UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

MEETING

FRIDAY
SEPTEMBER 18, 2015

The Panel met in the Holiday Inn Arlington, Grand Ballroom, Ballston, Virginia, at 9:11 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

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

Dr. Nathan Galbreath
Dr. James Lynch
Major General Camille Nichols, U.S. Army
Glenn Schmitt
Dr. Howard Snyder
Dr. Cassia Spohn

STAFF:

Maria Fried - Designated Federal Official
Colonel Kyle W. Green, U.S. Air Force - Staff Director
Lieutenant Colonel Glen Hines, U.S. Marine Corps - JPP Subcommittee Staff Attorney
Dale L. Trexler - Chief of Staff
Julie K. Carson - Attorney Advisor and Legislative Liaison
Doug Nelson - Attorney Advisor
Meghan Tokash - Attorney Advisor
Sharon H. Zahn - Senior Paralegal
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Adjourn
PROCEDINGS

9:11 a.m.

MS. FRIED: Good morning, Madam Chair, and distinguished Panel Members. Welcome to the 13th public meeting of the Judicial Proceedings Since FY 2012 Amendments to the UCMJ Panel.

My name is Maria Fried, and I am the Designated Federal Officer for the JPP. Colonel Kyle Green is the Staff Director to the JPP.

The following distinguished individuals are appointed to the Panel: The Honorable Elizabeth Holtzman, who serves as the Chair; The Honorable Barbara Jones; Vice Admiral Patricia Tracey; Mr. Tom Taylor, and Mr. Victor Stone.

This Panel is a federal advisory committee and must comply with the Federal Advisory Committee Act. The JPP also has a publicly accessible website at http://jpp.whs.mil/. Publicly available information provided to the JPP is posted on the website, to include information about meetings of
the Panel, transcripts and recordings of the meetings, and background information and documents provided to Panel Members.

The Panel has not received any written request for public comment today.

Madam Chair, we're ready to proceed.

CHAIR HOLTZMAN: Thank you very much, Ms. Fried, and good morning, everyone. I'd like to welcome the Panel Members and members of the audience to the September meeting of the Judicial Proceedings Panel.

Four of the Panel Members are here today; Admiral Tracey, unfortunately, could not join us. Today's meeting is being transcribed and the meeting transcript will be posted on JPP's website.

The Judicial Proceedings Panel was created by the National Defense Authorization Act for Fiscal Year 2013 as Amended by the National Defense Authorization Act for Fiscal Year 2014 and 2015. Our mandate is to conduct an independent review and assessment of judicial
proceedings conducted under the Uniform Code of
Military Justice involving adult sexual assault
and related offenses since the most recent
amendment to Article 120 of the UCMJ in 2012.

For today's meeting we will first
devote time to continue deliberations on two
important JPP topics we discussed at last month's
public meeting; restitution and compensation for
victims of sexual assault crimes in the military,
and the prevention and response to retaliation
and ostracism against victims of sexual assault
crimes.

Our Staff has prepared additional
materials based on our discussions last month
which we will use with the other materials we
have previously received to assist our
deliberations.

After lunch, we will begin our review
of the tasks assigned to the Panel regarding
trends and statistics of the military's judicial
response to sexual assault crimes.

Today, we will begin our review by
examining the collection analysis of data on judicial proceedings for sexual assault crimes. First, we will hear from senior representatives of the U.S. Sentencing Commission and the Bureau of Justice Statistics about crime data collection and analysis in federal and state jurisdictions.

Next, two esteemed criminologists will help us understand how they study justice systems. Finally, the Director and Senior Executive Advisor of the Department of Defense Sexual Assault Prevention and Response Office will brief the Panel on sexual assault data collection in DoD.

Finally, each public meeting of the Judicial Proceedings Panel includes time to receive comments and input from the public. The Panel received no comments or request from the public for today's meeting. All written materials received by the Panel Members for today's meeting and previous meetings are available on the JPP's website, which has already been described.

Thank you very much for joining us
today. We are ready to begin our deliberations on restitution and compensation.

Good morning, Panel Members.

HON. JONES: Good morning.

CHAIR HOLTZMAN: Colonel Green.

COL GREEN: Good morning, ma'am.

CHAIR HOLTZMAN: Good morning, sir. I guess on the deliberations we will pick up --- we will start with the issue of restitution. Is that correct ---

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: --- and compensation.

COL GREEN: And if I could just orient you, I ---

CHAIR HOLTZMAN: That would be very desirable.

COL GREEN: We --- you made it through all of the issues on the issues list in last month's deliberation session. There were a number of questions that you asked the Staff to provide more information on; specifically on the topics of restitution, if restitution is made an
authorized punishment in courts-martial, and then
a number of questions regarding the uniform
compensation system for DoD fell into some --- an
outline of issues proposed by Mr. Ken Feinberg at
a previous meeting, and you asked the Staff to go
back and provide some more details relevant to
how the states --- state compensation programs
implement or deal with those issues with their
own programs, and how that might impact or affect
a DoD program. So, we provided you handouts to
assist in providing you guidance on those --
- relevant to those issues.

I think those are the outstanding
issues for us to --- for you to discuss. But
before we do that, I --- Doug Nelson from the
Staff had the opportunity to attend last month
three days of training and information at the
Victims of Crime Act National Training Conference
here in Washington, D.C., and it was a great
session. Doug prepared Minutes for you of key
points of that that I think are relevant to your
discussion and issues. There's a link to the
materials there. But I thought it might be best
to just --- since it is a lot of material
covered, to give Doug an opportunity to give you
a summary of that, and some additional materials,
and then answer any questions you might have.

CHAIR HOLTZMAN: Okay, that's fine. Do
you have that issue outline for us, or is it in
our materials?

MR. TAYLOR: It's actually in the
package, I think.

COL GREEN: Let me get the issues --
- the summary of issues.

CHAIR HOLTZMAN: Make sure everybody
has it in front of them. Is it in our materials?

COL GREEN: No, we've got it.

Deliberations Guide.

CHAIR HOLTZMAN: Excellent. Thank you,
Kyle; beautiful.

COL GREEN: Okay. Members, that's the
statements from the August materials. This is
just updated to reflect your deliberations from
last month.
CHAIR HOLTZMAN: Excellent, Kyle. This is a very useful document. Do you want to brief us, please?

MR. NELSON: I just want to say a few words about the conference we had. You should have the Minutes ---

CHAIR HOLTZMAN: You can pull the mic in front of you.

MR. NELSON: You should have the Minutes in your folder.

CHAIR HOLTZMAN: Why don't I have that?

MR. NELSON: I'm sure you'll have the opportunity to read that, if you haven't already, but I just wanted to highlight a few things that stood out to me at the conference.

Just so it's clear, over the several days there were dozens of different sessions and workshops that were offered, and I attended the ones that I felt were the most relevant to the JPP's mandate, crime victim compensation.

The bolded headers are the names of the sessions that I attended. The one interesting
thing from the Federal Victims of Compensation
sessions increasingly are these newer crimes like
human trafficking, to cyber-crimes that are
crossing the state boundaries, and the state
programs are struggling with determining and
agreeing on which states are responsible for
paying out these claims for victims in multi-
jurisdictional crimes, so they're actually going
to form a committee where they decide to reach an
understanding on that.

One of the common themes that came up
less so in that sessions, but you can see there
was actually a separate session focused on sexual
assault. This is an area that all the programs
are grappling with. The Executive Director
actually mentioned that whereas in the 1990s it
was very common to be hearing about issues with
domestic violence because there used to be a rule
where you were automatically ineligible for
compensation if the offender was a member of your
family. There was a reason for that rule that
made sense at the time, but then through
experience they realized that domestic violence victims were --- it obviously didn't make sense to them, so the laws changed. And just like during that period, now the common issue that everyone is grappling with is sexual assault, and the law is starting to change for that. So, there's more detail in the Minutes about the different ways in which the law is starting to change.

I would draw your attention to two state statutes that are new, one in Texas, and one in California. In Texas, the bill that was mentioned during the testimony in March of Gene McCleskey, who's the Director of their state program. He mentioned that the bill would probably pass, he expected it to pass, House Bill 1446. It did, in fact, pass and I think became effective this week, actually.

Under that new legislation, sexual assault victims who had a SAFE exam are eligible for compensation of medical fees for services that they received at the time of the exam
regardless of whether they report the sexual assault or cooperate with law enforcement later on. There's actually similar legislation pending in Louisiana and in Georgia a similar law had already --- was already in force.

And then in California, there's a bill pending that is expected to become law this fall and pass, and that would prohibit the denial of compensation based solely on a sexual assault victim's failure to report to the police.

I highlight these states because of their size. Actually, it was interesting to hear that Texas and California when you add the four other largest programs that actually, the amount of compensation they pay out is equal to all the other programs across the country combined. California was the first state that established a program. It's their 50th anniversary this year, so they tend to be a leader in compensation. And, of course, the larger --- many of the largest military installations are located in those states.
There are also --- there are slides available on the VOCA conference website. If you're interested, we can get more information about the data that was reported by DOJ's Bureau of Justice Statistics from the National Crime Victimization Survey, but the bottom line from all their detailed data was that crime is -- crime rates including for sexual assault have declined over the years. And going along with that, eligibility for compensation has declined, partly because of the decline in crime, but also because of increase in insurance coverage based upon the Affordable Care Act and the states where Medicaid has been expanded. So, that helps explain why, for example, in Fiscal Year 2013 there were about 13,500 sexual assault victims who received a total of $18 million in crime victim compensation. That number decreased in the next year to 10,400 sexual assault victims who received a total of $12.7 million in compensation funds. So, it's not that the denials are increasing, but it just is a reflection of those
other trends in terms of crime.

CHAIR HOLTZMAN: Are you saying that
the Affordable Care Act has some good results?
Shocking.

MR. NELSON: I think that's mostly what
I wanted to highlight, but I'm happy to address
any questions that any of you might have.

CHAIR HOLTZMAN: Anyone have any
questions? Thank you very much for that report.
That's very interesting, and I guess we now move
on --- is that correct, Colonel Green, to our
issues on restitution and compensation, which I
hope we can conclude, and then focus on
retaliation.

Do we have anything further on Issue
1 that needs to be discussed or resolved? The
Analysis and Recommendation of this --- I'll just
read it. "Panel Members agree that the focus of
the current restitution mechanisms is on the
accused's ability to negotiate a more favorable
sentence rather than making the victim whole." Is
that really accurate?
Well, I guess the real question is whether the convening authority's and parole board's power to grant the accused's request to pay victim expenses are sufficient restitution mechanisms throughout the military justice process. Judge Jones?

HON. JONES: We did discuss this a lot. I guess in the intervening time, we received from the Staff a document --- I guess we're talking about whether to make restitution an authorized courts-martial punishment. Is that really what the issue is at this stage of the game?

CHAIR HOLTZMAN: Yes, I think so, because if you combine Issue 1 and Issue 2, that's really where we are.

HON. JONES: And I think I --- I haven't reviewed my previous comments, but I think I was persuaded that there might be a system that would work within the military justice system, as opposed to a separate compensation system. But then when I read the various modifications that might be required, I
began to worry about how, you know, how practical it really is to try to introduce compensation and restitution as a part of the military justice system, as opposed to worrying about it in a separate, more freestanding manner, such as a fund.

And I think you and I went back and forth, Mr. Taylor, on all of that, and you --- I think you had some good ideas about how it might be streamlined. And I guess I'm asking you, did this extra information that we received, or at least it was new to me, make a difference?

MR. TAYLOR: Well, I think that the difference that it has made in my thinking is that when we first started talking about restitution, as I recall, we had not developed as fully as we have now the idea of a DoD compensation fund. So, at that point I thought that there were problems that perhaps restitution would solve that were not solved by some other compensation scheme.

So, were we to proceed to develop a
more firm recommendation, I suppose, for some sort of DoD compensation scheme that would apply across the board, then I'm left with the question: so, what is there left to solve, what problem are we still trying to solve with restitution? And for me, it comes down to perhaps the notion that several victims' advocates mentioned to us in their testimony that somehow it made a difference to some victims to have restitution from the individual perpetrator rather than from a system; that that was somehow more meaningful. So, I guess the question for me is, have we solved enough of the problem so that we are creating a much better system, although perhaps not one that everyone would say addresses every problem; the problem being that it was identified by the victims' advocates that somehow there was a greater sense of recovery or wholeness if the victim were made to pay some -- - if the victim received something, excuse me, directly from the defendant, the person who had been convicted, as opposed to a system.
MR. STONE: I would say that I agree with most of that, but I think my view is just a refinement of it. In typical systems, the victim doesn't get it directly from the victim, from the defendant. It goes through either a court or a probation officer because they don't want anything more ever to do with the violator, and lots of times they've moved, and they don't want the violator even to know where they are. So, it's always --- there's always an intermediary.

I agree they like to know that the victim of their defendant doesn't just go happily on and think that they didn't have to repair the damages in any sense. However, the military, since it has the ability to forfeit the salary of the offender, which is typically where the restitution comes from in virtually every case in the civilian world; since that's where it comes from, my view was that there was sort of like -- and maybe this is something of a hybrid. Again, because the military has its own unique system, it could also have its own unique compensation
program that's called a restitution and compensation program. I mean, I think we can intertwine them. I don't think it's impossible to suggest that if there's a claim made at the time of a conviction for restitution, that at least the fact that restitution is being sought is made at the time of sentencing so that if the Authority who's deciding thinks there some reason it shouldn't be imposed, they would have a chance to say something, and the defendant would know it was a part of sentencing with the amount to be determined later either by this compensation/restitution program officer, or the commanding officer, if you wanted a name to put it there who would then say yes.

And we've got --- this is one of those few cases where there's some medical expenses that weren't compensated for, there's some lost wages; particularly, it would be if it's a non-military person, because the military people probably aren't going to lose their wages if they were a victim. And maybe there'll be some other
miscellaneous items, I don't know, you can never
be certain, but there aren't too many. And
they're very cut and dried because you submit
bills, and they would enter the order, pay it out
of a fund. But because it's called restitution,
it would be clear that if they want to go back
against the offender for it, they can. If for
some reason it exceeds his wages or they know
that he has a huge amount of assets, but it would
solve the problem of the victims thinking oh,
it's just the government. They understand it's a
restitution and compensation program; because,
typically, the compensation programs outside the
military pick up what the restitution order,
which part of it never got paid. So, they are
integrally related, and it seems to me we could
sort of take a little bit from each one without
necessarily making the bills have to go to that
military judge in the first instance, who's not
expert at that, and avoid the delay issue, too.
Because at least the claim is made, he
understands there's some expenses that haven't
been covered, and it's going to go to this
administrative official whose job is to look at
that and issue a restitution/compensation order.
And that also lets the victim know that some of
it's going to be paid that way.

So, I was thinking that that's a way
without trying to have to disrupt everybody to
make a recommendation that might feather in a
little bit better. And, of course, that same
office, the restitution/compensation office,
could also handle any claims of compensation
where there has been no judgment because, as was
just explained from that conference, either it
was a --- I don't know if Restricted Reports are
going to count, but it was a situation that for
one reason or another did not get prosecuted, but
the woman had an exam, or there was an
investigation report written up, or it could be a
man, but the victim had some expenses. They could
also file something directly with that office if
they needed, and it would administratively take
care of both without disrupting the rest of the
system. So, I thought it was some of what both of you were saying. I was trying to figure out how to do it exactly, but I think maybe the Staff could do that without disrupting everybody.

We know from what's come back. It's going to be a very small percentage of cases, and so it shouldn't be an extreme work load, and it shouldn't be a tremendous amount of money, but it does make people feel good, I'm glad to know, that possibility exists. We wouldn't have a gap that people can say you're not covering this. It would be covered.

CHAIR HOLTZMAN: Well, of course, if a separate compensation --- I mean, I guess there are two issues here. One is, and I think, Mr. Taylor, you outlined them very well. One is making sure that the victim sustained no monetary loss, and how to accomplish that the best way. And the second is, are there any other losses that can be compensated for in a non-monetary way that the restitution system accomplishes?

So, I think with regard to the issue
of compensation, of course, if we were to
recommend a compensation fund, that still would
not eliminate the present ability to get
compensation whether as part of a plea agreement,
or some other --- I guess that's the only way it
would happen, but as part of a plea agreement.
So, it doesn't end the existing system, there
still would be an opportunity for restitution in
the existing system, but you'd also have this
compensation system out there.

I think it's an intriguing idea to see
if restitution could be ordered by such a
compensation fund. I don't know what that would
mean. I'd have to give that some more thought.
But I'm --- the symbolic issue, I know some
people said --- some of the advocacy groups said
that that was important. I'm not in a position to
disagree with them, or agree with them, but I did
pose that issue to one of our --- one of the
psychiatrists or psychologist, I think it was a
psychiatrist that testified. I said in your
opinion --- and it's on the record, so you don't
have to take my word for it. I said in your
opinion, what kind of difference does this make
to the victim? Does it make a difference to the
victim to have direct restitution? And he said
the answer to him was no, it didn't make any
difference. Now, that's an off-the-top-of-his-
head response, and I don't know what weight to
give that, but I just --- I think the --- the
concern for me here, personally, is how much of a
disruption of the existing system are we going to
have to undertake in order to get compensation
which should be a fairly routine matter and avoid
having the present system where when the
Affordable Care Act doesn't kick in, that a
victim would have to rely on. What state the
crime occurred in, or where they're living, or
who wants to claim jurisdiction, and go through
that whole mess. I think we could have a much
fairer compensation system than we have right
now. And that would be my approach, and if we
wanted to think about your idea of adding a
restitution kicker to that, I'm prepared to think
about it, but I'd have to give it much more
thought. I'm not sure we've had anybody focus on
exactly that point, so I'd be a little bit
concerned about making a recommendation. But I'm
not necessarily opposed to that.

MR. STONE: And I think it could
address the concern you raised about whether --
how exactly we would do it, as long as it's a
delegated authority, the convening authority,
this officer or office, and the convening
authority, just like it can change some of the
punishment that's decided initially, can say,"Restitution was ordered and I've looked into it,
or my unit here, my program office has looked
into it, and that's what we've decided to do. So,
I think we could get it under the current
convening authority without having to make it a
whole separate line of authority.

HON. JONES: You know, one of the
things that Doug mentioned, and he was very
helpful in giving us the statistics, as well, and
that I think we have to remember here is that
we're talking about a very small percentage of victims who --- and we're not talking about pain and suffering at all in this context, whether we set up a separate fund, or we're talking about restitution within the military justice system.

I was surprised to see this. I'm glad to see it, but an incredibly small number of -- and here's the statistic from page 4 of 37,000, approximately, victims who receive medical treatment, only 3 percent didn't have medical insurance. Now, that's all victims in state programs. Here we have something like 6,600 sexual assault victims, but only 776 of them -- now, you know, reporting may go up and these numbers may increase, which is like around 13 or 14 percent are non-military.

So, I am --- having read all the changes that would have to be made and replicated throughout the military for such a small number of cases, I really don't see changing everything so that restitution can be made a criminal punishment; which is essentially what would have
to be done because, obviously, they don't have
the jurisdiction right now to do it within the
criminal justice system.

MR. TAYLOR: So, I agree. I think
that's right. I also think as a practical matter
the more recommendations we have that cause these
two issues to conflate, the less likely it is
that we are going to be able to deal with what we
think is --- I think we think is the bigger
issue, which is a DoD-wide compensation system
that provides some sort of uniform relief. So,
for now I think that's probably the better course
of action for us to take.

HON. JONES: And I want to just speak
to the notion that the victim --- that we have
heard testimony, and it was, you know, very
compelling testimony about victims wanting to get
something from the defendant. I assume that's
true, but I just think that in this particular
system it's also just more difficult than even in
the civil justice system to make it happen; when
we're talking about in the vast majority of cases
the forfeiture of wages while someone is incarcerated, which more than likely we would all agree should go to the person's dependents probably first. I don't know whether we'd agree, but that's a competing issue, and/or to the --- I believe it's the Veterans Home. I mean, it's just --- I think the amount of times that we would actually be awarding someone some money that came supposedly directly from the perpetrator when it's actually his federal wages, is not really what victims are talking about, or wouldn't be significant enough to, you know, really meet that concern.

MR. STONE: I think it meets the concern because they know that the federal government in most of these cases has forfeited the wages so they --- I mean, whether that exact money is going --- whether they've decided to use that exact money to pay the compensation program or not, that the federal authority has the right to forfeit the wages so he doesn't walk away scot-free and feel like I never paid the damages.
I think that it does make them feel that the
system doesn't, you know, just have --- like the
civil system, the guy says, "Yes, I still have my
job, so what do I care?" So, I do think it meets
that.

The only other thing I was going to
mention was, I didn't want to drop all together --
-- and you mentioned if it would be separate. I
would like, if we do a compensation scheme, for
us at least now to have a placeholder in there
that we might provide a token nominal payment for
--- we can call it emotional damages or pain and
suffering, but a token payment, whether it's
$2,000 or whatever it is, and maybe in the
discretion of the compensation office to decide
whether to award it. But I'd like to see a token
payment in there to acknowledge the emotional
damage.

CHAIR HOLTZMAN: I have a thought,
also, on this which would avoid the whole issue
of restitution, conflating the two of them with a
compensation system. It's possible if you had a
fund and you indicated that any fines that were
imposed would go to this fund, then that would
help address to some extent your concern. So,
that would be something the court could impose at
the time of trial. Is that correct? Am I wrong,
Kyle?

MR. NELSON: Madam Chair, I am aware
from the conference that there are some state
programs that actually have restitution units, so
it would be a little different because I think
the program would collect ---

CHAIR HOLTZMAN: I'm not asking that
question, sir. I want to know fines can be
imposed, under the present system, we don't have
to change anything for a fine to be imposed by
the court in a court-martial?

COL GREEN: Yes, ma'am, a fine is an
authorized punishment ---

CHAIR HOLTZMAN: Okay.

COL GREEN: --- at court-martial.

CHAIR HOLTZMAN: Okay, so there could
be --- this might encourage the existence of a
fund, and any fines went to it, might encourage
the imposition of some fines at these trials. I'm
not saying it would, and maybe we don't want to
do that, but that's a way of addressing your
concern without getting into calling it
restitution as part of this compensation point.

MR. STONE: I think, though, from what
we've heard up until now, though, some of those
fines go to the Veterans Home, and some of the
times the fines ---

CHAIR HOLTZMAN: Fines or restitution?

MR. STONE: The fines.

COL GREEN: Forfeitures and fines
currently do go to fund ---

CHAIR HOLTZMAN: Oh, the fines, also?

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: Okay.

COL GREEN: By statute.

MR. STONE: And then you always have --
the issue that the Office of Victims of Crime
have is, is the fund they have huge and not being
spent, or is it not large enough.
CHAIR HOLTZMAN: Okay.

MR. STONE: So, I'm a little nervous --

CHAIR HOLTZMAN: All right.

MR. STONE: --- about making a fund.

CHAIR HOLTZMAN: Okay. So, I think we should split this into two questions. Are we in favor of recommending a restitution program in cases of sexual assault? Everyone in favor?

HON. JONES: Could I amend that question?

CHAIR HOLTZMAN: Okay, sure. Please.

HON. JONES: Are we in favor, and if I could find the issue statement, I'd have it. Do you have it in front of you?

CHAIR HOLTZMAN: Yes, Issue 2, whether the UCMJ should be amended?

HON. JONES: Yes. I think the question is whether or not we believe the UCMJ should be amended so that we could add restitution as an authorized punishment that would be adjudged at courts-martial. And I do not think we should,
that's my vote. If everyone agrees that's the question at least at the moment.

CHAIR HOLTZMAN: Right. Anybody?

MR. STONE: Contingent on us coming up with a compensation program. I agree, you know, based on that contingency.

CHAIR HOLTZMAN: Okay. And you share that view?

MR. TAYLOR: Yes, based on the fact --

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CHAIR HOLTZMAN: Okay.

MR. TAYLOR: --- that we're going to have a DoD compensation fund as part of our recommendation.

CHAIR HOLTZMAN: Okay. And I agree with that. So, we've resolved Issue 2.

Now, the second question --- I think we've gone over Issue 3 about Article 139. I don't think it's --- does anybody feel a burning desire to revisit that?

HON. JONES: No.

CHAIR HOLTZMAN: All right. Issue 4,
okay. "Whether forfeited wages of incarcerated Members of the Armed Forces should be directed to pay compensation to victims of military offenses." And this was postponed pending resolution of the proposal that it was postponed.

COL GREEN: Ms. Holtzman, I think this goes to exactly what you were just discussing in terms of whether funds which currently are used to fund the Armed Forces Retirement Home, which is where forfeitures and fines go, whether the Panel wants to make a recommendation. And, again, this is a direct question in the statute posed to the Panel, what the Panel believes in terms of whether these funds should go to fund a compensation program, or to victims directly.

HON. JONES: But just for clarification, I don't know what the amounts of forfeitures versus fines, is that what we're talking about here?

COL GREEN: Yes, Judge Jones. The fines are much less commonly imposed so ---
HON. JONES: That's what I thought I remembered.

COL GREEN: --- we're really talking primarily about forfeiture of wages both in the automatic forfeitures and adjudged forfeitures at courts-martial.

HON. JONES: Okay. Do we have any idea --- well, maybe I'm wrong about this, but I would assume that for the most part, if a defendant has dependents, those funds would normally --- they might defer forfeiture and get --- or forfeit and pay those to --- for expenses of the dependents. Am I right or wrong on that?

COL GREEN: The UCMJ provides for that. At the request of the accused, those forfeitures can be waived for up to six months for the benefit of the accused's family members, yes.

HON. JONES: And then after that any other forfeitures would go to the Home. Correct?

COL GREEN: That's correct.

HON. JONES: Okay.

MR. TAYLOR: So, it seems to me that if
we are moving in the direction toward a recommendation for a DoD-wide compensation system, that as part of that logic we would just leave the rest of these issues alone. And to the extent that we would intertwine our restitution with that issue, or conflate this issue of what to do about forfeited wages with the DoD-wide compensation, I think it will make it much more difficult to actually come up with a compensation scheme that has a chance of being successful. So, I would say we should just leave this alone.

MR. STONE: I totally agree. And the other reason is, in theory we can go a whole year, the military can go a whole year without a compensation claim if everybody was in the military and was essentially compensated, so why do things that might adversely affect the Armed Forces Retirement Home? Let the military worry about how much it needs to pay out of that fund, or not, the compensation fund. And, you're right, not changing the UCMJ on the speculation that you're going to need that money.
CHAIR HOLTZMAN: Yes. I mean, one of the things we could do in our recommendation is not recommend, necessarily, that these funds be used for that purpose, but point out that these funds might be available if Congress so desired to use it for that purpose. I mean, aren't they by statute allocated to the Retirement Home? So, Congress would have to make that decision, anyway. And I don't think we know really enough about what it would mean to the Retirement Home, et cetera, if we changed it, so we could just -- if we wanted to, we just could point that out without making a recommendation. That would be as far as I would suggest going on this. I completely agree with you, Mr. Taylor. So, what's our conclusion, we just make no recommendation on this point?

HON. JONES: I have somewhat stronger feelings about it. I just don't think we should ever recommend the use of these funds for -- it's a dissent among the four of us, for restitution. I think it would be symbolic, which
I understand is a worthy goal, but so minimal that it's not worth disrupting the payment of dependents and the Home.

CHAIR HOLTZMAN: Okay, so we --- Judge Jones, if we just said nothing on the subject --

HON. JONES: Oh, that's fine with me.

CHAIR HOLTZMAN: Okay.

HON. JONES: I just wanted to put, you know, how I feel about it.

CHAIR HOLTZMAN: All right. So, if nobody objects, we will just simply --- on Issue 4, we'll simply not respond to it.

MR. STONE: Isn't it a negative, that we don't think it needs to be changed?

MR. TAYLOR: It seems the answer is no, that we don't ---

MR. STONE: Yes.

MR. TAYLOR: --- think the system needs to be changed.

CHAIR HOLTZMAN: Okay, I'm for that.

All right, Issue 5. "Whether there are
other gaps --" this is the proposed changes to compensation. So, I think we're finished with the restitution issue. Okay. Now, we're up to compensation.

Is there a point at which we want to confirm that we want to set up, Kyle, a DoD-wide compensation system? Is there an issue with regard to that?

COL GREEN: I think Issue 9 speaks probably most directly to this. Does the Panel recommend establishment of a DoD compensation board program for sexual assault victims? I think some of the other issues flow from that.

CHAIR HOLTZMAN: Okay, so why don't we do 9, first? So, here, does the Panel recommend establishment of a DoD compensation board program for sexual assault victims?

We've already --- four Panel Members have recommended the establishment of a uniform compensation program to be administered by DoD. Okay. And then we've talked about --- I guess 9 also addresses some of the criteria for
eligibility. Okay. So, let's just --- is there any reason for us on Issue 9, let's break it into several parts.

Is there any reason to revisit the determination that we want to recommend a DoD-wide compensation program? We don't need --- does anyone want to revisit that issue? No, okay. Hearing no request for that, let's go to the next issue.

"DoD compensation programs should be sensitive to the needs and realities of sexual assault cases in which, for example, the 72-hour reporting requirement," blah, blah, blah, blah, blah. Is there any need for us to spell out --- I mean, I'm not sure that this paragraph actually is strong enough, in my opinion, but just saying it should be sensitive to the needs of victims in sexual assault cases. I mean, should it spell out more clearly that there should not be a 72-hour requirement, or do we just leave it in general terms?

MR. STONE: Well, it seems to me from
looking at that summary chart that was made of
the state systems, there's like two ways you can
do it. The states that have a short time deadline
say we liberally waive, and then other states
instead of that say we have no time limit, or we
have a three-year time limit or something. In
other words, you can either settle on a time
limit, or if you have a short one, they liberally
waive.

I'm inclined to think it's easier to
have a longer time limit instead of putting the
burden on someone to ask for a waiver, and then
an official to have to make a waiver, and justify
why he made a waiver. So, I'd rather see, like
you say, something stronger than --- because the
liberally, you know, the way we put it, it almost
sounds like we're saying if it's 72 hours they
should waive it, or we have them make a
recommendation. I'd make a recommendation as to
whether we want 72 hours and liberally waived, or
a longer time period. I'm in favor of a longer
time period myself, because especially in sexual
assaults where depending on the military exigency, the person doesn't want to report it right now until their operation is over, or their tour of duty is over.

CHAIR HOLTZMAN: Plus, I mean, not only do we have a time limit, but we also have the issue of cooperation with law enforcement, which in the military is not a requirement. So, I think that at least those two issues --- I'm sorry, this is my own personal view. Those two issues need to be addressed specifically saying that the compensation program should not have a time limit requirement, or any requirement that would be in conflict with the Restricted Reporting provision.

MR. STONE: I'm totally in favor with that.

MR. TAYLOR: Yes, I agree with that. I really don't favor having a specific time limit at all, because we know that sometimes these crimes take a while for people to process. And to the extent that you set a time limit, I think we're probably setting a time limit which will be
ignored for the most part. And I really think that there are alternative ways to be sure that you can guarantee some sort of reliability, like the SAFE exams and other types of --- you consult with some other medical person. I think there are going to be all kinds of reports that one could make to a variety of people other than law enforcement and still be entitled to receive the benefits of the compensation system. So, I think it ought to be a very liberal standard which we -- -- I think would provide the most support to the victims.

HON. JONES: And I don't disagree with that. I think that's right. I don't know how far into the weeds we need to get in terms of rules and regs, and all that. And we did discuss some things, I recall at the last meeting about whether or not counsel should be introduced into the system, and all that sort of thing. And I think we all agreed if they wanted counsel, they could bring one, but it wasn't required. So, I think there's enough that we've already sort of
discussed in terms of some of those issues that we could flesh this out a little bit.

CHAIR HOLTZMAN: So ---

HON. JONES: But --- and I guess the only thing that I want to say right now about this compensation system is, again, it's not for pain and suffering. It's going to be --- I think, and this is an issue that I would love to hear other people's opinions about. It's going to be a system that will be used by people who are non-military victims almost exclusively, because the military victims, as we all know or at least believe, are compensated.

CHAIR HOLTZMAN: Except there might be some cases --- maybe, Kyle, you could correct me, where the VA for some reason --- remember the VA has some kind of screening system.

HON. JONES: Yes.

CHAIR HOLTZMAN: Suppose the VA said well, we don't think you meet our screening standards. But, for example, there was a test, a SAFE test secured, and so maybe nobody's paying
compensation for that. So, there might be --- I think essentially you're correct, but there might be some --- one, or two, or three cases that fall through the cracks. That's all I'm saying.

HON. JONES: Right. And I guess the other thing is --- and I agree. I don't know. There may be some situation at some point where a military victim would come to try to use the compensation system. But the bulk of them will be ---

CHAIR HOLTZMAN: Correct.

HON. JONES: --- civilian victims who will be told you can also go to your state compensation system. And then it will be up to them to make a decision: "Is it convenient to use this one, and then I'll go to the other and see if I can get more money," or what have you. But when you look at what we're compensating, which is medical expenses and that sort of expense, not pain and suffering, it seems to me that we have to remember, too --- and I think this is a good thing, that insurance is going to cover a whole
lot of that. So, we are talking about in terms of a budget here not a big push, it doesn't sound like to me. Of course, it's not my money.

And I just wanted to make sure everyone was in agreement that we're talking about that population, and that these are the likelihood --- this is the likelihood, because I think we ought to think a little bit about a budget here, and what are we really asking for. And I don't think it's going to be a lot of money. That's --- I'm just putting that on the table. Kyle?

COL GREEN: Well, Judge Jones, we -- Doug provided some guidance. We were trying to figure out how to help the Panel with figuring --

HON. JONES: Okay.

COL GREEN: --- out the money aspect of this for funding purposes, and the questions that Mr. Feinberg posed. And you mentioned 700-plus victims are non-military and may fall into a category ---
HON. JONES: I saw that in some statistic somewhere.

COL GREEN: Yes, ma'am. And based on the state claims, the state programs' average payout of about $1,200 per claim, I mean, 700 times 1,200 seems to be perhaps the low end of an estimate; whereas, you know, $25,000 cap which is the cap at most state programs, might be a more reasonable conclusion as a high estimate. I do think one of the things ---

CHAIR HOLTZMAN: What are those totals, please? What are those totals?

COL GREEN: Oh, boy, you're making do math in public, ma'am.

CHAIR HOLTZMAN: Yes, I am.

COL GREEN: Let me get those numbers.

CHAIR HOLTZMAN: Okay.

COL GREEN: But one thing I think the Panel may want to consider is whether this is going to be a retroactive, or the recommendation of the Panel is to make this retroactive, which obviously may have more --- substantially more
financial implications, or whether it's going to be proactive as of the date of the establishment of the program.

CHAIR HOLTZMAN: Can we just hold that question in abeyance ---

COL GREEN: Yes. Sure, ma'am.

CHAIR HOLTZMAN: --- because we still have one or two issues, pain and suffering, and so forth.

MR. STONE: And some of those take us right to Issue 5. Those were Issue 5, at least the last part of it.

CHAIR HOLTZMAN: So, I gather, though --- let me just make sure that we've gone through this properly. We're going to --- have we dealt with the 72-hour --- the reporting --- the time for reporting and the cooperation requirements? We've said that those need to be consistent with existing military practice, and we don't support time limit, or reporting --- or a cooperation requirement. Is that ---

HON. JONES: Well, the latter part, I
agree, we don't support time limits. I mean, we have to put some finishes on this, but yes, we don't support time limits. As you said, it can take a long time for someone to realize what's happened, and they shouldn't be shut out of a compensation program.

Maybe the date on which it happened despite --- will make a difference, which is really Kyle's point, whether --- how retroactive is this going to be?

CHAIR HOLTZMAN: Right.

HON. JONES: I mean, if somebody five years from now after we have this program remembers something, I think we all agree, that's fine. If somebody remembers something from 10 years ago, two days after we start the program, that may not be so fine. We have to worry about that.

MR. STONE: Well, that goes to the standard of proof. And remember they were saying in discussing other compensation programs that they had, that they expected the person either to
have a hospital report, or a police report. In other words, the person who comes in has to in some way document that something happened. It's real easy if there's a conviction, but if there's not a conviction because it never got that far, I mean, maybe they would show that they made a Restricted Report, now they're no longer in the military. But, in other words, I think a lot of those issues are covered by a person who has been hurt but has to in some way document it. I don't think it's enough for them to say, "I remember that this happened." They've got to show they did something at the time.

CHAIR HOLTZMAN: Right, I'm not ---

MR. STONE: So, that's the burden.

CHAIR HOLTZMAN: That's not what I meant. Maybe I need to be clearer, but that they don't need to cooperate with law enforcement.

HON. JONES: And we all agree on that.

CHAIR HOLTZMAN: That I'm just --

- we're just --- okay, we all agree on that --

- okay, we're all in agreement that that should
not be a requirement.

MR. STONE: Right.

CHAIR HOLTZMAN: And there should be no
time limit in terms of reporting.

MR. STONE: Right.

CHAIR HOLTZMAN: Those are two
requirements.

MR. STONE: Absolutely.

CHAIR HOLTZMAN: Okay. But, of course,
we do think they have to be able to document in
some way that the sexual assault that they made --
that they took some --- or that the sexual
assault happened, whether it's through a report,
or a medical test, or whatever. Okay.

And now, do we want to address the
retroactivity issue? Is that something we need to
address? Yes?

MR. STONE: My own views are that if
they can document that they were sexually
assaulted and they can document at this time that
they never got compensated for those expenses.
Again, we know it's going to be a slim number of
people. I would say we open it up and we
recognize we're trying to address injustices. And
just because the system has been slow to get to a
compensation program, don't hurt the person who
says in 2005, I complained about this, in 2006 I
did, or whatever. I wouldn't set a retroactivity
date because they're still going to have a burden
to show it happened, and they never got
compensation which we know is going to be slim,
anyway.

CHAIR HOLTZMAN: Any other comment
about this?

MR. TAYLOR: Well, I certainly
understand the reason why you would say that, and
I generally support the sentiment. But it seems
to me that a logical point that you could pick
would be the point at which Restricted Reporting
was made a possibility, because at least in that
instance there would be some way that you could
identify that someone had made a report.

I guess I'm a little worried about
some ancient claims that would be very difficult
to prove or disprove. And in any kind of a
compensation system, we're trying to help people,
not limit them from recovery, I understand that.
But if we wanted to pick a point, maybe around
2005 when Restricted Reporting began, would be a
place that we could at least say well, did you
talk to whoever the SAPRO person was at that
point in time, or did you go to a clinic, or did
you seek help? Just a thought.

HON. JONES: Those reports --- I mean,
those would still be military members, though,
who for the most part would have had their
expenses covered presumably, or not.

COL GREEN: No, ma'am. Anybody can file
a Restricted or an Unrestricted Report.

HON. JONES: Oh, no, no, no, I realize
that. But I think what we're talking about is --
- I don't see the connect. If somebody needed
medical despite the fact that they hadn't filed --
-- you're talking about Restricted Reports?

MR. TAYLOR: Yes, Restricted Reports.

HON. JONES: Okay. So, they would have
still gone ahead and gotten their medical?

MR. TAYLOR: Maybe, maybe, but if they're still experiencing, you know, post-traumatic stress disorder ---

HON. JONES: Right, right.

MR. TAYLOR: --- based on that, then that seems that that would be something that perhaps one could look at.

HON. JONES: Right. I don't have a problem with that. I'm just assuming most of them if they're in the military, or out of the military but with the VA, are getting it covered. But that's just to say there may be very few claims.

CHAIR HOLTZMAN: I think that that's a good cutoff point, because my concern here would be a very practical concern, is Congress might say, wait a minute. What flood gates are you opening here if we have no starting point? In other words, it could go back to the beginning of time.

So, I think that going back to the
time that Restricted Reporting was imposed sets a justifiable rationale for this, and I'm --- you know, and it addresses the point that Mr. Stone made about wanting to make sure people get compensated.

Of course, this is not going to affect the civilian people who are injured --- civilians who are injured, because can they make Restricted Reports?

MR. TAYLOR: I think so. Isn't that right, Kyle? Yes.

MR. NELSON: It looks like only military members are restricted --

COL GREEN: Unrestricted.

MR. NELSON: Oh, Unrestricted?

COL GREEN: There are two options. So, there are limits on who can file a Restricted Report, Unrestricted.

MR. NELSON: Right.

CHAIR HOLTZMAN: Well, then I would say the same for --- when the Restricted Reporting started. Let Congress ---
MR. TAYLOR: It's a bright line.

CHAIR HOLTZMAN: It's a bright line.

HON. JONES: Yes.

MR. TAYLOR: And it's 10 years.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: So that's, I think, most people would say a reasonable period of time.

CHAIR HOLTZMAN: Reasonable, okay. So, if there's ---

HON. JONES: I'm sorry, what was 10 years?

MR. TAYLOR: 2005 to 2015.

HON. JONES: Oh, right, got you. Right.

CHAIR HOLTZMAN: In new math, as well as old. All right, let's see. So, Kyle, where does this leave us?

MR. STONE: Question 5.

CHAIR HOLTZMAN: Do we have the answer?

MR. STONE: Question 5, the kinds of things we want to recommend that you could get, and they talk about some of those in 5, and in 6.
And if I can say, I think the advantage of including personal property loss, and we heard some testimony about the typical thing being my cell phone was broken.

CHAIR HOLTZMAN: Right.

MR. STONE: Is that --- this will get rid of a lot of Personnel Claims Act cases where people are trying to figure out how to get paid for their cell phone, that maybe this will get rid of some of those cases, and there'll be less litigation under the Personnel Claims Act for cell phones or, you know, my $500 pocketbook is missing. The guy, you know, destroyed it, or whatever. I mean, it would be nice to simplify, I certainly think, personal property losses.

To me, the hardest one is going to be future losses in terms of treatment for PTSD on people who are not military members and don't get VA benefits. And I think that's a real issue, if somebody can show expenses for PTSD ---

CHAIR HOLTZMAN: And are not covered under any other insurance.
MR. STONE: Not covered under any insurance, right. You know, are we going to cover it? I'm inclined to say yes, because again, we're not looking at a lot of claims. And I think those are real.

CHAIR HOLTZMAN: Right, but should there be a cap?

MR. STONE: Oh, well, we're going to cap what they can get under the fund anyway, yes. You mean, a sub-cap?

CHAIR HOLTZMAN: No, I mean a cap for the total award.

MR. STONE: For sure, yes.

CHAIR HOLTZMAN: Is everybody --- I'm not sure everybody is in agreement with that.

MR. STONE: Oh.

CHAIR HOLTZMAN: So we haven't decided that.

MR. STONE: Okay, okay.

HON. JONES: I agree on it.

MR. TAYLOR: I do, too. I agree.

CHAIR HOLTZMAN: Okay.
HON. JONES: We have to have a cap.

CHAIR HOLTZMAN: All right. So, then

the question is whether --- well, then what's the

question?

MR. STONE: Oh, okay. If everybody

agrees with those kinds of things, that's good.

CHAIR HOLTZMAN: In other words, we

need to spell out what would be covered.

MR. STONE: Well, we at least should

recommend what we think.

CHAIR HOLTZMAN: Okay, fine.

MR. STONE: It was included in that

definition. That was the point of 5 and 6.

CHAIR HOLTZMAN: Is there any

disagreement about medical expenses, lost income,

travel expenses, relocation costs, personal

property, Personnel Claims Act?

HON. JONES: I don't know what that

is.

CHAIR HOLTZMAN: Yes. I don't know

what that is, either.

MR. STONE: That's those cell phone
things.

CHAIR HOLTZMAN: Is that 139? No.

MR. STONE: No, I don't think it's 139.

CHAIR HOLTZMAN: Is that foreign -- is that when you're abroad and you sue? What is the Personnel Claims Act?

MR. STONE: It's when your personal property is damaged or lost, and how you sue to get compensated for it.

COL GREEN: Right.

CHAIR HOLTZMAN: That's a suit under like --- it's the equivalent of the Federal Torts Claim Act kind of thing?

MR. STONE: Yes, yes.

MR. NELSON: You can only use Article 139 if it's the government that damaged your property.

CHAIR HOLTZMAN: Oh, I see. Okay. So, this would be the equivalent of a --- this would be a personal property claim against the federal government.
MR. STONE: Right.

CHAIR HOLTZMAN: As a supplement to the 139 claims. Is that correct?

MR. STONE: Yes.

CHAIR HOLTZMAN: Okay.

MR. STONE: And if the compensation program paid it, then the person wouldn't be able to make a claim. They'd get rid of that case.

CHAIR HOLTZMAN: So, are we in favor of the Personnel Claims Act?

MR. STONE: I ---

HON. JONES: I'd like to know a little bit more. I don't know what more I need to know, but there's something about it, I don't quite get. What kind of --- these are literally property claims?

MR. STONE: Yes. You had a cell phone at the time you got sexually assaulted.

HON. JONES: Right.

MR. STONE: And maybe the government took it for evidence and now it's lost. It's gone. It was a $600 cell phone.
CHAIR HOLTZMAN: Or the person who broke it is not a military member. You're a military member, but the person who broke it is not a military person.

HON. JONES: All right. So, it's ---

MR. STONE: The Personnel Claims Act would be against the government. If the person was not a military member ---

CHAIR HOLTZMAN: Oh, I see.

MR. STONE: --- that wouldn't be a Personnel Claims Act.

CHAIR HOLTZMAN: Oh, that wouldn't be.

Okay.

MR. STONE: It would be more like they had it in the evidence room and it got lost.

CHAIR HOLTZMAN: Okay.

HON. JONES: Okay. And right now there's no ---

MR. STONE: Right, there's no way to do it except filing a separate suit, or they were trying to lift the fingerprints off it, or the DNA, and you wreck items when you do that a lot.
of times.

HON. JONES: Okay.

COL GREEN: PCA.

MR. TAYLOR: Yes, I'm not sure about that, somebody can check. But I think this Personnel Claims Act limitation is primarily that you have to be a government personnel in order to file a claim. So, that's the basic limitation. Is that right, Maria?

MS. FRIED: The Personnel Claims Act?

CHAIR HOLTZMAN: Somebody's nodding in the audience.

COL GREEN: I believe that's true.

The testimony the Panel heard was more about the Military Claims Act, which is for the external victim who is damaged ---

HON. JONES: Yes, which is irrelevant pretty much.

COL GREEN: --- by someone in their military capacity, and that and the Foreign Claims Act are two vehicles by which those external to the military can be compensated for
1 military members who commit -- or damage things
2 in the course of their duties, their military
3 duties.
4
5 MS. FRIED: So, it's Article 139 of
6 the UCMJ that you make a claim to your command.
7
8 CHAIR HOLTZMAN: That's what it is.
9 Okay.
10
11 MS. FRIED: I think --- I'm not aware
12 of a Personnel Claims Act per se. There's a
13 Foreign Claims Act ---
14
15 COL GREEN: There is a PCA.
16
17 MR. NELSON: There's the Military
18 Personnel and Civilian Employees Claims Act which
19 applies to victims who are Service members or DoD
20 employees.
21
22 CHAIR HOLTZMAN: So, that's a --- and
23 what do you do under that Act? What are you
24 entitled to under that Act?
25
26 MR. NELSON: You can file claims
27 against the government for damage to or loss of
28 personal property as a consequence of service,
29 including seizure of evidence.
MR. STONE: Including seizure of evidence? That's typically ---

CHAIR HOLTZMAN: Okay.

MR. STONE: --- where it arises. And it will obviate a lot of those, because you'll have been paid. You won't have any claim left.

HON. JONES: Or maybe it's working just fine, so --- and we don't need to include it. I don't know.

MR. TAYLOR: But it is limited, of course, to Service members or DoD employees.

HON. JONES: Right.

MR. STONE: That's okay.

MR. TAYLOR: Yes.

MR. STONE: And even if it is working fine, the idea is not to make a victim have to file a separate suit. That's the idea. They've got to find somebody who knows the paperwork, and where to file it, and more paperwork, and more delay. The idea is to just ---

HON. JONES: One-stop.

MR. STONE: --- wrap it up and get it
done.

CHAIR HOLTZMAN: One-stop shopping.

MR. STONE: That's it.

CHAIR HOLTZMAN: Okay. So, I would be in favor of including that. I don't know how anybody feels. Should we take a vote on that? Anyone opposed to including it? Okay, so it's included.

All right. And future losses, I guess we agreed to that before, and we're not going to revisit it unless somebody objects.

"With respect to all victim categories, two members recommended that medical and mental health care be distinguished under future losses, and separately from pain and suffering." Well, I guess let's first deal with pain and suffering. I think Judge Jones ---

HON. JONES: I'm sorry, where are you?

CHAIR HOLTZMAN: I'm getting to Issue 5.

HON. JONES: Okay, great.

CHAIR HOLTZMAN: Implicit in Issue 5
is a ---

HON. JONES: Okay, thanks.

CHAIR HOLTZMAN: --- question of pain and suffering. I gather already that Judge Jones is opposed to any compensation for pain and suffering, and Mr. Stone wants to put a bookmark or a place mark there.

I don't know what that means in terms of how you come out substantively. I don't know how you feel about this, Mr. Taylor. Do you -- somebody want to address the issue of whether we're having pain and suffering? I guess the question is, one, do we want pain and suffering? And if we do, is it a flat amount, or is it something to be proven? And three, is there a cap?

HON. JONES: Well, I guess all I can tell you is, I don't think most compensation systems, and you can correct me, Doug, give pain and suffering. It's not part of the compensation system. It's --- and you know this, better than I. Pain and suffering is usually based on having
to go to court and suing, and getting your tort claim.

If we were to add pain and suffering to this, it would be a claim that would be, obviously, in every compensation. It would open it up. Obviously, the military victims would be able to get this. It would require setting up -- well, with the proviso that there's always going to be a cap, I think we would be trying to make decisions about amounts of pain and suffering in every case that were going to be difficult. And it would be a lot more money, because everybody would come in and want the cap for their pain and suffering.

I, personally, think that's a tough kind of program to administer. If we're going to try to be --- actually figure out well, what's your case worth? Your pain and suffering is 3,000, someone else's pain and suffering is 20,000. I mean, I just think it's very difficult, and it requires a whole different administration, and a much larger one. Off the
top of my head, that's where I'm coming out.

MR. STONE: Well, the reason I wanted
a placeholder is because I wanted to hear
everybody's views. I mean, I think that there
would be more claims. I think you're right. I
would certainly --- Tennessee, it says in the
literature, has a cap of $3,000. I could even go
with a cap lower than that.

HON. JONES: You mean for pain and
suffering?

MR. STONE: Yes, for pain and
suffering.

HON. JONES: Okay.

MR. STONE: It's a $3,000 cap.

HON. JONES: An internal cap, right.

MR. STONE: An internal cap.

HON. JONES: Right.

MR. STONE: Like a sub-cap. I guess
we could either --- if it's --- I would have it
very low, and I would also have it as a flat
payment so that you didn't --- I wouldn't make
it, you know, necessarily documented, or we could
do it the other way and say in the discretion of
the convening authority, or the commander,
whoever authority of this ---

HON. JONES: No convening authority
would be involved. Right?

MR. STONE: Well, whoever the
authority --- the person is who signs off ---

HON. JONES: Right.

MR. STONE: --- that you could make a
claim for it, and they would decide up to this
very low cap, or you can make it a flat amount.
I wouldn't care which.

I --- there was another state that did
do it, and their issue was that they didn't have
a low cap, so they ran out of money. I mean,
having a low cap would be one thing.

I think that --- I almost feel like
this is the way we make up for how badly sexual
assault has been handled in the past, that this
--- it is looking back. It may be a way to
address what happened in the past, but I think
it's a statement that we take it seriously.
So, I --- that's what impels me to say, you know, I want to hear everybody's views, because I'm inclined to think Tennessee is probably right, that it's, you know, a small amount but something --- this sort of reminds me, and I hate --- I don't mean to go back to the restitution decision, but I've had clients who said, when I get a restitution check from the guy in prison who's got a job in prison of $10 four times a year, I'm happy because I understand my hurt was addressed every time I get that check, and that person knows it.

It's sort of symbolic, you know. It's a ridiculously small amount of money, and there's a lot of bureaucracy involved, and I kind of feel that way with this. There's a symbolic value to a small award for pain and suffering because these are sexual assault. These are not negligence torts that get sued in court where nobody could help it. I mean, these are people who were injured, and it's a way of the military saying I'm not just going to make you whole. I'm
going to recognize, you know, that you were actively hurt.

So, I like the idea. I would try and make it as administratively easy to do as possible, and accept any suggestions.

MR. NELSON: Mr. Stone, one alternative in making it easier, in Hawaii they have this recognition award, where they award $800 automatically. Whereas in Tennessee, the claimant actually has to make a separate showing.

MR. STONE: Okay.

MR. NELSON: And that's why they have a cap for pain and suffering.

MR. STONE: Right. And I could go with the Hawaii version.

CHAIR HOLTZMAN: Mr. Taylor, do you have some thoughts on this?

MR. TAYLOR: Well, I certainly agree with many of Mr. Stone's sentiments because of the comments I made earlier about the feeling of wholeness that I think victims need to have.

But I'm not sure given the practical
difficulties in this case that it really
outweighs Judge Jones' comments about the
difficulty in assessing. So certainly, if we
decided to go in that direction, I think a flat
payment that's more of an acknowledgment of the
pain and suffering, rather than an evaluation of
the pain and suffering, would be called for.

CHAIR HOLTZMAN: That's my feeling,
too. I think that it's possible that the $3,000,
or $1,000 payment could be misinterpreted in
saying, "Wait a minute. I mean, I'm still
suffering. Here we are so many years later and
they think it's only worth $1,000, or $3,000?"
I mean, it could be viewed as something very
trivial.

Whereas, I think the Hawaii --- I
don't know what the experience is with Hawaii,
but I like that idea, which is that it's not
linked to any actual suffering, but that it's
just an acknowledgment that you've had to go
through this.

But I don't know. I'd have to --- I'd
like to know a little bit more about that. But
definitely, I would not be in favor of any system
in which there is anything aside from a flat
payment. And I'm not even sure that I like the
idea of a pain and suffering award at all,
because I think also --- I don't know how
Congress is going to react to that, and --

HON. JONES: And, also, with a flat
payment it's basically everybody makes a claim.

CHAIR HOLTZMAN: Right, exactly.

HON. JONES: Gets a flat payment.

CHAIR HOLTZMAN: Correct.

HON. JONES: Which I don't like,
because really what has to be evaluated, among
other things, is at whatever minimal threshold is
there a claim?

CHAIR HOLTZMAN: Right.

HON. JONES: Pardon me?

MR. NELSON: Judge, it's only claims
that are granted that receive the award.

HON. JONES: Oh, okay. I didn't
realize that. So, we have to decide ---
CHAIR HOLTZMAN: Is that the Hawaii?

MR. NELSON: Yes.

HON. JONES: So, you have to give them their ---

MR. NELSON: Recognition Award.

HON. JONES: Oh, I'm sorry.

CHAIR HOLTZMAN: Okay.

HON. JONES: So, you have to give them --- they have to get past that threshold, and you have to give them compensation.

MR. NELSON: Right.

HON. JONES: And then you'd put extra on for ---

MR. NELSON: Correct. That's my understanding.

MS. FRIED: Are these just for Unrestricted Reports, or do they have Restricted and Unrestricted Reporting? How would that be handled in a claims process?

MR. NELSON: I don't know. We can get more information about --

MR. STONE: That would be good --
MR. NELSON: --- the program.

MR. STONE: --- because that would simplify it, too. If they had to otherwise justify an award of compensation, then an $800 of recognition would be put on.

CHAIR HOLTZMAN: What's it called, what kind of recognition award?

MR. NELSON: Just Recognition Award. I don't think ---

CHAIR HOLTZMAN: And it's only for sexual assault victims? Or is it --

MR. NELSON: I believe so, yes.

HON. JONES: I'm not --- my gut reaction is I'm not too happy with this, but that's not very articulate, so I would like to think about it some more. I just don't like it.

MR. TAYLOR: Well, I think one thing that that would do, is that if you had a separate adjudication on the claim itself, based on the standard that we agreed upon last time, which was preponderance of the evidence, then it would tend to eliminate those people who simply want to file
a frivolous claim in order to try to get the
minimum statement that they could get, the $800
or whatever amount it happened to be.

So, there would be a winnowing process
that would end up with legitimate claims for
which this would be added as an acknowledgment of
what they went through.

HON. JONES: But that would mean that
every victim would come in and say I was
compensated in --- well, there was no
compensation in the military. You got your --
- unless there were things that were not paid
for. And, presumably, non-civilians would come
in and say I got the cap in Iowa, but now I would
like my Recognition Award from the military, or
whatever you want to call it. Is that what we're
talking about here?

CHAIR HOLTZMAN: Well, we could say
that --- I mean, the claims system could say that
if you've been compensated under any state system
--

HON. JONES: You're not eligible.
CHAIR HOLTZMAN: You're not eligible for anything. I mean, unless the state system, for example, doesn't compensate for --- I don't know what it would be. Some kind of thing that's aside from this recognition that the military would compensate for.

MR. STONE: Yes, we will have to have somebody figure out the details of how -- whether this comes before the state system or after.

CHAIR HOLTZMAN: Right, and how it meshes.

MR. STONE: They have to mesh.

CHAIR HOLTZMAN: Right.

MR. STONE: Usually, the compensation systems say only expenses that have not previously been compensated.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: Of course, if you're from anywhere but Hawaii, you can make that claim.

Right?

CHAIR HOLTZMAN: Correct. Correct.
MR. TAYLOR: And if you had been assaulted in Hawaii, you'd get the $800, and if you're assaulted in California, you don't.

MR. STONE: Except that, I think the idea is you don't have a right --- it's not a harm. Maybe that's why they're calling it a recognition rather than pain and suffering. That isn't the basis of a claim. You have to have another basis of a claim.

That's simply something that's tacked on recognizing you otherwise had a claim. So, you know, people couldn't be suing just for that. I kind of like ---

MR. TAYLOR: When you say suing, I assume you mean filing a claim.

MR. STONE: I mean filing a claim.

MR. TAYLOR: Yes.

MR. STONE: Yes.

MR. TAYLOR: Thank you.

CHAIR HOLTZMAN: So, where do we stand on this? Do we need more information about the Hawaii program, or is the majority opposed to the
Hawaii program even at --- just from what we've heard?

HON. JONES: Oh, I'm opposed to it.

CHAIR HOLTZMAN: And what are your reasons, Judge Jones? Because you're a very persuasive person.

HON. JONES: All right, let me try. I understand what compensation means, and it's easily --- not so easily sometimes, but at least you know what you're getting your money for. You suffered these losses, here's your compensation.

I think pain and suffering is a completely different issue. It's true having a flat fee takes away a lot of the administrative issues and the problem that there will be some people --- you know, people would be upset if there were grades of awards.

But I think there's sort of a notion here that somehow this military DoD fund is --- I mean, is paying this extra money. I don't know --- I'm not sure what it's supposed to symbolize. I mean, I think you were talking about that the
military didn't handle this problem very well, so
is that --- is this some sort of reparation
payment from the government? I don't like that
idea.

MR. STONE: It's a recognition that
you were put in a difficult spot that you
couldn't easily extract yourself from, and you
wound up getting sexually violated, and now in
addition, despite everything else in place, you
needed to file a compensation claim, and this is
a recognition that this has been a difficult
ordeal.

MR. NELSON: Mr. Stone, we do have
information about the Hawaii program. It's
actually called an Acknowledgment Award. It says
that they're symbolic in nature, and are awarded
to acknowledge victim's suffering. "Such awards
are not intended to quantify physical and/or
emotional losses suffered as a result of a
crime." And it appears that it's not limited to
sexual assault victims.

MR. STONE: I mean, that is the
spirit, I think.

MR. TAYLOR: Well, I think I'm persuaded by Judge Jones' arguments, as well as by my own experience, which is that any time you create a class like this, that's different from the best practices throughout the rest of the country, I think Congress might ask well, what is different about this for the DoD victims, and why only sexual assault, as opposed to families that have gone through murders, armed robberies, et cetera? So, it seems to me that probably it would be better for us not to make a recommendation along those lines.

CHAIR HOLTZMAN: Well, I mean, it's a very tough issue because I do sympathize and agree with a lot of what Mr. Stone says. But I'm just worried about how --- you know, even though this is not supposed to deal with pain and suffering, it could be opening the flood gates.

Also, we have a stronger argument vis-à-vis the Congress, if we say simply this program basically mimics what the states have done,
except in some areas where it would conflict with
DoD --- existing DoD policy, which is Restricted
Reporting, and so forth. And so we've
accommodated that, but really we're picking up
where the states --- we're basically imitating
that. We could say to Congress, we have --- for
that reason we have decided not to adopt pain and
suffering, but that is something that you might
want to consider.

    HON. JONES:  Sure.

    MR. TAYLOR:  True.

    CHAIR HOLTZMAN:  And point out the
    Hawaii program.

    MR. STONE:  Okay. I think that's sort
    of a compromise. We don't recommend it, but we
    point out that at least Hawaii and Tennessee try
    and do things to ---

    CHAIR HOLTZMAN:  Right. Why don't we
    just say ---

    MR. STONE:  --- address it.

    CHAIR HOLTZMAN:  Right, that we
basically --- the philosophy that we've adopted
here is basically to imitate the state programs,
and build a federal program that would operate in
the same fashion or better, but consistent with
DoD policy. So, therefore, we have not
recommended pain and suffering, but you might
wish to take into account, blah, blah, blah.

MR. TAYLOR: I think it's also fair to
say that this is a best practice. We're adopting
the best practices of the states.

CHAIR HOLTZMAN: Okay.

MR. TAYLOR: But we're being more
progressive than some states, and that we're not
trying to establish a 72-hour time limit.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: We're not trying to ---
HON. JONES: Right.

MR. TAYLOR: --- require reporting to
law enforcement and cooperation with law
enforcement.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: So, I think there's a lot
to be said about a recommendation that's
progressive. And in addition to which, we're
adopting the best practices from many states, but
there's still something else that could be done.

CHAIR HOLTZMAN: Well, you know, I'm
not sure I agree with the best practices, because
I'm not sure that it is the best or not the best
practice to have the states not to award pain and
suffering. That's where I would --- I don't feel
comfortable saying that.

MR. TAYLOR: I wasn't thinking so much
about pain and suffering as the program in
general.

CHAIR HOLTZMAN: Yes, right. Well, I
think that from where we are right now, I think
there might be a couple of other issues that we
should do. I would suggest that the Staff draft
the language for the recommendation, and also
list what's going to be --- you know, the nature
of the compensation program, what's going to be
covered, what's not going to be covered, and we
might just want to also compare it with state
systems, basically say, you know --
Now, wait a minute. Let's just ---

MR. STONE: Yes, I think you've more or less covered all of them now.

CHAIR HOLTZMAN: Have we covered all of them? Oh, no. What we haven't covered is there going to be an overall cap?

MR. STONE: Oh, right. You're right.

HON. JONES: I think we all agree there should be a cap. We just haven't figured out what it is.

CHAIR HOLTZMAN: Okay, great. Thank you for reminding me about that. Okay, so what is our --- so, do we --- so, we agree that there should be an overall cap for any individual payment? And what should that be? Is it --- most states have what, a $25,000 cap?

MR. NELSON: That's the most common one, ma'am. Yes.

CHAIR HOLTZMAN: And what --- does anybody go --- does any state go --- a few states go beyond that. Right?

MR. STONE: Yes, go to 50.
CHAIR HOLTZMAN: New York State --

- sorry?

MR. STONE: A few go to 50.

MR. NELSON: New York actually has no cap for medical.

CHAIR HOLTZMAN: Right.

MR. NELSON: The lowest is Puerto Rico, which is $6,000 total, so there's a range.

CHAIR HOLTZMAN: That's not a state.

MR. TAYLOR: Nevada has $100,000.

CHAIR HOLTZMAN: Sorry?

MR. TAYLOR: I'd just note that Nevada has $100,000.

MR. STONE: And it says in here that Maryland has 45, but I know it has 50, so I don't know when this compilation got put together.

It's probably ---

HON. JONES: Caps are things that can change. If we started with 25, and then realized that we were getting very few claims, and they were uninsured people whose claims went beyond $25,000, we might raise the cap, or there might
be some circumstance where we would raise the cap.

MR. STONE: But we would have experience then.

HON. JONES: But we would have some experience at that point.

CHAIR HOLTZMAN: So, we could say, if everybody agrees, that most of the states have a $25,000 cap. We're adopting that. We recommend that that should be the cap --- it should be that cap, but we also recommend to Congress that it monitor that carefully because it may not be --- may not produce a just result, because those caps were probably adopted, what ---

MR. STONE: A long time ago.

CHAIR HOLTZMAN: Yes, 50 years, 25 years ago, whenever this program ---

MR. STONE: But the other advantage to having the cap there is, if a person exhausted the state system and got 25, they wouldn't come to us, or if they went to us and there was an ability to go back to the state, but they've
gotten their 25 because they had big expenses,
they wouldn't go back to the state.

So, that would be --- it would make
some sense in terms of administrative
efficiency, like you say, not to have, "Well, we
did that, but now we can still go here. It will,
for the most part, take care of probably 90
percent of the states, maybe higher.

HON. JONES: Well, that's true.
Effectively, if you talk about 25 caps for most
states, if the person uses both systems and can
legitimately claim over 25, they're going to get
--- the cap is effectively 50.

MR. STONE: No, no, no, they don't get
one and the other.

HON. JONES: Well, I'm saying if
you're talking about medical expenses and you've
reached your cap in Iowa, don't you get to come
to us?

MR. STONE: No, because you've
received $25,000 in compensation. The Maryland
system wants to know what anybody else has paid
you, and what they've paid you is deducted from your cap.

HON. JONES:  So, you ---

MR. STONE:  You can't run around and stack cap on top of cap. That's the cap that this program would recognize, and if you've got it somewhere else, then ---

HON. JONES:  Oh, that's how you're defining cap.

MR. STONE:  Well, that's I think ---

HON. JONES:  How most of ---

MR. STONE:  --- how most of the states do it.

HON. JONES:  Right.

MR. STONE:  They don't stack them.

HON. JONES:  I know, that's an interesting question to me. I'm not suggesting we change it among the states, but if you're a civilian victim --- and, again, I think there would be very few. What is it, 3 percent are uninsured?

MR. STONE:  Yes.
HON. JONES: And you get $25,000 in restitution for medical expenses of the $50,000, and you go to the state first, you can tell them, I haven't gotten anything else, and then you can come to us.

But, again, this is all off the top of my head. I have no idea whether that's a viable situation or not. For now, I think it's fair to say we should go with what seems to be the generalized cap, and maybe just think about this some more.

MR. STONE: Okay.

CHAIR HOLTZMAN: Well, I mean, I think --- I mean, my recommendation is also the $25,000 cap because it's very easy. I mean, most states have it, but I do think that Congress ought to be urged, if they adopt a system, to review that cap periodically --

MR. STONE: Right.

CHAIR HOLTZMAN: -- because medical expenses tend to increase ---

HON. JONES: Yes that would handle it.
CHAIR HOLTZMAN: --- and you may find that there's some injustice here.

And, in addition, there's --- I don't know if you noticed, but Mr. Taylor was kind enough to give me a copy of the sheet that lists what the compensation caps are. Some states in homicide cases give much more money, or funeral expenses.

MR. STONE: Yes.

CHAIR HOLTZMAN: And we haven't even looked at that issue.

HON. JONES: Right, true.

CHAIR HOLTZMAN: So, that may be something that ---

MR. STONE: That ought to be added in, too, funeral expenses.

CHAIR HOLTZMAN: Yes, added to the --- - you know, I think we ought to note that we have not examined how this would work in other --- you know, other categories of crimes.

MR. STONE: Yes. Right. Maryland has a $5,000 cap, sub-cap of funeral expenses within
its maximum award.

CHAIR HOLTZMAN: Right, probably no --

- 

MR. STONE: And today, a lot of times we're getting bills for $8,000, but we only give them --- they only get back 5, but funerals are not cheap. But it's so that they can't have $25,000 funerals.

HON. JONES: But these are in homicide cases. Right?

CHAIR HOLTZMAN: Right.

MR. STONE: Yes, these are homicide.

HON. JONES: Okay.

CHAIR HOLTZMAN: Right. So, we might just point out in our recommendation that we have not addressed whether there's any different need in any other kinds of cases, which some states have adopted.

MR. STONE: Yes, right. We wouldn't have funeral expenses ---

HON. JONES: Right.

MR. STONE: --- in sexual assault
cases, I don't think.

CHAIR HOLTZMAN: Right. Kyle, are we finished with compensation now? Okay, I think we are. Excellent. I think we're going --- I think we can --- can we turn now to retaliation?

MR. TAYLOR: Can we take a short break, please?

CHAIR HOLTZMAN: Yes, I want to do that. Let's take a 10-minute break, please. Thank you very much. We made a lot of progress.

(Whereupon, the above-entitled matter went off the record at 10:36 a.m. and resumed at 10:57 a.m.)

CHAIR HOLTZMAN: Okay, everybody, welcome back. It just occurred to me, and I'm sorry to do this because we made so much progress ---

HON. JONES: Don't do it. Don't do it.

CHAIR HOLTZMAN: I feel compelled. I'm trying to be responsible. There was one small issue that we didn't really address, which
is --- I mean, Mr. Stone addressed it several times in a kind of --- but I don't think it was completely focused.

And that is, we haven't focused on what happens if you get a compensation award.
Can you --- and are you then barred from seeking further compensation from the federal government?

And the only area --- I think Kyle said that last time we decided that you weren't barred from any tort claims against the federal government, but my concern is the property claims. In other words, if you make a claim for the cell phone to the Compensation Board, and you get whatever the amount is, $100 let's say, can you then go and make a claim under 139? And I think that that would not be a good idea.

MR. STONE: You don't have a loss at that point. And, typically --- I mean, we can write it in, but typically, the compensation systems say that, you know, any compensation you get has to be deducted against any future claims you make.
CHAIR HOLTZMAN: Correct. But suppose you go first to the Compensation Board, get your 100 bucks, and then go to the --- sue under 139?

MR. STONE: Well, I don't want to change 139, but I'm sure under 139 you wouldn't have a harm. What's your harm? You've been paid back.

CHAIR HOLTZMAN: Okay.

MR. TAYLOR: I think that's right.

CHAIR HOLTZMAN: All right. Well, just --- I think somehow we just want to make sure that we're ---

MR. STONE: Okay. We could write some commentary.

CHAIR HOLTZMAN: Indicate there are no double recoveries here.

MR. STONE: Right, that you don't get a double reward.

CHAIR HOLTZMAN: For cell phones, at least.

MR. STONE: And that's a healthy solution.
CHAIR HOLTZMAN: Okay. So, now I think we proceed to restitution, I mean retaliation, which is a very big and important issue. And I want to thank the Staff very much for the issue sheet that they prepared on this. Where is that in the materials? Okay, it's on -- it's Tab number 6.

Okay. I guess we can go through these one by one, but I just want to indicate my own personal view, that, you know, the reason that this is such an important issue for us to take up is because this is the largest single reason that victims give for not reporting. Even though enormous progress has been made by DoD in terms of encouraging reporting, retaliation stands out as a major factor here. And despite that, there are real problems in terms of dealing with retaliation, as we will see going through this issue sheet, in terms of lack of standards, lack of --- and so forth.

So, let's just start at the beginning, which is a good place for the moment with Issue
1, which is, whether the retaliation reporting process for victims of all retaliation should be standardized and centralized within one organization, or standardized among multiple organizations?

I think --- so, Kyle, do you want to give us a briefing, or who is briefing us on this?

COL GREEN: Just to give you an orientation of what the Staff has prepared, and then, you know, Julie and Meghan have really become the subject matter experts.

CHAIR HOLTZMAN: Okay, good.

COL GREEN: So, they can assist you with any of the factual points or issues you want to say. But what we've tried to do is, in addition to the issue, just to give you a layout, either from materials you've received, or testimony you've heard regarding the background and sort of the information that you received on the issue, just to try to provide you a summary. Obviously, you've received a whole bunch on this,
and so by no means is this exclusive, but in terms of this --

MS. CARSON: The issue with reporting, unlike sexual assault where you can report a lot of different places but there's one form that gets filed, and there's one designated group, the SARCs who --- and the Victim Advocates who do this form. Retaliation, you can report it a lot of different places, and they've revised the DoD instruction on sexual assault to say you can report it all these different places. Depending on the type of retaliation it is, though, the process is going to be completely different.

And the question is, if you want to track and understand, as a whole, all the different types of retaliation, should there be one place that everything is tracked initially before it's sent out to all of the different places where you investigate it, or handle it? And if so, who should that be? Should it be, like sexual assault, with the SARCs, or should it be based on what it is?
If it's an IG complaint, if it's a professional retaliation complaint, currently, you go to the IG hotline, or file it with your Service or DoD IG. If it's not actually an IG complaint, they'll send it out where it should go, so they could be the people who receive all of the complaints. And then the command does one aspect of investigating, and the MCIOs if it's a criminal issue does the other investigating.

So, the question is, should there be one place you go where they're recording all of these complaints from the worst to the simplest, or should it continue to be different organizations? If it should be different organizations, should they have some form that is ultimately reconciled somewhere so that you can track it all?

CHAIR HOLTZMAN: Okay, so there are really two questions here, as you said. One is, whether you have a centralized or non-centralized system. Do you have one form so that you could easily track this information? It seems to me
that -- does any of the Services have such a
form?

MS. CARSON: The Air Force has what
they're calling Experience Interview that's a
voluntary document that asks several questions,
and it's been in the handouts. That's the only
formalized document that we have seen that
exists.

And then, for the sexual assaults,
there is the reporting election form where they
elect Restricted or Unrestricted Reporting. And
in that form, they have to be advised about
retaliation, and that they can report
retaliation. But there is no other form.

CHAIR HOLTZMAN: Right, but for sexual
assault there's a standardized form that's used.

MS. CARSON: There's actually two
forms. There's the election form which is the
one that just says ---

CHAIR HOLTZMAN: Right.

MS. CARSON: --- do you want to be
Restricted or Unrestricted. And then they have
the DSAID information form that's all the data.

CHAIR HOLTZMAN: Right. And are both

of those forms standard ---

MS. CARSON: Yes.

CHAIR HOLTZMAN: --- throughout DoD --

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MS. CARSON: Yes.

CHAIR HOLTZMAN: --- across the Services?

MS. CARSON: Yes.

CHAIR HOLTZMAN: But there's no such similar requirement with regard to retaliation, there's no standard form, so that you can't even track the information properly. At least with regard to sexual assault, with a standardized form and with --- we're going to hear a lot about data collection later this afternoon, at least you have an ability to track.

MS. CARSON: To point to a document that needs to exist, that needs to be collected somewhere and can be tracked.

CHAIR HOLTZMAN: So, maybe we should
address that one first, because that seems to me
like a no --- can we call it a no-brainer?

            MR. STONE:  Yes.

            HON. JONES:  Is there any impediment
to having one form, and having it Service-wide?
And, you know, it would serve --- that would be
terrific, I think. I mean, I agree, it seems
like a no-brainer, but there's always something
to be concerned about.

            MS. CARSON:  We don't have any
evidence that that would be a problem. You could
--- possibilities are, add it to one of the
existing forms. In the DSAID information form
they collect all kinds of information. It's like
a five-page document. You could add it to that.
You could create its own DD form that is just for
retaliation.

            We also provided you with what the
MEO, the Military Equal Opportunity, complaint
forms look like, because that's where you make
the complaint that the command investigates. So,
the sexual harassment complaints are made on that
form, so that's just another example of an
existing format. So, the options are create
something new, or put it into something that
already exists.

MR. STONE: Which one do you
recommend, does Staff recommend?

MS. CARSON: I don't know ---

MR. STONE: You don't have a
recommendation?

MS. CARSON: --- that I'm allowed to
recommend.

CHAIR HOLTZMAN: Well, I think it
makes a lot of sense. If you are already
tracking information from a sexual assault
victim, whether it's Restricted or not
Restricted, that report is the same. Right? I
mean, that information. I mean, you could just
have another page annexed to that and that's very
easy to track.

And you're also --- the advantage to
that is you're tracking --- I mean, here you have
a victim that's come in and reported, whether
it's Restricted or not Restricted that hey,
something bad has happened to me. Okay, so now
we're going to follow you. We're going to follow
you in terms of do you have victims assistance,
whatever, and we're going to follow you with
regard to retaliation. So, it's all the same
person, it's the same person, so I think we ought
to keep the information together with the person.
Just my --- I'm not a bureaucrat but it seems to
me the right way to do it.

HON. JONES: And who's --- am I right
that it's basically the SARC that is the person
that tends to the form ---

MS. CARSON: The SARC has a privilege
---

HON. JONES: --- the nature of the
data?

MS. CARSON: So, the SARC is someone
you can go talk to already. The SARC is being
trained to be in the position, they already have
to tell you about retaliation. It's already in
the form, so they're the place where the subject
gets raised.

The one thing that won't happen, and the requirement that you have someplace for bystanders, or witnesses, or people who aren't filing a sexual assault complaint, they would have to know to go to the SARC to make that specific complaint to SARC. And then, do you want to tie that to the sexual assault complaint that was made, I mean, that's documented? In that case, you could still use the same form. I mean, it doesn't matter who's reporting the retaliation, you could still track it on the form that is for that sexual assault, assuming it's been reported.

CHAIR HOLTZMAN: Well, that's ---

MS. CARSON: You can capture most everything that way.

CHAIR HOLTZMAN: And I think if --- I think the good thing about the SARC is that the victim already has a relationship with the SARC.

MS. CARSON: Or the Victim Advocate.

CHAIR HOLTZMAN: Or the Victim
Advocate, whoever, so that that's --- you're not having a new person. And if we still have to, for example --- I'm not even going to say what I want to say about the IG operation, but if we still have to send the information to the IG, there's nothing to stop, since you have a standardized form and you have data on it, there's nothing to stop the SARC from filing it with whatever other agency.

MS. CARSON: Sending the person to the IG to make their complaint.

CHAIR HOLTZMAN: Yes.

COL GREEN: One distinction that I think is important is, a victim has multiple reporting options for a Restricted Report or an Unrestricted Report. They can make the complaint with a ---

CHAIR HOLTZMAN: Right.

COL GREEN: --- number of resources. Ultimately, the person that the Services have designated as the administrator of that complaint is the SARC, so I do think that --- I think what
I'm hearing from you is, really what we're talking about is who's responsible for administering, once a retaliation complaint is made, and whether the Panel wants to determine that, and in addition, who are the appropriate receivers of complaints that feed into that system?

CHAIR HOLTZMAN: Yes, I think what we're saying right now is where is --- who -- what ---

COL GREEN: Right.

CHAIR HOLTZMAN: Should there be a uniform form that captures ---

COL GREEN: That's the form, yes.

CHAIR HOLTZMAN: --- the information.

I think the consensus here is yes.

COL GREEN: Yes.

CHAIR HOLTZMAN: Who should be responsible for keeping that form? The SARC. That doesn't answer the question of where you make your report to, just like the present system with regard to sexual assault. Am I right? I'm
sorry, Mr. Taylor, you wanted to say something.

MR. TAYLOR: Yes, thank you. The point I wanted to add to that is that, it seems to me that where you have the possibility of cases slipping through the cracks is when for some reason it gets handed off to the IG, properly so, because they're supposed to handle it according to a Service regulation, or it's investigated by an MCIO, or by the command.

There needs to be some requirement for all three of these organizations to track that information back to the SARC, so you don't have four independent parallel silos of potential reporting, as opposed to a one-stop shop to collect all the information. It doesn't mean that they're necessarily grading the work of what someone else does, but they're information addressees that will be responsible for reporting it back up, and consolidate it eventually, I would suppose, in some big central report. Does that make sense to everyone?

MR. STONE: Well, if it's a form
you'll be able, theoretically, by computer, at
some point, to gather all that data.

MS. CARSON: Well, interestingly, the
Services have the Case Management Group as the
place now designated, and all of those people,
with the exception of the IG. I'm not sure the IG
participates. But the MCIO and command all
participate, as well as the SARCs, so there would
be a way there for all to be sure that
information is all being followed.

CHAIR HOLTZMAN: But who --- I don't
understand a group. If you have a group, who is
responsible?

MS. CARSON: I'm not sure I understand
the question.

CHAIR HOLTZMAN: Yes. Well, who ---

MR. STONE: Isn't it the SARC who
follows it and makes the presentation to the
Command Management Group?

MS. CARSON: Yes. The SARC has been
designated as the single sort of center of the
universe ---
CHAIR HOLTZMAN: Well, I understand.

So, when you're telling me that it's really the --- what's it called, the Management Group?

MS. CARSON: The Case Management Group.

MR. STONE: Yes.

CHAIR HOLTZMAN: The Case Management Group that's responsible for the retaliation.

Well, that's a group. Who's the person? Who do I hold accountable if something's gone wrong?

Who is a person who said ooh, whoops, I sent this over to IG. I haven't heard anything for ---

MR. STONE: In three years.

CHAIR HOLTZMAN: --- two years. Oh, you beat me.

MR. STONE: I beat you.

CHAIR HOLTZMAN: Five years, okay?

MR. STONE: Right.

CHAIR HOLTZMAN: Who's responsible?

If you have a Case Management Group, who is the person who's responsible for that?

MS. CARSON: Well, the Case Management
Group -- the head of the Case Management Group is the installation --- typically, the installation commander.

MR. STONE: Yes.

MS. CARSON: And there isn't anything above that --

MR. STONE: Because he takes responsibility for all the cases, sees that they get moved along.

MS. CARSON: --- in the way that the current system works, and that is outside of IG. IG is not really tied to that.

MR. STONE: Okay.

MS. CARSON: Well, so, it's a fair question.

MR. STONE: Before we move on to the, who we report, I have one comment about the form.

CHAIR HOLTZMAN: Yes, I'm sorry.

Maria?

MS. FRIED: I'm sorry. I was just going to say Major General Nichols and Nate Galbreath will be here this afternoon. They
could probably shed some light on how the CMG is operating and being implemented for purposes of retaliation, if that helps.

CHAIR HOLTZMAN: Mr. Stone.

MR. STONE: I guess this is an observation. I like the idea of tying it to the original report, whether it's Restricted or Unrestricted, because then you have a basis to know what's going on without somebody --- it means if they need to, they can pull the original investigative report, they can see where it happened. You don't have to reinvestigate the whole case.

The only concern I have, and it's possible this is outside the scope of what we're supposed to do, is that if the retaliation comes out of a sexual harassment case, she didn't say it was a sexual assault, but she said it was harassment. He didn't actually assault her; he just harassed her in a way, every time she moved to one side of the desk, the other, or he did, the person came around the desk towards them, and...
they felt like they were chased around the desk. There was never any physical touching at all, there was no assault. Those are going to get totally dropped. So, I kind of wonder whether if we had --- and this is what I say, if we had a separate form that was called Retaliation that looked at this, and you could check off sexual assault or other, sometimes they're going to be very close to, they're going to verge on that. And I don't know if it would be more useful to the military to see if there are events like that that they want to count or not, because if we tie it to the form, those others are not going to get reported this way, and later when they ask us for data, we're not going to be able to say well, there's a lot of sexual harassment going on, and there's people who stop just short of that, but it's really part of the same attitude. They're still ostracized, denied promotion, blah, blah, blah. So, I wasn't quite --- we sort of leave that behind if we make an adjunct to the Restricted or Unrestricted Reporting. I just
throw it on the table. I'm not sure what to do
with it.

CHAIR HOLTZMAN: I mean, my view is
we've been told to deal with sexual assault. If
we can figure out retaliation for sexual assault,
we'll be doing God's work.

MR. STONE: Okay, right. I just throw
that out there.

CHAIR HOLTZMAN: And then someone can
just copy what we've done and apply it to sexual
harassment. I think that that's probably the
better way to approach this. I mean there are,
obviously, limitations ---

MR. STONE: Okay.

CHAIR HOLTZMAN: --- to what we'll
do, but I think starting off with a uniform
report is like, you know, is pretty simple.

HON. JONES: Yes. And I assume there
may be people who don't file any report,
Restricted or Unrestricted, but then for whatever
reason believe they're being retaliated against.
And that's a command climate issue, I guess.
MR. STONE: Well, there's lot of them.

Remember we said ---

HON. JONES: Or sexual harassment.

MR. STONE: Even sexual assault,

remember we determined that only ---

HON. JONES: But that could still be

retaliatory.

MR. STONE: A lot of them are never

filed Restricted or Unrestricted. Remember we
got those numbers, a huge number, at least a
third don't get filed regardless. You're right.

HON. JONES: Right.

MR. STONE: They could still see

retaliation.

HON. JONES: But there's been no

adverse employment action. And, actually, since
they haven't reported in any manner, it's hard to
know how to classify them. I don't have a
problem with trying to figure out a way to
capture those situations; but, otherwise, it
seems pretty easy to keep this all together, if
we tag everything to the reports that we already
have. Am I making any sense? I hadn't really thought about ---

MR. STONE: I guess what it sounds to me like is that the form ought to recognize that if they come in for the first time on retaliation, and it hasn't been reported, that is treated as a Restricted Report at that time of a prior --- because they didn't make any report, and they didn't want it to go anywhere, but it's based on a prior event that we don't have a record of. And until or unless they want to make an Unrestricted Report, that's the equivalent of a Restricted Report, and now a report of retaliation.

HON. JONES: Yes, I don't know -- well, of course, the problem is what are they retaliating against the person for, if they haven't reported it.

MR. STONE: Oh, just the general behavior, that the person is not willing to be their girlfriend or boyfriend now, and, you know, they're angry. I think that happens commonly in
the civilian world.

HON. JONES: Right. I'm not sure that's retaliation. I think that's something else, and I started this, so ---

MR. STONE: You know, if they don't give them a promotion they should have gotten because of that, or they're socially ostracized ---

HON. JONES: No, no, I agree. There are definitely adverse actions ---

MR. STONE: Yes.

HON. JONES: --- that are taken. But if there's no adverse action then --- I don't know. Look, there should be a way to capture retaliation claims. We can go into what they are and they're not when there's no previous report to tag it to. That's all I'm saying. And it should get tagged in a group. That's all.

MR. STONE: Right.

CHAIR HOLTZMAN: But it makes sense still to have this located with the SARC because these do relate to sexual assault, whether
they're reported or not, even a Restricted Report. I mean, I think people would understand the connection.

HON. JONES: Well, and I mean, everything --- I mean, we rely on all those reports. SAPRO relies on all those reports to issue their full set of statistics. And we certainly want retaliation statistics full -- you know, as many as accurate as possible and included with everything else they already report on.

CHAIR HOLTZMAN: Okay. The second -- I think the second issue here is on page 1. I think there are two more issues that we have to address. One is the multiple reporting, where you report to, assuming you don't report to the SARC. I mean, the point that Kyle raised.

But then the second point, or maybe this is the first point, is that it's interesting here that not only does the Air Force provide a written policy regarding the role of its SARCs and VAs with respect to retaliation, so it has a
written policy, but they also assign --- the Air Force also assigns SARCs responsibility for tracking retaliation reports throughout the investigative process.

Now here again we seem to see the Air Force taking really a lead role in innovation to try to protect sexual assault victims. I don't know if we've heard back from the Air Force as to how this has worked, or have we asked the other Services why they haven't adopted that system? Maybe that's our next inquiry, but that seems to me --- that was the point I was raising earlier, which is, you know, you give it to a group, or you give it to this agency, but who is the person actually that's going to be held responsible for making sure that something ---

MR. STONE: They're tracking ---

CHAIR HOLTZMAN: Not just tracking, but making sure that --- because once they track and they find nothing's happened, presumably they have some responsibility to do something then.

MR. STONE: To report up the chain.
CHAIR HOLTZMAN: Correct.

MR. TAYLOR: I think, if I could just add to that. This is the point I was trying to make earlier, and perhaps not too successfully, and that is that because there are multiple people to whom the reports may be made, there needs to be a policy that requires all those individuals who receive reports of retaliation to touch base with the SARC ---

CHAIR HOLTZMAN: Correct.

MR. TAYLOR: --- so the SARC understands at any point in time you've got all these different ones out there that are in some form of investigation, or some form of process, whatever the process might be. And then accept responsibility for closing the case out, knowing what happened in each case. And I noted, for example, that even in the Air Force, according to the write-up we got, there was no particular requirement that the IG come back and give the SARC the resolution, which I think seems unsuccessful, which seems to me improper.
CHAIR HOLTZMAN: Well, I agree with that, but maybe we hold the IG in very special -- in a special case that it deserves.

MR. STONE: I think we'll get to this later.

CHAIR HOLTZMAN: I think that's a big issue ---

MR. STONE: That's another question here.

CHAIR HOLTZMAN: --- in every respect.

MR. TAYLOR: My point being that everyone who has a responsibility for retaliation ought to coordinate all their information with the SARC. That ought to be the one-stop shop for ---

CHAIR HOLTZMAN: Okay.

MR. TAYLOR: --- collecting and following the information.

HON. JONES: Makes sense.

CHAIR HOLTZMAN: Right. You said that Air Force SAPRO personnel are required to
document only the initial retaliation report, and
when the case is referred to the IG, the
resolution. Yes, well, I think that issue will
have to be addressed because I don't know what
the statute permits now. But there needs to be
--- if we're going to have a system where there's
a central report so we can track it, and
somebody's responsible for tracking it, then we
have to be able to give them the ability to find
out what's happening ---

MR. TAYLOR: Right.

CHAIR HOLTZMAN: --- throughout the
process. No question about that.

MR. STONE: I think that that's Issue
3, maybe I'm wrong.

CHAIR HOLTZMAN: All right. We're
getting ahead of ourselves. All right. But I
think the --- unless anybody disagrees, I think
it would be a real good idea to find out from the
Air Force how their system is working, its system
is working, and maybe touch base with the other
Services to see what kind of reaction they have
to that.

MS. CARSON: Can I ask, would you like us to go reach out and find out from the Services and report back, or would you like to hear from the Services?

CHAIR HOLTZMAN: I think why don't you find out initially what the story is, and then maybe we can ---

MR. STONE: And if they want to come talk to us ---

CHAIR HOLTZMAN: Yes, maybe --- if they have a better idea than that, that's fine.

MR. STONE: Because they may have objections that they'd like us to hear ---

CHAIR HOLTZMAN: Correct.

MR. STONE: -- concerns.

HON. JONES: Objections, or concerns, or better idea, or whatever.

MR. STONE: Yes. But before you leave that issue, though, I thought one of the questions was, is there one point of contact that we want, or do we want to say many points of
contact that a person has? Wasn't that the implication of (b), 1(b)?

CHAIR HOLTZMAN: Yes. Well, okay, we haven't completely addressed that.

MR. STONE: Okay.

CHAIR HOLTZMAN: Okay, so how does the Panel feel about that?

MR. STONE: I mean, my own view is we heard enough testimony from victims where they were unlucky enough to be in a situation where the one point of contact was the person sexually assaulting them.

CHAIR HOLTZMAN: Right.

MR. STONE: That, you know, maybe they want to go to the chaplain who's not the normal line of communication, or they're on a ship where they don't have a lot of options. So, I think having a lot of points of contact but that can funnel in with the same report. They all have a standard report they write, would be helpful. I don't like one point of contact. I think that's too difficult.
MS. CARSON: If I could clarify a little bit on the issues, I think the distinction that was intended here was a little bit more of should there be a single form and multiple groups who use the form, versus should there be one group using the form, being the SARC or whoever you would identify, and others would send you to the SARC to do the form? That's how the sexual assaults are. Now, you could go to a different SARC if there was a ---

MR. STONE: So, that's a problem ---

MS. CARSON: -- you know, the SARC in question, so ---

MR. STONE: --- because some of those other people might not be privy to the stuff on a Restricted Report form.

MS. CARSON: Right. So, really --

- but the question is, do you --- is it better to have the different groups operating independently with separate forms that then get reconciled?

CHAIR HOLTZMAN: No, we decided one form. We've decided that issue. That's
finished.

MS. CARSON: Then I think you've decided what ---

CHAIR HOLTZMAN: Okay. But the other point that we have here, and I don't know whether it gets decided under Issue 1, or somewhere later is, who is responsible then for tracking and monitoring that report? And I think we've basically decided it's the SARC, unless we --- I mean, pending hearing from the Services. But if that turns out to be a good system, then we have to have some way of insuring that the SARC can get follow-up if this goes to the police investigation, or if this is going to the IG. They have to be able to have follow-up to know where it's going, that it's not just in limbo.

And so that ---

MS. CARSON: And at this point, what is required is that this all be discussed at the Case Management Group, but there is no specific requirement of anybody to feed information back to the SARC. So, I think that would be something
that would need to be put forward with more specificity, that the SARCs need to have that information.

CHAIR HOLTZMAN: Correct.

MS. CARSON: And I think you'll hear, especially from the IG --- I'm not sure that they feel that they can tell the SARC that information.

CHAIR HOLTZMAN: Well, I wouldn't tell that I haven't done anything for three years on a project. I completely understand their position.

MS. CARSON: Possibly here.

CHAIR HOLTZMAN: Completely understand it. I agree, but so then maybe they don't have that responsibility.

MR. STONE: But they could still give a status ---

CHAIR HOLTZMAN: I'm just joking.

MR. STONE: --- report of in process, closed, you know, active, not active. They would be able to say that much ---
CHAIR HOLTZMAN: Well ---

MR. STONE: --- whether a case is actively in their --- it's active in their office or not active, assigned to somebody.

CHAIR HOLTZMAN: I would like us to defer what the IG should do about this ---

MR. STONE: Okay.

CHAIR HOLTZMAN: --- because I really have grave reservations about them all together in this area.

Okay. So, now we have Issue 2, which is standardized investigation process. Whether current procedures and resources for investigating reports of professional and social retaliation, including military whistleblower claims, are effective, and whether investigations of all reports of social and professional retaliation should be handled by the same investigative authority? This is where we get to the IG. If reports continue to be investigated by multiple investigative authorities, whether they should be standardized or otherwise
coordinated processes, procedures, and timelines
for substantiating founding complaints.

Okay. Staff, do you want to give us
some background on this, please?

MS. TOKASH: So, currently, the
investigating authority is all over the map for
the different types of retaliation. And the
MCIOs are largely linked to --- even though the
Services now have punitive regulations making
retaliation punitive. There's a rather large
caveat within those punitive regulations, and
that's the intent element. So, there has to be
an intent to interfere with the justice process
or prevent reporting. So, that throws a little
bit of a monkey wrench into the works when it
comes to who investigates what.

And then we also have professional
retaliation, which really belongs solely to the
IG, at least statutorily right now. And then we
have the Case Management Groups that are supposed
to investigate all claims of retaliation.

CHAIR HOLTZMAN: And who does the
investigation for the Case Management Groups?

MS. CARSON: That's actually not an investigating group. That's ---

CHAIR HOLTZMAN: Oh, I understand that, but ---

MS. CARSON: It's a command investigation.

MR. STONE: Isn't that ---

CHAIR HOLTZMAN: Well, who does it?

I mean, what kind of person does it?

MS. CARSON: The command --- this is where it follows, it will be a command-directed investigation which has --- each Service has its own way that that is done.

CHAIR HOLTZMAN: Okay, so how is it done?

MS. CARSON: And that is what follows most closely with what the Equal Opportunity procedures are, which is the command designates an investigating officer.

CHAIR HOLTZMAN: And who is that likely to be? Is it somebody with any training
investigation, or what is it?

MS. CARSON: That I don't --- I don't

have the ---

MR. STONE: The MCIO.

MS. CARSON: --- military expertise
to be able to tell you.

CHAIR HOLTZMAN: Well, we need to know

that.

MS. CARSON: Maybe somebody in the

command.

COL GREEN: The Case Management Group

is an oversight, and the investigations of

claims, or issues, or individual cases within the

Case --- that the Case Management Group is

monitoring could range from something as

significant as something that's under the

investigation of an MCIO, and could be as minor

--- I mean, not using that word negatively, so it
could be something that the commander is just
dealing with directly.

CHAIR HOLTZMAN: I know, but I'm

focused on who does it?
COL GREEN: Right.

CHAIR HOLTZMAN: A person, because one of the things that we focused on a Lot in the MCIOs when we looked at that whole issue was the special training that these police officers are now getting with regard to sexual assault.

COL GREEN: Right.

CHAIR HOLTZMAN: Why is that important? Because in the past, people would -- police officers and investigative people would disregard the complaints. They didn't understand that somebody could --- the trauma involved. They weren't sensitive to these issues, and we spent a lot of time, and I'm sure the military spent a lot of time and money training these people.

Now you're throwing --- that's why I asked the question, who's doing it? Now you're throwing the whole investigative process, when it's not the MCIOs, into the hands of people who have no training whatsoever in this area, including the IG. So, it's as though we're going
back to the Stone Age. You know, here the military has made a lot of progress in investigating sexual assaults in so many different areas, and professionalizing the investigative operation. And now when it comes to retaliation which is part and parcel of that, we're going back to the Stone Age. So, that worries me a lot, and that's why I've asked the question, who is doing it? And that's what worries me about the IG. I mean, I just wonder --- I mean, I don't know if we've had any statistics on the IG, but does the IG generally take --- have the same results in corruption cases as it has with regard to sexual assault cases? I mean, what's the timeline in those cases? What's the unfounding, you know, rate in those cases? It may just be that they don't take these cases seriously because, you know, it's not in their bailiwick. They have never dealt with them before. They don't feel any connection with them. It's kind of like what are you burdening me with? So, I mean, I think we need to know a
little bit more about this, because I think who
does it, and what their training is, is vital
here. So, that's why I asked the question about
the commander, I mean the CMG.

MS. CARSON: Do you want to hear from
the Services about how they do a command-directed
investigation?

CHAIR HOLTZMAN: Well, I don't know.

Maybe you could find that out. Maybe we don't
need to take their time.

MS. CARSON: Would you like us to walk
you through that? Because each of the Services
has a regulation that explains exactly how those
are done, starting with the commander identifying
an investigative person who ---

CHAIR HOLTZMAN: Right, but if the
investigative person has no experience and no
training ---

MS. CARSON: Quite possibly, is my
understanding.

CHAIR HOLTZMAN: --- in this area,
how good a job --- I'm not saying that they may
not be the smartest and most professional and, you know, most decent and fair-minded person, but they don't have the background. I mean, I don't know.

MR. TAYLOR: Well, actually, I think you've put your finger on a problem in general, at least I know it was a problem in the Army, and that was the uneven quality of these administrative investigations, because quite often, an officer was appointed who really had no understanding of the problem before being appointed. The idea is hey, you, it's your job to appoint this.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: And I don't know whether the other Services do a better job at this or not. For some very sensitive investigations, that's sometimes the reason a lawyer is appointed, but there's no requirement to appoint a lawyer. So, I think you've put your finger on a systemic problem that also impacts this in a very real way.
CHAIR HOLTZMAN: And even if you use a lawyer, I mean, lawyers --- the prosecutors in my office when I was DA, had to be specially trained to handle sexual assault cases. I mean, you just didn't take them off the street.

MS. TOKASH: Well, you heard testimony in November from some of the MCIOs who came and testified about the Special Victims Capability Course, at least that the Army is running out of Fort Leonard Wood.

CHAIR HOLTZMAN: Right.

MS. TOKASH: So, maybe the Panel might want to consider recommending that now commanders go through the same --- if commanders are going to be investigating.

CHAIR HOLTZMAN: Well, there might be some easier way to do it.

MS. TOKASH: Perhaps.

CHAIR HOLTZMAN: But I think the training issue is, to me, something --- I just see red flags about that.

MR. TAYLOR: So, have we even looked
into what kind of training the IG provides for its Service investigators when it comes to retaliation? Have we looked at that at all?

MS. TOKASH: No, we don't ---

CHAIR HOLTZMAN: In sexual assault cases.

MS. TOKASH: We know they have investigators that do this, but we don't --- we have not looked into what kind of training those investigators receive.

COL GREEN: I think intuitively, the volume of cases that involve sexual assault offenses that are managed by --- or at least reported by the IG, you know --- generally, the IGs lump this type of investigation into an IG-type of response, and conduct that type of investigation. There's no indication that there's a special consideration given to these types of claims, and that their investigators are specifically trained, or specially trained, or manage these cases differently than other types of IG investigations.
CHAIR HOLTZMAN: I'm sure they think they're doing ---

MS. CARSON: They have a whistleblower organization that does all of the whistleblower complaints regardless of what ---

CHAIR HOLTZMAN: My reaction to that is big deal.

MS. CARSON: And that's what ---

CHAIR HOLTZMAN: I don't see that as --- that doesn't resolve this problem. Could we just go over the statistics again on the IG? How long is it, what's the average period of time to handle these cases, like 18 ---

MS. CARSON: This is based on the ---

CHAIR HOLTZMAN: Oh, yes, the GAO Report.


MR. STONE: It says here almost three times the 180 days ---

MS. CARSON: It was issued in May of 2015.

MR. STONE: It's the last sentence.
MS. CARSON: And it says, during the Fiscal Years of 2013 and 2014, an average length of investigation was 526 days, which is almost three times the 180 day DoD requirement.

CHAIR HOLTZMAN: But they don't compare it to how long it takes them to do corruption investigations, for example, does it?

MS. CARSON: Well, it's all whistleblower investigations.

CHAIR HOLTZMAN: All whistleblower. So, sexual assault could be longer?

MS. CARSON: Could be. You heard from the DoD IG that they don't separate the sexual assault. We did hear from Human Rights Watch, who actually got this data ---

CHAIR HOLTZMAN: Right.

MS. CARSON: --- and went through it.

CHAIR HOLTZMAN: Right.

MS. CARSON: But we don't hear from the military whistleblowers --- the IG that they separately track sexual assault whistleblower complaints.
CHAIR HOLTZMAN: Well, maybe we need to find that out from them.

MR. STONE: Or ask them to track it. We've got to ask them to track it in the first instance.

MS. CARSON: They don't --- their system doesn't track it. They do a word search to find the ones that --- the cases that they brought to us when they appeared before us.

CHAIR HOLTZMAN: Okay.

MS. CARSON: They want to upgrade the system, but have funding issues, is my understanding.

CHAIR HOLTZMAN: Okay. Now, what is the results? Didn't the GAO also point to the results? I mean, how many whistleblower retaliation cases has the IG, in sexual assault, how many have they brought?

MR. STONE: I thought it was zero.

CHAIR HOLTZMAN: Don't we have --

- yes, I thought it was zero, too.

MS. CARSON: Well, for the sexual
assault, that's in another --- for remedies.

CHAIR HOLTZMAN: Yes. I'm sorry to

pull all this stuff together, but ---

MS. CARSON: It's number --- well, I
don't know what number it is on this, but it's
the remedies for victims. And from the Human
Rights Watch, basically no one has ever been
protected. No sexual assault victim who reported
an assault and experienced professional
retaliation has benefitted from the act, despite
the fact that a DoD survey estimates that 32
percent of people who report a sexual assault
experience face intended retaliation. And their
numbers were during their period of time, which
was 2004 to 2013, DoD IG received only 38
complaints, this is sexual assault, and
investigated five, none of which led to relief
for the victim.

CHAIR HOLTZMAN: Okay. Well, you
might --- you know, it's probably a self-
reinforcing system. People aren't complaining
because they're not getting a result.
MR. STONE: Yes, that's Issue 5.
That's our Issue 5 here.

MR. TAYLOR: But there is one point of clarification I'd like to seek, and that is, if you go back and look at the regulation, they can determine that, in fact, they can pass that off to a Service. Right?

MS. CARSON: Correct.

MR. TAYLOR: Let the Service do the investigation.

MS. CARSON: But they have to oversee it.

MR. TAYLOR: So, do your data include all those that are reported back by the Services?

MS. CARSON: Yes.

MR. TAYLOR: Not just the ones they personally conducted?

MS. CARSON: Correct, because what the GAO --- what the requirement is is that DoD IG has to approve every one of these, whether it was sent back to the Service to investigate or not.

CHAIR HOLTZMAN: When it's sent back
to the Service to investigate, is it sent back to the Service IG?

COL GREEN: Yes.

CHAIR HOLTZMAN: And who investigates for the Service IG, their own staff?

MS. CARSON: Their own staff.

CHAIR HOLTZMAN: Okay.

MS. CARSON: And another issue in the report, interestingly, within 10 days of a report to the Service IG, they have to notify the DoD IG, but when you look through the different Service regulations, it seems some of them can determine a case doesn't have merit, and it's not clear that every case, even those that don't -- they determine don't have merit gets sent to the DoD IG.

CHAIR HOLTZMAN: So, in other words they're not following the rules right now.

MR. STONE: Right.

MS. CARSON: By their policy.

CHAIR HOLTZMAN: And how would we substantiate that?
MS. CARSON: I would bring a Service IG --- we've never heard from a Service IG.

CHAIR HOLTZMAN: Maybe you can ask them to respond to this. Yes, MR. Stone?

MR. STONE: We know from the data we've seen here that it's taking them three times the 180 day DoD requirement to close the cases, that data that we do know. I'm just wondering if what we're hearing is similar to the kinds of difficulties that we saw before there were Special Victims Counsel and advisors. And it's a small number of cases, but maybe our recommendation is given the delay, the lack of people with experience, they need to --- our recommendation is they need to have a subgroup who focuses on this, and is the investigators that they send out, that they send out, instead of designating it to anybody or to somebody without experience, that this is an issue that's not --- if they've got zero recommend --- you know, prosecutable issues out of this, it means to us that they need to have some more
experienced people, who is their team, who they can use who know what to look for.

CHAIR HOLTZMAN: Well, my own view on this is that there are two options with regards to IG. One is that you create a special focus -- a special bureau within the IG's operation ---

MR. STONE: Right.

CHAIR HOLTZMAN: --- to handle sexual assault cases.

MR. STONE: Right.

CHAIR HOLTZMAN: And then that could very easily be tracked. We'd have people who are accountable, they'd have people who are trained, so forth. I mean, I was responsible for doing that once with the Justice Department in an area that they weren't too interested in investigating, and it worked brilliantly, so that's one possibility. Or the other thing is a larger overhaul, and suggest that the whole process be taken away from the IG and put someplace else. Because, I mean, 30 --- what did you say, 38 cases in 12 years or 15 years, and
we've had how many claims, reports of sexual assault? And only 38 claims were even filed with the IG, and they couldn't even --- right?

Something like that.

MS. CARSON: The estimate of Human Rights Watch was based on the 32 percent of people who --- between 2004 and 2013, is likely that 5,700 Service members who have experienced retaliation that would qualify as whistleblower reprisal. In that subset there were actually 38 complaints.

MR. STONE: Right. But 51 cases in which someone reported a sexual assault got relief.

MS. CARSON: No, that's going to the BCMR.

MR. STONE: Right, to the BCMRs.

That's the 51.

CHAIR HOLTZMAN: I mean, the numbers are appalling, just appalling. I mean, probably the fastest thing to do is something along the lines of what you're suggesting and I'm
suggesting. I don't know how the other members of the Panel feel because, you know, that's something that you don't need a statute to do. And, you know, the Secretary of Defense, or the --- I don't know who's in charge of IG, they could do that right now. But I don't know whether that's a long-term good solution here, because my sense is --- oh, I don't know how overworked they are, and overburdened, but my sense is that they think, one, there's a small number of cases. And two, it doesn't fit within their normal pattern, so it's kind of like what are you giving me these cases for? And I don't really --- you know, they don't fit within my professional --- my sense of my professional self. But I'm just ---

MR. STONE: Well, except that whistleblower does fit within their professional sense, so if you press them to have a subgroup, whether you call it a bureau or whatever, they could track it. They'd know how many there were. They'd have a reason to give those people extra
training. Those people after they've done a few of these would start to have experience and see what they're hearing, and they'd understand that if they didn't identify that as a regular part of their work before, it is now. And I think you're right, you can do that with a lot less changes in budgets, or statutes, or regulations. Like you said, they can establish that easily. They might like that.

CHAIR HOLTZMAN: Right, they might even take some pride in their work.

MR. STONE: That's right.

CHAIR HOLTZMAN: I mean, so is that a recommendation? Do we feel comfortable making such a recommendation? Should we hear from the IG first about what problems this would cause the Services or anybody else?

MR. TAYLOR: I think the Services ought to weigh in a little bit on this, and give us some background. I think that for that to be effective it may be that you would have to also withdraw from the Services any authority to
investigate these claims themselves. So, this would be the DoD IG investigating all of these types of claims, rather than referring any of them back to the Services, which they now are permitted to do. I don't know, the Services might be happy for them to do that, and they might say fine, you know, let this pass from me. So, it would be useful to know what they think about that.

CHAIR HOLTZMAN: Okay.

MR. TAYLOR: But I suspect that would be one way to do it. It's not uncommon for the DoD IG to withdraw certain types of cases from the Services to investigate that they otherwise would; for example, very senior official misconduct often gets investigated by the DoD IG rather than a Service IG; although, the Service may have an interest. So, this may be one of those where the Services would say that's fine, take them, or they may have some reasons I can't think of why they would still want to do this.

MS. CARSON: The DoD IG when they
spoke at the meeting said that they generally will take the sexual assault cases at the DoD IG level, but they didn't offer any numbers on that. And the point that I was making earlier from the GAO Report is that the Services don't consistently provide DoD IG notification when they receive complaints that do not contain protected communication when they dismiss them.

HON. JONES: That do not contain what?

I'm sorry.

MS. CARSON: That do not contain a protected communication of personnel action. According to Service IG officials, specifically the Air Force IG's guidance states that the DoD IG must be notified when a complaint contains an allegation of reprisal; however, the guidance states that a complaint does not contain a reprisal allegation unless two elements are met. So, they're not submitting every claim to the IG, to the DoD IG, is the complaint about the Services.

HON. JONES: And what are the two
elements? Do they say?

MS. CARSON: Their elements for a

complaint ---

MR. STONE: One is going to be intent.

MS. CARSON: --- are, did the Service

member make, or prepare to make a protected

communication, or was the Service member

perceived as having made or prepared to make a

protected communication? Was there an

unfavorable personnel action taken or threatened

against the Service member? Did the responsible

management official have knowledge of a Service

member's protected communication, or perceive a

Service member as making or preparing to make a

protected communication? And would that same

personnel action have been taken, withheld, or

threatened absent the protected communication?

CHAIR HOLTZMAN: Well, how would you

know that without an investigation? I mean,

that's absurd. Am I wrong? I mean, is --

- aren't the questions that you'd want to know at

the end of the --- aren't those the questions to
be answered at the end of an investigation, and not before?

MR. STONE: Well, I think at this point they're using it as a threshold ---

CHAIR HOLTZMAN: Of course.

MR. STONE: --- to winnow out the cases.

CHAIR HOLTZMAN: Exactly.

MR. STONE: But we're suggesting something different, that there not be a threshold, and they just take all the cases.

CHAIR HOLTZMAN: Well, that's a different point, but what I'm saying is that what they're saying is that unless you can show this at the onset, we're not taking this case?

COL GREEN: Every IG case, there's an initial assessment made whether it's a claim of retaliation, or reprisal, anything, and the IG does an initial assessment as to whether or not the --- a prima facie case.

CHAIR HOLTZMAN: Right, but what happens if you go to the police? Do they do an
initial investigation, say well, I don't think so? Seriously.

COL GREEN: Right.

CHAIR HOLTZMAN: I understand that may be their modus operandi.

COL GREEN: Right.

CHAIR HOLTZMAN: But in these cases it seems to me to be wrong.

MS. CARSON: The point here was the DoD IG official stated that any Service determination that a complaint does not meet its first two elements of reprisal must be submitted to DoD IG for oversight.

CHAIR HOLTZMAN: Right.

MS. CARSON: And the problem is that's not happening in cases that are being dismissed by the Services' IGs. So they can't even tell you.

CHAIR HOLTZMAN: Right, so we have a big problem here, that these cases aren't even going to DoD IG, and that they're being winnowed out because we don't have the answer at the
beginning, what the investigation is supposed to show. This is a very --- so, what do we do about it? So, our solution isn't going to work unless we get all the reports, whether they're -- before being winnowed out going directly to the DoD IG, and directly to this unit, whoever it is.

Right?

MR. STONE: I agree with you. Then they wouldn't have to worry about oversight. It would be their case.

CHAIR HOLTZMAN: Right.

MR. STONE: And they'd have it, they'd write it up.

CHAIR HOLTZMAN: They'd have to get the answer as to whether ---

MR. STONE: It would be tracked.

They'd have statistics, and they'd have a little more experience because they've seen more of them.

CHAIR HOLTZMAN: And they'd have to investigate.

MR. STONE: Correct.
CHAIR HOLTZMAN: It wouldn't just ab initio say oh, we don't see what the person knew, we don't see that he knew, or she knew.

MR. STONE: Well, I think it's just that the approach until now is we take the more serious cases, but what we're saying is, given that you haven't found any --- you have zero that you reported as being serious, let's start having you look at all the cases, because we think that you need more experience in the area to be able to properly process.

CHAIR HOLTZMAN: Right, but I'm saying it's more than just to --- but I think it's more than just you have to take a look at all the cases. You have to investigate all the cases, not just decide without any investigation that I don't have any evidence that this person had an intention to interfere with a result. So, if I don't have that as a part of the complaint, I'm not even going to look at it. I don't know. Then, you know, if they don't want to take these cases then it should go somewhere else. If they
don't think they have jurisdiction because that's not in the complaint, so that they get only 38 complaints, then maybe these go to the police. That's all. Maybe just ---

MR. STONE: Okay. Well, today it's being bucked back down, I gather, to the Service IGs, and then we've gotten all these disparate results, and they also don't have a lot of experience. So, you're right, but I mean it's nice to have one place for them to go. The idea is the same in terms of the retaliation based on a complaint. And you're right, we should invite them to take it, or tell us they don't want to take it, in which case then our recommendation can be they've declined to want to do those kinds of cases.

CHAIR HOLTZMAN: Correct.

MR. STONE: I think they would do one or the other. They'd have to tell us they do or they don't want to, you know, specialize a little bit to take those.

HON. JONES: Could you just clarify
for me, and I probably should know this, so there's the DoD IG, and what --- who is the Service IG? Is that a separate office that each Service has?

MS. CARSON: Each Service has its own IG.

HON. JONES: All right. Who is actually responsible, though, for the Whistleblower Statute? It's the DOD IG?

MS. CARSON: It's both.

HON. JONES: Or is it both?

MS. CARSON: An IG.

HON. JONES: An IG.

MS. CARSON: Which means any of them.

HON. JONES: Okay.

MS. CARSON: It may be in the --- all in the statute.

MR. TAYLOR: Judge Jones, just by way of background, each Service has its own Inspector General.

HON. JONES: Right.

MR. TAYLOR: And under the Goldwater-
Nichols Act in 1986-87, that Inspector General reports to the Service Secretary. So, it's a very close relationship with the Service Secretary.

HON. JONES: But it's possible, they both have jurisdiction over whistleblower complaints? That's, I guess, my question.

CHAIR HOLTZMAN: Yes, I think we have to have a better sense of how exactly this works, the practice, and then ---

HON. JONES: It is a very specific Statute which does require things like a protected, you know ---

CHAIR HOLTZMAN: Right, but my problem is how do they ---

HON. JONES: -- communication.

CHAIR HOLTZMAN: Right. So, if they're taking the position that the communication --- when you say protected, you mean that the retaliation ---

HON. JONES: In other words, what they said they should not be retaliated for.
CHAIR HOLTZMAN: Correct.

HON. JONES: They made their report, they should not be retaliated against.

CHAIR HOLTZMAN: Right. So, if their position is --- and I don't know what the Statute requires, but if the Statute requires that the complaint itself specifically say that I was retaliated against because I reported this. Okay, then the question is since the complainant may not know that, and if they say I don't have jurisdiction because the complaint doesn't have it, then who has jurisdiction? And what is the capacity of that group to deal with it?

Now, if the statute doesn't make that requirement, but that the IG has the ability to investigate to determine whether it has jurisdiction, which is mostly how investigative agencies operate as opposed to saying no, the complaint doesn't say that. So, I don't --- you know, it's ridiculous.

MS. CARSON: It's in the Statute.

CHAIR HOLTZMAN: That says what?
MS. CARSON: That if an allegation is submitted to an inspector general within a military department, and if the determination of that Inspector General is that there is not sufficient evidence to warrant an investigation of the allegation, that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.

CHAIR HOLTZMAN: And what does the Department --- what about the Department of Defense? Do they have jurisdiction over it, if the complaint doesn't make the allegation? What do they do? What does the statute say about their jurisdiction over this?

MR. STONE: Well, if they're forwarding it to them, they must have jurisdiction.

HON. JONES: They have to review, yes.

MS. CARSON: They review.

CHAIR HOLTZMAN: But can they investigate to determine whether there's sufficient ---
MR. STONE: How would they have oversight otherwise?

CHAIR HOLTZMAN: I have no idea. I didn't write the Statute.

MR. STONE: They've got to have jurisdiction based on that language.

CHAIR HOLTZMAN: Got to, it doesn't mean they do. I think that the real world of statutes---

MR. STONE: Well, I think it goes beyond the Statute. I think it's whether or not in their structure, and their funding, and their personnel they have enough investigators at the prime level who can do more than review the paperwork when you say oversight. And I think that'll determine in part whether they want to keep it, or they say we can't do it because they don't have enough field-level inspectors. Either they do, and they want to have more, or maybe they don't have that kind of budgetary authority, so they say that's why it's not really reinvestigated. I mean, I ---
CHAIR HOLTZMAN: Well, that's all speculation. The other possibility could be that they don't want to handle these cases, and, therefore, they're not taking them. That's all, simple, very simple. We don't know, but I don't know what their jurisdiction is, and so if the Service --- I believe there's nothing in that Statute that precludes the Service IGs from investigating to determine whether they have jurisdiction. I mean, I'd be surprised, but we need to ask them whether that's the case. And then we need to find out from the DoD IG whether they have jurisdiction to investigate whether they have jurisdiction.

MS. CARSON: It says, upon determining that an investigation of an allegation is warranted, and this is coming after the DoD IG reviews it, the Inspector General making the determination shall expeditiously investigate the allegation. So, if a Service says it's unwarranted, but the DoD IG says it is warranted, then they have --- I would read that as they have
the obligation for it to be sent back to the
Services to investigate it.

        CHAIR HOLTZMAN: Okay, so it sounds --

        MS. CARSON: That Inspector General --

        MR. STONE: They have jurisdiction.

        MS. CARSON: --- may delegate

responsibility to an appropriate IG within a
military Department.

        CHAIR HOLTZMAN: So, what are your
suggestions, members of the Panel? I think we
need to hear from the IGs personally as to what's
going on with them in terms of these cases.

        HON. JONES: I gather you can report
directly to the DoD IG, and then it's not a
review situation.

        MS. CARSON: They can still delegate
it to the Services.

        HON. JONES: They can delegate it, but
they can also keep it.

        MS. CARSON: They can also keep it.
HON. JONES: Right. Okay.

CHAIR HOLTZMAN: But,

bureaucratically, I'm sorry, did you ---

HON. JONES: Yes. No, no, go ahead.

CHAIR HOLTZMAN: But bureaucratically,

there would be nothing to stop the --- maybe somebody else here knows the answer to that, Secretary of Defense, or whoever is in charge of this saying well, we want to have a separate office now, since given these problems, it's going to look at these cases in a very serious way with trained people, and their basic initial impulse isn't going to be to kick these cases out, but to investigate to determine whether they have jurisdiction, and whether these cases should be handled. That could happen. Right?

MS. CARSON: This statute does not say anything has to go to the DOD IG. It says specifically if it goes --- if a member of the Armed Forces ---

CHAIR HOLTZMAN: Right.

MS. CARSON: --- submits, then the IG
shall.

CHAIR HOLTZMAN: I understand that, but maybe somebody --- but I'm just asking whether that could be done, to create, basically, that responsibility in a special office within the DoD IG to handle these cases.

MS. CARSON: I'm not aware of any reason it couldn't be done.

HON. JONES: Is there --- I mean, I'm assuming that the vast majority of whatever the number is of these kinds of whistleblower complaints are going to the Service IGs?

MS. CARSON: Yes.

HON. JONES: And they're either --- do we have their statistics independently of how they're doing, because they don't have to -- - they only have to refer if they're not ---

MS. CARSON: Everything has to be approved by the DoD IG.

HON. JONES: Oh, whether they're going to go forward.

MS. CARSON: Whether they go forward
or not.

HON. JONES: Or not.

MS. CARSON: The question is, when they decide not to, they're seemingly not always sending it up to the DoD IG to approve those.

HON. JONES: I see. Well, I mean, I think we have to figure out where the problem is that, to some extent, whether we have a problem with the Service IGs, or --- because I mean, frankly, I don't know what's getting to the Department, or the DoD IG. It may be a problem there, as well, but if we're talking about, what was it, 38? I mean, there --- maybe --- how many retaliation complaints are there, I wonder? Do we have those numbers?

MS. CARSON: We have the numbers that are reported by the DoD IG; they report every six months to Congress on their total ---

HON. JONES: Well, that's --- so it's like minuscule. Right? Or we believe that there must be much ---

MS. CARSON: And the majority of the
cases are dismissed ---

HON. JONES: Yes, right.

MS. CARSON: --- by the DoD or the Services that ---

CHAIR HOLTZMAN: And, also, we have no breakdown of sexual assault cases. That's the other problem here. So, you know, my view about it is that this is a vicious cycle; no cases are being reported - no cases are being sent to the IG because nothing is happening there. Who would want to send a case there? Why would I want to complain? It's useless. And I think that the fact that this is still going on despite the GAO report, I mean, it would seem to me the Inspector General himself or herself, whoever that is, would be saying hey, wait a minute, something is wrong here, and we've got to do something about it. Somebody should be saying that aside from us. So, I ---

HON. JONES: Well, you know, I hate to --- I want to --- I just --- I don't have a sense of the scope of the problem. I just have a sense
that this can't be all of the whistleblower cases
that ---

    CHAIR HOLTZMAN: It could be.

    HON. JONES: --- should be reported.

I don't know. Yes.

    CHAIR HOLTZMAN: Well, I don't think
it's all the cases that should be reported. I
think you have the same reporting problem that
you had with sexual assault.

    HON. JONES: Right.

    CHAIR HOLTZMAN: That people are not
going to the IG because they don't see any
purpose in going to the IG, and nothing is going
to happen there.

    HON. JONES: Okay.

    CHAIR HOLTZMAN: So, the minute you
change that, you should get some more cases. I
don't know that you'll get a thousand more cases,
but you might get 40, or 50, or 100, or 200 more
cases. In any case, that itself will have a
deterrent impact. You know, DoD made, I think --
- by raising the people's awareness of the
problem of sexual assault and giving all these
tools to people, Special Victims Counsel, you
know, hotlines, trained SARC's, trained Victims
Advocates, gave people a sense that the DoD took
it seriously. But then you come to the
retaliation, where do you see that? So, you have
to give the response to retaliation the same
visibility and the same legitimacy that you've
given to sexual assault complaints to begin with,
I think. I think we have --- I have no problem
with trying to understand better why this is
happening, but it's --- you know, I hate to say
shocking, but it is ---

HON. JONES: Well, maybe they have too
high a standard initially, and --- with the
connection between the protected comment and the
adverse, you know --- I don't know, somebody gets
reassigned, somebody gets demoted. And so we
need --- but I would like to know a little bit
more about how this is working.

MR. TAYLOR: That's exactly where I
am, because we don't know whether they're looking
at a prima facie case, or whether they're looking
for something like clear and convincing just at
the initial stage, or whether it's just enough
information so that we should consult --- look at
it a little bit farther. I don't know what
they're doing. And I really don't know what the
Services are doing either, so I'm very disturbed
by the fact that we don't have that link, it
seems to me, of the information of what gets
passed up, what gets passed back, what kind of
conversations take place about why that happens.

HON. JONES: Yes. I mean, the Special
Victims Counsel, for instance, who has a sexual
assault victim already that he or she is working
with, I mean, they need to be attuned to a
whistleblower potential complaint. I assume they
are, but I don't know, and that is a relatively
new program.

CHAIR HOLTZMAN: The Whistleblower
Program is not new.

HON. JONES: No, no, no, the Special
Victims Counsel.
CHAIR HOLTZMAN: Right, but I don't think that they're ---

HON. JONES: Well, no, I'm ---

CHAIR HOLTZMAN: --- wasting their time on it. I mean, I think they know about it.

HON. JONES: Well, then you need an awareness and an instructional campaign, if we think that these are not getting reported.

Forget about whether they're --- the ones that are getting reported are getting anywhere.

CHAIR HOLTZMAN: But they're not going to report if they don't see a result. And they're not going to see a result unless --- I mean, that's why it's chicken and egg. They have to see that DoD takes retaliation seriously, and it takes the IG process seriously. So, they're going to do some reforms to it and make sure that it works. If they don't, if they just leave it that way and say, oh, you can call the IG, who's going to do it?

HON. JONES: I don't disagree with that.
CHAIR HOLTZMAN: That's the problem. That's what I'm saying, so they need to take some steps, I think. But what steps we would recommend, I think we need to have a little bit more information.

HON. JONES: Yes.

CHAIR HOLTZMAN: But why, you know, they're dismissing all these cases? What's the level of evidence they need? And if they're going to buck all these cases to --- you know, they're going to say well, we're not going to take these cases, then somebody's got to take them and investigate them, and has to investigate them properly. And if it's not going to be the IG, it has to be somebody else.

MS. CARSON: We did ask in the RFIs what the standard of proof is for all the different investigating agencies ---

CHAIR HOLTZMAN: Yes.

MS. CARSON: --- and all of it is preponderance of the evidence.

CHAIR HOLTZMAN: For what?
MS. CARSON: For substantiating their claims.

CHAIR HOLTZMAN: Right, but I'm not even getting to substantiating the claim. I'm getting to ---

MR. STONE: To investigate.

CHAIR HOLTZMAN: --- investigate the claim.

(Simultaneous speaking.)

MR. STONE: Right, opening an investigation.

CHAIR HOLTZMAN: That's the key.

MR. STONE: Yes.

CHAIR HOLTZMAN: Are they even going to open it? And then who's going to be making the judgment? Are these people trained? So, that seems to me to be like, you know, some key questions here.

MR. STONE: Well, that suggests to me that for all the reasons we just heard we do want to hear a panel of IGs, and maybe there's a variety of questions we can ask them to come
prepared for. You know, what do they need to open a case? You know, would they like to have --- do they think that it's reasonable to have a specialized unit to follow these, or do they find these outside their expertise, and outside their general focus? And maybe we should also ask them what have they done in response to that IG Report in 2012, because usually agencies respond to the GAO Reports.

MS. CARSON: This is a subsequent report, this 2015 report is subsequent to the 2012 report.

MR. STONE: Right. Well, we can ask them what they've done, what they plan to do, and we'll have a presentation.

CHAIR HOLTZMAN: Can I just say something? No agency ever wants to be told to set up a special unit. They're definitely not to agree to that, or like it, but I think that ---

MR. STONE: Okay.

CHAIR HOLTZMAN: --- it's something -- personally, I think given my own experience
dealing with the Justice Department on this
issue, and it had to do with Nazi war criminals,
they didn't want to investigate these either, and
they didn't want to set up a special unit either.

MR. STONE: Okay, that's a --- I worked

---

CHAIR HOLTZMAN: And you needed special
erpertise to deal with this.

MR. STONE: Yes.

CHAIR HOLTZMAN: Just the way you need
special expertise ---

MR. STONE: Okay.

CHAIR HOLTZMAN: --- to deal with
these cases.

MR. STONE: The other side of that coin
is I worked in that Division of the Department of
Justice, and I know that when the Congress and
the public needed investigation of computer crime
fraud, the section I was in set up a special
computer crime subgroup which later became a
section, because they recognized there was a need
for it. It needed lawyers who really understood
computer crime. It was not the run of the mill, and they did do it without Congress pressing, and without special funding.

CHAIR HOLTZMAN: Fine, but we haven't seen this kind of response here.

MR. STONE: That's why we want to ask. That's why we want to ask. I would just say that you actually raised another slightly different question a few moments ago that occurred to me, and that is we keep talking about the SARCs doing it. Do the SVCs have the jurisdiction after they've handled the sexual assault case to come back and help that victim with the retaliation complaint? I don't know if the SVCs still have the jurisdiction to do that, because remember they couldn't do certain collateral misconduct. This isn't misconduct, but it's certainly collateral to the original case. So, the question is whether the SVCs can help with that.

COL GREEN: We'll get clarification on that.

HON. JONES: I know ---
MR. STONE: If it's within their allowable duties.

MS. CARSON: The response to the RFIs was that they are all allowed to assist with retaliation. However, the Air Force charter for their SVC Program does not allow them to assist with Congressional complaints, MEO complaints, or IG complaints. My latest understanding, because we asked them after the last meeting, is that that's being changed, but it has not yet been.

MR. STONE: Okay. So, they're trying, anyway, to make sure ---

MS. CARSON: But they're aware of the issue.

MR. STONE: Good. Okay, great.

MS. CARSON: And their structure is different. It's not --- their SVCs are not part of their legal assistance, so they have just a different legal organization responsible for those complaints. It's not that those complaints aren't handled at all.

CHAIR HOLTZMAN: So, I think more
information is our next step here. And maybe we can --- right? Anybody have any other thoughts, and then we can break for lunch?

HON. JONES: No, I think we've said that we need to see what kinds of reports are coming in to the, you know, Service IGs.

CHAIR HOLTZMAN: Right. And we also need to have a better understanding of these investigations that are conducted by the -- - whatever it's called, that management group.

COL GREEN: Case Management Group.

CHAIR HOLTZMAN: Yes, Case Management Group. Okay. I think we made a lot of progress this morning. Thank you, everybody.

(Whereupon, the above-entitled matter went off the record at 12:06 p.m. and resumed at 12:58 p.m.)

CHAIR HOLTZMAN: We'll come to order now after our lunch break and the Panel will focus on the issue of Civilian Crime Data Collection and Analysis, Comparing Data in the Federal and State Jurisdictions.
This is to inform the Panel in connection with our responsibility to report to Congress and the Secretary of Defense on statistical reporting on sexual assault in the military.

We're going to hear from two witnesses, Mr. Glenn Schmitt, Director of the Office of Research and Data at the United States Sentencing Commission and Dr. Howard N. Snyder, Deputy Director, Bureau of Justice Statistics, United States Department of Justice.

Welcome gentlemen and Mr. Schmitt you're the first one to be listed so, you'll go first.

MR. SCHMITT: Madam Chairman, Members of the Panel, it's my pleasure to speak to you today about the work of the United States Sentencing Commission and, in particular, its Office of Research and Data which I lead.

The United States Sentencing Commission is an independent agency in the judicial branch of the federal government. Its
principle purposes are to establish sentencing
policies and practices for the federal courts, to
advise and assist Congress and the Executive
Branch in the development of effective and
efficient crime policy and to collect, analyze,
research and distribute a broad array of
information on federal crime and sentencing
issues.

The Commission was established by the
Sentencing Reform Act of 1984 which, among other
things, abolished parole in the federal criminal
justice system and replaced it with a system of
determinate sentencing.

That Act also created the Commission,
a bipartisan agency led by Commissioners
appointed by the President and confirmed by the
Senate and charged with providing advice to
federal judges when determining the sentences to
be imposed on persons convicted of federal
crimes.

The Commission does this principally
through the promulgation of a complex set of
sentencing guidelines which are amended each year to account for the changing nature of crime and the persons who commit those crimes.

And, as you may know, federal judges are required to consult the guidelines in each felony and Class A misdemeanor in the federal system when deciding what sentence to impose.

To support the work of the Commission, Congress authorized the Commission to establish a research and development program for the collection and dissemination of information on federal sentencing practices, to collect and disseminate information concerning the sentences actually imposed and the relationship of those sentences to the sentencing factors set forth in federal law, to publish data concerning the sentencing process and to collect and disseminate information regarding the effectiveness of the sentences imposed.

In practice, the Commission relies upon its data for almost every aspect of its work, whether amending the sentencing guidelines,
providing information to Congress concerning the
nature and extent of federal crime or the impact
of proposed legislation, providing information to
judges to assist them in imposing sentences in
individual cases and when informing the public
about the work of the federal courts in criminal
cases.

Central to our work is our data. We
collect data from every federal felony and Class
A misdemeanor case sentenced every year.

In Fiscal Year 2014, the Commission
received documentation on 76,000 original
sentencings. We also received information on
3,500 re-sentencings and other modifications of
sentence and over 8,000 appeals decisions.

In total, Commission Staff reviewed
more than 365,000 court documents last year.

The Commission dedicates approximately
45 of its 100 person Staff to the data collection
and analysis function.

And, since 1987, the Commission has
amassed a database of information on
approximately 1.5 million federal offenders.

To facilitate the Commission's work, Congress has required by Statute that the courts provide to the Commission documents within 30 days of the entry of judgment in a case. Those documents are the indictment or other charging document, the plea agreement, if there is one, the pre-sentence investigation report, if there is one, the judge's judgment and commit order and a written Statement of Reasons form, a document that's unique in the federal system where judges are required to explain the sentences they impose.

The Commission is required to submit to Congress, at least annually, an analysis of these documents and to report to Congress if any districts have not submitted the required information.

As you might expect, compliance with the statutory directive to submit documents to the Commission is very high, in fact, it's well above 99 percent.
Data from these documents are extracted and coded into a sophisticated database and for each case in our data set, we collect numerous pieces of information, case identifiers, demographic variables, statutory information such as the offense of conviction and the applicability of any mandatory minimum penalty, the guideline provisions that apply to the case and how the judge applied them and, of course, information about the sentence actually imposed.

We perform numerous checks of our data that we enter into the system to ensure that it's complete and accurate. And, in addition, when particular research questions are posed to us that cannot be answered from the data we regularly collect, we will undertake special collection processes to go back into the data to collect additional information from the documents the courts have provided to us.

The Commission uses this data primarily to inform the work of the Commissioners in amending the sentencing guidelines. However,
we also use this data to provide information to Congress about how federal Statutes are being used and to provide estimates of the impact of proposed legislation and we routinely answer questions from judges who require additional data when deciding what sentence to impose in cases before them.

We also provide analysis to the Department of Justice and other federal agencies to assist them in their work, and that is part of our statutory mission.

We disseminate this work to the public through a wide variety of publications such as our annual Sourcebook of Federal Sentencing Statistics, of which I will hold up a copy now and I'm going to provide a copy of this to the Panel for their use, several copies.

We also disseminate our work through other documents of varying sizes designed for various audiences.

And, we disseminate our work through Commissioner and Staff presentations at
professional conferences and other events.

Our data sets are available to the
public, although stripped of identifier and judge
information. We make that data available through
our website and through the Inter-University
Consortium of Political and Social Research at
the University of Michigan so that other
researchers can have this data to make it work.

Commission data is regarded as one of
the most complete and accurate data sets in
social science research and there are several
reasons why this is.

First, our data is a universe and not
a sample. Because the courts are required to
provide us the source materials we use, our data
sets reflect the universe of federal sentencing.
As a result, we know that our data represents the
ture sentencing practices of the courts and our
analysis can be reported to a high level of
precision on a wide variety of factors.

And, because of this, policy decisions
supported by our data are really not subject to
attack as if they were based on incorrect or insufficient information.

Second, our data is extremely accurate. Only Commission Staff input data into our data set and we employ numerous quality control checks to ensure that it is accurate.

The courts provide only the source documents to us but do not place any information directly into our data sets. We do that ourselves to make sure we get it right.

Our data is extremely thorough. We are fortunate that Congress has authorized and appropriated the funding for such a large Staff. We're unique, I think, or at least unusual in the size of our research Staff for the size of our agency.

And, obviously, the more people there are to work to collect data, the greater the quantity of data that can be collected.

And, most importantly perhaps, our research Staff are experts. Our social scientists all have advanced degrees in
criminology or related fields with a thorough understanding of research and analytical methods.

Based on our experiences, I would make several recommendations to you as you consider developing a database to inform your own recommendations.

First, make sure you're getting everything you can. Ideally, you would be certain that you would be collecting data from every court-martial sexual assault case over the last several years.

In our experience, the only way this is going to happen is if compliance is mandated by an authority to ensure compliance.

If you have to rely on only partial responses or if you have to chase down the data, you will not have all the information that's available and any policy recommendations that you make based upon it will be subject to criticism.

Second, ensure there is a mechanism to compel people to report.

At the Commission, we are required by
Statute to report to Congress as to the districts that fail to comply with the statutory obligation to report data to us. This is a powerful motivator for those few districts who occasionally need a nudge to get all of their documents submitted on time. No one wants to be on the wrong side of Congress.

Third, allocate sufficient Staff and computer resources for the data collection effort. Many people, sometimes policymakers will think of data collection as a sideline, but it should be the foundation of all of your recommendations given what is at stake in your work, you have to get it right.

And that said, because you will never have enough Staff or time to collect data on every possible issue, you need to decide in advance what you most want to know about.

It's really difficult to go back and get something after you've started the process.

Fourth, have the right kind of people to oversee this work. This is social science
research. Find a good criminologist or two to advise you on this and to help you do the data analysis once your data set is complete.

Fifth, I recommend that you make your data available to others when you are done with it. Any data you collect will be of great interest to other researchers and they should have access to it with appropriate protections to prevent the disclose of the identity of victims, judges or panel members and, perhaps, even the offenders themselves.

And sixth and lastly, I suggest that you consider using us as a point of reference. Over the past five years, there have been over 2,000 people convicted and sentenced for sexual abuse crimes in the federal system.

Information about the sentences imposed by federal judges in those cases may be helpful to you as you assess the extent to which punishments for similar crimes the military are sufficient.

I wish you well on this important work
and I'm happy to answer any questions you may have about the Sentencing Commission or our work.

Thank you.

CHAIR HOLTZMAN: Mr. Taylor? Oh, I'm sorry, let's hear from Dr. Snyder and then we'll ask questions.

Dr. Snyder?

DR. SNYDER: First of all, I'd like to apologize for my appearance, I came over on the subway where the air conditioner was not working, we got stuck in a tunnel for 15 minutes when the air conditioner was not working and so, everybody on my subway car looks just like me right now.

So, I apologize for that.

What I was asked to do was to describe how the Bureau of Justice Statistics collects information on this topic and the problems we ran into in doing that which might give you insight on how you may do that work.

Glenn has the -- I just was amazed the Staff you have to -- 45 people, that's bigger than all of BJS to do that work, so it's -- we
are not blessed with that large of a Staff to do all the collections that we need to do.

Let me walk you through three data systems and talk about the strengths that we use as the approach.

The first one is we call the State Court Processing Statistics. This was the data collection designed to collect information from state felony courts about the processing of cases in those courts.

This design started out looking at -- it began with the referral, the court intake and going all the way through prosecution. So, unlike Glenn's data which captures cases that are just at the conviction level, this started earlier on.

And, I think in this topic, you're dealing with a lot of the issues. You're dealing with what happened and it gets disposition, because a lot of these cases are diverted before the final point.

To do that collection, we had to go
out and both extract data from automated records, which we were able to do. But, we also had to go out and read paper records which you do a lot. And, it became, honestly, just too expensive for us to maintain this at a national level.

We were only doing this for a sample of cases, but still, it was very, very expensive to go and read the records and then input it with the data.

So, we disbanded that collection because we just certainly couldn't fund it.

So, given the Staff that Glenn's talking about, you may be able to that. But, it is a very expensive process to do and to maintain.

The next system that we put together called the National Judicial Reporting System, like Glenn's just looked at dispositions. And, they looked at dispositions in state felony courts across the country.

To do our work, we picked a sample. We could not do a universe, it was too expensive,
so we picked 300 courts in the country. It was a national representative sample and went out and collected automated data that they had on all the cases disposed in a particular year to do that work.

That system became, again, very expensive to maintain because, essentially, what you had to do to make relationships with 300 different courts and get information and data from those individual courts, which were all different and then try to put it together in some way which was just a lot of work.

So, we are now -- we have now redesigned that system and, I think we have a plan together to make it work. Instead of going to 300 courts, we are going to 50 states.

Most states now in the United States have statewide court processing data in one form or another. So, instead of working with 300, our goal is to work with 50. We think that's possible to do and we think it's possible to combine the data from those 50 states to do it.
So, the idea of working with automated data and not doing hand collection is a big step. Most national statistical efforts are moving in that direction because of cost, because, simply, you cannot -- specifically, we cannot afford the cost of doing this.

But, the administration of the data that's functioning within the system, the systems themselves are becoming so good and so complete that you can extract data from these systems and be pretty confident you're getting most of the information.

Now, we're a statistical system, we're not a case by case processing system. So, we can live with some error because we make national statistics. And, given that little bit of wiggle on the data, an extraction process would work very well.

Now, what Glenn's doing differently is that some of his data, and the most expensive part comes from non-automated data. You're reading pre-sentence investigation reports,
things like that, and somebody has to extract it.

So, that's what you lose in looking at just data extracting. You lose what's not in the automated systems.

But, if you've, you know, taken a look at the new systems that are around the country, they are very complete and sophisticated. They collect a lot of information. In fact, a lot of what we do is we get the data files in, we get dumps of the systems there and we have to throw out a lot of data because we don't need it.

You know, they have a lot of like dates of hearings, all the hearings in the case, we don't need all that stuff.

So, the idea of extraction of data is something I think you should think about. And, even though they might be different from different parts of your universe, it is possible to extract data and to put it together into a common system.

The good part about that process is that those data sets have generalizable use
meaning that, right now, you're focusing on sex abuse or sexual offenses. But, if you were to start collecting and extracting data from the systems you're talking about for all case types, next year's topic would be available to look at, too, and the next ones because you're collecting a general use database.

And by setting up an infrastructure like that, you can prepare yourself for future hearings and future needs.

And, that's a real benefit for BJS because we never know what topic we're going to be asked to look at. So, our data collections are very rarely specific to one little topic or one point of topic. We try to collect general bases to serve general needs.

In that model of collecting and harvesting data, another program that BJS has is called our Federal Justice Statistics Program and Glenn's a part of that.

We get data from U.S. Marshals, from the U.S. Attorneys, from the U.S. courts, from
USSC and from BOP. All the systems report to us.

Glenn's just one of our major data files.

We are able with these data files,
given the ID numbers that they have and the
information we have, that we can link the records
together between the systems so that we can get
all the case from the point of arrest through
prosecution to conviction and then to BOP and
then look at the recidivism patterns, too, as
they come back with the ID numbers.

So, the idea of harvesting data for
one entity and combining it with data from other
entities gives you a more complete picture of
what's going on in the system.

Again, by doing this, setting this
system up, you will then be able to look at many
different case stats.

Like, for example, I got a call
yesterday, there's interest from some groups, I
can't say which ones, but they're interested in
public corruption. You know, we even talked
about that.
But, the data files have information on cases that were charged with public corruption.

So, it's the data sets that we already have because we started collecting generalizable data for a lot of topics and now, we can go back at it.

So, there's the benefit to that because the cost of data collection is so high that to justify, at least at our level, we have to say this is costly but it will do many, many, many things and I strongly encourage you to take a look at that.

There is one other dimension to this that I know you've talked about at other times and it has a characteristic that is helpful if you could have the authority to do it.

I know you've talked about DIBRS, is that true? The Defense Incident-Based Reporting System? Well, maybe not. Let me talk about that for a minute.

There is a -- I don't know how far
back to go. The FBI has set up something called
the Uniform Crime Reporting Program. You hear
about it every September, it comes out in the
news how many crime are in every town in the
country that does that stuff.

Back in the early '80s, it changed --
the FBI said we'd like to move away from this
reporting system which says this town had one
burglary this month to getting data on the
incident, where the crime occurred, who was the
victim, who were the offenders, the time of day,
the weapon used, all the information you need to
describe the crime and then what happened to
that, was an offender arrested or not.

So, going from an accounting system to
an incident-based reporting system.

So, that was started back in the '80s,
maybe it was done. In, I believe it was 1989,
Congress required all DoD law enforcement
agencies to report NIBRS data to the FBI.

CHAIR HOLTZMAN: What's NIBRS?

DR. SNYDER: NIBRS is National
Incident-Based Reporting System.

CHAIR HOLTZMAN: Oh, so the same thing?

DR. SNYDER: The same -- they require -- but now, but the Defense Department didn't want to call it national, they call it Defense Incident-Based Reporting System, which is DIBRS.

CHAIR HOLTZMAN: So, they had to report the same information to you?

DR. SNYDER: Right.

CHAIR HOLTZMAN: And to the FBI?

DR. SNYDER: No, to the FBI.

CHAIR HOLTZMAN: To the FBI --

DR. SNYDER: As all --

CHAIR HOLTZMAN: -- as the FBI is getting from other --

DR. SNYDER: Other law enforcement agencies. They have not done it. They have not done it. It's been, well, you do the math from like the late '80s or late '90s. I think it was '97.

CHAIR HOLTZMAN: A statutory
requirement?

DR. SNYDER: Statutory requirement, yes. I have it in my slides here, I put the date in there. I didn't put the date in here. But, I had a quote, it is DoD policy that DoD compounds with assigned law enforcement agency activities comply with these criminal incident reporting requirements, NIBRS. It's in the Statute. It hasn't been done.

CHAIR HOLTZMAN: Can you give us the statutory citation?

DR. SNYDER: I could do that.

CHAIR HOLTZMAN: Please.

DR. SNYDER: I could find it, I don't have it here.

The FBI is now dealing with this, though, since Director Comey came in with the FBI, he's made it one of his DPA, Director Priority Areas, to get NIBRS data nationwide. And, when they found there was this hole in the data, including the FBI, they weren't reporting it either, they are now standing up this big
national program to get all the law enforcement agencies in the country, including DoD agencies, to report.

I believe the Navy is close to doing it. That's what I've been told by the FBI.

The key part about this data collection is that, let's just call it NIBRS for now because it's easy, NIBRS has a set of required data elements that everybody has to collect to do the reporting.

So, for example, they have offenses and for sexual assault, they have four sexual offenses that they require people detail on, forcible rape, forcible sodomy, sex with an object and forcible fondling. They have that level of detail on the offense.

The key part of this is that all of the law enforcement agencies in this country don't collect data like that. They collect data by state statutes or things like that.

So, the beauty of NIBRS, this is what I'm getting to about the style, is that states --
you can collect a lot -- you can collect anything
you want as long as you can recode it into these
data.

So, if you don't change what they do,
you've put a program on top of the system to say,
now, extract offenses in these categories,
extract race in these categories, extract
whatever you want to extract in the categories.

So, the system developers now across
the country who -- the big computer vendors who
sell these systems, know that NIBRS is a
requirement. So, when they build a system for
law enforcement, that's the natural output of it.

And so, what happens then, every local
system is different, but they all extract the
same data and put into the same database and then
you can take a look at the detail of that. And
it's great detail.

I don't know if you have the handouts
that I sent.

COL GREEN: Yes, everybody does.

DR. SNYDER: Okay. If you -- there's
a -- I'm just going to walk you through what --

We used to know what the UCR, like how
many forcible rapes there were. Okay? But, what
we did recently was forced sexual assault, it's
not your topic but I think it can be modified.

If you take a look at these graphs,
these graphs tell a story about sexual assault
that you can get from NIBRS.

For instance, this first graph looks
at the time of day when sexual assaults occur.
The dark bars there are the bars for juveniles,
juvenile victims and the golden bars are for
adult victims.

You see how the patterns are very
different. It used to be forcible rape was a
thing. NIBRS data lets you sort of start
segregating this into saying there are different
types of problems we have to deal with.

The problem of sexual assault of
juveniles, as you can see the peak times are at
dinner times and after school is when most
juvenile sexual assaults occur.
Now, for adults, you know, it's 2:00 a.m. when bars close and all that stuff. It's what you expect.

But, there's a whole different picture when you look at sexual assaults of juveniles and two-thirds of all the sexual assaults reported to law enforcement are of juveniles, two-thirds. Not the offenders, but the victims, two-thirds of all victims. So, people want to understand the nature of that.

This kind of work, you could do with DIBRS to try to understand what's going on with.

But a couple of the other slide -- skip the next one. Go to the next one. Yes.

The other ones are like this, I don't want to go through them all, you have them there. But, this gives you a snapshot, like an MO of what's going on. This is a story that you can tell with NIBRS taking a look at sexual assaults of children under the age of 12.

Notice the real young kids, look at the peak times when they're assaulted, 8:00 a.m.
and noon. This is happening in the home during meal times and most -- and if you can see on the other side, it tells you who the offenders are. Almost all of the offenders are acquaintances and family members. Very, very few of these offenders are strangers. And it happens in the residence of the home. It's not happening outside on the streets, it's not happening in bars, it's not happening in schools. It's happening in the residences.

Now, think of your data. If you want -- if you could change the coding for residences, we were looking in home and out of home. There's a lot of codes, there's like 30 codes in NIBRS for place. It can be school, it can be in a bank, depending on -- there's a lot of codes.

But, for you places, you could talk about on base, off base, you could use your own codes and just extract this. But, you can start telling where these crimes occur, who the victims are, what the relationship of the victim and offender, what time of day things occur.
And then also, the NIBRS data tell you about whether an injury -- whether physical injury happened, whether there was a weapon used, whether the victim had to go to the hospital, whether there was other monetary loss, whether there other crimes going on at the same time. A lot of these assaults are occurring during other kinds of like robberies or some kidnappings that occur. You could tell that.

You could tell a great story about the nature of the crime through NIBRS. Now, I know that's not your focus, but that's part of the story.

The key part for data collection of this, though, is that NIBRS and DIBRS or somebody who has the power like the FBI to say, we want you to collect these data however you want to, you can collect it, but we have to be able to extract these data.

And so, you give the locals the ability to set up a system to meet their own needs. And, I imagine that every one of your
entities have their own needs and have their own focus and have your own codes. The thing is, just so underneath it there is a structure that can generate these data.

So, we talked about collecting data by hand, it's great if you have the money. We talked about harvesting data, it's great except when you harvest data, you have to extract what they have on their systems already and it may not be just what you need. But, if you predefined what you want, like NIBRS, and let the agencies set their systems up however they want, any way they want to, just so they can report data in this format, you get the ability to let the locals get what they need and you get data from a system that they use day to day so you know it's right and you're going to extract from it.

So, the -- we only just need you to sit back and passively extract data or you actively design the extraction process and tell people what they need. And that's what's happening. That's the data collection model
we're working with now.

        Now, very few of the data sets the BJS has have that authority to do it. Mostly what we're in the business of now is extracting existing data and we've gotten away from collecting data by hand because it's just too expensive.

        But, we can handle large data files now and we get records, for example, on everybody entering and leaving prison in the country. We know that they -- we can link the information together with their rap sheets to tell what their criminal histories are. We can do these big linkages.

        But, if you want specific data that's not normally collected, you can do it by the -- what Glenn's talking about like the assigning, he does it by hand because he has the authority to do it and the ability to do it.

        But, if you don't have that, you could set up a structure like NIBRS, you could have them report it. This could be done at the court
level, too. You can require all the courts under your umbrella to report certain specific elements. They can collect it any way they want to. They can use any kind of offense coding they want as long as they summarize it into the codes that you think are most valuable to you.

So, the question is how much you actively participate in the design of those systems or giving them rules.

What the FBI does, it has a code book saying however you design a system, this has to be in it. And the developers, the software vendors, take that as part of their specifications and design it for law enforcement agencies.

So now, today, if -- it's not done all the time, but it's well upward in the 80 percentile, whenever a law enforcement agency goes out to a vendor to buy a law enforcement system, NIBRS is a natural part of it because they know that's a selling aspect of it.

So, what I would suggest that you do
is to take a look at the ability of harvesting
data that's there. It does have this generalized
ability to other problems that may come up so,
therefore, the funding to do this could be
explained by, well, I know it's a lot of money
now for this one topic, but look what it'll do
for everything else that we do. That's how we
sell it when we have to do it.

And then, the idea of adding on top of
the extraction some rules about what has to be
collected. And, if you can do that, then you can
start getting the data that you need on a routine
basis, not just the one off basis, on a routine
basis and the cost of doing that goes way down.

Once you have the system set up, the
cost goes way down because it's a natural extract
of a day to day operational reporting system.

CHAIR HOLTZMAN: Thank you very much,
Dr. Snyder.

Mr. Taylor?

MR. TAYLOR: Yes, well, thank you both
for being here. We really appreciate your
insights.

    Starting with you, Mr. Schmitt, what kinds of information do judges routinely request from the U.S. Sentencing Commission? I mean how else can this serve the judiciary in a way that I wouldn't have thought about?

    MR. SCHMITT: Well, as I said, the main focus of our work is to advise the Commissioners in making the policy decisions.

    However, our data is so precise that we will occasionally, about once a week, actually, be called by a judge who will have an unusual case, something that he or she does not usually have, and they'll say I have this kind of crime committed in this sort of way, what can you tell me about similar cases in the nation or in my district or my circuit and how was the sentence imposed?

    And so, you know, we know if weapons were applied. We know what the criminal history of the person was. We know the quantity of the drugs involved in the case. We can get down to
very specific levels.

And so, in an unusual case, not their usual practice they'll call us and we're able to say, the average sentence in your district is this and the national average sentence is this. Or judges stay within the guideline range or they don't stay within the guideline range and here's what they do.

We can even say that, in cases where the government sponsors a sentence below the range because the person has provided assistance to the Government, what's the degree of the discount that the court gives? You know, how much off do you get for being a cooperating witness?

We can quantify that by district or circuit or nation by the type of crime involved. So, those are those kinds of questions.

MR. TAYLOR: Well, I thought your recommendations, your six recommendations, for some sort of system were very interesting and I wondered if they were based on experience that
the Commission had gained over time internally or
did it also depend upon best practices that you
picked up from other governments or other states
about how to build such a system?

MR. SCHMITT: About half the states
have a Sentencing Commission and they collect
data and so we are always in conversation with
them. But, I think most of this comes from us.
We were the first Commission to do this and so,
over 25 years of experience, we have sort of
figured this out on our own.

To be sure, we regularly interact with
people who are researchers in the field and they
are not shy to tell us how we can do better and
make our data better for them.

So, it's really drawing on our years
of experience and that of the colleagues who
preceded me in my position.

MR. TAYLOR: Okay. In terms of the
intensiveness of the Staff's work, is this
something that becomes routinized or are there
peaks and valleys as you work through these
problems?

MR. SCHMITT: The actual process itself has become routinized, it's just a never ending stream of documents that come in. There aren't noticeable peaks and valleys in the federal courts other than you can see the cases go down in August when people are on vacation and in the first part of January, we see the impact of the holidays.

But, otherwise, we don't see that. We see some annual trends, crime cases go up or crime goes down.

But, that part of our analysis, the actual building of the data is routine. The analysis part really is a reflection of what questions have been posed to us. The Commissioners pose a lot of questions to us, so we stay busy, but the intensity of that work varies based on the complexity of the questions asked of us.

MR. TAYLOR: In terms of the incentives that are there for districts to comply
on a timely basis, is the sort of naming and
shaming threat adequate for most people to
comply?

MR. SCHMITT: Absolutely. I make one
call to a chief judge and he will or she will
strike fear in the hearts of their Staff and
everything happens.

I will say, though, that the judges
and the probation officers who work for them are,
I think, fully supportive of the spirit of this
and we really don't have that problem.

But, I stress that point with you
because, for us, this is 25 years of experience,
people sort of understand this is what they have
to do. And all new chief judges know that that's
part of their responsibilities.

But, when we see, you know, we work
with Dr. Snyder and his folks and we see other
data collection processes, we realize how lucky
we are that this is mandated by Congress. If it
weren't for that, we would not be able to do the
work that we do.
And so, I really -- that was my very strongest recommendation really was to make sure that you are able to have someone require it.

DR. SNYDER: I also imagine that when this started 25 years ago, it took a while to get up to the point you are now. The mandate was there.

MR. SCHMITT: Right, and I think that's right. I think that's right.

You know, your time frame is a little shorter than mine and that's why I think it's so crucial that you have someone who can require all the Services to submit everything that you need in the time frame that you need.

And, you all appreciate that in there are innumerable data calls that come out, a FOIA request for this, a request from Congress for that, so, this could really get lost in the shuffle of data calls to the courts if it doesn't have the emphasis by somebody really, really high up to say this has to happen and in a short time frame.
MR. TAYLOR: Thank you. Dr. Snyder, I thought your comments were very interesting. I happen to be in one of the Service General Counsel offices when the requirement came down to create DIBRS.

DR. SNYDER: You remember that?

MR. TAYLOR: And I can remember --

DR. SNYDER: It was a long time ago. Right?

MR. TAYLOR: -- the wailing and gnashing of teeth and I'm really disappointed to hear that they still haven't gotten on board in terms of putting it in the system.

But, do you have any thoughts about how to incentivize organizations at a lower level? Because, what we all know is, that one can put out an order and then there can be some follow up and then, pretty soon, unless the people who are actually required to collect the data, or at least this is my understanding, unless they see value in it, it will not be something that's sustained beyond the person who
issued the order and is around to enforce it.

So, how do you do that? How do you create a system that would be, let's say for example, within the Service's benefit? Clearly to their benefit to continue to cooperate and provide the data instead of doing it on a one off basis which is what you're saying we should probably avoid if we can make it.

DR. SNYDER: Definitely. I think we have a parallel to that with the Comey's directive that he wants every law enforcement agency in the U.S., all 19,000 or 20,000 of them, to report NIBRS data.

We are now past making that happen. And so, we have to encourage lots of law enforcement agencies to do this. And, we are working through a process to do that and we're finding that there are a lot of avenues to make that -- to encourage it.

I mean, often times now, we see that there is a transitional change in law enforcement in the leadership where they're becoming more
data savvy and they realize the value of data and they realize, for example, one of the big selling points for law enforcement directly is that if they report the DIBRS or NIBRS data, they can then -- they already know their own stuff, but they can then compare themselves to other people. And, without this data, they can't do those comparisons because the NIBRS data, the common format, lets you compare people on an apples to apples basis and not something else. So, that's a big selling for inside law enforcement that they can either compare themselves or they can combine data from their regions, their multiple law enforcement agencies in every region, take a look at a regional picture of what's going on and not just a local picture with their one agency.

MR. TAYLOR: Well, do you find that the counterfactual results are true, that sometimes they really don't want to have that data out there in a way that it can be readily compared because it might show they're not doing
as well as others?

DR. SNYDER: I think there's some

concern about that. There was a myth started

about NIBRS that if you did NIBRS, your data

would double, your crime rate would double, which

was completely wrong, but that's still going

around.

I think there is a concern about the

data being better and, therefore, you're getting

more information.

But, it really has resolved itself in

the last few years. Again, that concern about

the data is diminishing because I think most law

enforcement agencies that I deal with think

they're doing a good job. You know, they said if

people knew what I was doing, they saw all the

work that I was doing and they'd realize it.

Right now, for example, the UCR that's

being collected, collects data on eight crime,
murder, rape, robbery, aggravated assault,
larceny, theft, burglary, motor vehicle theft and

arson. There's nothing there about weapons,
there's nothing there about gangs, there's nothing there about drug offenses. All the work that they do is not captured.

They realize that they get the new data system, they can talk to their communities, to their budget people that look at all the work we're doing, look at the success we're having, look at the changes we're having in our community that we need help on. And they can use it for their own funding purposes, again, to compare themselves or to combine a group of agencies in a region to make that statement.

The other thing we're finding, too, another method for doing this, there are a lot of other people who want these data.

We are working closely with the advocacy organizations in the country. In fact, currently, the biggest funder of this transition of -- for law enforcement to report in NIBRS is the Office of Violence Against Women because the Office of Violence Against Women they don't -- none of UCR data tells you who are the victims of
these crimes.

So, they can't tell -- they have no idea how much domestic violence there is in the country. They have no information on how much child abuse there is in the country. They have none of this information. And they realize that if NIBRS were set up nationally, they could get the data that they need to do their planning and their policy development and their identification of areas of need.

The White House is the same thing. The White House has a number of programs that we always had an answer. Well, if you had NIBRS, we could do that. Because the data are generalizable to a lot of topic areas.

So, not only are we pushing and encouraging law enforcement to do it, we're looking at the people who want the data. And so, my dream would be if some law enforcement agency wasn't doing it that at night, the chief's wife would knock him on the head and say why don't we have any data on domestic violence? I mean,
that's my mission in life and you aren't giving me any of my data here. I mean there are those kind of pressures and we are working with all that.

So, we're doing reports showing the strength of NIBRS like the child sexual assault work. The child sexual assault people in the towns are going to come to the police and say, we want these data. We need to know if there's an 8:00 a.m. peak in crime. I want to put my social workers in the homes at that period of time because that's where I see the crime problem is. There's other uses of the data.

So, you can get not only in the system, but people outside of the system to encourage it, too.

MR. TAYLOR: Thank you, Madam Chair.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes. Let me just introduce my comments by explaining that my time frame, personally, has been pretty long. I was in the Department of Justice in 1984 when the
Sentencing Commission was discussed and then
enacted and I did liaison work to the Sentencing
Commission back then and was a federal
prosecutor. So, I'm familiar with both a lot of
the individuals who work there, both the
researchers who set up the first guidelines on
how to collect data as well as the lawyers and
the Commissioners.

And, I guess one of the questions that
occurs to me right off, so I'll throw it out
there is, what's being prosecuted that we're
looking into, sexual assault in the military are
federal crimes? They are part of Title 10 in the
U.S. Code. The judges deciding them are federal
judges. They may be Article I judges, but they
are federal judges.

And, I guess my first question is, why
shouldn't the Sentencing Commission be collecting
that data? Why are they excluding and have they
been excluding collecting data on felonies,
sexual assault felonies, which, frankly, if the
military didn't prosecute them, the U.S.
Attorneys Offices would?

And it's only by MOU, as we heard at the beginning and various other agreements that the military is doing them and they've been handed off, in effect, and sometimes, they're even investigated first by the FBI and handed off when they just see it's a military case.

Why aren't -- why isn't the Sentencing Commission collecting that data and doesn't that mean your universe is not a universe of all sentences? And, doesn't that also affect the averages and the data you're coming out with?

So, I'm kind of wondering offhand why you're not collecting it?

MR. SCHMITT: We collect data on the cases to which the guidelines apply. And they do not apply to cases prosecuted in the courts-martial.

And so, that's a decision by Statute by Congress and so we don't collect data on cases where our guidelines don't apply.

For example, we don't collect data on
B and C misdemeanors that are decided in federal
courts by Article III judges or by magistrate
judges because the guidelines don't apply to
those.

If Congress were to have mandated that
the guidelines apply, we would collect the data
on that.

MR. STONE: I thought, actually, that
it was the opposite way around, that the Statute
says you collect them on felonies, et cetera by
class rather than that you work on cases to which
guidelines apply and that, just looking at it
stepping back, these seem to me to have been
overlooked.

MR. SCHMITT: I take the point. We
have interpreted that Title 18 Statute to be
limited only to cases brought under Title 18 and
Title 21 and a few of the other miscellaneous
titles and not cases under Title 10 of the United
States Code. That's been our longstanding --

MR. STONE: I mean, I know they can
collect data on non-Title 18 felonies. There's
lots of non-Title 18. All the drug cases are in Title 26.

MR. SCHMITT: Yes, or Title 21.

MR. STONE: So, it's not --

MR. SCHMITT: Title 21.

MR. STONE: -- you know, or Title 21, and it's not limited to --

MR. SCHMITT: But all those cases are brought in an Article III court and so, maybe that's another frame of reference is that we collect data that are from Article III courts, not from Article I courts.

If Congress were to tell us to do differently, I'm sure we'd be happy to do that.

CHAIR HOLTZMAN: Would you just yield on that point? I mean, is this a matter of your interpretation of the Statute or does the Statute explicitly say that you are limited to Title III courts -- Article III courts?

MR. SCHMITT: The Statute is -- our authorizing Statute's in Title 28 which is understood to apply only to Title III courts.
And, the provision of Title 18 that references the guidelines is in the context that it would only be construed as applying in Title III courts and not to cases under Title 10 decided by an Article I judge.

CHAIR HOLTZMAN: Could you send us those statutory provisions?

MR. SCHMITT: Yes, ma'am.

CHAIR HOLTZMAN: I mean I know it's easy to pull up, but it'd be very nice to take a look at them because, you know, when you say it's understood that, that's in the passive voice. I mean is this your reading of the Statute or is it the exact language of the Statute?

I don't mean to be argumentative, just curious because it might be an easy way to solve this problem for us.

MR. SCHMITT: It's -- well, I can tell you --

CHAIR HOLTZMAN: Or solve some of the problem for us.

MR. SCHMITT: -- that it's not going
to be that easy.

CHAIR HOLTZMAN: Just kidding. I mean I hope you understand where we're coming from.

MR. SCHMITT: I think the case law is clear as to the cases in which the guidelines apply and that's been litigated some time ago in the early days of the Commission. Its constitutional authority was challenged. And so, the Commission's jurisdiction has been decided by the Supreme Court in a series of cases. And, I can provide all that to you.

I'm not aware that anyone has ever challenged us or suggested that we should be collecting data from the courts-martial. I just don't know. I can find out.

MR. STONE: Great. But --

MR. SCHMITT: Let me just say that there are a great number of federal cases that we have and I think they might be influential to you. It depends on how broadly you think federal cases are.

There are cases of people sentenced in
the District of Columbia Courts which you could say that's a creation of Congress, the Article I judges.

MR. STONE: Those are Article I judges, exactly.

MR. SCHMITT: But we don't -- I don't consider them federal cases in the same way that other people might.

So, if you're looking for analogies to cases decided in the courts-martial, there are a couple of different places you can look. If our data's helpful, that's fine. If not, that's fine too.

CHAIR HOLTZMAN: But, shouldn't it work -- just a follow up question. So, do you include the information from D.C. Courts?

MR. SCHMITT: We do not because the guidelines do not apply in those cases. There's a separate statutory scheme that provides for sentencing for offenders convicted in the District Courts.

CHAIR HOLTZMAN: So, where is that
information collected?

MR. SCHMITT: There's the D.C. Sentencing Commission that collects that data.

CHAIR HOLTZMAN: Oh, so your Commission doesn't even publish any data whatsoever about D.C. Courts?

MR. SCHMITT: No, we do not collect data on cases to which the guidelines don't apply. So, we don't collect data from the states, that's BJS's authority. We don't collect cases decided in the D.C. Superior Courts. There are offenders, of course, convicted of federal crimes in the D.C. District Courts which we collect because the guidelines apply in those cases.

CHAIR HOLTZMAN: Even -- okay, so --

MR. SCHMITT: And, don't collect cases in Title 10 courts-martial.

CHAIR HOLTZMAN: -- it's where the guidelines apply is your standard?

MR. SCHMITT: That's right.

CHAIR HOLTZMAN: Okay, thanks. I
appreciate that clarification. Sorry.

MR. STONE: And, the Statutes he's
talking about which we can look at are 28 USC 994
and 18 USC 3551, et cetera. But, I don't know
that anybody's ever looked at the question of
whether it's legitimate to suggest to Congress
that the Sentencing Commission should be looking
at this.

For example, if some of those Class A
misdemeanors are tried by federal Magistrates,
those are Article I judges.

MR. SCHMITT: That's true.

MR. STONE: So, I think that that's a
question that nobody's looked at whether instead
of erecting a parallel structure to the
Sentencing Commission with 45 people could expand
its scope and give us somebody who's looking or,
you know, trying to get the federal data.

And, I think of that partly because of
Dr. Snyder saying that there was a Congressional
mandate for the military to provide data across
the board. Maybe it hasn't been complied with,
but --

DR. SNYDER: It's still there.

MR. STONE: -- if the data came in,

that would certainly help the Sentencing
Commission do things on an ongoing basis even
when this Panel is done.

So, I think that's -- it'll be

interesting to see and we invite a response along

those lines.

And, to some extent, I have the same

question for Dr. Snyder, even though he sort of

answered that and that is, do you think that

there was any, from your Justice statistics point

of view, any -- either bar or specific

authorization or opening for your organization to

be collecting the military statistics because

you're collecting from all the jurisdictions, at

least as a sample? And, certainly, the military

jurisdictions are handling a lot of these cases.

DR. SNYDER: I don't think that

there's a statutory bar for doing that. It's

just that it's never been done.
I mean we are getting questions now from military sources about doing research with them. We had one recently, they're interested in knowing when people leave military prisons, what their recidivism patterns are. And we are able to look into that because we can run rap sheets on anybody and we've got those rap sheets. So, it just hasn't been --

The BJS, except for the justice program that we extract data from the existing systems, we've never collected original data on or even existing data on the military side of things. That's always been -- that's never been a part.

Honestly, I think it's just because it was a high mountain to climb to do it.

MR. STONE: And, part of the reason I'm asking is --

DR. SNYDER: I don't think there's a restriction for doing it.

MR. STONE: Okay. But, part of the reason I'm asking is because the federal judges
that I personally know say that it's helpful to
them to have sentencing ranges so they know when
they are doing what seems to be what most other
judges are doing and when they're departing from
it. Instead of blundering through that and
finding out later, they have a guideline that
they can consult. They don't have to follow it,
but it's really helpful.

And in a place like the military where
people's occupational specialty changes with some
frequency, it's particularly helpful for someone
who's doing sentencing to know what the average
guideline is when they see a case like that
before them.

So, that's part of the reason I ask
it. And to have a structure in place that does
that for the other federal judges but not for the
military federal judges, it would be quite a
tremendous benefit for the military to have it.

And, just like federal judges aren't
obligated to follow those sentencing guidelines,
neither would the military judges. But, it's a
tremendous comfort to know, oh good, someone's
giving me some data on where this typically would
have fallen.

So, that was the first question that
I had.

The second question for Dr. Snyder has
to do with, you were talking about categories of
offenses and you ran through four offenses that
related to our subject matter, but I noticed you
said forcible rape, forcible sexual assault --

DR. SNYDER:  Forcible sodomy.

Forcible sodomy.

MR. STONE:  Forcible sodomy and --

DR. SNYDER:  Sex with an object.

MR. STONE:  Sex with an object and was
there --

DR. SNYDER:  And then forcible
fondling.

MR. STONE:  And forcible fondling.

And, we have taken over the course of our
proceedings and awful lot of testimony where,
just like on college campuses, the sexual
assaults are non-consensual but we wouldn't say violent. They're not forcible, they're just non-consensual.

And so, the question is, do you even collect that data, and have you thought in the future between Panels like ours that folks from the military and the discussion in this country about what's happening on college campuses with requiring consent, you know, you know, a verbal yes, yes means yes, or whatever, have you thought about trying to collect, at least in the sexual assault area, data that's not limited to the forcible violent offenses?

DR. SNYDER: Right. And the process for that, and this has occurred -- when NIBRS was first designed back in the '80s, it had a list of offenses. Offenses have been added along the way.

We recently got codes added -- we had to go in and add one of cargo theft and on hate crimes, and the newest one is animal cruelty they want to collect.
So, you can always add more detail to the underlying structure if you want things.

Right now, along with the four I mentioned, we do collect information on statutory rape and incest. And there is also the nonviolent sex offenses is a code there, which breaks up pornography, Peeping Toms and other things.

So, there are lots of codes, and the idea of the structure is you can always add more codes to it. And, honestly, the way the codes are added, is if there's a need for it. If there's a need for it, then what you do is you say -- the FBI says, here's a new code we need on cargo theft, for example, because people are concerned that cargo theft is being done by people who want to get money to buy guns to ship over to the Middle East -- that was the reason I heard.

So, they say, well, let's do this.

And so, what the systems do then, they go in the automated systems and they pull out those
Statutes, and they recode them into those categories because they're already in the Statutes.

Human trafficking was a big example. They're now reporting human trafficking. Before, it was coded in prostitution and things like that, but now they say no, human trafficking is a new aspect -- both labor and sexual trafficking. And so, those are now required reporting.

So, yes, you can -- we thought -- people think about that. It has to go through the FBI's Advisory Policy Board, but those -- modifying the codes, expanding the codes is done on almost a routine basis as the issues come up.

MR. STONE: So, if this JPP decided to make a recommendation to have you focus at least on the most frequent crimes which we see in the military that relate to sexual assault, what we or the Secretary of Defense would do would write the FBI Advisory Policy Board rather than you directly?
DR. SNYDER: Right. Exactly, because they are the ones that control that.

MR. STONE: Right. But, that's an open avenue if we decide to do it?

DR. SNYDER: That's -- it happens all the time.

MR. STONE: Okay.

DR. SNYDER: You would send an information paper, they then discuss it and make the decision whether they should do it or not.

MR. STONE: And, I guess the last question, and you can both comment on this, I thought -- I'll start with Dr. Snyder. I thought I heard you say that you also deal with the Bureau of Prisons, BOP data? And I'm glad to hear that recidivist data.

I know it's of importance when looking at real offense sentencing and real time served, that both state and federal systems are virtually all different in terms of some states still have parole, amount of good time that an inmate can get, frequency with which there might be medical
releases, furloughs, frequency that a particular Governor gives, commutations.

And so, I guess what's interesting -- beyond what the judge says at sentencing -- is how much time the person actually does so that a person like a military judge could look at his situation and say, oh, well, in the military setting, because we only have either a little bit or a lot of good time the person can accumulate, if I see that everybody is actually doing ten years for this offense, then I can internally calculate to make sure that there's a ten year sentence, I either have to give 15 years or 12 years or 11. But they can tailor it to the kinds of incarceration reductions that they see.

And so, I'm wondering if, particularly the Sentencing Commission on its data, is using BOP release data to also advise people on how much time they're doing? Because everybody knows for a long time sentences that were given out were very -- they were unrelated to how much time a person did.
And so, I'm wondering if you can both

tell me to what extent do you use BOP release
data to help inform the various judges?

MR. SCHMITT: We do use BOP data for

a variety of our work. Since the Sentencing
Reform Act was passed and changed the federal
system to a system of determinant sentencing,
it's now the law that every person sentenced to
a federal sentence --- that is to say, you know,
by an Article III judge --- has to serve at least
85 percent of their sentence.

And so, the maximum amount of good
time that the Bureau of Prisons can award is 15
percent off of the sentence. No less than that
can be served.

The issue of recidivism is one that
has been something the Commission has studied for
quite some time, and Howard and the folks at BJS
have done a lot of work in this area.

The Commission is currently in the
middle of an ongoing project to study a cohort of
35,000 people released in 2005 to see what the
We think we know from studies about 20 years that federal recidivism is around 45 percent, compared to states which are much higher -- probably two-thirds of state offenders return to prison within three or four years of release.

Our study is going to be able to parse this a little bit more and say, well, the recidivism of drug offenders is this. And, in fact, we'll be able to say the recidivism of crack offenders is this, compared to the recidivism of meth offenders. And, we'll even get down to the point of saying: crack offenders with a gun have a recidivism rate of this; crack offenders without a gun have a recidivism of that.

And, one of the things we're going to look at is the length of sentence to see what impact that might have had on the recidivism rate. That's just a preview of coming attractions; we hope to begin to release results of that study sometime in calendar year 2016.
I'm sorry that doesn't help you now, but that work is under way.

DR. SNYDER: In general, I always go back to how the data is structured.

When we get a report from BOP when someone enters BOP, or state prisons we get records going in, on that record is the sentence length. We also get a record every time they leave. So, we can link those to the ins and outs together to get an exact measurement of how long they're there, and we can compare it then to the original sentence length to see what it is.

And you're right. It varies greatly across states of how the sentence relates to the actual time served.

MR. STONE: And, would you be able -- at least on the data you have from the states -- to give us maybe in a little supplemental note on the sexual assault crimes you're collecting?

DR. SNYDER: Yes. The data are publically available; I mean, they're at the same source that he sends his data to.
MR. STONE: Okay.

DR. SNYDER: If it's a --

MR. STONE: What the average sentences are that are imposed and the amount, also, like you say, the sentences are actually done? Because I know that despite the federal Statute that says you've got to do 85 percent of your sentence, that is not what ultimately happens because there are exceptions that doesn't count commutations, it doesn't count compassionate releases -- all of these are exceptions.

It doesn't count when you in a drug program and you get extra good time. It doesn't count when you get an early conditional release, the last ten percent of your sentence to a halfway house.

There's a huge number of circumstances that were excepted specifically from the 85 percent limit, and so the data you have on what people actually serve, I think all of that would be helpful even if it's sort of global to the military judges, who right now, don't have --- as
far as I can tell -- anything, and so that would be great and help us to write our report.

DR. SNYDER: And, I have to go back and check this out exactly, but I'm pretty certain that both the federal data and the state data have the reason for release, not just -- and, it could be that time was served and it was done or it could be compassionate release, or it could be that he died.

MR. STONE: That's right.

DR. SNYDER: I mean, I think the reason for release is a part of the data systems.

MR. STONE: Great.

DR. SNYDER: I think we get that. Just one thing, I mean I could -- BJS is a federal statistical agency. When we provide data, we have to provide it to the public -- an analysis to the public. BJS can't -- we're going to have to do a report probably, when we publish the report, then you can have it.

MR. STONE: Okay, maybe you can do it --
DR. SNYDER: Because we just can't do something --

CHAIR HOLTZMAN: Well, maybe our Staff can find it from the figures if they're public.

DR. SNYDER: Okay, yes, the data are there and the analysis.

MR. STONE: Fantastic. And, maybe you can just point us to which report and which page, and that'd be great.

DR. SNYDER: Right. Okay.

CHAIR HOLTZMAN: I want to thank the panelists for coming. It's very helpful.

Mr. Schmitt, I'd like to ask you: what is your budget?

MR. SCHMITT: The Commission's budget?

CHAIR HOLTZMAN: Yes.

MR. SCHMITT: It's approximately $16 to $17 million each year; I can get you a precise number. I'm not responsible for the budget, so I only know in the generalities. I know my paycheck shows up every two weeks, so that really satisfies me. But I will be happy to get you the
amount of our budget, which is, of course, a
matter of public record.

CHAIR HOLTZMAN: Sure. Because I
think one of the questions that should be asked
by Congress when they review our recommendation
here is: what is going to cost to provide this
information?

Now, in that regard, and in terms of
what both of you said and Dr. Snyder said, some
of the information you collect by hand. I take
it that's the pre-sentencing report material?
What are you collecting by hand, and why do you
need it? And is it something we would need?

MR. SCHMITT: Well, the five core
documents that we receive come in to us in
digital format. But we code the items from those
pieces of information into our computer system by
hand.

That is to say, a person sits at a
computer and looks at the screens, and they code
the items in electronically.

We do that to ensure that everything
is collected in the same way and to our
standards. There's technology that would allow
the courts to push data to us or for us to reach
into other court systems and suck out the data;
we have made a decision not to do that because we
believe that by having our Staff enter all the
data into the system, we ensure its accuracy and
completeness to the level that we require.

CHAIR HOLTZMAN: Okay, so maybe I
misunderstood what you were saying. So, all of
the data is coded?

MR. SCHMITT: Every item of data in
our system is coded by --

CHAIR HOLTZMAN: By your people?

MR. SCHMITT: -- a Sentencing
Commission employee. That's right.

DR. SNYDER: The original text is a
narrative; it's a paragraph of words.

CHAIR HOLTZMAN: Okay.

MR. SCHMITT: Well, it's even more
than that. So, the five documents are things
that the court creates. The court's order and
the pre-sentence investigation report prepared by
the probation office.

We receive those documents and we read
them, and then we take the items we need from
them into our system. The Statute of Conviction
comes from the judgement or commitment order.
The details of the crime comes from the per-
sentence investigation report. The actual
reasons why the court went within or outside the
guideline range comes from the Statement of
Reasons form, for example.

CHAIR HOLTZMAN: Okay. So, but that's
not the kind of information, Dr. Snyder, that
you're getting necessarily from the court systems
that you are --

DR. SNYDER: No.

CHAIR HOLTZMAN: -- in your database,
or am I wrong?

DR. SNYDER: Right, right, right. We
do not --

CHAIR HOLTZMAN: You're just getting
the statistics? So, in other words, when the
Bureau of Prisons, X went in on such and such a date, and X exited on such and such a date?

DR. SNYDER: We get elements for a database. We're picking element for the database that they've coded by what the offense is.

CHAIR HOLTZMAN: Right.

DR. SNYDER: We don't see any original documents.

CHAIR HOLTZMAN: So nobody -- so, you're not recoding any documents?

DR. SNYDER: Well, we do that some. Like for the -- with our work with the rap sheets, we do that. Because when we get a rap sheet, it's a document that is -- you've all seen rap sheets, you know, they're a hodgepodge of information.

And so, we've written programs now to go through and read those and pull the data out. But, so we do --

CHAIR HOLTZMAN: But not people? This is done digitally?

DR. SNYDER: Well, it's done
digitally, but the people had to write all the rules.

CHAIR HOLTZMAN: I understand that.

DR. SNYDER: Yes, yes, yes.

CHAIR HOLTZMAN: But, he says all of this is done not digitally; it's done by people who are trained, Mr. Schmitt, am I correct? The people who are trained --

MR. SCHMITT: Yes, ma'am.

CHAIR HOLTZMAN: -- and reading these documents and they decide what code is to apply.

DR. SNYDER: The difference I think is --

CHAIR HOLTZMAN: So, the question I have -- excuse me -- is: to what extent do we need, does the military system need to have -- what would call it, a hand operated system --- as opposed to the kind of system that Dr. Snyder has? Or is that a ridiculous question?

MR. SCHMITT: Oh, no, no, it's a, I think, a very timely question. And I think that part of that answer depends on you deciding: at
what stage do you want to have the information?

Our information is the sentence. We
don't know about the charge; we don't know about
post sentence activity for the most part. We
just know about the sentence.

And so, it's a finite amount of
information that we can manage from the courts.

If you want to know about complaints
made or the police's decision to arrest, then
that's a bigger database, which we couldn't
possibly begin to keep up with that if we had to
do that by hand.

So, when Howard's talking about the
NIBRS information, these are law enforcement
agencies reporting complaints made by them or
arrests made by them.

And some of that data will involve
people whose cases were dismissed. So, that's a
larger universe than the people who are
convicted.

And, of course, if you just want to
know what is happening to include non-charged
conduct or conduct that is never reported to the police, then you have to go a step further and use survey data -- which, of course, BJS does --- to find out what's the nature of what kind of crimes are happening in the country, even those that are not necessarily ever reported to the law enforcement.

So, I think you have to decide where you want to try to make the military collect the data. Is it only when there's a conviction? Is it when CID or NCIS charges someone? Or do you really want to know just what people say is happening to them regardless of what they do with that information?

Each of those has then a follow-on consequence to the structure that you create to do it and the cost it would take to do it.

CHAIR HOLTZMAN: Right. Now, what would happen if you weren't given as much money as you have? I'm not saying that it's a lot, and you had to do a system that was not a hand crafted system, could you do that and what would
be the downside? What would -- how much
information would you lose in terms of accuracy?
I mean, you know, can we afford to be 70 percent
right as opposed to 100 percent right?

MR. SCHMITT: Well --

CHAIR HOLTZMAN: Or 50 percent right?
I don't know how to frame the question.

MR. SCHMITT: Right; yes.

CHAIR HOLTZMAN: But, basically, what
would be the -- I mean, suppose Congress said
well, you know, we have a limited budget, we have
budget issues. Yes, we want to have more
information, but we really can't afford the
perfection level of detail and perfection that
you have. What would we be losing?

MR. SCHMITT: Well, you --

CHAIR HOLTZMAN: Why do we have -- in
other words, if we want to tell Congress we need
your system, we need to know why.

MR. SCHMITT: Right. So, you would
lose a couple of different things, depending on
how you structured the case, how you structured
the system.

You could collect fewer things from all the cases, in which case you are confident in what you have, you just know less about each case.

Or you could collect a lot of things from a smaller number of cases, and then you have to worry that what you are getting is representative of your system as a whole.

And I don't know what the right decision would be, but it's better to know everything about a smaller amount of questions than to have less reliability in what you have received.

If you had everything but you didn't get Fort Bliss, then you don't really know what's going on there. You've got everything but not Fort Bragg, then you wouldn't -- you might not know that.

So, to have a sample of cases coded to a high level is better than just saying, well, we'll take what we get.
There are no doubt systems in the military that exist now where data is collected. So, CID and NCIS have systems where people have reported crimes to them. You could look to them to try to extract that data.

And I know you have witnesses coming later to talk about what the military currently does do in collecting this information. So, it may be that you have those systems.

The issue is when you take data from a system that isn't designed to be a statistical system, then there are miscodes and things that are missing, and people just make mistakes because they're not using it for your purpose. They're using for their other purpose -- managing the flow of people in the office and whatever that might be. And so when you do that, then sometimes things are wrong or missing, and then that affects the reliability of your data.

No one will tell you what the magic number is in terms of how much air you can accept. You'll have to decide.
Social scientists will say that they
don't like a lot of air. But only you can decide
what's good enough. And I wish I could be
clearer on that, but I can't.

CHAIR HOLTZMAN: Dr. Snyder?

DR. SNYDER: Two points. I agree
completely Glenn about the nature of the data.

The data that are in the -- the
automated data that are in systems are only as
good as the people who put those data in that
care about those data. If somebody's out there
entering data into a field and they don't use it
for their own needs, they can put slop in there
and they'll be fine.

But if you limit your data collection
to data elements that are used by the person that
puts it in to do their day-to-day job, those data
are going to be pretty good.

And, that's why I really promote the
harvesting of existing data because these data
systems are not done for statistical purposes;
they're done to manage the day to day case. And
so, if the Statute's typed in wrong and the
system's used to generate the petition order in
the court and if it's wrong, then somebody's got
to fix it. That's one thing.

CHAIR HOLTZMAN: But, you're assuming
that there are those systems in place.

DR. SNYDER: I'm assuming there are
systems. And what you're --

CHAIR HOLTZMAN: That's a big
assumption here.

DR. SNYDER: And what -- just to
summarize what Glenn said, some or in another
way.

What you lose by not using the hand
work that he's talking about are data that are
not in those automated systems.

When we are doing with the state court
process, we had to get bail information. The
bail information was not in our system. You had
to go around the court -- you always said that
those buildings are around the court -- and find
out the record on those people and what their
bail was because it was not in an automated system.

So, what you lose by not having all of this exceptional work that you guys do to extract this non-automated data is some detail. It could be a lot of detail, but you're losing the non-automated data.

CHAIR HOLTZMAN: Right. And so --

DR. SNYDER: And --

CHAIR HOLTZMAN: -- what you're saying, the problem with that is maybe at the outset, you'd say, oh, I don't need bail information. It just didn't even occur to you that you need it, but maybe a year later, you say, whoops, it's something we really need.

DR. SNYDER: Whoops. And, then that's the --

CHAIR HOLTZMAN: And then you won't have it.

DR. SNYDER: And we're looking at it. It's just too costly to get; it's just too expensive to get those.
CHAIR HOLTZMAN: Now, the $16 million, is that a figure for -- and how many cases do you process a year, Mr. Schmitt?

MR. SCHMITT: Seventy-six thousand was last year's number.

CHAIR HOLTZMAN: And, how many cases do we have in courts-martial?

COL GREEN: We've gathered records from the past three years -- 2,300. So about 750 a year.

CHAIR HOLTZMAN: Seven hundred fifty a year? And you have how many?

COL GREEN: Court records.

CHAIR HOLTZMAN: Right.

MR. SCHMITT: Seventy-six thousand cases were sentenced last year.

CHAIR HOLTZMAN: So, it's about a tenth? I mean -- yes.

COL GREEN: Right, but --

CHAIR HOLTZMAN: No, not even a tenth -- a hundredth.

COL GREEN: A hundredth.
CHAIR HOLTZMAN: A hundredth.

DR. SNYDER: One percent.

CHAIR HOLTZMAN: One percent. So, theoretically -- and just assuming that there's some correlation between the numbers -- we're talking about a hundredth of $16 million to keep a data system on that.

MR. SCHMITT: Well, the number -- I don't disagree with your math. The number that I gave you was --

(Simultaneous speaking.)

MR. SCHMITT: And, the Commission does a great many things besides just collect data. And so that money that I mentioned is, of course, staff costs to --

CHAIR HOLTZMAN: Right.

MR. SCHMITT: -- keep our General Counsels' staff fully employed, and to pay our Commissioners for the work that they do, and our trainers who go out and train judges and probation officers on how to use the guidelines. So, it's not just my part. Since we're half of
the Commission, I guess I'm half of the budget
and you can take it as a rough cut, if you wish
that way.

CHAIR HOLTZMAN: Okay. Okay, well,
that's very useful.

I don't think I have any further
questions. Anybody have other questions?

MR. STONE: Two quick follow up
questions that occurred from what you had said.
The first is, I realize that we've
heard that the Bureau of Prisons actually holds
a lot of military prisoners because the actual --
in Leavenworth in their regular facilities
because the military facility is rather small.

And, I just wondered: do either of
you, therefore, get that data even if you're not
currently using it? And if we made a request --
a special request, or maybe it's in your reports
-- you can find some data on the military
prisoners who are in regular U.S. BOP custody?

Is that out there?

DR. SNYDER: That's part of our data.
MR. STONE: That's great to know.

MR. SCHMITT: Well, there's no question that it is, but I would just urge you to make a request to the Department of Justice specifically that it provide to you information on the military offenders housed in the BOP.

DR. SNYDER: Yes.

MR. SCHMITT: The Bureau of Prisons is part of the Department of Justice, just as is the Bureau of Justice Statistics. And so I think you should just ask the Department of Justice to provide that information to you, and they'll decide which part of the Department is best suited to do that.

DR. SNYDER: It would be better for BOP to provide you with that.

MR. STONE: I just did that. I was just trying to find out if you have it collected somewhere but you've just not put it in your statistics because it didn't seem relevant at the time, and it might actually be lurking there with the proper kind of request. Sometimes you just
have to query it in a different way, and you say,
gee, we do have this; we just don't query it that
way because you collect all those data elements.

DR. SNYDER: Just to expand what Glenn
was saying, the BOP has those data. We get an
extract of their file; we don't get everything
they have on the cases.

MR. STONE: Right.

DR. SNYDER: So, if you want to know
more about those cases, BOP is certainly the
source because we only get some of the data; we
don't get all the data they collect.

MR. STONE: Yes, because -- now, just
the last question had to do with when you were
talking about the data elements, I don't know if
the group that we were talking to, to help us
collect our data elements, has actually received
your data elements that at least you collect
either by machine or by hand.

And, if they haven't, I guess we can
-- you may know by going back whether they
requested them from you. If not, I'd kind of
hope you'd provide them so that if we want to
make a comparison or they do later, they have at
least used the same kind of a data element on the
military so they can compare one against the
other and you can so, oh, this similar crime when
prosecuted federally, here's the guideline and we
can say, yes, we looked at those same data
elements and found that the sentences are either
longer or shorter for us.

So, I would say if you haven't had
that communication, we'd ask that, I guess, you
make it available.

CHAIR HOLTZMAN: Well, yes, if the
Staff --

MR. STONE: On the hand-done data
elements.

CHAIR HOLTZMAN: -- hasn't asked to
review that, then we'll ask them to do that.

MR. STONE: Yes.

MR. SCHMITT: I'd be happy to provide
that information to you. We'll provide our code
book, which lists every item we collect and what
it mean.

MR. STONE: Great, great.

DR. SNYDER: We'll do the same thing.

Every data file that we send to the University of Michigan's archive has a code book for it, too, that are downloadable.

MR. STONE: Fantastic.

CHAIR HOLTZMAN: Thanks very much.

Members of the panel, we really appreciate your helpfulness here and appreciate your important work, and thank you very much for taking the time to be with us.

We're going to take a five minute break, and then we'll come back promptly so hopefully we can get finished before the end of the allotted time.

(Whereupon, the above-entitled matter went off the record at 2:13 p.m. and resumed at 2:21 p.m.)

CHAIR HOLTZMAN: Okay, we're ready to start with our next panel, which is How Criminologists Study the Justice System.
Panel Members, I would be very grateful to you if you could -- I know you've condensed your comments for this panel, but if you could further condense them, that would be great because some of us have to leave early, and we need a quorum.

So, we are fortunate to have Dr. Cassia C. Spohn, Founder, Professor and Director, Arizona State University School of Criminology and Criminal Justice, and Dr. James P. Lynch, Professor and Chair for the Department of Criminology and Criminal Justice at the University of Maryland to appear before us.

I think you've been before us before, and we appreciate your being gluttons for punishment. So, welcome.

Dr. Spohn, you'll start, and then we'll hear from Dr. Lynch.

DR. SPOHN: Good afternoon. I'm delighted to be here today to talk to you about this important topic of adjudication of sexual assault.
And, I've been asked to talk about what social science research can tell us about social phenomena, and in particular, what social science research can tell us about sexual assault case processing decisions.

So, and I may skip over some of this in the interest of time, but --

CHAIR HOLTZMAN: Thank you.

DR. SPOHN: -- I'm going to talk about the importance of social science research and then describe and talk about the traditional social science model that is the scientific method, look at the issue of causation -- I think that's what I might skip -- and then give some examples of recent research on sexual assault case processing decisions, talking first and kind of building on what Mr. Schmitt and Dr. Snyder talked about in terms of data limitations.

So, although social science research is sometimes depicted as the poor stepsister of natural science research, it obviously is important that we research social phenomena.
As Earl Babbie, the author of one of the most highly regarded books on social science research said, we can't solve our social problems until we understand how they come about and persist.

Social science research offers a way of examining and understanding the operation of human social affairs; it provides points of view and technical procedures that uncover things that would otherwise escape our awareness.

Often, as the cliche goes, things are not what they seem, and social science research can make that clear.

So, under the traditional model of science, or the so-called scientific method, the researcher -- whether a natural or a social scientist -- begins by developing a theoretical understanding of the phenomenon or the relationship in which she is interested.

And this leads to hypotheses about the nature of the relationship --- in essence, an expectation about what we should find if the
theoretical propositions are correct.

So, the scientific method or the traditional model of science has three main elements, as I've already indicated. We begin with a theory that leads to hypotheses. We then operationalize our concepts and our variables.

This leads to the formation of a testable hypothesis. And the final stage in the process is observation in which we collect data either through experiment or through survey research, through interviews or through observation designed to test the hypothesis.

So, let me just give you an example focusing on prosecutors' charging decisions. And so, let's assume that we're interested in the question as to why prosecutors file charges in some cases but reject charges in others.

So, we would begin by looking at the theoretical perspectives that are designed to explain prosecutorial decision making and charging decisions in particular.

And one theoretical perspective -- the
so-called uncertainty avoidance perspective ---
holds that prosecutors attempt to avoid
uncertainty by filing charges in cases where the
odds of conviction are high and, therefore,
rejecting charges where the probability of
conviction is low.

Similarly, Donald Black's sociological
theory of law argues that the relational distance
between the victim and the offender affects the
outcome of the case, such that cases in which
victims and offenders are strangers are more
likely to invoke the intervention of the law than
those in which the victim and offender are
intimate partners or acquaintances or family
members.

So, both of these theoretical
perspectives on the decision to charge or not
suggest that case outcomes and charging in
particular will be affected by the relationship
between the victim and the offender.

So, assuming that theoretical
propositions are correct, the hypothesis would be
that prosecutors are more likely to file charges in cases involving strangers than in cases involving non-strangers.

So, at the next stage of the process, the researcher has to decide how to define and operationalize the concepts, that is the variables in which he or she is interested.

And so we might measure charging as a simple dichotomous measure that differentiates between cases in which the prosecutor filed charges and those in which she did not.

Or, we might have a more nuanced variable, where we differentiate between cases where charges were rejected, cases where the District Attorney sent the case back to law enforcement for further investigation, those that were sent to the city attorney for prosecution as a misdemeanor, and then those that were accepted by the county attorney for prosecution as a felony.

Similarly, we can define that the relationship between the victim and the offender
in a variety of different ways.

A simple way to do so would be to simply differentiate between cases involving strangers and non-strangers. But, of course, the non-stranger category includes intimate partners, family members and casual acquaintances. And so, we might want to be -- attempt to tease out some of those more nuanced relationships.

But if we assume that we've decided to measure charging using a dichotomous charged or not charged variable and the relationship measuring strangers versus non-strangers, we could have a testable hypothesis in which we posited that prosecutors would be more likely to file charges in cases involving strangers than cases involving non-strangers.

We would then test this relationship by collecting data on prosecutors' decisions to charge or not to charge, either in a particular jurisdiction, or if we have the luxury of having national data, we could do so in that way.

So, this is a graphic depiction of the
scientific method, which shows that theories
generate hypotheses which we test using
observation. Observations then lead to
generalities or generalizations, which in turn
are used to modify or expand on our theoretical
perspectives.

So, let me turn to researching sexual
assault case processing decisions which is the --
I understand is the task that this Panel is to
look at, that is the adjudication of sexual
assault cases in the military.

And let me begin by saying that the
research that we do in this area suffers from
serious data limitations.

And let me build on what Mr. Schmitt
and Dr. Snyder said in the sense that those are
-- or the data systems that they're talking about
have their own limitations.

The Sentencing Commission data only
includes data on cases that are convicted and
sentenced in the district courts; it does not
include data on any of the important stages that
precede conviction and sentencing.

And so those of us who use that data cannot tell whether, for example, there were plea bargains and, if so, what the nature of those plea bargains were because there's no data on the original charges in that database, as comprehensive as it is.

So, one of the real limitations -- and I think both of them emphasize this -- is that we have no national data on case processing outcomes in sexual assault cases, or really in any kinds of cases.

That is, the BJS and the NJRP data are limited; the NIBRS data is also limited in a number of different ways.

And so what this means is that researchers who are interested in sexual assault case outcomes and case processing decisions have to collect data from individual jurisdictions. And this is costly and it's time consuming, and it requires convincing police departments, district attorneys and -- to a lesser extent --
court systems to cooperate and collaborate with you.

So that a further limitation of going to individual jurisdictions is that, as I think Dr. Snyder pointed out, most case processing systems -- electronic case processing systems that are in individual jurisdictions -- are designed for case management. They're not designed for research, at least not the kinds of research that we do.

And so much of the data that we need to arrive at valid and reliable conclusions about sexual assault and its outcomes are not contained in those case management systems.

For example, prosecutors' case management data contains very detailed information about defendants, but almost no information at all about victims. And that, obviously, is an important limitation in terms of crimes like sexual assault or domestic violence, where information about the victim -- her credibility, whether she had a motive to lie and
so on --- is extremely important.

And, as a result -- and another

limitation of jurisdiction-specific research is

that the results of our research may not be
generalizable. And so, even though we conduct
research in some of the largest jurisdictions in
the United States, we cannot necessarily say that
what we find in Los Angeles or New York City or
Philadelphia or any other city really is the same
-- are the same patterns or outcomes that we
would find in other jurisdictions.

So, in terms of thinking about sexual
assault case processing research, we can look at
descriptive research, we can look at research
that is bivariate analyses, and then the more
sophisticated kinds of multivariate analysis.

And so, let me just talk about some of
these different kinds of research.

Beginning with descriptive research,
this is research that looks at case outcomes or,
in some cases, case attrition.

So, for example, much of this research
uses data from the National Crime Victimization Survey or from the Uniform Crime Reporting System and looks at, for example, the likelihood that victims will report the crime to the police, arrest rates, offenses known — sexual assault offenses known to the police, and so on. So, this is very descriptive kinds of data.

Probably, one of the best examples of this type of research, again, this descriptive research is the Vera Institute of Justice's 1981 book or report on felony arrests in New York City.

So, they collected data on 75,000 felony arrests that were in 1971, and then they followed those arrests through the entire criminal justice process. And so they were able to look at the proportion of arrests that resulted in charges, the proportion of charges that resulted in convictions, and so on and so forth.

And when they looked at sexual assaults in particular, one of the things they
found is that the rape cases in their sample had
the lowest conviction rate -- at 25 percent -- of
any of the 11 offense categories that they
examined.

This compared to 58 percent for
robbery and 41 percent for aggravated assault.

But of those convicted, the Vera
Institute found that 85 percent received a
sentence to jail or prison. And, again, this was
compared to only 20 percent of those convicted of
robbery.

So, this is an example of this kind of
descriptive research that looks at case outcomes
or case attrition and that attempts to follow
cases through the criminal justice process.

Another example is a study that my
colleague, Katharine Tellis and I did in Los
Angeles. And, in this case, we collected data on
5,031 sexual assaults that were reported to the
Los Angeles Police Department from 2005 to 2009.

And we then followed those cases
through the entire criminal justice process to
determine what was the likelihood of cases moving through the system, and what was the locus of case attrition.

And several things stand out. I don't know if you can see these numbers, but I'll just walk you through a few of the important findings.

I think the most important takeaway is we found that only 594 of the cases that were reported to the police during this five year period resulted in an arrest.

CHAIR HOLTZMAN: Five ninety four out of what?

DR. SPOHN: Five thousand thirty-one.

CHAIR HOLTZMAN: Okay.

DR. SPOHN: So, 88 percent of the cases did not result -- were not cleared by arrest by the Los Angeles Police Department.

Of those cases that resulted in the arrest of an adult suspect, the Los Angeles County Attorney filed charges 80 percent of them.

Now, this is a higher charging rate than most other research has found. Most other
research puts the charging rate at about 50 percent. So about one out of every two arrests result in the filing of charges.

And, again, this is from studies --

CHAIR HOLTZMAN: Is this only in the sexual assault area or --

DR. SPOHN: This is all sexual assaults.

CHAIR HOLTZMAN: Only sexual assaults?

DR. SPOHN: Only sexual assaults.

CHAIR HOLTZMAN: Okay.

DR. SPOHN: Yes.

These are rapes and attempted rapes; they do not include sexual batteries.

And the reason that the charging rate in Los Angeles is so high is because, in this particular jurisdiction, if the police have probable cause to make an arrest, but the case is problematic in some way, they will take the case to the District Attorney, ask the District Attorney if charges would be filed. If the District Attorney says no, they do not arrest the
suspect; they clear the case by exceptional means.

And so, the cases that go to the prosecutor for a formal charging decision are those in which these problematic cases have already been removed.

Of the cases where charges were filed, 80 percent resulted in a conviction. Again, this is not surprising. The District Attorney takes only what some would call the dead bang cases.

And, 90 percent of the convictions were obtained as a result of a guilty plea.

Of those who are convicted, most resulted in a sentence to prison or jail but a third of the offenders -- and these are rape and attempted rape cases -- a third of them got probation.

CHAIR HOLTZMAN: Dr. Spohn, if I could just interject, I'd like you to wrap up, if at all possible, in about five minutes.

DR. SPOHN: Okay; oh, sure.

CHAIR HOLTZMAN: Thank you.
DR. SPOHN: Okay.

So, this study then provided very
detailed data on case outcomes in sexual assault
cases in one of the most -- one of the largest
jurisdictions in the United States. But we can't
really say that what we found here is what we
would find in other jurisdictions. We need
national data in order to reach those kinds of
conclusions.

If you'll just skip to the
multivariate.

The research that is, I think, the
most valid and reliable kinds of research that
those of us who study sexual assault do is
multivariate research, in which we attempt to
isolate the effect of one variable on an outcome
while simultaneously controlling for other
factors -- other theoretically relevant factors.

And using this kind of research we
can, for example, reach conclusions about, let's
say, the relationship between the victim and the
suspect and charging, holding constant the
seriousness of the offense, the strength of
evidence in the case, and other characteristics
of the suspect and the victim.

And, if we could just skip to the
last?

So, in conclusion, I think social
science research can tell us some important
things about social phenomena and about sexual
assault case processing in particular. But this
research suffers from some serious and important
data limitations, the most important of which is
that we do not have national data on sexual
assault case outcomes.

We don’t have current, consistent and
reliable national data. And that’s exactly what
we need, whether it's the NIBRS data or something
more similar to what the Sentencing Commission is
collecting, there’s obviously a need for that
type of data.

CHAIR HOLTZMAN: Well, thank you very
much, Dr. Spohn.

And, Dr. Lynch, we'll hear from you
next, please.

DR. LYNCH: Yes, I'll be quick

because, as someone pointed out, I've already
been before a panel, and I've told them all that
I know. So I won't repeat myself.

So, I'm coming at this from a
different -- Cassia has for years been looking at
the understanding of prosecution and people in
that process.

I'm sort of focusing on, I thought,
was your particular problem and that is to say,
you all, I think, are interested in the idea of
whether or not the military justice system is
effective and fair and efficient in processing of
their sexual assault cases.

If I'm starting out in the wrong
place, then I can stop even sooner. But, that's
my understanding.

And then, one of the ways that you
would go about assessing that was to compare the
processing of cases in the military justice
system to the processing of cases in the civilian
justice system, holding the civilian justice
system as the standard.

And so, but if you saw transitional
probabilities -- Cassia called it case attrition
and other things --- then you would understand
that either one system is treating these things
less aggressively and less thoroughly than
another or is giving punishments that are quite
different.

And so I think that what you're really
trying to do immediately is to look at a
comparison of these transitional probabilities
from the occurrence of the event to the serving
of sentence in the military system and in the
civilian system, and you would compare those
transitional probabilities and the sentence
length and whatever measure of sentences varying.

And then, you would move to that next
-- once you've done that, you would move to the
next level, which is what Cassia talked about, in
terms of once you see -- say you see differences,
you have to know that those differences aren't
just due to case composition and a whole bunch of
other things, and you can get quite sophisticated
as to the kind of things you want to hold
constant while you look at that.

But, that's basically how you're going
to move through this problem with whatever data
you have, I assume.

And so let me just say that if that's
what you're going to do, let me talk a little bit
about some of the issues that you're going to
confront in trying to put together this patchwork
of information to get something that's better
than what you have now, which is nothing.

So, in the -- I think the first
problem you're going to run into is the front end
of the process. And, last time I was here, I
talked about surveys in rape and sexual assault
because that's the only way we can think of to
get an estimate that's independent of the system
itself.

And I was for a number of years the
Director of the Bureau of Justice Statistics.
I've redesigned the National Crime Survey twice over the last 30 years. And this has been a huge issue, this measuring.

So, in order to get that starting point -- that is to say, that point, the incidence of the prevalence of the phenomena, which is where we want to start -- it's very problematic because there are many methodologies out there. I think there's some good work going on now at the Bureau of Justice Statistics, trying to decide what the optimum set of procedures is for doing that.

But, you're going to have to deal with a messy bit there because you're going to have different methodologies producing different level estimates and you're going to have different definitions, people will fight over the scope of definition as to what, especially in terms of alcohol inducement and other things like that. So, these are all going to be big problems that will have a big effect on that base that you start with.
And so, that's where the headlines
several years ago, we started with a great big
base and when you get to the military justice
system, there's this little tiny effort. And so,
sometimes you have to look at the base and make
sure.

So, you're going to have to deal with
-- and there is literature out there and things
that you can do, but you're not going to get one
number. You're going to get a range of numbers
and so, you're going to have to do sort of
sensitivity analysis to get the correct number.

And, you're going to have to take
definitional issues to the extent that you can
and remove them from those estimates.

And so, that's one thing that I
cautions on. And, it may be that you don't take
the level estimates coming out of these
procedures. That is to say, a point estimate of
how many of these events have occurred.

Anybody who tells you they can do that
is wrong. So, you're going to have to think
about handling that more --

CHAIR HOLTZMAN: What's a point estimate?

DR. LYNCH: A point estimate, meaning there are 240 million people with acne in the United States, forgive me, I can't think of anything equivalent to that. So, that's a point estimate. That is how many people who are at that given point in time. It's not a change estimate, it's a level estimate, it's a point estimate. So, that's a very difficult thing to do.

And, change estimates are a little more forgiving and also, you might not have the right level, but you know what the change is. So, I think you're going to have to deal with that at some point and it's going to be a difficult thing to deal with.

The second thing if you want to do a comparable study is, and someone may have done this already in the military, and that is you're going to have to get decision points that are
comparable.

The military process is somewhat different, at least in the reports that I read and there are more actors involved and there's more decision points made and how those actually square up to the decision points and the processing in the civilian system, someone's going to have to deal with that, I think, so that you get those points.

And it may be that you can't get good information on all the points and you collapse them. So, but that's another thing that you're going to really have to deal with, I think, if you're going to use this methodology of comparison to make your statements.

The third thing is you're going to have the same kind of problem with punishments. The civilian justice system has a very limited number of things that they can do so that -- and that will affect every other decision in the process.

If my choice is to send you to prison
or to let you go, that constrains a lot of things in the system.

If I have the option of taking your pension, of demoting you, of doing a whole bunch of other things, then you should have a philosopher around to see how things are going to square up in terms of sentencing area and so on.

And so, I think this is going to be a real problem. I think that the comparability of losing your pension as opposed to spending six months in jail is going to be an interesting thing for people to deal with.

And so, the other thing I think that's going to be a problem is what Cassia has already referred to and that is when you want to get something and say something about the civilian system, you do not have a national representative number at this point.

But I doubt if that would mean that you'll be off the hook about doing this. You're going to have to do something. So, the question becomes -- you should look around.
The federal justice research program is a very highly integrated set of data that BJS maintains. It's only good for the federal system. But, it's pretty good for the federal system. I think Brian has a few problems with it, but I think it's pretty good because it goes through each stage which you don't have much at the local level.

The state data, which I'm sure Howard talked about, is representative of, what was it, about 40 jurisdictions?

DR. SPOHN: Forty jurisdictions.

DR. LYNCH: Forty largest jurisdictions.

So and, then they'll have some good studies like the ones that Cassia has done and has referred to and which would be much more detailed.

And, I think you're going to use all of those sources. And, again, you're going to be stuck in the sensitivity situation where you're going to look -- it could be that these things
will converge very nicely so that the
transitional probabilities will be easy to
select. But, they probably won't.

And so, I think, again, you're going
to have to sort of do some approximations to get
those kinds of things.

So, I think that's really all I have
to say. It's not much, but I think it's -- I
don't envy you, but I think if you can do those
things about the decision points, and if you can
do those things about the comparability of
punishments, I think that would be a terrific
advance on this issue, you know, because people
don't know that there are those things in there
in the data.

There may also be charge issues.
There may also be the changes in the code or
differences in the code that you may not take
into account when you're starting to do this
comparison across the two systems.

CHAIR HOLTZMAN: Well, thank you very
much.
We'll start with Mr. Taylor.

MR. TAYLOR: Yes, thanks to both of you for being here today.

I'm very interested in your comments, particularly in your report about the prosecutorial decision in LA and the LA Sheriff's Department and Police Department.

And, when you made your comments about exceptional means for clearing a case, I wasn't sure in the Executive Summary that we were provided what you meant, but I assume it's a decision just to wash that case out at that point.

DR. SPOHN: According to the Uniform Crime Reporting Handbook, the police can clear cases in two ways. They can clear it by arrest or by exceptional means.

And, to clear the case by exceptional means, they have to know who the suspect is, where he is. They have to have probable cause to make an arrest, but there has to be something beyond the control of law enforcement that
precludes them from making an arrest.

And so, then when the FBI reports that data, they mush those two things together into cleared cases. And so, cleared by arrest and cleared by exceptional means get combined by the FBI as cases that were cleared.

And so, if you just look at that data, you might say, oh, the Los Angeles County Sheriff's Department solved 88 percent of their cases in 2008 because they had clearance rate of 88 percent. Well, 55 percent of those were exceptional clearance which means they didn't make an arrest at all.

MR. TAYLOR: I thought that was very interesting.

When you did your analysis earlier of how a prosecutor might make a decision to go forward or not in a sexual assault case, you talked about the likelihoods of one outcome or the other.

How would that change, in your view, when a commander who is responsible for good
order and discipline for an entire military community and an organization, how would that calculus change in terms of how he evaluated or she evaluated whether to go forward with the case?

DR. SPOHN: That's a difficult question. Usually, you think of prosecutors of making decisions to charge or not either based on legal sufficiency. That is, are all the legal elements of the crime present? Or based on trial sufficiency. That is, could they take the case to trial and win?

And so, those other sorts of considerations would obviously impact that decision, but the way that they impact, that's an interesting question.

MR. TAYLOR: And, it may be a little unfair, but let me ask you a third question, and this is my last question.

You made the comment that even though you are able to do research, you were concerned about generalizing and you used the urban rural
comparison. Do you think it would be easier to
generalize based on sample if, in fact, you're
speaking of a military culture as opposed to an
urban rural or other distinctions you would make?

DR. SPOHN: Are you talking about
getting a sample of data from the military?

MR. TAYLOR: Yes.

DR. SPOHN: Obviously, if the sample
is selected appropriately, then you can reach
generalizable conclusions. But, that's -- you
know, the devil is in the details. You know, are
you able to select a representative sample of
cases and, you know, how much will that do?

MR. TAYLOR: Thank you.

DR. SPOHN: Yes.

MR. TAYLOR: I have no further
questions.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: I guess my question is for
either and, if you both have an answer.

Based on what we just heard and other
testimony we've had, I think that we are most
interested in sexual assaults committed by non-
strangers because the military is such a closed
unit and also not family members. Because
typically, they're not, you know, cited together
in great numbers.

So, I guess what I'm wondering is, do
you either know of or do you think there might be
a sample or study out there you could find us
that deals with sexual assaults among non-
strangers that people have done? Because I think
that would be really useful if somebody could
find that for us. That would be a little closer
to our situation.

DR. SPOHN: Well, in a civilian
system, most sexual assaults do not involve
strangers. In the LA study, I can't remember
exactly what the numbers were, but the
overwhelming majority of these cases involve non-
strangers.

And so, and that would be true, I
think, nationally. And so, if we could -- most
research then is research on non-strangers.
DR. LYNCH: Yes, that's true, even the National Crime Survey, I'd guess that people are not strangers.

MR. STONE: So, the fact that they're not strangers in the military shouldn't be a real bar to us learning something from national statistics to the extent they're out there, studies, even if they're anecdotal?

MR. LYNCH: Well, you could even -- there are data filed. I mean ICPSR, there are places where you can -- Inter-University Consortium for Political and Social Research. It's a Michigan archive that's been around since the '30s, I believe, or something, maybe the '40s or something like that. I wasn't born yet, when it was there.

So, there are data there that can be analyzed. You can pull out those cases if that's what you want.

MR. STONE: Okay.

DR. SPOHN: And, there are studies that partition the data by the relationship
between the victim and the offender and just look at cases involving non-strangers. We did that in our Los Angeles study.

MR. STONE: So, maybe if you could point us to one or two in a follow up email or letter, that would be great.

DR. SPOHN: Okay.

CHAIR HOLTZMAN: I don't have any questions, but I just want to thank you very much for a very thoughtful and very helpful testimony and we really appreciate your time in helping to enlighten us on this very, very important but difficult subject.

Thank you. Our next panel will be --

MR. STONE: Can we get a two minute break?

CHAIR HOLTZMAN: Okay, two minutes.

(Whereupon, the above-entitled matter went off the record at 2:57 p.m. and resumed at 3:03 p.m.)

CHAIR HOLTZMAN: Thank you very much.

We're very fortunate to have as our next panel
discussants who will give us an overview of data collection on sexual assault by the Department of Defense Sexual Assault Prevention and Response Office.

And, we have two experts to help guide us, Major General Camille M. Nichols, U.S. Army Director, Department of Defense Sexual Assault Prevent and Response Office and Dr. Nathan W. Galbreath, Senior Executive Advisor, Department of Defense Sexual Assault Prevention and Response Office.

And, Dr. Galbreath is definitely some kind of level of masochist. This is -- I don't know what time this is, the fourth, fifth, sixth time before us.

DR. GALBREATH: Something, yes, ma'am.

Happy to help.

CHAIR HOLTZMAN: Thank you.

Purple Heart, I think that's maybe the more appropriate.

MG NICHOLS: Wait a minute, they didn't tell me I was going to get injured doing
CHAIR HOLTZMAN: You never know.
Okay, we'll start with you, Major General Nichols. Thank you for coming.

MG NICHOLS: Thank you. Good afternoon. Thank you, Chairwoman Holtzman and Members of the Panel for inviting us here today.

Today, we're pleased to be able to describe our data collection efforts and how they inform our policies and initiatives.

Following my statement, Dr. Galbreath will briefly walk you through a process map that describes how cases flow through the military justice system.

First of all, I want to acknowledge the brave survivors, both men and women, who have shared their testimony with this Panel over the past few months.

Members of my staff were present at each of the previous meetings and listened to their accounts. I can only --

CHAIR HOLTZMAN: Excuse me. Major
General Nichols, let me just say first that we are prepared to accept your whole written statement in full, so you should feel free to summarize it or cut and paste, whatever you like.

MG NICHOLS: All right, ma'am.

So, based on the last couple of discussions, I do need the whole document presented into the record, if that's all right.

CHAIR HOLTZMAN: It will be done.

Thank you.

MG NICHOLS: So, the data sets that we have to use to go about gathering our information are from actual case files, crime reports, if you will, surveys and then focus groups.

Crime report data comes from the restricted and unrestricted reports of sexual assault made to the Department. This information is now uniformly captured in the Defense Sexual Assault Incident Database or DSAID.

We also capture case disposition information that allows us to record what happened to each report we receive, including
outcomes of prosecutions, administrative separations and the other actions taken by the command.

Survey data comes from a variety of sources but we rely heavily on the Workplace and General Relations Survey conducted by us, excuse me, for us by the Defense Manpower Data Center, DMDC, to estimate the occurrence of sexual assault in the military population.

Most recently, the RAND Corporation was tasked with fine tuning and conducting the survey for us in 2014. The revised version that RAND conducted considered and incorporated recommendations made by the Response System's Panel, allowing us to produce crime rate estimates that more closely align with the language in the Uniform Code of Military Justice.

We have also deployed two victim-focused surveys to better capture their experiences and needs.

We also capture data from the Defense Equal Opportunity Management Institute on their
climate surveys and the DoD Health-Related Survey.

Data from surveys could not -- not only allows us to estimate how often sexual assault occurs, but also what the impact of the crime is on the victim and the attitudes that our people have about reporting and the services we provide.

Finally, the Department is participating in the National Intimate Partner and Sexual Violence Survey conducted by the Center for Disease Control and Prevention.

This particular research effort is the only reliable source for comparative information about the prevalence of sexual assault in the civilian and military populations.

Our results from our focus groups are qualitative and cannot be generalized to the full population, we find them helpful in exploring themes from our survey data as well as identifying emerging trends in the attitudes and behavior of our victims.
We find that our people are becoming overly surveyed on this and other topics and so the focus groups help us with that survey burden.

I want to go specifically to the DSAID Development Database.

Since 2005, the Department has provided Congress with an annual report on sexual assault in the military. Over the years, this report has grown in both size and scope as our collective need for data has expanded.

In the early years of the SAPRO program, our reports were quite short and only captured the number of sexual assault reports made the Department and a few data elements about the victims and the offenses.

Logically, both the Department and Congress wanted to know the outcome of these cases which caused us to include in our annual reports disposition information and a brief synopsis of each case.

Starting in 2009, the Department began to use this information to graphically illustrate
how cases flow through the military investigative
and justice processes.

    Case attrition through the military
justice system was both informative and eye
opening.

    We are aware of no other jurisdiction,
as just was pointed out, in the country that can
follow every sexual assault report through its
justice system.

    Dr. Galbreath, as I said, will walk
you through those details.

    We'd like to tell you that the
Department approached that perfectly anticipated
all of our data needs and reflects a strategy put
in place in early 2005 when we implemented the
SAPRO program was the right thing.

    In truth, our approach to gathering
data has been an iterative process. In addition
to data collection across the Department to
support our program required new and improved
data sharing agreements between our office, the
Military Services, criminal investigators and the
military justice personnel.

Our data capture efforts also required us to map a process so that, again, as I said, there's no comparative one in the civilian sector.

In 2009, Congress directed that we develop and implement a case level database for the reporting of sexual assault data.

We also recognized that we needed to provide our response personnel with case management and business management capability.

Consequently, we assembled a Service-led task force to develop a proposal for that database with all of these functionalities.

The result is DSAID. DSAID attained full operational capability in 2012 and has since standardized and automated the Department's sexual assault data capture process, improved both Services and DoD oversight of cases and outcomes and enhanced analysis and reporting.

2014 was the first full year where all four Services used the database.
Sexual Assault Response Coordinators enter the information about unrestricted and restricted reports into that database and leverage the system to help them actually manage care.

DSAID is the system of record for all information about restricted reports except that we do not have the victims' personal identification in it.

We rely upon the military criminal investigative organization databases to be the system of record for data on unrestricted reports. Consequently, the investigator systems share nonsensitive information and alleged offender information with DSAID through weekly automated interfaces, the sucking and pulling as was described earlier that we should have systems to do that is, in fact, how we get the data out of the actual investigator files. So, we already have that capability.

We also capture case outcomes in DSAID. At the completion of the investigation,
legal officers from the Offices of the Judge
Advocate General and the legal advisor to the
Commandant of the Marine Corps input and validate
case disposition data and write synopsis for each
substantiated case.

This disposition data show whether the
Department was able to take legal action against
an alleged offender, what that action was and how
long the process actually took.

We are looking to do even more as we
learn where gaps or are required to get more
information that we currently don't do. We have
a process where we try to do some investments to
continually look at how the users of the
database, how user-friendly it is, the kinds of
things we need them to put in, validation of that
data so that we have an open, transparent,
consistent way to gather it and that we're very
confident in the data.

And so, that's a real quick summary of
my statement and now we'll go through the process
that Dr. Galbreath has.
CHAIR HOLTZMAN: Thank you very much, Major General.

Dr. Galbreath?

DR. GALBREATH: Ma'am, when Dr. Spohn put up her process map for LA County, it got me very excited because I have one just like it except mine is in color and it has a little -- a few more data points.

But, we're certainly happy to share. One of the things that was a real challenge for us is our requirement from Congress to report all sexual assaults committed by and committed against Servicemembers as well as provide an outcome associated with every case that's reported.

So, that really kind of set us up to begin to create our process.

So, this is the page I'll start off with. This is the very beginning. You'll see that at the top line here, at Point A, these are all the reports that come in to the Department.

Before we start going down the flow,
I would also just emphasize the fact that we try to get the full picture of sexual assault in the military by conducting our prevalent surveys and those are every two years. So, that gives us basically a denominator.

What I would offer to you is that if you think of the problem of sexual assault as an iceberg that the iceberg is the full prevalent survey and whatever part sticks up above the water, that's the cases that we actually see.

So, our cases that we receive every year have varied, and these are very rough estimates, from about seven percent of what we think the problem is to last year, where we got around a quarter of what we think is actually out there as far as cases being reported.

And, that's one of the ways that we are tracking our progress is we think that bringing people forward to report the crime not only connects them with care, but that's our only opportunity, really, to hold people appropriately accountable for the crime.
So, I don't -- I'm not going to
terrorize you with my process map, but what I
will do is just offer to you the idea that at
Point A, you'll see all of the cases that come in
that are reported.

At Point B, we break off, and these
are going to just be the unrestricted cases and
those are going to be referred for criminal
investigation.

A quarter of our cases every year are
restricted, in the red box, and there is no
further disposition associated with those. And
that's because that's the promise of a restricted
report, that it's confidential. It allows you
access to care and you don't have to participate
in the justice system.

You can always convert if you'd like
to. Most cases, if they're going to convert, do
so in about the first 30 days or so. But, bottom
line is, that's where about a quarter of our
cases stop.

I won't deep dive you into this next
part, but I will tell you that all cases are referred for criminal investigation because we have to report on the fiscal year, it's a snapshot in time. All of our cases are a snapshot in time.

So, when cases are referred for investigation, there's always going to be some that are completed within the fiscal year reporting period and some that are not.

Now, a coming attraction within the next year or so, I'm actually going to be able to have for the first time ever in the Department, everything that came in for 2014, I will be able to tell you where it went to.

So, we'll basically have a whole case accounting for a whole year's time period.

The difference what I have right now is, these are cases -- some came in this year, some were finished this year and others were not.

So, if you turn to the next page, both of the researchers in the previous panel talked about case attrition. And this is largely what
we're talking about here is, after a case is investigated, where does it go?

And, you'll notice that, starting up at the top at Point J, you'll have a number of subjects in our criminal investigations where -- that were conducted by the criminal investigators.

There are every year in our cases, there are people that fall outside the jurisdiction of the Department either because the case was found to have not occurred as alleged, and those are cases that are often called unfounded.

There are other cases that were the offender is unknown and these are the blocks over in K, L, M and O. The offender is unknown, the subject is a civilian or foreign national outside our jurisdiction, the subject died or deserted before we could take action.

And then, finally, we have military alleged offenders that are under the authority of a state or foreign nation. And they're
exercising their legal authority.

But, if you were to go down to Point Q, what you would find Q and U, and actually that diamond right before Point Q, this is the point at which military commanders engage at that system in our system.

And so, these are the cases that are put before military commanders for a determination of what should be done.

And so, this would be the equivalent, I would say and a rough estimate of taking your case to your district attorney and saying here's the evidence that we have, what should be done at this point?

The rest of the process is largely how we account for all of the things that go forward or not.

Before I talk about cases that go forward, if you take a look at Points U and V in the blue color, these are reasons why a case might not go forward.

So, for example, commanders can't take
action because the victim may have declined to
participate in the justice action, there was
insufficient of any offense to prosecute,
insufficient evidence of any offense to
prosecute. It could be that the Statute of
Limitations has expired or it could be that the
victim died before completion of a justice
action.

And then, finally, the last one is
because the case was determined to be unfounded
by a commander after legal review.

You'll notice that K and V look very
similar. You all may give us a recommendation to
align these processes and we have and we'll have
that in '15 for you.

If you look at the green column over
here, you're going to see the light green and the
dark green and that's at Points Q and R and S and
T. S and T are the dark green, Q and R the light
green.

The light green are cases where after
a criminal investigation, there was at least one
sexual assault offense to be charged in that situation.

The dark green are cases where, even though the case was reported as a sexual assault, there was no evidence of a sexual assault identified but there was other misconduct that could be acted upon and we track that, too.

And so, that's what you see in the S and the T, that dark green piece.

What your staff asked me to do is to have -- is for us to take a look at this court martial charge preferred block up here under Q and I'll just ask you to very quickly turn the page and it says court martial outcomes and this will be largely the same for other folks, but they asked me to walk you through the process map here that we were able to come up with.

So, this will say R at the top of the page. On the top of the page it says Court Martial Outcomes Sexual Assault Offenses. Okay?

So, every year, you know that after a court martial charge is preferred, there is a
rather long system of Article 32 hearings and
reports that are written and things like that.

My system doesn't necessarily capture
the Article 32 process, but it does capture
charges that are preferred, how many actually
proceeded to trial. The others could be cases
that the court martial charges were dismissed or
that a discharge or resignation in lieu of court
martial was granted.

Those are those three boxes that
you'll see on this kind of second column here.

So, that reflects largely the outcomes
of Article 32 hearings as well as any other
reason for why a case that has been preferred
might fall out of the system or attrite under
those situations.

So, if you take a look at that top box
that talks about proceeded to trial, then you'll
see in the next column, convicted of any charge
at trial or acquitted of all charges.

Our bucket that talks about convicted
at any charge will then connect to all of the
different kinds of punishments that you can get
out of the court martial as well as we track
individual sex offender registration requirements
as well as cases where when there is no punitive
discharge awarded at court, the Congress has
required the Services to process those cases for
administrative discharge. And so, we capture
that information as well.

This information on this page is
largely entered by our legal officers from the
Judge Advocate General's Offices. We grant
access to them that, at the end of the year, they
actually have a list of cases, sometimes very,
very long, that they then must hunt down and
track down what the outcomes of these cases are
to report.

They do that not only for sexual
assault cases that travel through our courts
martial system, but also for non-judicial
punishments as well. And then, also for those
cases where there was no sexual assault charge
identified, but we prosecuted for some other
misconduct.

That is a warp speed travel through the process map. We're happy to answer any questions that you have.

But, what I would offer to you is that this was, as Dr. Spohn pointed out, there is no equivalent process or database that we could find and so, we largely had to -- I had to lock everybody in a room for about three, four or five weeks on multiple occasions to have them map this process out.

I had to get representatives from the Department's Defense Inspector General, the Office of the Judge Advocate's General, the criminal investigative organizations and everybody together to kind of talk about how we could reduce this to a process map that we could then begin to bucket, identify dispositions and collect data on.

So, this was kind -- this started -- this work started in about 2008 just to process -- to get this process on the thing. And then,
of course, since that time, we've been building in the automation ever since.

So, I'm done.

CHAIR HOLTZMAN: Thank you very much.

That was very good.

Mr. Stone, we'll start with you.

MR. STONE: Okay.

I think the process map is very interesting. I think it makes a lot of things clear. But, I'm most confused a little bit by the footnotes on the last three pages that say punishments do not add to a 100 percent because subjects can receive multiple punishments.

What I was hoping to see was some percentages in those boxes you had or when you'll have for us some numbers and percentages on the same chart so we get a sense of where it's going.

DR. GALBREATH: I have those for you. They're in our annual reports every year. We thought it might be easier to give you the non-numbered version just to familiarize yourself, but I have all of that reaching back to 2009 for
you.

MR. STONE:  Great, and you'll send

that to us with the same chart with the number in

it?

DR. GALBREATH:  Absolutely, sir.

MR. STONE:  Fantastic. Thank you,

that's my only question.

CHAIR HOLTZMAN:  Mr. Taylor?

MR. TAYLOR:  Yes, well, first of all,

thanks to both of you for being here late on

Friday afternoon.

Did I understand you to say that the

lawyers enter their data at the end of the year,

meaning that this is not continuously updated as

things happen, but there is a period of time

during which people must refresh or enter the

statistics for that particular year?

DR. GALBREATH:  We actually have them

try to do it quarterly and keep it up to date on

a quarterly basis because we've told them that

starting in 2014, since we have all of this, we

wanted to be able to do some quarterly snapshots
and see where we are throughout the year.

Again, 2014's the first year that we've had data. So, I've asked -- we've asked everybody, as a matter of fact, General Snow asked everyone last April to do a quarterly data drill.

It is a level of effort, a considerable level of effort because all of your Judge Advocate General reps have to chase down, of course, we're decentralized all over the world and they have to chase down every single case and get the record -- the report of trial and the outcomes and then load those in.

MG NICHOLS: We do need the data to be certified and fully validated at the end of the year so that we're able to generate the annual reports, sir.

So, there is definitely a big push to ensure anything that was closed but they might not have gotten the information is on its way in getting into the database so that we can assure we have a good snapshot for that last FY.
MR. TAYLOR: And, is there some
guarantee at the local level that you're local
SAPRO officers are also following this on a real
time basis so that they're tracking reports at
the same time the data are coming into your
system?

DR. GALBREATH: Yes, sir.

MG NICHOLS: Yes, absolutely right, sir. So, we now can see things so we're trying
-- we're running reports, the SAPRO Service
Offices are running reports to see what kind of
data fields are filled in by the SARCs, what
types of field use is happening down at that
local level and we're trying to then have those
discussions.

I meet with the Service SAPRO offices
senior leaders once a month just about and we
talk about data entry, data access, we have our
DSAID expert here as well. They do webinars,
they do runs for Nate and myself to see where do
we sit, how many reports do we have going in
there, so that we can ensure in our little
oversight role that everyone's not waiting until 
the end of the year.

So, again, it's only a year and a half 
old in the sense of its full use by all four 
Services. So, we are encouraging people to use 
it as they go so that it's much easier to have 
the data -- not have data integrity problems.

MR. TAYLOR: Thank you.

CHAIR HOLTZMAN: Thank you again very 
much for your testimony.

So, I just have a couple questions and 
maybe I hope not too many.

Is there any information that you 
think or any boxes that are off -- that are not 
on this chart you think need to be on this chart?

MG NICHOLS: As it relates to sexual 
assault?

CHAIR HOLTZMAN: Sexual assault.

MG NICHOLS: We are being definitely 
insightful in the retaliation arena. And we have 
an effort ongoing right now, the Secretary of 
Defense has got us doing a prevention strategy,
retaliation prevention strategy and we have a
couple of recommendations about tracking
retaliation and then supporting a report of
retaliation.

So, I believe we'll be looking at
information along those lines as well.

CHAIR HOLTZMAN: We were just
discussing that this morning.

MG NICHOLS: So, that's something to
be, though, in our new policy that just came out,
the SARCs and the advocates and the Service SAPRO
offices have to track sexual assault reported,
retaliatory behavior, now just a matter of
getting it in and ensuring that it's tracked in
the database as well.

CHAIR HOLTZMAN: That's what we were
just discussing this morning and we were actually
recommending the use of a standard form to report
retaliation throughout the system so that you
could keep track of it.

MG NICHOLS: Ma'am, so great, I guess
good minds --
CHAIR HOLTZMAN: Great minds.

MG NICHOLS: -- think alike. Great minds.

CHAIR HOLTZMAN: Great minds.

MG NICHOLS: And so, we are in the process. If the Secretary buys off on that recommendation, there'll be an implementation team that figures out what are the data set, how often, where will it go, what will it look like and then, of course, we have to adjust our DSAID because we want to automate it in there and easy to use, so we'll have to make some adjustments.

CHAIR HOLTZMAN: Great. So, I'm glad we're on the same page.

MG NICHOLS: Excellent.

CHAIR HOLTZMAN: But, I was just -- not including something like retaliation, which I think is also very important because you've got to track that if you're going to address that in the same way you address -- I mean the DoD has addressed sexual assault.

But, I'm just looking at this, for
example, convicted of any charge at trial is pretty vague, how do we know whether anyone was convicted of a sexual assault charge or was charged with sexual assault? There's no way of disaggregating that information at this point, or am I wrong?

DR. GALBREATH: No, we can, ma'am.

MG NICHOLS: You could do a report.

CHAIR HOLTZMAN: You can? But, is that going to be reported out here? In other words, is that going to be a separate or a part of this box so that we can know just eyeballing it without asking for additional information how many cases where there was a sexual assault charge alleged, did you have a conviction at trial for that charge?

DR. GALBREATH: And that's what this page will show you.

CHAIR HOLTZMAN: Oh, okay. I couldn't really tell from that.

DR. GALBREATH: Yes, ma'am.

MG NICHOLS: And, the annual report
has that specifically called out.

DR. GALBREATH: Yes, ma'am.

CHAIR HOLTZMAN: Okay. In the testimony we heard from the Sentencing Commission, the judges are required or the courts are required, but actually, I guess each judge and the probation officer or whatever is required to provide the information within 30 days so you're not in a situation of playing catch up ball.

How would that requirement work for you and would that be something worth looking at?

MG NICHOLS: So, the folks that are entering that data are from the Judge Advocates General's offices and, you know, we -- the policy, I mean they are executing, right, so we don't say within 24 hours, you have to have this uploaded.

So, I mean it's something I think you'd have to ask them what type of burden that would be if a 30-day turnaround is required.

We do know that when we do our annual
report, so that's the dilemma, at the end of the FY and within that 30 days after that, we need all of this data updated. So, how they are actually downstream internally working that, I don't know if they're internally done within 30 days or 60 days of a case closing, they must put the data in and then they're monitoring the data quality.

We aren't doing that at our level. We are leveraging the Services validation, secretaries validation, of all of their data knowing that it has to be for the entire FY closing.

And so, we're probably not the right people to ask what impact that might have, it would certainly ease our concern that maybe we don't have the latest and greatest data as we're trying to do -- snap the chalk line in, execute things.

CHAIR HOLTZMAN: According to the Sentencing Commission representative here, Congress mandated the provision of that
information, the sentencing information. Maybe I have it -- I don't have it completely accurate, but certain information about the sentence has to be provided within 30 days. Congress mandated that.

So, and they enforce that actually by publishing a list of all the baddies who don't comply and nobody wants to be on this list. So, apparently it works. I just throw that out as something we heard earlier today.

And, the other point that they made in terms of data entry was that the information was more accurate, is that the right word, more legitimate, more credible, if the people were putting this in as part of their routine job. So, I don't know whether that applies when the Judge Advocates don't -- if that's not a routine task they have. Are they the right people to do this? And what you can do to make sure that the data entry is as accurate as possible.

Is there something that's going to be in here about sentences? I mean about what
happens to people who are imprisoned and that's not going to be part of this? Well, it's not part of it now, is it going to be part of it?

DR. GALBREATH: As far as how much time they actually spend in prison and things?

CHAIR HOLTZMAN: Yes and so forth.

DR. GALBREATH: Right. Not on the drawing boards right now. That's not something that's been outside -- that's outside of the scope --

MG NICHOLS: That's outside the scope, right.

DR. GALBREATH: -- of our requirement.

CHAIR HOLTZMAN: Oh, okay. So, that's not going to be here? But that's something we might want to look at.

Okay, I don't think I have any other questions. Mr. Stone, you have one?

MR. STONE: Just one clarification of what was in there.

But, where it says confinement, reduction in rank and fines and forfeitures, the
data you're collecting will tell us how much an
average -- what the average sentences were? What
the average fines were in those cases? And, what
the average reduction in rank were? It doesn't
just say it was done, it gives us some kind of a
number that's an average or something?

DR. GALBREATH: Mm-hm.

MR. STONE: That's great. It just
doesn't tell us how much of the time that was
imposed is actually served? I gather it won't
tell us how much of the fine was actually paid?
I mean those are sort of interesting and you
might kind of think of that to the future, if you
have a way of capturing that.

And, the only other question was, on
the various bits of data, is it going to give us
elapsed time from each box? In other words, from
first complaint to resolution? It won't give us
elapsed time?

DR. GALBREATH: It will -- we can give
you basically from the day that a complaint came
in to the day that the final --
MR. STONE: The outcome?

DR. GALBREATH: -- outcome was captured and we do have that and that was a non-metric that we tracked for the President's report in 2014.

MR. STONE: So, there is some kind of elapsed time?

DR. GALBREATH: There is. I can give you investigative length and I can give you kind of from the day that the report came in to the day that that sentence was adjudged.

MR. STONE: Great.

CHAIR HOLTZMAN: Great.

MR. STONE: Well, look forward to that.

CHAIR HOLTZMAN: Thank you very much for this very helpful information. We appreciate your accommodating us on the time factor, too.

MG NICHOLS: You're welcome.

MS. FRIED: Ma'am, have you concluded for the day?

CHAIR HOLTZMAN: Yes, ma'am.
MS. FRIED: The meeting is closed.

CHAIR HOLTZMAN: Thank you, Ms. Fried.

Thank you, Panel Members, thank you members of the audience. Thank you to all presenters.

(Whereupon, the above-entitled matter was adjourned at 3:34 p.m.)
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