is a standardized point  
19 in time for all offenders.

20           So, those types of things are  
21 standardized across all of DoD.

22           I guess the one issue that you would

1 probably what to think about is like a third of  
2 cases are from 2014 and so, obviously, with sex  
3 offenses and presumably a lot of long sentences,  
4 you're going to get currently serving, so you're  
5 not going to get completed and to know what the  
6 total confinement time is and so --

7 MR. STONE: No, I understand.

8 COL GREEN: -- you know, the value of  
9 that information, I mean if you go across the  
10 board and look at it, we would just -- it may not  
11 be as valuable because you're not going to get  
12 full sentence to be able to really know what the  
13 final numbers would be.

14 MR. STONE: But, if we start to see  
15 people who were sentenced and getting out in 2011  
16 and 2012, that's going to tell us a lot. And,  
17 even though they have uniform rules, you don't  
18 know which of those guys are getting extra good  
19 time, which you can get for drug programs, for  
20 special work programs.

21 There's so many permutations even  
22 within the federal system that unless you know

1       how many days are served, you're dealing -- you  
2       can't measure apples and apples.

3               VADM TRACEY: We're looking at cases  
4       that were done is my thought, right? The  
5       earliest cases we're looking at are 2012?

6               COL GREEN: That's correct.

7               VADM TRACEY: So, this --

8               MR. STONE: It's three years old at  
9       this point.

10              COL GREEN: In terms of the data, Mr.  
11       Stone, the confinement system does keep an  
12       earliest release date and a maximum release date  
13       and so, all of that -- and I've worked with the  
14       system -- it does -- all that's maintained  
15       electronically.

16              So, if the Panel determines that this  
17       is something that you want us to go and pursue,  
18       we can track that --

19              MR. STONE: I know they have an  
20       absolute release date because they've got to  
21       notify the victims ahead of time. You can't  
22       release a defendant without notifying the

1 victims. They have to have an actual release  
2 date.

3 CHAIR HOLTZMAN: Well, are we looking  
4 only -- I'm sorry.

5 VADM TRACEY: Have we thought about  
6 how we're doing the evaluation of consistency of  
7 decisions based on the facts of the individual  
8 cases?

9 MR. OSBORN: We have, and that's where  
10 it's going to get a little fun, right? Because  
11 everything is, you know, one case is so fact-  
12 specific to another case or whatnot.

13 Certainly, when you're looking at  
14 punishments and you're like this person was  
15 convicted of rape and they got four years; this  
16 person was convicted of rape and they got 15  
17 years. And then you look at the charge sheet and  
18 you realize, well, that's because this one had a  
19 ten-page charge sheet and that one had a one spec  
20 charge sheet. Right?

21 So, that way we built the system is to  
22 be able to filter down the cases so to at least

1 give us a starting point. And then, from there,  
2 if we've got a find that case, it's kind of like  
3 when you're doing the real estate, I'm down to  
4 six properties, I can go look at the specifics of  
5 each one of those and see why those are the  
6 outliers or see what's different about those  
7 cases.

8 We've got the documents from each of  
9 those. So, the 32 report, in some cases, a pre-  
10 trial agreement, certainly the charge sheets and  
11 we can see exactly what the -- if there were any,  
12 you know, aggravators in that piece or not to be  
13 able to get a little bit more into the facts of  
14 that.

15 MR. STONE: And, just so you  
16 understand, the Sentencing Commission has a two -  
17 - well, they call it a four factor table,  
18 whatever, but they have a whole set of factors  
19 that are not only the offense across one axis,  
20 but the offender across the other axis before  
21 they even get to a range, which is usually what  
22 they call the heartland of the sentencing that

1 should be imposed, which is often a two-year  
2 window.

3 Because the difference between things  
4 that can affect it are: did the defendant pick on  
5 a vulnerable person? A person in a wheelchair  
6 that they sexually assaulted? Totally different  
7 sentence because of the -- that affects, the you  
8 know, the crime. It won't be showing up in the  
9 charge sheet. Is this offender somebody who was  
10 previously reprimanded, or is he brand new to the  
11 Service?

12 So, there's factors that go down the  
13 offender as well as the charge. And, expecting  
14 all of that is a lot. So, you're going to see  
15 discrepancies.

16 But, the federal judges have that  
17 precisely so that they have comparison of  
18 offenders and crimes and have an idea about where  
19 they want to be within the window.

20 And, they can still go above and below  
21 that sentencing guideline range, but at least  
22 they have what they call "the heartland" and an

1 idea of what the average sentence is across the  
2 country in that situation with that kind of  
3 offender. That's what gives them --

4 MR. OSBORN: And then, if I could just  
5 go back to your question. I think if it was  
6 whether or not the Services at the base level  
7 office are tracking or managing these cases  
8 electronically --

9 CHAIR HOLTZMAN: I'm not asking about  
10 management; I'm asking about the data in the  
11 cases. Is this data being collected on an  
12 electronic basis, or are they keeping records --  
13 are all their records hard copy, or is it a  
14 mixture of both?

15 MR. OSBORN: It's both. It's both.

16 So, the records aren't necessarily  
17 stored in the case management systems, but, you  
18 know, if the trial and the sentence was adjudged  
19 X, Y, Z, they'd denote in their case management  
20 system and input that into their system.

21 CHAIR HOLTZMAN: But the records of  
22 the case are in hard copy?

1 COL GREEN: That's correct.

2 CHAIR HOLTZMAN: And my question was:  
3 and how is that done in the federal system,  
4 criminal justice system?

5 MS. PETERS: We understand that most  
6 of that is electronic, but how it is processed  
7 and sent to the Sentencing Commission, how  
8 automated the system is for collecting and  
9 aggregating that data, I would still have to  
10 defer to the Office of Research and Data because  
11 the biggest issue that they have is statutes  
12 demanding that the judges send it to them; how  
13 that is accomplished, again, I would have to  
14 defer to the experts that will come to you.

15 CHAIR HOLTZMAN: But the Sentencing  
16 Commission is only looking at the Sentencing  
17 issues.

18 MS. PETERS: Correct, and so --

19 CHAIR HOLTZMAN: And we have a little  
20 bit broader mandate than just the sentence.

21 MS. PETERS: Right, and what we have  
22 --

1 CHAIR HOLTZMAN: And, I mean, for  
2 example, the consistency and appropriateness of  
3 the decision, is that on every motion?

4 MR. OSBORN: Well, and that's --

5 CHAIR HOLTZMAN: I don't know what  
6 that means. So, I mean how do we even go about  
7 doing -- I'm sorry?

8 COL GREEN: Well, I would go back to  
9 Admiral Tracey's question. And, ma'am, we've  
10 dealt with -- obviously, the first thing the  
11 staff did was start scratching our heads with  
12 these things and figure out what we can do to get  
13 you information on that.

14 And I think we've cracked some nuts  
15 and not others. I would say that, and so these  
16 ones talking about based on the facts of the  
17 case, you know, as trial practitioners, I think  
18 we realize the devil is in the details in so many  
19 of these things, and so I don't know that we've  
20 got a clean answer for that one yet.

21 MR. TAYLOR: So, a question that I  
22 have, just a fundamental question: when we're

1 talking about the FY12, '13 and '14 cases  
2 requested and identified, are these cases that  
3 are completed as of those dates so you have a  
4 complete record of the trial, meaning that the  
5 actual incident happened, perhaps, 2009, 2010,  
6 whenever the incident happened?

7 MR. OSBORN: So, that is an  
8 interesting piece and something that we certainly  
9 invite you when the -- when our military folks  
10 come and talk about that and certainly the DoD,  
11 you know, SAPRO personnel as well.

12 There's a little bit of a disconnect  
13 that we found from that, and that, in point, kind  
14 of talks to the difference in numbers that we  
15 have.

16 For instance, in FY12, in those charts  
17 that have all those, it's Service-specific. So,  
18 in every Service but the Army, all of the cases  
19 in that FY12 report were complete at that point.

20 And, when I say complete, I'm talking  
21 about either dismissed, discharged in lieu of a  
22 court-martial as a finding in trial. So, not

1 through the appellate process, but completely the  
2 trial.

3 The Army for FY12 and FY13 as well  
4 listed pending cases in addition to their  
5 completed cases.

6 So, that is a disconnect in terms of,  
7 you know, the guidance given to the Services and  
8 then how the Services chose to answer that.

9 So, the answers as to why that is, I  
10 think, would probably be better for those folks  
11 to talk about.

12 FY14 is a little different because  
13 this is the first year that they've used the  
14 DSAIDs database system to kind of pull that  
15 information out. And in FY14, all of the cases  
16 listed in those charts were all completed.

17 So, for everyone but the Army in FY12  
18 and FY13, that's when the case ended. So, in  
19 some of those, absolutely; the initial report  
20 could very well have been FY10, FY11, but it was  
21 listed in the FY12 report, and that's when the  
22 case was, you know, disposed of certainly after

1 trial.

2 MR. TAYLOR: Well, and as we all know,  
3 the standards, the legal standards changed during  
4 that period of time a couple of times.

5 MR. OSBORN: And that's the fun part  
6 of what we were able to work into the system  
7 because, you know, if it happened before 2012,  
8 you know, was it between 2007 or 2012, or was it  
9 pre-2007?

10 So, since we have the charge sheet,  
11 we're able to see when the act occurred to then  
12 be able to figure out, all right, which version  
13 of the 120 Statute were they used, and then we've  
14 been able to build that in the system.

15 So, we can pick pre-2007 Article 120,  
16 and then once you click that one, the next  
17 subcategory are the provision under the pre-2007  
18 120. If we pick 2007 to 2012, we've got those  
19 statutes and then 2012 on.

20 So, because we have the charge sheet,  
21 we know when the offense occurred and then can  
22 tell what statute framework that was used.

1           So, that's the other part, too, is  
2 we'll be able to break down, all right, did the  
3 changing in the Statutes in terms of convictions  
4 or pleas -- certainly punishments, those type of  
5 things -- how did those change along the way?  
6 So, that should be an interesting piece.

7           MR. TAYLOR: And that's people's --

8           MR. OSBORN: Yes, sir.

9           MS. PETERS: And we interpreted  
10 consistency and appropriateness applied to not  
11 just the sentence, but, again, the decision  
12 points at which a case was resolved. You can  
13 associate maybe a charge with a result, you know,  
14 or a finding at the Article 32 with the results  
15 at referral.

16           With the caveat that our gap might be  
17 just the fact that the military's unitary  
18 sentencing does not come with a list of the  
19 factors that the Judge used in determining a  
20 sentence. And that there is one sentence  
21 adjudged for all crimes at once and you can't  
22 parse out, from the Judge's mind or the Panel's

1 mind how much was the aggravated sexual assault  
2 worth? How much was the false official statement  
3 worth?

4 So, we're left with that gap based on  
5 the system.

6 MR. STONE: And you can't parse that  
7 out in a federal sentence either because the  
8 Judge typically, the sentences -- and he runs all  
9 kinds of sentences concurrently and he's  
10 considering all the factors at once because,  
11 under the guidelines, it's an aggregated sentence  
12 anyway.

13 So, I mean that's where, if you count  
14 the number of days, you have some apples and  
15 apples.

16 I just want to make one comment in  
17 response to the Chair's question. It goes back  
18 to a comment that I made I guess almost a year  
19 ago and that was: does the federal system keep  
20 this on paper as well -- federal non-military  
21 system?

22 The answer to that is driven, I think

1 -- the answer is no. And the answer was driven  
2 by the fact that there is a right to see the  
3 documents in every publically filed case.

4 So, people -- not only the lawyers  
5 involved, but also the public --- wanted to see  
6 the documents, and they wanted access. And,  
7 before you knew it, the docket sheets are  
8 electronic; the docket sheets list every Motion  
9 that's filed. You can click on the Motion that's  
10 filed; you can click on the Judge's Order --  
11 they're all uploaded -- and when a transcript is  
12 ordered, you can click after the first 30 days --  
13 you can click on the transcript. You don't even  
14 have to pay the Court Reporter.

15 And, when appeals briefs are filed --  
16 and I recently filed two in the 9th Circuit and  
17 one in the 10th Circuit -- they had me file them  
18 electronically. They didn't -- used to be, you  
19 had to file hard copies.

20 So, they're going completely  
21 electronic, and when I said I needed access to  
22 this or that, you know, I was given my PIN code

1 or whatever, download it and print your own  
2 transcript.

3 Don't get the hard copies of the other  
4 side's brief; print them off.

5 So, because they were trying to have  
6 a public docket for the lawyers and the public,  
7 they started to go electronic. And, so, they  
8 found that it saves a heck of a lot of paper and,  
9 you know, file rooms and finding stuff, they have  
10 a huge amount of stuff that's electronic.

11 That goes back to the fact that I  
12 mentioned at the beginning that the Military  
13 Services don't have a similar electronic docket  
14 even for the lawyers in the case, and they often  
15 need -- I think one Service does, if I remember  
16 correctly, I'm not sure which one it was but I  
17 was involved in some military cases and at least  
18 one had some semblance of an electronic docket.

19 But, a lot of the military Judges are  
20 asking you to file with them electronically; you  
21 literally have to serve them at their email  
22 address and copy the other sides.

1           Because they also -- given where they  
2           are, they don't want a room full of paper. But,  
3           it hasn't -- but there isn't, as yet, an  
4           electronic docket for all these cases which would  
5           encourage them to go electronic and ultimately,  
6           while it might not be surgical for data points,  
7           it is word searchable in a universal fashion like  
8           we do with anything else.

9           CHAIR HOLTZMAN: Right. That was the  
10          reason for my question because ultimately, if  
11          everything is electronically recorded at some  
12          point -- whether it's a word search or other kind  
13          of search -- you can basically get a lot of data  
14          that you would have to read through tons of paper  
15          to find. And so, that was my question.

16          MR. STONE: Right.

17          CHAIR HOLTZMAN: And --

18          MR. STONE: And you know, you don't  
19          have to go out and hand collect it either; get  
20          them to send it to you.

21          CHAIR HOLTZMAN: Right. So, if Congress  
22          really wants this information, they're need to

1 spend some money to get this all digitized.

2 MR. STONE: Or just get the electronic  
3 database company, which is -- currently exists  
4 for all the federal courts, all of them --  
5 bankruptcy, District, Courts of Appeals, it's all  
6 out there -- have their company take on as a  
7 separate little --

8 CHAIR HOLTZMAN: Yes, but they someone  
9 has to pay them for it. That's what I'm saying.

10 MR. STONE: Yes.

11 CHAIR HOLTZMAN: Congress wants it.

12 MR. STONE: That's right.

13 CHAIR HOLTZMAN: They've got to put up  
14 the money for it, and if they're going to really  
15 want the trends and the basic information that  
16 they want here, that's what's going to have to  
17 happen.

18 Do we have any other questions? Okay,  
19 Maria?

20 MS. FRIED: Are we done, ma'am?

21 CHAIR HOLTZMAN: Yes, I think -- oh  
22 wait.

1 COL GREEN: Can I just -- I mean in  
2 terms for the planning purposes among the  
3 Members, obviously, we -- this presupposes that  
4 next month we will turn to the data trends and  
5 analysis and start on that.

6 We left, obviously, I know restitution  
7 compensation and retaliation remain still in  
8 work. And I mean, we've been working with some  
9 of the experts. We know that they are -- we have  
10 people lined up and available for the September  
11 meeting. I mean, if the Panel wishes to delay  
12 that and move out then we certainly can. My  
13 recommendation would be to look at --- at least  
14 proceed to get this started in September.

15 CHAIR HOLTZMAN: Yes, but I think we  
16 should save some time on the schedule for  
17 finishing up. I don't think we have that much  
18 more time that we need to finish up the  
19 restitution issue.

20 COL GREEN: Okay.

21 CHAIR HOLTZMAN: And particularly, if  
22 the staff does some of the work and sends it to

1 us before the meeting, I think we can try to  
2 abbreviate that or make that discussion concise  
3 and short. But, I think we should try to finish  
4 the restitution and maybe leave ourselves a  
5 little bit more time on retaliation, too. I  
6 don't know that we need to spend the whole  
7 meeting on this.

8 COL GREEN: Okay.

9 CHAIR HOLTZMAN: But I think we should  
10 try to make some progress on or finish up  
11 restitution if we can and make some more progress  
12 on retaliation.

13 COL GREEN: Okay.

14 CHAIR HOLTZMAN: That would be my  
15 suggestion for how we proceed and then do as much  
16 of this as we can.

17 COL GREEN: Okay.

18 MS. FRIED: The meeting's closed.

19 CHAIR HOLTZMAN: Thank you very much,  
20 and thank you to the Panel Members.

21 (Whereupon, the above-entitled matter  
22 went off the record at 4:32 p.m.)

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Place: Washington, DC

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