UNITED STATES DEPARTMENT OF DEFENSE

DEFENSE ADVISORY COMMITTEE ON INVESTIGATION,
PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT
IN THE ARMED FORCES (DAC-IPAD)

PUBLIC MEETING

FRIDAY
APRIL 20, 2018

The Committee convened in Suite 1432, One Liberty Center, 875 N. Randolph Street, Arlington, Virginia, at 9:00 a.m., Martha S. Bashford, Chair, presiding.

PRESENT

MARTHA S. BASHFORD, Chair
THE HON. LEO I. BRISBOIS
MS. KATHLEEN B. CANNON
MS. MARGARET A. GARVIN
THE HON. PAUL W. GRIMM
DEAN KEITH HARRISON
MR. A.J. KRAMER
MS. JENNIFER GENTILE LONG
MR. JAMES P. MARKEY
CMSAF RODNEY J. McKINLEY, USAF, Ret.
BRIG. GEN. JAMES SCHWENK, USMC, Ret.

DR. CASSIA C. SPOHN

MS. MEGHAN A. TOKASH

THE HON. REGGIE WALTON
ALSO PRESENT

COLONEL STEVEN B. WEIR, U.S. Army, JAG Corps,
   Deputy Staff Director

MS. JULIE CARSON, Legislative Liaison/Attorney Advisor

DR. JANICE CHAYT, Investigator

MS. THERESA GALLAGHER, Attorney Advisor

MR. GLEN HINES, Attorney Advisor

MAJOR ISRAEL KING, USAF, Alternate Designated Federal Official

MR. CHUCK MASON, Attorney Advisor

MEGHAN PETERS, Attorney Advisor

MS. STAYCE ROZELL, Senior Paralegal

MS. TERRI SAUNDERS, Attorney Advisor

MR. DWIGHT SULLIVAN, DFO

MS. KATE TAGERT, Attorney Advisor
<table>
<thead>
<tr>
<th>CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Welcome and Introduction ....... 4</td>
</tr>
<tr>
<td>Best Practices for Case Management and Data Collection in Civilian Criminal Courts .... 8</td>
</tr>
<tr>
<td>Current Capabilities of the Military Services' Case Management and Data Collection Program .... 145</td>
</tr>
<tr>
<td>Updates for the Committee from the Data, Case Review, and Policy Working Groups .... 154</td>
</tr>
<tr>
<td>Adjourn .......... 328</td>
</tr>
</tbody>
</table>
MR. SULLIVAN: Good morning, I am Dwight Sullivan, the designated Federal Officer of the Defense Advisory Committee on Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces -- because that is such a mouthful, better known as the DAC-IPAD. Public comments will be heard at the end of the meeting at the discretion of the Chair. It would be inappropriate for anyone in the Public hour to make a comment at any other time. However, written public comments may always be submitted to the committee for consideration. This meeting is open. Ms. Bashford, you have the conn.

CHAIR BASHFORD: Thank you, Mr. Sullivan. Good morning. I would like to welcome members -- everyone in attendance today to the seventh meeting of the Defense Advisory Committee on Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces. Or, as Mr. Sullivan said, that's a mouthful, so the DAC-
IPAD. The Secretary of Defense appointed 16 members to this committee. All of the members are present with the exception of Major General Marsha Anderson and Dr. Jennifer Markowitz, and we anticipate the arrival of Jennifer Long to the meeting.

The DAC-IPAD was created by the Secretary of Defense in accordance with the National Defense Authorization Act for Fiscal Year 2015 as amended. Our mandate is to advise the Secretary of Defense on the investigation, prosecution and defense of allegations of sexual assault and other sexual misconduct involving members of the armed forces. Please note that today's meeting is being transcribed. A complete written transcript will be posted on the DAC-IPAD website. At today's meeting the committee will begin its review of Article 140a, Uniform Code of Military Justice, which was passed as part of Fiscal Year 2017 National Defense Authorization Act. Article 140a requires the Secretary of Defense to set uniform standards and criteria for
managing courts-martial, collecting data from criminal cases across all of the military services no later than January 1, 2019.

The committee will make recommendations to the Secretary of Defense for the statutory deadline based on its review of best practices in the civilian and military justice systems. This task ties together several issues of importance to this committee. First, the committee has reviewed the findings and recommendations of the Judicial Proceedings Panel, the JPP, concerning the need for improvement in sexual assault case data collection. Second, the DAC-IPAD has collected and continues to review court martial case documents from 2012 to the present for military services. Finally, with the passage of the Military Justice Act of 2016, Congress has enacted a substantial overhaul of the procedural and substantive provisions of the UCMJ and many of those changes will affect the investigation, prosecution and defense of sexual assault in the
armed forces. 140a provides a vehicle for
understanding the impact of those changes, and
for obtaining valuable information about sexual
assault cases prosecuted by the military.

The broad expertise in civilian and
military criminal justice of our members makes
this committee extraordinarily well positioned to
advise the Secretary of Defense regarding the
sexual assault case information that should be
available under 140a, and how best to obtain this
information. For this meeting we will hear
testimony from experts from the U.S. Sentencing
Commission, the Administrative Office of the U.S.
Courts, and the Department of Justice's Bureau of
Justice Statistics to discuss current and best
practices in the civilian system as well as
testimony from representatives from each military
services' legal organizations to discuss the
services' legal data collection capabilities and
requirements.

Each public meeting of the DAC-IPAD
includes a period of time for public comment.
The committee received no such requests before this meeting. If a member of the audience would like to comment on an issue, please direct your request to the DAC-IPAD staff director, Colonel Steven Weir. All public comments will be heard at the end of the meeting at the discretion of the Chair and written public comments may always be submitted for committee consideration.

Welcome Colonel Steven Weir at his first meeting as director, and Ms. Julie Carson at her first meeting as deputy-director of the DAC-IPAD. Thank you all very much for joining us today. Our first presenter is Mr. Glen Schmitt, director, Office of Research and Data, U.S. Sentencing Commission. Mr. Schmitt, we look forward to hearing from you and from each of the presenters.

MR. SCHMITT: Madam Chairman, if you don't mind, by agreement with Ms. McCaleb, we thought that it might make more sense if she were to precede me because it reflects the order in which things happen in the judicial branch. And
so, if you don't mind, I will defer to her.

CHAIR BASHFORD: Great, thank you.

MS. McCALEB: Good morning everyone.

My name is Margaret Sheehan McCaleb. I am the project director for the next generation of the Case Management Electronic Case Law System at the Administrative Office of the U.S. Courts. CM/ECF is the online system that all federal, appellate, district and bankruptcy courts use to manage their cases and which attorneys use to file their motions, briefs and all case-related documents over the internet. The development of CM/ECF began in 1995 when a district court contacted the AO for help in managing very large cases involving attorneys from around the country. The court asked if the AO could develop a method for the attorneys to file case documents electronically. A prototype was developed and successfully used by the court. The benefits to both filing attorneys and the court were apparent. Attorneys could file documents 24/7 and from their own offices, and the documents
could be used simultaneously by opposing counsel, judges and all court staff. Subsequently, the AO worked with four district and five bankruptcy pilot courts to refine the electronic filing component and to develop a case management component to allow court staff to electronically manage the case information. These nine pilot courts began live operations between November 1996 and March 1998.

In 2001 the national rollout of CM/ECF was launched to the district and bankruptcy courts and the development of the appellate court version of CM/ECF began. By 2012 all 204 federal, appellate, district and bankruptcy courts were using CM/ECF. Because there were variations in the business processes among each of the three court types, there were three separate but related versions of CM/ECF -- one each for appellate, district and bankruptcy. For example, there is no need to file claims information in an appellate or district court, but that information is necessary for bankruptcy
cases. Similarly, appellate courts track three judge panels and the work of those panels, but that functionality is not needed for bankruptcy courts. Because there are also variations among the courts within a given type, the nationally supported versions of CM/ECF include tables that allow individual courts to customize the application to meet their local rules and procedures. For example, in district courts, there are seven possible ways to display the case number. In addition to the year and number, some district courts use an office code, the judge's initials and the case type -- criminal or civil -- in various combinations. A table in the database allows that configuration to be set for each court.

There are hundreds of examples of other means of configuring the system that allow courts to make their own determinations for options such as information displayed on particular screens and reports, the order of the information and which modules in the system will
be used and by whom. CM/ECF allows judges, chamber staff and clerks' office staff to manage cases electronically, keeping track of deadlines, hearings, trials, motions filed and more. It also provides automatic notification of filings. For example, when an attorney files a motion, a notice is emailed to all attorneys in the case and the document is automatically added to the docket sheet. Court staff also receive the email notification. When an attorney receives the email that a document has been filed, he or she can click on a link to view and download the document.

Courts have developed quality control processes that are used for documents that attorneys file to ensure, for example, that the document is filed with the right case, or that the title of the document matches the docket event that the attorney selected when uploading the document into the system. Each court establishes its own procedures to determine how quality control is conducted.
When a criminal case is opened, court staff enter the data and file the indictment into the system using the information from the document emailed or delivered to the clerk's office, from the U.S. Attorney's office or from the arresting official. Basic case information is stored, such as party name, attorney name and address including the email address, the divisional office in the district, the date filed, the citation for the alleged offense from the Federal Rules of Criminal Procedure, the number of counts and the offense level.

Demographic information is not captured because it is not relevant to the processing of a case.

As the case progresses, other information is entered into the database such as hearing and trial dates, and deadlines for responses or replies -- including data that is for court use only, such as the length of a trial. Throughout the life of a case, when an attorney files a document, federal court rules provide that it is the responsibility of that
attorney to redact any personal information, such as social security numbers, before that document is filed. A warning to this effect has been placed on the attorney log-in page.

In the current version of CM/ECF, all attorneys have a separate log-in and password for each court in which he or she practices. In the next generation of CM/ECF, which is currently in use in 23 courts, each attorney needs only one log-in and password, which can be used in all federal courts in which the attorney has permission to file. The single log-in feature will be used by all courts within the next three years.

Over 53 million cases are now managed in CM/ECF across all court types, and nearly 1 million attorneys have filed in the system. Any public user who registers can access all non-restricted information in any case in any court. My colleague, Wendell Skidgel, will talk about that public facing part of CM/ECF, which is PACER, and about the policy issues that the
courts address when moving to the CM/ECF system.

JUDGE GRIMM: For some of my colleagues here who are not familiar with the CM/ECF system, you might want to provide some explanation as to how sealed matters can be filed, given the nature of some of the offenses that are -- the committee is charged with study. There is great concern about information that might involve victims, the nature of offense, and evidence. And of course, the designation of matters under seal -- filing under seal before a judicial officer approves the filing -- it would be helpful, I think, for the committee if you could take a moment and explain that.

MS. McCALEB: Sure. There are -- in the different applications there are different levels of -- like, different applications, I mean in the district version, the appellate version, the bankruptcy version -- there are different levels, depending on the business processes in those courts. In the district courts, I think there's seven or nine different levels of
restrictions that can be set. So, a document can be sealed. A docket -- a can be sealed, so the entry that appears on the docket report. The case can be sealed. And then within those categories there are different levels of who has access. So, you can set it so that only the judge has -- can see it, so that the judge and chamber staff can see it -- maybe just the law clerks and not the judicial assistants. You can set it so that a judge and the clerk of court can see it. So there's all different levels of restrictions that can be configured, and each court decides the levels that are needed in their court and for each particular document.

JUDGE GRIMM: Thank you, ma'am.

JUDGE WALTON: Can you explain how the system accommodates individuals who represent themselves?

MS. McCaleb: Pro se filers?

JUDGE WALTON: Yes.

MS. McCaleb: In terms of security and permissions?
JUDGE WALTON: Yes.

MS. McCaleb: If an -- if a pro se filer wanted to file a document under seal, they would need -- I think they would need to file a motion saying that they want to file under seal. The judge would decide whether or not the -- that motion should be sealed. And then, if so, they will be given permission to do that. I think some pro se filer need -- sometimes you need help from the clerk's office to determine exactly how they need to do it -- but they get that help.

JUDGE GRIMM: And there -- there's variation that exists within the system. Some courts, like ours, do not permit pro se filings unless specifically authorized by the court. Others, as Judge Walton referenced, do. And of course, in the context in which we would be talking about here in the military system you would not have people accessing it -- filing materials who were not counsel for the government, the victim or the defense.

DEAN HARRISON: I have a question.
MS. McCaleb: Oh, yes.

DEAN HARRISON: The development of the software -- was that done by government staff? Was it contracted out?

MS. McCaleb: It was done by government staff. Along the way, when we started in 1995, along the way we have added contractors to the project. But they work for us if we -- we have a contracting company, but they work on our office and we direct them -- the work that they do. So we have really what we call blended staffs. We have programmers, analysts, testers, trainers. Some of them -- most of them are government staff, but probably about half of them are also contractors.

DEAN HARRISON: And have there been any major issues along the way in terms of advice that you would give to anyone who was going to implement this system to watch out for?

MS. McCaleb: Yes, there's a lot of advice I could give. There are a lot of lessons learned. When we started this in 1995, we did
look at -- and the judiciary as a whole, actually, looked at commercial, off-the-shelf software, and our office had developed this case filing component of it. And we were using these prototype courts. But we thought we should take time to see if there's anything out there on the marketplace that could be used instead of using the government staff. And so we had several companies come in and give demonstrations -- along with the demonstration of the software that we had developed. And we had close to 100 judges and court staff meet in Williamsburg, actually, and we did demos of the system and -- or, the contracting companies did, and the vendors. And at that time there weren't -- there wasn't anything on the market that could meet the needs of the Federal Courts. It's -- CM/ECF is -- we support it nationally from the AO, but we built in a large amount of configurations so that local court practices and rules could be accommodated. So it's a very flexible and configurable system. It also makes it more complicated to support and
maintain, but it gives the courts what they need.

So, we're developing the next

generation of CM/ECF. And we are looking -- a

lot of years have passed since we first developed

it. So we are now looking to see if there is

anything -- any commercial products that we could

use, if not for the whole system, to maybe

replace some components of it.

JUDGE GRIMM: Before the CM/ECF system

was rolled out for the entire federal judiciary --

all 93 districts -- there were a number of

pilot courts that had tested it out.

MS. McCALEB: Yes.

JUDGE GRIMM: And as a consequence of

the success of the pilots and the experience that

they gathered, it made it possible to adjust the

system in a way that when there was a national

roll-out, it was much feared, but now no one

could imagine living without it. Would you

recommend that an organization such as the

Department of Defense, that has multiple

constituent services with folks all over the
world -- would you recommend that before you go
in for a penny, in for a pound, that you try any
system that is developed out in some pilots first
to see whether there are glitches that were
unanticipated and worked out before you go live
throughout the entire system?

    MS. McCaleb: Yes, I absolutely would.

That was invaluable when we developed CM/ECF.
It's actually invaluable -- that's what we're
doing with the next generation as well. Even,
you know, the -- we could develop these systems
within our agency and we bring in -- which I
highly recommend -- bring in end users to help
develop the requirements to tell us what you
need. We have used those end users, judges, law
clerks, clerks' office staff, to test our
software with us, tell us what's wrong before we
roll it out. But even after that, when it goes
into a court and goes live, those pilot courts
still found things that they didn't expect
because when you're testing things, you don't
test every last possible combination because you
don't -- you know, it's just too much. So we
highly recommend a pilot phase before it goes to
all-in users.

JUDGE GRIMM: And one final question
from me, would you just give your observations
regarding the utility of the system in allowing
users to access it from wherever they can have
internet connection through a secure method so
that they are able to -- if they have a laptop
and they are at a place that has a wifi
connection, that they can access the CM/ECF and
see the cases, the dockets, and manage it --

MS. McCaleb: Yes, they can. Now they
even access it from a phone. We have a mobile
query. And as -- you know, as time has gone on,
we -- we've moved from, you know, huge computers
that take up a whole room to iPhones. And so we
have adapted technology along the way. And we're
doing more of that with next -- with the next
generation of CM/ECF. But attorneys can file --
and they do -- 24/7. You know, the opposing
counsel, you know, as soon as it goes into the
system, the opposing counsel gets that email. They can look at the document and download it. It goes on the docket report right away. The judge can get it right away. The clerk's office staff -- the judge's staff. So it's that -- it's that simultaneous access to the documents and the information that's so valuable. It used to be that file folders would be in the clerk's office, which was open from 9:00 to 5:00, and attorneys had to come down to the court house or send a messenger. And if they were in a different state, they had to hire somebody to go and deliver it. It has changed attorneys' practices completely, I think.

JUDGE GRIMM: Thank you, ma'am.

MR. MARKEY: I just had a follow-up, it's that -- you answered one of my questions, actually. Where -- where does this system sit? And it sounds like it's web-enabled? Not on a local server?

MS. McCaleb: It is web-enabled. Each -- each court -- all 204 courts have their own
separate databases. But those databases are housed in two data centers. And all -- all you need is a -- you know, a phone or a laptop or a PC to access them.

MR. MARKEY: So then, the next question, so where is the data stored?

MS. McCaleb: Physically?

MR. MARKEY: Yes, all this electronic

--

MS. McCaleb: It's in databases in these two data centers that we have.

MR. MARKEY: Okay, it's not in the cloud.

MS. McCaleb: Oh, it is not in the cloud. At least not yet.

MR. MARKEY: Okay. And then, the follow-up was it sounds like one of the keys to the success of the system would be standardized forms, et cetera, and language that everybody across the country is using. Is that -- would that be accurate?

MS. McCaleb: There is some amount of
standardization. There's a large amount of
standardization, but there's also room for
flexibility so that -- you know, in my example
with the -- even just the case numbers. So, if
that seems like that could be standardized, year
and number, but it's not. And some courts wanted
to have the judge's initials, or -- or whether
it's a criminal or civil case. So a CR or CV,
depending on that. So there absolutely is
standardization, but there's also room for local
court procedures.

JUDGE GRIMM: The -- the -- towards
your point, when you go to file, there are drop-
down boxes, there are instructions, there are
manuals. The individual courts train the lawyers
so they could come in and use it before they have
access to it. Online, when you access it, you
have an electronic docket. When you go down the
docket, the events that are on the docket have
hyperlinks so that when you click on it you can
see the document and all the attachments. When
there is a document filed that requires a ruling
by a court, there's an icon -- a little gavel --
that indicates that that has yet to be ruled on.
So, if you have a case where there are multiple
motions and you are trying to manage open
motions, you can look at that in a -- in a link.
There's the ability to file electronic orders
that are paperless orders, as well as hard copy
orders that are sent out instantaneously to the
parties. For the people who use it, it's a
remarkably robust and user-friendly system. And
-- and my suggestion -- strong suggestion would
be is, as the military migrates towards
considering such a thing, that the people who
might be responsible for developing it coordinate
with the Administrative Office -- or any other
organization that has similar filing systems --
to see how it actually works. It's really quite
a user-friendly system.

MR. MARKEY: Great point. So, common
terms, language and definitions are probably
important --

MS. McCaleb: They are.
MR. MARKEY: In establishing this sort of a network system.

MS. McCALEB: Yes. And the more standardization that you can accommodate, the better. But, from our experience, there's a -- there's kind of a limit to where courts like their own language for some things. For example, in -- when an attorney files, say, a motion to extend time, in some courts it's called that. In some courts it's called motion for extension of time. There are different variations. And this system allows the courts to decide which of those variations can used.

MR. MARKEY: Did that make it difficult to extract that data out of there? Because it is put in differently?

MS. McCALEB: No, because there is a code attached to each and so as long as the code is the same, the display can be different. And that's one way to make it flexible, but standard at the same time.

MR. KRAMER: The best news is the
universal username and password for every court.

Thank you very much.

MS. McCALEB: Oh, very popular with attorneys.

(Laughter.)

MR. KRAMER: But there -- the one question I have, so just, let's say, the District Court Database, how many cases are open a year? Civil and criminal? Roughly?

MS. McCALEB: I don't know. I would have to look it up. Do you know by any chance? Oh, I -- I can look it up easily and let you know.

MR. KRAMER: Is it the hundreds of thousands?

PARTICIPANT: Yes.

MS. McCALEB: Yes.

MR. KRAMER: So we're not talking about small numbers, that's what I was --

(Simultaneous speaking.)

MS. McCALEB: Oh, no. We are not talking about small numbers.
JUDGE GRIMM: The other aspect of it, which is something that -- that perhaps is going to be commented about by some of our other speakers today, but this is -- the CM/ECF system is a -- is a system designed to be used by the courts and the users of the courts. However, in the Administrative Office, there is another branch -- the Judicial Training Center and the Federal Judicial Center -- which has the legal education and support for the judges. And they are able, because of the standardizations, to mine this type of information. So, if there is an issue before the courts about whether or not a rule should be changed or adopted in order to account for how a certain specific type of motion is resolved in a specific type of case, they can go back in and mine that data and get the information and produce reports that make it possible to have non-anecdotal development of policy. Data-driven developmental policy.

And for -- I spent six years on the Civil Rules Advisory Committee. We went through
a tremendous amount of investigation before we promulgated rules that took five years to go into effect and began effect in 2015. And we could not have done our job and made decisions that were based upon demonstrable needs, absent the ability of the researchers to go in there and mine that data, generate it for each case, without that secondary use in mind. But capable of being captured in big-data analysis and coming up with very, very helpful ways to be able to solve policy questions.

CHAIR BASHFORD: Just following up on Judge Grimm's statement. You're collecting a lot of data around the country and a lot of it from the beginning of the case until its conclusion. Absent somebody wanting to do a research project, I mean, are you collecting data and somebody is routinely looking at it to see disparate outcomes? Disparate length cases pending? It's all sitting someplace, but what's happening to it?

MS. McCaleb: We -- the Administrative
Office does receive some amount of data from the courts. So, every month they send data about the number of cases open, the number of cases closed -- and some other -- Wendell may be able to answer better than I can. Some other -- but they're -- the Administrative Office doesn't use that data for research purposes. Federal Judicial Center may.

JUDGE GRIMM: FJC would do it. Now, to your point, Madam Chair, if you're talking about sentencing outcomes, I believe we're going to hear from the Sentencing Commission. And as -- I am enormous fan, as you might have noticed, for what CM/ECF has done. What the Sentencing Commission has done in terms of developing sentencing policy guidelines in an enormously complex area is nothing short of astounding. The -- it may drive us mad trying to apply it, but it is an unbelievably brilliantly conceived process. And they capture all of the sentencing data. They can tell you the number of judges that varied above or below a sentencing guideline, the
judge is required to put reasons for that, even if they're not publically done. They can go in there and they publish reports to that if you are concerned about a particular type of offense for a particular demographic of defendant, what the outcome was, what the sentence was, whether it was within or above/below what the recommended guideline would be and the reasons for that developed into explanations that have the most frequent explanations as to why a judge would exercise their discretion one way or the other, all that can be captured by the Sentencing Commission. It is -- and the annual reports and the periodic reports that they file are astonishing.

We just got one last week -- Judge Walton will remember that -- on mandatory minimum sentences in drug cases because that is a matter of some concern throughout the nation. And the Sentencing Commission was able to generate a report that is the same size as our first annual report that drills down deep into all the
explanations for that. And from that, it enables
the policy side of the commission to be able to
make intelligent decisions and recommendations to
Congress on things that affect sentencing.

CHAIR BASHFORD: But apart from
sentencing, is -- is your unit, then, looking at
-- cases seem to take twice as long in this
district as they do in other districts? Or,
outcomes are very different for different types
of cases in one district versus another?

MS. McCaleb: My particular unit
doesn't, because we just develop the software.
But -- but do you know if anybody --

JUDGE GRIMM: The six-month list comes
out twice a year and that has the information --
that's published. We are required by law to
report every six months to Congress the status of
cases. And it talks about cases that are over
three years old, motions that have been pending
and for resolution over six months in a number of
different categories. And that is collected from
each district court twice a year and published by
the AO and reviewed. And part of that
information, if you have courts that are swamped
because they have judicial vacancies or workloads
that are imbalanced -- and that information can
be gathered that way.

JUDGE WALTON: That's only capturing
civil information, not criminal.

JUDGE GRIMM: Correct, that's right.

CHAIR BASHFORD: But shouldn't your --

apart from the judges' reports that they then
have to -- wouldn't your system, if somebody
queried it, be able to tell you length of case
duration?

MS. McCaleb: Yes, you -- we certainly
can tell -- can say for each case --

CHAIR BASHFORD: But somebody would

have to query it?

MS. McCaleb: Yes. Yes, a query could

be done to see how -- you know, open this day,
closed that day. Like -- that data is collected.

MR. SKIDGEL: That data is actually

available publically. On the FJC site, it's a
database of information. In answer to your question the number of cases ---

CHAIR BASHFORD: You may have to keep your voice up a little bit.

MR. SKIDGEL: Sorry. In answer to your number of cases, it was approximately 300,000 civil cases and 75,000 or so criminal defendants.

MS. GARVIN: If I may, how do you -- how does this system -- or, how regularly does the system get modified, either at the district court level, or court of appeals -- for each of the levels, when new requirements for reporting are asked for? So, right? The 18 USC 3771 put in new reporting requirements out of the office with regard to when the victim's rights are past, how many cases involved, maybe, are seen? How often is that looked at? Is it just when Congress passes something new? Or are you regularly looking at your ability to issue those reports? Because I know there's been some challenges capturing some of the victim
information.

MS. McCaleb: We -- we do a release, at least one major release every year of the software. And often a few minor releases to each. And -- and when we do a release, we get the requirements and the -- you know, the need for what's going into that release from Congress, from just changes in the local -- or, federal rules. Or, just from usage of the system and, wouldn't it be great if it did this? And that kind of thing.

So we have -- we have a staff that works, you know, year round on various releases. The other thing that we're doing -- we started several years ago -- it will just increase -- is we do more security updates than we used to. It's become a very important part of the releases now. Making sure that our software is up to date -- all the tools that we use, that there's no -- you know, if something -- some of the minor releases that we do during the year is to let the whole, or, you know, we find out that when we
upgraded something we need to fix something in
the software that -- to go along with it.

    If I could, just one -- we had
mentioned attorneys, and -- having this universal
login and password that will work, now, in all
courts in which they file, which is great. But
each court still has the ability to accept or
reject an attorney's ability to file. So, while
they have this universal access, the courts did
not give up their ability to say no, you didn't --
you know, your training isn't done yet, so you
can't file in this court. So it's -- there are
safeguards on the court's side to make sure that
the attorneys who do file have permission in the
court to file.

    CHAIR BASHFORD: Who is speaking next?
Would that be you, Mr. Skidgel?

    MR. SKIDGEL: It would.

    CHAIR BASHFORD: Keep your voice up.
You sound like a bit of a low talker.

    MR. SKIDGEL: Sorry about that. Good
morning. As Margaret mentioned, my name is
Wendell Skidgel. I am a senior attorney for the Judicial Electronic Public Access Program at the Administrative Office of the U.S. Courts. The mission of the Judicial's Electronic Public Access Program is to facilitate and improve public access to court records and court information in accordance with federal law, rules, judiciary policy and user needs. Although I am here today to discuss access to court records through the judiciary's Public Access to Court Electronic Records System, PACER, I would be remiss not to mention that the program is broader than just PACER -- encompassing the judiciary's public website and implementing judicial conference's privacy policies.

PACER was established in 1988 as a dial-up service. During the past decade, through the widespread adoption of the judiciary's case management -- Electronic Case File System, CM/ECF, PACER has evolved into an internet-based service. In other words, PACER is a portal into CM/ECF and CM/ECF is integral to public access.
PACER provides access to reports, docket sheets for 53 million cases and access to more than 1.1 billion documents that have been filed with the courts through CM/ECF.

In terms of fees, as Congress -- as directed by Congress, the program is funded entirely through user fees set by the Judicial Conference of the United States. The fees are published in the Electronic Public Access Fees Schedule that's available on USCourts.gov, and all users -- attorneys, data brokers, government agencies -- are all charged the same rate of ten cents per page. There is a cap of $3.00 -- 30 pages -- that applies to any single document or case-specific report. Transcripts of court proceedings are excluded from this cap. Users with bills of $15 or less during a quarter are not charged, and approximately 75 percent of active users each quarter pay no fee.

In Fiscal Year 2017 the program generated about $146 million in fee revenue. Approximately 90 percent of that came from less
than 3 percent of PACER users. The revenue was used to support PACER and to cover the costs associated with the CM/ECF systems that are used by the federal courts throughout the country. The revenue was also used to finance other expenses related to electronic public access to the courts, including the network security and court websites.

Judiciary employees and those that are paid out of judiciary funds -- such as CJRA attorneys -- are exempt from fees. Additionally, individual courts may, by a showing of cause, grant exemptions for certain classes of users -- researchers, nonprofit 501(c)(3) entities, and others -- can be granted exemptions for access to the court's data without charge.

JUDGE GRIMM: You might want to explain what CJRA means.


JUDGE GRIMM: Reform Act.

MR. SKIDGEL: Reform Act, yes.
Authentication -- other than users who view case information using public terminals at the courthouse, PACER users must register to use the system. All PACER access requires user authentication through a login and password.

Usage information is collected and stored as set forth in the PACER Privacy and Security Notice, and the PACER login banner. This information is used for billing purposes. The fact that it's stored provides a deterrent to those who would use PACER to obtain information for nefarious purposes. I can tell you that the Administrative Office does respond promptly to grand jury subpoenas for information on PACER usage, and that information has been provided -- and that information that has been provided has been used quite effectively in court.

There have only been 2.3 million PACER user accounts. Approximately one-quarter of these are active each year. In addition to court staff, the users of the system include members of the bar, city, state and federal employees and
the public. In 2017, the PACER service center
staff established more than 250,000 new accounts.
They fielded 183,000 calls and responded to more
than 50,000 emails.

The judiciary proactively works to
strike a balance between providing public access
to court files and protecting sensitive
information as evidenced by the evolution of
national policies, rules and procedures over the
years. This has not been done in a vacuum. We
seek expert advice and input from various
interested parties, including those with widely
divergent agendas and viewpoints. Information
about the judiciary's privacy policy for
electronic case files is located at
www.privacy.uscourts.gov. Example of documents
that are not available via remote electronic
access, nor are they available to the court at
the -- nor are they available to the public at
the courthouse include unexecuted summonses or
warrants of any kind, pre-trial bail or
presentence investigation reports, statements of
reasons and the judgment of conviction, juvenile records, documents containing identifying information about jurors or potential jurors, financial affidavits filed in seeking representation pursuant to the Criminal Justice Reform Act, ex parte requests for authorization or investigation, or experts or other services, and sealed documents -- motions for downward departure, for substantial assistance, plea agreements, et cetera.

The CM/ECF login screen contains a notice of redaction responsibility and provides links the Federal Rules of Privacy. To successfully access CM/ECF and file a case document with the court, users must check a box acknowledging their requirement to comply with redaction rules. Granted, redaction software -- ensuring the redaction of information identified in the privacy policy is a challenge. Algorithms can be developed to identify social security numbers in most, but certainly not all cases. Unfortunately, it is far more difficult and in
some instances, not presently possible, to
develop algorithms to identify other types of
highly sensitive information, such as the name of
a minor. While technology is a wonderful tool,
it certainly is not an adequate substitute for a
filer's vigilance with respect to protecting
sensitive information from disclosure. Thank
you.

CHAIR BASHFORD: This may be a
question that people who are more familiar with
this system know the answer to, but if I wanted
to file a motion to allow similar crime evidence
in in a particular prosecution, and I want -- I
don't want that to be private, particularly, but
I am sure my opponent defense attorney would love
that to be private. I am the one who's filing
it. How -- how do those things get to be under
seal or not?

MR. SKIDGEL: I was going to defer to
one of the judges. I mean, the -

MR. KRAMER: Once a -- once a document
-- once you -- you can file a document and it's
out there in public. If another party -- and, so
in a sense, it's too late to try to seal it. If
another party wants to move to seal that
document, it can then be worded to be moved to a
sealed status. But for people who looked at it
originally, there would be no -- they could have
looked at it originally, but it would then be
taken off of the public access docket if another
party moved to seal it or remove it from the
public docket.

JUDGE GRIMM: And if someone files a
document that they want sealed, and they file it
along with a motion to seal, that has to be
authorized by a court because the filings are
public filings and the public has a right to have
access to what goes on in the federal courts.
But there are matters that -- and there are
criteria that the judges have to find have been
met before you can seal a document. And what
would happen is, is if you file a document
requesting that it be filed under seal, it is --
the system allows that to be sealed until such
time that the court rules on it.

CHAIR BASHFORD: So it's not like a

lag where it's up there until the judge rules.

JUDGE GRIMM: Correct. Now the -- if

one side files something that the other side

believes should be under seal, the -- the benefit

of the system is that it is electronically filed.

There's instant filing hit. And you have to

serve the other side. So they get the hit and

they see it. And it's absolutely true that there

may be a period of time when the party looks at

it and says, this should be sealed, can file a

motion to seal it, but if they're paying

attention to the docket, then they will generally

be able to file something immediately saying we

want it under seal. And then the court can

authorize it and it will be under seal because,

if they have requested that be the case. And

there's also a fair amount of dialogue, maybe

less in some places than others, between defense

counsel and prosecutor to avoid the ambush

possibility of filing something -- to put
something out there for the purpose of
embarrassment or, even worse, to possibly
influence the public in a potential jury pool.
So, in practice, we don't hear much of that. I
don't know if my other colleagues in the court
system have a different view on that. But the
system does allow for making sure that things can
be sealed. And then the courts, when they --
when we see it, we are required to review it as
well. And if you've seen that someone has put a
minor's name or full social security number or a
bank account -- we get that all the time in
identity theft and various types of fraud cases
where it involves someone's account number, and
they put the entire account number instead of the
last four digits -- then it can be monitored.
And the clerk's office can monitor it when it
comes in because each docketing clerk is supposed
to reveal the materials that are posted on there,
too. It's not fail-safe, but there's -- it's
pretty good.

MS. GARVIN: If I may, one of the --
one of the lags in response to the conversation
is if victims have counsel, but they have not yet
entered their appearance in the case –

JUDGE GRIMM:  Right.

MS. GARVIN:  They are not going to be
triggered when a filing happens.  So they won't
know about it, and the lag could be longer if
they have a dispute over what they believe is
personally-identifiable, or confidential
information.  Which is why best practice for
victim's counsel is to enter the case immediately
so that they get triggered at every filing, too.
But that of course, increases the work load, when
in fact they usually only have a handful of
issues that they have standing -- actually do.
But that lag from victim's counsel would be more
significant if they aren't entered into the
process immediately.

MR. KRAMER:  And there's two kinds of
sealing.  There's a sealing where there's a
notation on the public docket that a sealed
document has been filed, but the public can't
have any access to it. And then there's a
sealing where there's not even any indication on
the public docket. You would not know from
looking at the docket that a -- unless you did a
very careful review of the numbering system, you
would not know that a sealed document had been
even filed.

JUDGE GRIMM: It's called super seal.

JUDGE WALTON: That's frequently done
when you have a cooperator and you don't want
that information to become known.

MR. KRAMER: Absolutely.

DEAN HARRISON: If I am a member of the
public -- a journalist or a victims' right
advocate -- not an individual victim, but just
generally victims' right advocate with an
interest in the case -- is there a way for me to
set up an alert any time a matter is filed in a
particular case? Or do I just have to come back
daily or hourly and check to see what's going on?

MS. McCaleb: No, there is a way that
you can -- that journalists and some researchers,
they can request to be -- to receive an email
when something is filed in a case. And then they
will automatically get that email.

CHAIR BASHFORD: Following up, let's
say I am a researcher and I want to know what's
happening with federal sexual harassment cases --
how many are being filed, what are their outcomes
-- do I have to know about each individual case,
or is there a way to query your system to get
aggregate information?

MS. McCaleb: There is not a way to
query it, because each database is individual --
is in each individual court. So there's
something called a party case locator that the
PACER service center, that Wendell talked about,
is housed in -- in our office in San Antonio.
But that just -- you can put in somebody's name
or a case number, and it will direct you to all
of the cases with those names, but you can't
search on a type of case.

CHAIR BASHFORD: But that information
is collected, right? You do know --
MS. McCaleb: Yes, but it's not aggregated.

Mr. Skidgel: It's two pieces. I can walk you through how a researcher would get that information.

Chair Bashford: Sure.

Mr. Skidgel: And then I just want to step back to the previous question after that. Courts are allowed to exempt users for access to their system. So what will often happen is a researcher has a particular research project -- they're associated with a university -- they will write to the courts. And we now have a clearinghouse where they can write to the AO, and the AO will coordinate with the courts their request. It needs to be limited to the scope. They have to agree that they're not going to republish the data itself or to sell the data. And what we will sometimes do -- often do, is work with them to see if there's a nature of suit code for particular types of cases. Or, if we're dealing with criminal cases, there's a particular
code that shows up in the system. Oftentimes, we will direct them to look at the statistical data, which is now available from the FJC. So we can go through looking for particular case information based on the type of nature of suit code, and then -- if we're dealing with civil cases -- and then go back to the court and say, we're not looking at all your records, your honor, we're after (coughing) this particular subset of records. And we want to pursue the period of time. And the court can grant exemption for that research access and then the researcher can go in. Their access in that particular court is exempt during that time period for whatever criteria the court has set up to allow them to have that access.

And that's how they would collect the data is they would -- if I were them, and I walked them through this, collect the statistical case numbers that I want from the statistical database, and then I will have a young -- or, a college intern write some shell scripting, or
pro-scripting that will go through and pull the
case information that I want -- pull the
particular documents or docket sheets and then
use that for my research. Does that --

CHAIR BASHFORD: You would have to do
that court by court?

MR. SKIDGEL: You would do that court
by court. But if I set up a naming process in
one court, it's pretty much the same in the other
courts as well.

CHAIR BASHFORD: You said you wanted to
-

MR. SKIDGEL: I did. I wanted to go
back to the question on the things that are put
on the docket that are unsealed and then should
have been sealed. That happens not just with the
filers, but occasionally it will happen with the
court where something was redacted improperly.
If you remember the GD case, we have to peel back
the black mark and see what was underneath.
Because the system is authenticated, we have a
record of who would have accessed the system and
accessed those particular documents remotely
during the time that it was publicly available,
and we are able to provide that information to
the court. And the court will often contact
those individuals, asking them not to
redistribute it. Or the Office of Public Affairs
-- in some instances it's called -- by and large
it's been very -- been very receptive to that
when they realize that, you know, the people who
are filing aren't perfect and they're -- they
often don't redistribute it, or they will say
well, we will make sure we don't send that any
further. So we do have that -- having that
authentication allows you to go back and find out
who looked at it and usually stem the
distribution of a record that should not be out
in the public until the court unseals it.

JUDGE GRIMM: Now, the interesting
thing about PACER is is that the exemptions for
academic research are individually requested and
granted frequently for research. But there are
organizations that pay the fee -- aggregate
information -- and then will republish for a fee to lawyers, and they will say, for this particular judge, for this particular type of case, we can tell you the number of instances in which they have granted summary judgment, the number of instances in which they have, you know, ruled this way on a particular motion -- and there's not any way that you can stop that. Once that data gets out there with a -- an era of big data analytics, that's information that if it's publically available, is going to be able to mine -- be mined. And there are people out there who will apparently pay for the information that can be brought in there with regard to the individuals who are making the decisions in the cases that they file.

MS. TOKASH: Can you talk about incarcerated defendants and access to PACER? Are they paying out of their commissary while they're confined, if you know? Or, how does that work?

MR. SKIDGEL: If they don't -- if they haven't been granted a -- an exemption order from
the judge, then they would have to be paying out
of the commissary, or some other method where
they have a user account that they've access to
the system from.

CHAIR BASHFORD: Mr. Schmitt?

MR. SCHMITT: Good morning, Madam
Chair, members of the committee. 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 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 to provide 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 the Sentencing
Guidelines, which are amended each year to
account for the changing nature of crime and the
persons who commit them. To support this work,
the commission authorized the commission -- the
Congress authorized the commission to establish a
research program to collect data about the
sentences imposed in federal courts, and to
disseminate that information to the public.
Central to the commission's work is its data
collection effort. In Fiscal Year 2017 the
commission received documentation on almost
67,000 original sentencings. But the commission
also received information on over 5,000 re-
sentencing and other modifications of sentence,
and 7,800 appeals. In total, commission staff
reviewed more than 325,000 court documents in
that year.

The commission has a staff of
approximately 45 persons who enter this data into
the commission database, ensure that it is
accurate and complete, and then use it for a
myriad of analyses. Since 1987 the commission has amassed a database of 1.6 million offender records. To facilitate the commission's work, Congress has required by statute that the courts provide five documents to the commission within 30 days after the entry of judgment in a criminal case. Those documents are the indictment or other charging document, the presentence report, the judgment and commitment order, the plea agreement if there is one, and the written statement of reasons form. 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 failed to submit the required information.

As you might expect, compliance with this statutory directive is quite high. The commission estimates that it receives documents for 99.8 percent of all the cases where documents are required to be submitted to the commission. Because of this, we consider our data to be a population and not a sample of the data on
federal sentencings. The data from the five core
documents submitted to the commission are
extracted and coded by commission staff and input
into a computer database. For each case in our
offender data set, for example, the commission
routinely collects information on case
identifiers, demographic information about the
offender, the statutes of conviction and the
maximum and any minimum penalties that applied at
sentencing, any guideline provisions that the
court applied in the case, the type and length of
sentence imposed, and the reasons given by the
court for sentences that are outside the
guideline range.

In particular -- in addition, when
particular research questions arise, the
commission staff re-analyzes these documents to
collect additional information. The commission
maintains additional data sets to study a variety
of other sentencing issues, such as
organizational offenders and appeals and re-
resentencing, as I mentioned earlier. The
commission's computerized data sets, excluding offender and judge names, are made available to the public. The commission also disseminates this data through a wide variety of publications, and through commissioner or staff presentations at professional conferences and other events.

The commission's research staff performs analysis for a number of stakeholders, for most of which are the members of the commission. Each year, the commissioners identify several subject areas as priority areas for study. Commission staff meet with the commissioners monthly to provide data and legal analysis relating to those subjects. Also, members of Congress may ask the commission staff to provide analysis of commission data, or to estimate the impact of pending legislation in order to inform their work. United States judges may also request that the commission research staff provide analyses of cases similar to those pending before the judge as a way to inform the judge's decision about the sentence to impose.
And finally, the commission performs data analysis for executive branch agencies, but only when they are acting in a policy-making -- as opposed to an advocacy -- role.

While these analyses for the stakeholders are confidential, the commission does provide separate analysis of commission data to the public through its many publications, all of which are available on the commission's website. The commission's data is regarded as one of the most complete and accurate data sets in the social science arena, and there are several reasons for this. First, our data is a -- is a universe and not a -- not a sample. Because the courts are required to provide us with the source materials we use, our data sets reflect the total information available regarding the areas for which we collect data.

Second, our data set is extremely accurate. Only commission staff input data into our data set, which the courts provide the source materials, court staff do not place any
information into the data sets themselves.

Although technology would allow us to pull information from the data collected by the courts, or to allow other court staff to push data into our system, we do not allow that. By limiting the number of people who are involved in our data collection and cleaning process, we can ensure that the data is collected in a consistent manner by our highly trained staff. The result is data that is very accurate.

Third, our data is extremely thorough. We are fortunate that Congress has authorized and appropriated the funding for such a large research staff of social science professionals. Obviously, the more people who are available to work on a project, the more data can be collected about the issues under study. Finally, our research staff are experts. Our social science staff all have advanced degrees in criminology or related fields with a thorough understanding of research and analytical methods. As a result, our data is collected with a view towards the
research questions that will be asked of us by
the members of the commission, by the courts and
by Congress. These key factors -- mandated data
submission to a single agency, collection and
analysis by a staff dedicated solely to this
task, a staff which is large enough for the
amount of data to be collected and who have the
education and training in the social sciences --
are what makes our data exceptional.

Despite the quality and completeness
of commission data, however, there are still
limits to what it tells us about federal criminal
cases. And these limitations may be instructive
to you as you consider the data that you would
recommend be collected from courts-martial. As
the name of our agency suggests, the Sentencing
Commission generally collects data only about the
sentencing process. The commission does not
collect data on investigations by law enforcement
agencies or decisions by prosecutors as to when
to seek an indictment against a defendant. The
commission also does not collect data on cases
that were filed but later dismissed, or on cases in which the defendant was acquitted. We also do not collect data about charges that are filed but later dropped as part of a plea agreement, even when the offender is convicted of one of the charges in that case. And the commission does not collect data on program participation by offenders while in prison, or on supervised release.

To be sure, other government agencies do collect some of this data. For example, the Executive Office for U.S. Attorneys collects information about the prosecutorial decision making process. The Federal Bureau of Prisons collects information about program participation, and the Probation and Pre-Trial Services Office of the Administrative Office of the Courts keeps records about program participation while offenders are on supervised release. However, in general, this data is collected for operational purposes, not research purposes, and often is not as complete as researchers might like. And those
agencies also have concerns about the public
release of this data even to us, and therefore
much of the data is not available to the public.

From a research perspective, because
all of this data is not collected by researchers
and not available to a single research staff, it
has never been fully integrated into any
comprehensive analysis of the federal criminal
justice system. A further limitation on
commission data is that it does not include
information about facts that have no statutory or
guideline relevance. And by that, for example, I
mean the commission does not collect information
about the victims of crimes other than the number
of victims in fraud cases and alien smuggling
cases, and some victim impact information in
fraud cases. This is because, generally
speaking, the identity of the victim -- such as
the gender, age or relationship to the defendant
-- has no legal bearing under the statutes that
make the conduct illegal or the sentencing
guidelines that apply to them. Additionally,
while the commission does record the criminal
history score that a court's assigned to an
offender under the guidelines, the commission did
not collect information about the specific types
of crimes committed until 2016. This is because
the type of prior crime did not affect the
criminal history score, only the sentence imposed
for it. And finally, the commission does not
collect information about offender
characteristics such as previous employment
history, mental health and drug abuse history,
support provided to dependents and military
service. Again, because the substantive federal
statutes and the related sentencing guidelines do
not take those factors into account. Of course,
judges may legally consider all of these factors
when imposing a sentence. Interestingly,
Congress has directed the commission not to
consider some of these factors when creating the
sentencing guidelines. From a research point of
view, however, it would be interesting to know
which factors matter most to judges and to what
degree. And certainly DoD leadership and Congress would have an interest in this information with respect to courts-martial. The commission's decision to not collect this information should not be viewed as evidence of what constitutes best practices in research, rather, this decision should be viewed as one based on Congress's direction that many of these factors not be considered by the commission. And also on the fact that the sentencing guidelines do not relate to many of them -- do not take those into account in determining the sentencing range. However, as this committee considers what information the Defense Department might wish to collect about the crimes prosecuted at courts-martial, you may wish to expand the data collection beyond what the commission currently collects.

The commission is happy to provide technical assistance to this committee or the Department of Defense or the individual services as you and they work through a data collection
program for military crimes. The commission appreciates the invitation to provide information to you, and I'd be happy to answer any questions you may have about the work of the commission.

DR. SPOHN: So, thank you for your presentation, Mr. Schmitt. As we've been reviewing cases from the services, one of the things that we've discovered is that there's little if any uniformity among the services in terms of the forms that they use to capture data and -- even in terms of the terms that they use for closing cases. I mean, it could be unfounded in one service. It could be prosecution declined in another. What advice would you have for us moving forward in terms of how to ensure -- or, how to improve the process so that there is consistency and uniformity? Because my understanding is that the -- the district courts all use the same format -- the same forms in presenting the information to you.

MR. SCHMITT: Well, that's correct. And I will say that the similarity of the five
core documents that we receive is very helpful to our work. So the judgment and commitment order and the statement of reasons form are mandated by the Administrative Office, or the commission respectively, and the courts follow those. The presentence investigation report does vary a little bit from district to district, but the items are more or less all in there -- usually in the same place. But that's the text document. Plea agreements, of course, are written in many different styles. And then, the indictment can vary dramatically as well. So in the federal system we do have a -- a mix of documents that are always in the same form and the information always in the same place, and then some that are not. But, in general, it's standardized. So I think the committee has -- really has to make a -- a decision. There's a big fork in the road coming up, and you have to take it. And that is, either to request or suggest that -- that the documents and courts-martial be standardized. Here's the standard judgment form, here's the
standard report of trial. And so that everything is in the same place. And you have that opportunity because, to some extent, it seems to me that you have a clean sheet of paper in front of you and you can say, here's what we recommend the services do.

Or, you can allow each of the services to have their own approach. If you do that, it does seem to me, then, that the data collection process becomes four or five times more complex because you'll have now four or five of those. Of course, you could have four or five data collection centers. The Marines have one, the Army has one, the Coast Guard has one. Or, you have a big staff with five different level groups of people. There's the Marine group, the Army group and the Air Force group. The reason why we are able to process so much in such a standardized way is because we know -- and our staff knows -- where it is every time. When a case pops up, it's almost always in the same place in the documents and they're able to get
into a rhythm and look for that information. If each case were different, we wouldn't be able to do anywhere near as much work as we do with the staff we have.

JUDGE GRIMM: Mr. Schmitt, I'd like to ask a question. You made some comments about information that is not routinely collected. For example, employment status of an offender, support of dependents, things of that nature. It is true that that may not currently be collected. But if you have the presentence report, employment history would be in there. If there is some comment about -- since one of the guidelines, factors that we look at is support of dependancy, there's some specific guidelines sections that tie into that for purposes of a departure or -- or a variance. That could be collected to a certain extent, similar to victims. So if, for example, you have a -- a sex offense involving minors, if the minors are below a certain age, there will be -- the offense level will have an enhancement for the age of the
victim. If the person who is the defendant was
in a position of trust, such as the parent or a
guardian or a teacher, that will be a possible
enhancement that you can search for as well. So,
it is -- it is -- if the -- the information that
you have would allow -- putting aside the
difficulty of finding it and how you would go
about doing that. Whether it would have to be
done through some sort of algorithm that would be
trained to go in and look for that, or
individually looking at the information in the
presentence report where they calculate the
offense level. But, presumably, that is
something that you could design a research method
to account for. Some of that information, which
is currently not captured, could potentially be
derived -- although, perhaps not with 100-percent
accuracy -- from some of the five documents you
already get. Is that not true?

MR. SCHMITT: That's exactly correct.

And -- and each year there are research questions
put to us that we cannot answer from the data
that we routinely collect. So the items that I mentioned earlier today are ones that we collect for every case -- always have, always will -- in perpetuity. But when we are presented with a research question, we will often go back into the documents -- and we call that a special data collection project -- and try to capture that information. It's time consuming, as you might imagine, and can be very small, depending on the size of the question. But it is there.

But the point that I was trying to make by illustrating what we collect and pointing out the limitations in our data is to say to you all that what is collected has to be a function of what it is you want to know. The commissioners in the past have only wanted to know the things that I mentioned -- as I stated, because the statutes make those meaningful -- or, the guidelines make those meaningful, which is not to say that if you ask one of them, do you think it's interesting to know if the person supported dependents? Of course they would say
yes. What you all have to decide, I think, is what is it that's crucial to the decision making process now? Either, by the services, by the department, or in response to questions from Congress. And then mandate that those things be collected from the beginning. It's so much easier to start with this big list -- you can always take things off. It is much harder to put things back -- put things on as you go forward, especially -- and especially if you know that the identity of the victim is going to matter, or the age of the victim is going to matter, or the military status of the victim is going to matter. And surely that the case. Then, you should mandate that that be collected from the beginning. But keep in mind that the longer your list, the more time it takes to finish that case. And then that's where the trade-off happens, then, with staff and the cost to actually collect that data.

JUDGE GRIMM: A follow-up question on your when you are going into the data that you
collect to be able to drill down and get
information that perhaps is not something that
you have previously been tasked with finding but
you are now being asked to do it or seek to do it
on your own, one of the things that we find,
those of us who deal in handling the civil cases
in the federal system is in the discovery area,
the notion of whether or not a human being has to
look at the data and pull the information out,
which is neither the most accurate nor the most
time efficient of doing it or whether, through
use of computer-assisted review where you do a
sampling, you test your data, you -- there is
artificial intelligence, whereby the analytics
learn from what the human person says is relevant
and then goes in there and captures the data in a
much faster way with pretty good recall and
precision rates.

When you all are searching your data,
are your hands -- or are human eyes on or are you
using your computer-assisted analytics to be able
to get the data or a combination of both, Just
for purposes of our Committee trying to get our arms around what kind of resources should be made available to the individuals tasked with managing this data for purposes of Congress and the military itself?

MR. SCHMITT: Yes. Prior to 2015, all of our data was collected by a commissioned employee who would look at the documents from the court and then manually put that information in a computer; it might be drop-down menu; it might be coded in, and that has a certain limitation. I have so many people. They'd only work so many hours a day. There's so much you can do. We do that because the commission has traditionally been extremely concerned with accuracy, and we have found --

JUDGE GRIMM: Yes.

MR. SCHMITT: -- that a human being, really, highly-trained, skilled human being is more accurate than any computer extraction program, at least up until that point.

In 2015, we made a decision to try to
use the computer for some new ways, and the
example of criminal history is probably the best
one. So as I mentioned, under the sentencing
guidelines, a commission -- an offender is given
a criminal history score; it's six, and when you
look at it, you don't know if that six is two
murders or if that six is three frauds or that
six is a whole bunch of small things. It's a
six. Under the guidelines, it doesn't matter. A
six is a six and that puts you where it puts you,
but you all would say it really does matter to me
whether it's two murders or three frauds. In
response to that, we try to be -- to think
whether we could collect criminal history
information to that greater level of specificity.

We now know that for the 70,000
offenders who were convicted last year, there
were about 400,000 prior criminal events. Well,
there's no way that my staff could collect
400,000 more things on top of the things we do.
So we began a process. We know that now because
we began to use the computer and so we have
developed a process for this particular function, to have the computer look for this information and extract it and then staff goes and cleans it, and it has worked very well in this way. We wouldn't be comfortable in doing the whole thing that way, although I will that much could be done that way. Then the trade-off is how good do you want it to be.

JUDGE GRIMM: That's right.

MR. SCHMITT: So if you want 80 percent accuracy -- I'm just making -- this is an informed guess, it's not a pure guess -- if you wanted 80 percent accuracy, you could probably let the computer fly and collect a lot of the stuff you're interested in. But the question is are you willing to be wrong one-fifth of the time? Probably not.

We're not willing to be wrong one percent of the time and that is just our cultural background. So we not only collect this data by hand, as I mentioned, with this one exception but we have ways to go in and clean the data. And
when that data is cleaned, it's cleaned by a
completely different set of people so that
there's a new set of eyes who are not biased
about what they did before. That's beyond the
gold standard. It's the platinum standard or
maybe it's the crazy standard, but that's sort of
what we're about. But that's because we know
that when we give advice, people respond to it,
and we know that when you tell a judge this is
what other cases look like, he or she's going to
use that information to deprive someone of their
liberty. So we really want to be accurate and I
think accuracy can only be through people;
however, to get back to your question, Judge, you
could come up with some way to extract it and
then have it cleaned.

JUDGE GRIMM: So Mr. Schmitt's point
is really a very important point. When you're
talking about sentencing and you're putting
people in jail and a liberty interest is at
stake, the accuracy cannot be suspect, and that's
why they have to have the accuracy rates that
they talk about. Whenever you're doing big data analytics, you have two components. You have precision and -- which is how much of what you are really looking for did you get; and you have recall which is how much of what is out there that you're looking for did you capture, and they're inversely related. So if you want 100 percent recall, you ask for everything but your precision goes off the charts because you got much more than what you really want. And you can get to that 80 percent accuracy rate for a much lesser human and electronic investment, but when you want to get to the 95, 98, 99, it -- order of magnitude goes up in terms of having those precision levels. And so you have to identify, which is perhaps the wisest advice that you could have given us, is identify what's important to the decision-makers within the military and in Congress to have captured and design your system around that from the very beginning.

CHAIR BASHFORD: Mr. Schmitt, it seems at the very beginning of this process that you
must have faced some choice of either letting the
individual district court or its personnel look
at the very same standardized documents and code
them and then send the coding up to you or have
this massive influx of documents and your staff
code. You clearly chose the latter option.
Would you have the same confidence had all the
district court personnel done the coding and just
sent you the codes?

MR. SCHMITT: Oh, not at all. I will
say that our choice --

CHAIR BASHFORD: Even though they're
highly -- I mean they're trained.

MR. SCHMITT: But they're trained to
do other things and so two or three points in
response. Part of the reason why we collect it
ourselves, I think, has to do with our legal
status. This all predates my joining the
Committee but the commission -- I'm sorry, the
commission -- the commission is an independent
agency in the judicial branch. We are not part
of the administrative office of the courts or the
federal judicial center. And so we feel that we need to do this internally because we are who we are and we're not the rest of the courts.

Second of all, the research staff who works on this, their focus and their training is to be researchers. We look at the data collection from a research perspective; what do we want to know, how do we want to know it. Everyone who works for the courts, most all of them are not researchers and so if we were to ask people in the clerk's office or the probation office to provide this information to us, they'd come at this from a different mindset --- which is running the courts, making it happen, and very few of them would have the kind of training that our social scientists do. And so even though I'm confident that they would work hard and do their best, I'm also just as confident that it wouldn't be as good because the mind set is different and not the least of which is that they have other things to do. So my 45 people who work for me, this is what they do. This is what they want to
do. The people in the probation office and the clerk's office, they want to do something else and I don't think they would be interested in doing this work.

And I'll say to you that I think that when you're going to mandate this on the services, there are going to be a lot of people in the services who want to do something else. They want to blow up things and shoot things and do this because that's what the services do. They don't want to be involved in a research data collection process. And God bless them. I mean that's fine. And as you've read my bio, you know that I'm one of those people. I'm a Reserve Officer in the United States Army. And so if were wearing my uniform, I wouldn't want to be a researcher. I want to go do what I want to do, what I was called to do in the service.

That's why think that you have to mandate that there be a dedicated staff to this function, whether it's in all five services or in just once place as a Defense Agency. That's a
decision to make but I think that centralization matters a lot if you can receive the information in a central -- in a consistent fashion. If you're going to have five different sets, then you either have five teams or you have five places to collect it.

DEAN HARRISON: I want to follow up on your idea and I agree with you that it's best to cast as far the best net as possible data collection at the beginning. But you said something that intrigued me. You have -- you only report the data that is relevant under the sentencing guidelines, and one of those data points is not veteran service I understand?

MR. SCHMITT: That's correct.

DEAN HARRISON: So as a group of social scientists and lawyers, what do you do when you find out that 90 percent of the data that begin with the defendant was an honorably discharged veteran; do you at any point tug on the sleeve of the commissioners and say even though this is not a data point that you're
interested in, it's one that you should be
interested in?

MR. SCHMITT: We do from time-to-time
suggest to the commissioners topics that we think
that they should consider based on our own work
on the data, and we think that they listen very
carefully to us but they have their own ideas at
times.

DEAN HARRISON: What I'm getting at is
if we don't cast as wide a net as possible, then
we've got trained staff like you have, we might
be able to correct our mistakes.

MR. SCHMITT: Well, that's right.
This is the trade-off and -- I mean what it is
you want to collect. You never know what's going
to matter later on, you know --

DEAN HARRISON: Right.

MR. SCHMITT: -- and -- but I think
you can think -- you have the benefit of all of
the history in the last few years of the
discussion on this and so you know what matters
to certain members of Congress, and you know what
matters to the judge advocate's general, and you
know what matters to all of you. And so I would
cast your net broader than we have. And so if we
were to do this all over again, there's no doubt
that I would suggest that we would collect
offender characteristics because the judges may
take that into consideration by statute even
though no particular substantive statute --

DEAN HARRISON: Right.

MR. SCHMITT: -- does that. And I
would certainly suggest that we collect
information about victims, because that seems
like a really important point when you're talking
about who goes to prison. But no substantive --
very few substantive statutes have something that
says if the person was four versus six, you know,
they might say under 18 but the age, specific age
didn't matter. So we might know they're a minor
but we don't know the age. You all have that
benefit.

But I think what's behind your
question is very important if I suggest this to
the commissioners, they, hopefully, will listen, to me because they respect me as a professional. But if I don't have the numbers to back it up, they may say, well, you know, Glenn, you may be wrong, maybe it's not 90 percent, maybe it's 10. In my courtroom, I don't see many of these people, and then it all becomes personal experience, which is the worst way to make policy.

DEAN HARRISON: An anecdotal statement.

MR. SCHMITT: So the -- if I had the numbers, they will listen to me because we are a very data-driven organization. But if I don't know, then they just say, "well, you don't really know."

DEAN HARRISON: Thank you.

JUDGE WALTON: One of the questions that has arisen after the Supreme Court ruled the mandatory sentencing guidelines unconstitutional is the increase in racial disparity as it relates to sentencing. Has the commission collected the type of information to assess whether there is
some legitimate basis for that disparity as compared to just race? And if not, what type of information should be collected, because I assumed that may be an issue that conceivably would arise in reference to sentencing in the military context.

MR. SCHMITT: So we do collect basic offender demographics and so we know race, ethnicity, and other things about the offender. The commission has done a number of studies and have made those results public that do show unexplained differences in sentencing that are aligned on racial grounds. In our studies, we have been quick to point out that there is clearly data missing from the analysis. There are some statistical ways in which a researcher can know whether the data that they have looked at explains the phenomena under study or whether it doesn't explain it fully.

We know from those measures that our analysis does not fully explain all of the variation at sentencing. So there's something
else. It could be that there's no other legitimate reason and it really is just race, or it could be that there's something that we aren't able to measure that is correlated with race that explains the result on a legal ground but it isn't the race. And undoubtedly, those are some of the offender characteristics that I mentioned. We think that employment status, support to dependents are two things that really do matter to judges. We know this because we have judge commissioners and we talk to judges all the time.

We had thought that violence in the offender's past might also explain then. When two offenders equally situated, one has a violent criminal history, one does not have a violent criminal history, the judge will punish the more -- the violent offender more severely.

We did some work earlier last year -- late last year rather to look at this and found through this new effort with the computer where we were able to extract criminal history, that violence in the past did not have a statistical
significant impact on the outcome, but still
there's a great deal that's left.

    We, I think, have been careful to say
that our data only goes so far but this is a
classic example of if we had more information, we
might be able to have more complete answers than
we do at the moment. So --

    MS. GARVIN: Mr. Schmitt, can I just
-- for purposes of -- or I could just clear --
we're trying to be clear on this and that the
record's clear -- that the prior -- that the
violence, that is about perpetration, it's not
the violence that may have been perpetrated upon
a convicted person through the course or their
life as a child, right? That was not part of
that study?

    MR. SCHMITT: That's correct.

    MS. GARVIN: Okay.

    MR. SCHMITT: It's the violent nature
of the offender's prior and --

    MS. GARVIN: Yes.

    MR. SCHMITT: Dr. Spohn, you've been
very patient.

DR. SPOHN: So one of the advantages of the data that you collect is that it's available to researchers and I and my students have used it over the past few decades. I wonder if you could talk about the process that researchers have to go through to get access to the data.

MR. SCHMITT: Certainly. As I mentioned, the Commission makes its data sets available to the public with two important limitations. We take out information that would identify offenders. We take out information that would identify the sentencing judge. And -- but everything else, for the most part, is available although if you are a member of the public, you would have to have the appropriate software and the ability to use this really enormous data set. From time-to-time, researchers will have a need to know the identity of the judge or the offender so they can piece and parse out the different things. And we have a process in place
by which researchers can enter into a cooperative agreement with the Commission and is approved by the Commissioners themselves. And through that agreement, we will then make this confidential information available to the researcher. They, of course, promise that they will use this data in a confidential way and when they report the results of their work, it will only be in an aggregate form, not identifying offenders or judges. And that has worked very well.

JUDGE GRIMM: I want to follow-up on Judge Walton's question. By definition, you get -- you start with a charging document and end up with a judgment of conviction and a sentence and explanation of the sentence and a presentence report that calculates some of the information that's required to be looked at by the court --

MR. SCHMITT: That's correct, yes.

JUDGE GRIMM: -- in making a decision. What you have no access to because you don't have the information is information underlying the prosecutorial decision for which there is
tremendous discretion on behalf of the prosecutor
as how they choose to charge and whether they
charge the defense as a mandatory minimum. If
you were designing a system that would capture
all of the steps from investigation to conviction
so that you could get at the kind of information
that Judge Walton is asking about, is whether or
not -- so in other words, if you have a question
about whether or not the number of people
sentenced for a particular crime tells you
something about whether there are -- that there
is a difference between race or ethnicity or
class or whatever else that may be, if you knew
numbers of investigations and the individuals who
were looked at and the numbers who were charged
and you had access to that data, you could have a
more rich set of data from which you could make
determinations as to whether or not there is
merely correlation or whether there's causation
based upon one of those demographics. Is that
true?

MR. SCHMITT: That is true and so I
would want to know at the very least who was
arrested for crimes. Perhaps I would want to
know the reports made of crimes. I'd try to
track that through based on what happened to the
people that were the subject of those reports
and, of course, if you have the -- at least the
arrests, you're going to then be able to
correlate that with some sort of a prosecutorial
decision-making news, declined or it was charged
in this way versus that way. And then social
scientists believe that the decision at the plea
agreement stage is also extremely important. I
would want to know what charges were dropped.

Now there are tricky parts to this.

As you all know or many of you know, sometimes
the prosecutor, you know, charges a whole
truckload of things and they have no intent of
bringing anything more than one charge to
completion and that's just a tactic. And so if
one were to look at that an say, oh, well, this
prosecutor, who happens to be of this race, is
dropping 12 of every 13 charges whereas this
prosecutor, who happens to be of another race, is only dropping 1 of 3, it might be important to know that this guy always charges the whole truckload and drops them and this person is more finely tailored.

JUDGE GRIMM: Right.

MR. SCHMITT: Both of them are legitimate. There's no legal problem there says the law, but -- so the sophistication of your analysis then has to be very careful --

JUDGE GRIMM: Yes.

MR. SCHMITT: -- to not attribute things that aren't happening. But in a perfect world, yes, I'd like to know more about what prosecutors and the law enforcement agencies do.

CHAIR BASHFORD: But isn't some of that information held by the people to your right?

(Laughter.)

MR. SCHMITT: I'm not sure they have prosecutorial information. It's just they're --

MALE SPEAKER: No.
MR. SCHMITT: -- the courts.

(Simultaneous speaking.)

CHAIR BASHFORD: But you would know

how many charges are at the outset of a case and

how many charges remain at the end of a case or

how many charges -- it seems like a lot of this

information is obtained --

MR. SCHMITT: Well, I think it's

knowable. I'm not sure it's known. So the

document is on file, someone could go through and

code all of the charges filed.

MR. KRAMER: But that's all in the

presentence report.

MR. SCHMITT: But it's not -- but it's

not record. So it --

JUDGE GRIMM: No -- no -- no.

MR. KRAMER: But it's not recorded by

you? It's not kept as --

MR. SCHMITT: Right. Nor do I think

--

(Simultaneous speaking.)

MR. SCHMITT: -- is -- are the charges
captured by the folks in the, you know, data
collection part of the administrative office.
They can say to you a criminal case was filed.
They can say to you a criminal case was a closed
on this day. They may even have some indicator
of the nature of the case, but they don't list
all the charges. They don't list what count one
was, count two was.

MR. KRAMER: No. It does -- it does
--
(Simultaneous speaking.)
MR. KRAMER: ECF, it lists every
single count in every case whether it's dismissed
or acquitted or convicted and it lists the
sentence on each individual count.
(Simultaneous speaking.)
JUDGE GRIMM: It also wouldn't capture
a superseding indictment or a criminal
information that was used when you dropped from
13 charges down to a criminal information for the
one charge and you have -- you would have -- for
each charging document filed, you would have to
have the criminal justice to add a summary, which
is a single piece of paper which summarizes the
charges that were originally brought. But is --

MR. KRAMER: It's on the docket sheet.

JUDGE GRIMM: It is on the docket but
what -- but that's exactly what Mr. Schmitt is
saying. It is knowable but not yet captured.

MR. KRAMER: I don't think you
extracted.

MS. McCALEB: If it is not captured
within the field in the database that captures
that information.

CHAIR BASHFORD: And if I understood
correctly, it's not aggregated. It's at some
central location. You wouldn't have to go back
court-by-court-by-court, is that correct?

MS. McCALEB: That is correct but it
also is true that if at the end of the case, what
we capture at the end of the case, but I think
it's -- you know, the -- whatever is filed in the
presentence guidelines, sometimes they're filed,
sometimes they're not depending on the court, but
that data is not captured separately in the database. The fact that the document is there, you can look at it but the information from the document isn't in the database.

JUDGE GRIMM: Right.

MR. SCHMITT: Again, the answer, I think, is that for our respective jobs, it's not -- it doesn't matter, it's not material for our jobs. Because the administrative office isn't going to do anything whether your charge 12 or 3, we don't care what you charge. We only care what gets sentenced because we're the sentencing commission. So -- but to the example though, I think that it's possible to do a lot of things. But it all is driven by what it is you want to know and we each want to know different things because we do different things. You have the luxury of saying this is what the Department needs need to know in all those cases.

MS. GARVIN: Does EOUSA collect and do they have their own database for analysis of some of this?
MR. SCHMITT: They do.

MS. GARVIN: So -- okay, that's what I thought, too, so in terms of understanding some of the prosecutorial data and data collection and analysis, it would be to have an EOUSA representative at some point?

MR. SCHMITT: The Department of Justice would. They -- you know, they even have what was considered and not charged.

MS. GARVIN: Yes.

MR. SCHMITT: That's -- but they, of course, are extremely protective of that information. And of course, this does legitimately impinge on prosecutorial discretion and so you'll get push back from some people as to what they want to know. We don't collect information about defenders and I would get push back from them if I wanted to make a distinction between CJ and a panel of attorneys and FPD's office.

JUDGE GRIMM: The EOUSA is the Executive Office of the United states Attorneys?
MS. McCALEB: Yes, sorry.

CHAIR BASHFORD: Over the course --

(Simultaneous speaking.)

CHAIR BASHFORD: Over the course of
the Commission, have you added any field of what
started?

MR. SCHMITT: Oh, yes, ma'am.

CHAIR BASHFORD: And how was that
done?

MR. SCHMITT: We had a decision come
about to actually add something.

CHAIR BASHFORD: You're told from now
on to collect an extra piece of information?

MR. SCHMITT: Yes.

CHAIR BASHFORD: How -- do you go
backwards; do you only go forwards?

MR. SCHMITT: It depends.

CHAIR BASHFORD: Okay.

MR. SCHMITT: For the most part, we
only go forward because once we have closed the
data set, then that is truth for us for that year
and we go forward. But we have other staff at
the Commission who are full-time computer
programmers and we also use contract personnel as
well to augment that ability. And every day,
they're working on the big computer system in the
sky and so if I say I need to now collect, you
know, left-handedness, they'll add a field to
collect left or right-handedness. I will then
get my staff together and we'll have a training
on you -- how do -- where do you find left-
handedness and do we need to have two codes or
three for the ambidextrous guys, "L," "R", and
"A?" We'd talk through that, you know,
"undetermined," how many variables would we have
for that particular thing, and then on a certain
day, I say, boom, from this day forward, we're
going to collect that and then it just gets added
to the series of collection that we do.

Our -- just mechanically, our staff
has a series of computer screens with fields on
it that are in a particular order that match the
order in which data is presented in the
documents. And so on the day I say go, when they
sign in that day, now there'll be a new blank on one of those screens that will be left-handed or, you know, handedness in the data-- to the pull-down, it would be "L," "R," or "A."

So we -- and then there have been instances where we would go back. So we're working on a data set that's a little separate now that -- about a particular aspect of mandatory minimum sentencing in drug cases. It's experimental. We've collected data for the first year on this and we look and then the Commissioners said, "well, what about this?" And we said, "I don't know." And they said, "We'd like to know." So we went back and added that to the coding process, and we went back to the prior year and added it. We had the luxury of doing that because we had not reported that data yet, and so it wasn't yet sort of locked in. But -- and I think that's the key aspect of adding stuff. Once you report something as public, people get anxious if the numbers change later on.
MR. KRAMER: Can I ask you how many fields or data points do you extract from each case?

MR. SCHMITT: Well, it depends on the number, what's in the case but, you know, the whole menu is about 200 I would say. And so some things are there. In fraud cases, you're going to have loss, number of victims is there, but if it's not coded as a fraud case, then that field doesn't get filled in. We even have a way that depending on what kind of case it is, certain of those screens are there, sometimes they just don't come up because it's not relevant. If it's not a drug case, then the drug screen doesn't even come up and it just -- you know, it's a streamlining of the process but about 200, I would say, is what's available in every case.

MR. KRAMER: So -- and I take it -- you've said but the main thing is that you have these five documents that are pretty standard across the board from every court, and that makes the job much --
MR. SCHMITT: Yes.

MR. KRAMER: -- easier.

MR. SCHMITT: The three that we rely on most are, of course, the judgment that the court signs, the statement of reasons form that the judge gives to us, and then the presentence investigation report. That is really where most of the information comes about the offender and the offense. And if those documents widely varied, it would be much harder to do the work.

MR. KRAMER: And so we're focused on sexual assault cases, obviously, but -- so what you're saying is there could be a standard form for all types of criminal cases in the military but they would have a field that wouldn't even come up maybe in a drug case, but they would come up in -- once you entered the type of case, then that field would come up to be filled in?

MR. SCHMITT: Yes. So at the beginning of our system, the case is called a certain thing or -- and the guidelines that apply are put in, and then that drives what comes
later. If we don't call it -- if we called it a
drug case or we say the guideline is 2(d)1.1,
which is the drug guideline, then the drug screen
is available. If it's a fraud case, then the
drug screen is -- doesn't come up.

MR. KRAMER: So if there was -- if
there -- say I'm going to -- there were
kidnapping charges and sexual assault charges,
and the person's acquitted of the sexual assault
charges for whatever reason and -- but convicted
of the kidnapping, you would code that as a
kidnapping and sexual assault would appear
nowhere in the data extraction?

MR. SCHMITT: That's correct, because
the person was not convicted of the sexual
assault.

MS. TOKASH: Because the military
doesn't have the presentence investigation report
piece of the program, I mean it's just -- it's
not meant to be pejorative but the military
system is just not that sophisticated. I mean
you could, in theory, have a conviction on the
same day that sentencing commences. So because we don't have that data in the military system, would you recommend that if we were going to -- if we're envisioning this kind of database to capture data, that it would be helpful to capture data at enlistment and then that could potentially solve problems like identifying qualifying convictions of those entering the service who may have say a Brady issue?

MR. SCHMITT: That's a very interesting question. I'm not sure that the last part I've thought about it enough to know, but I would say that the fact that there is no presentence investigation report does provide an opportunity for you to mandate how that information is collected. I was thinking that you were going to suggest that there be some sort of report of trial document with little check-boxes that were the key things that the trial counsel might complete and the judge would sign, that would be submitted, that would be all the things that we get from the presentence
investigation report. I suppose you could put it at the beginning of their enlistment, but I think you'll get push back from people to say you're collecting information about someone who hasn't been convicted of any crime and why are you doing this. But once the person has been convicted, then the trial counsel has all sorts that he or she has to do. Adding one or two more sheets wouldn't be that much work. Please don't tell TJAG that I said that. But that's a way that they'd have the standardized data, because you would mandate the form and you would have one person who's intimately involved in the case put it all together. Perhaps both sides would review it, you know, as a part of the record of trial review. And then that could come to a central place to be collected.

We get the bulk of information from the presentence investigation report, and so because there isn't one, there will be -- it'll be difficult to collect information if it doesn't exist in one place, and I think you don't want to
have anyone have to read through the whole record of trial to try to find all those things or go into all the various personnel databases and try to pull that stuff. You ought to just make them pull out a document.

MR. KRAMER: Okay. Go ahead.

DEAN HARRISON: I think the data that we could collect for the military even though there's no presentence report would be things about the defendant, years of service, awards earned, fitness evaluation scores, whatever, and things about the victim age, relationship, severity of the crime measured some way or reported some way, those would be data points that could be of interest.

MR. SCHMITT: I mean they certainly could be and you could have that central collection document have a place for that, you know, the last five NCOERs, was it top block, middle block, bottom block. But you'll have to think very carefully, I think, and I say to you respectfully, on what it is you collect; does it
matter that this person was a top block the last
three NCOERs? I don't know. Does it matter to
the sentencing judge? But certainly, if he was
or she was, the defense will have introduced that
into the record some place so it's there to be
found and it would be submitted separately but
could also be on the collection document.

JUDGE GRIMM: We're also talking
about, as was pointed out by Ms. Tokash, is that
we're talking about a specific constellation of
offenses and a total number of under 1500 in
terms of charges brought if you aggregated all
the services, so we're having a smaller
population of offenses that we're trying to drill
down on. Does that allow us the luxury of having
a larger number of data collection points that
we're interested in?

MR. SCHMITT: Oh, certainly, this is
all a trade-off between staff, cost, and what you
collect. And if you all think that there's
enough desire by people who appropriate money to
have enough -- a big enough staff, you can
collect an awful lot of stuff.

Can I -- if I may, can I just make a
pitch? This is me talking and not the Commission
talking. And I realize the mandate of this
Committee is what it is, but I think it would be
extremely unfortunate if there was a data
collection system created that was limited only
to sexual assault cases. As someone who has been
a defender in the military, I will say to you
that the lack of transparency on what happens in
courts-martial is unfortunate, and it's really a
data collection problem. And to not be able to
say that these are the cases brought it courts-
martial, these are the results and the sentences
imposed for all variety of things, I think is
unfortunate and unfair. And so if you're going
to create a system, it would be nice if it was
not just limited to these types of crimes.

Again, my personal view, not the Commission's.

DEAN HARRISON: And I was -- I never
disagree with the sitting judge but I think the
Article 140 Alpha really requires data collection
on all crimes, not just --

MR. KRAMER: Yes.

DEAN HARRISON: -- sexual assault so even drug possession or whatever data points,
they're all there.

MR. KRAMER: I'm sorry. Can I just --

DEAN HARRISON: Go ahead.

MR. KRAMER: -- you said there's about 200 fields but obviously, like you said, if it's a drug case, some other things are not going to pop up. So in a -- what's like the core, like in an average case, is it, say, 50 or 75 that are actually populated finally in the end, or is there an average number of the 200?

MR. SCHMITT: I don't think I know, Mr. Kramer. I'm sorry.

CHAIR BASHFORD: But let's look at it another way. One of your analysts working one day, how many cases can they do?

MR. SCHMITT: We set quantity and quality standards for our employees and so the document analysts are required it depends on the
grade of the employee as well -- to complete between 4 and 4.4 cases per hour. That's moving pretty fast.

CHAIR BASHFORD: But that's helpful.

MR. SCHMITT: And it's the standardization of the process is what allows that to happen, and the standardization of the documents is what allows that to happen. When we do a special coding project where we have to go back in, read the documents and say, what does it mean when the judge said blah, blah, blah, blah, blah, that process is much, much slower.

BGEN SCHWENK: And they have to sustain that for both of the hours they worked that day?

(Laughter.)

MR. SCHMITT: Or all eight or nine.

(Laughter.)

BGEN SCHWENK: What about quality control? What ideas do you have for quality control on -- in our system, it's definitely diffused. We could centralize it probably some
if the Department chose to do that, but what
ideas do you have for quality control so that you
have some reasonable expectation that -- and I
don't think anybody wants to create an 80 percent
system because that makes the job of future
people, the JAGs themselves and future people
evaluating it, they got a 20 percent error rate
they're using, that doesn't help. So it's going
to be a higher number that it's probably going to
aim for. So how -- what ways can you do that?

MR. SCHMITT: Well, there are three or
four at least that I think are important. I
can't stress enough my personal view and I think
the Commission's that having people dedicated to
this data collection and analysis effort is
crucial. If this is only a part of their job,
they won't be as good as if this is their job.

Second, as with anything, training is
key to this. We continually train our people.
We have quarterly staff meetings. We have
meetings with your supervisor and those folks are
trained as to how to be good at their work. And
so what their supervisors do is they review their work periodically, pick cases at random, look to see how the person has coded it to make sure that they are coding it in the correct way. And if that's -- if it's not, then they go back and say, you know, you're missing this, you need to get this improved.

But the way in which we are -- we have helped to ensure the quality of our work is through some computer technology. And so we have programs that run in the background that will tell the analyst while they're in the case if they've forgotten to fill in a field or if they complete a couple things that together relate to a third thing but it can't possibly be that way based on the math or the way the guidelines work, then a little box pops up that says, you know, warning, you can't have this or this has been left undone, you know, drug quantity is wrong or missing, that sort of thing. And so that's while the person's in the case.

And then we have a second computer
program that goes in from time-to-time and reads, you know, the variables in a whole swath of cases to look again for things that are, if you will, logical inconsistencies in the way the data is done or things that are missing. And when that happens, we have a separate staff that goes in and reviews those cases so that maybe the fourth point is the redundancy --

BGEN SCHWENK: The clean up people.

MR. SCHMITT: The clean up people, yes, to make sure that it's right. But the fact that they're different people is important to that because it's a new, fresh set of eyes.

MS. CANNON: Thank you. It seems that you're gathering data at the end of the case for sentencing purposes. What we're finding is we're very interested in the cases that don't get filed as well as the cases that do get filed and the questions and issues that go into that. Do you have any suggestions how, based on how you're doing it at the end, how we might capture that at the beginning?
MR. SCHMITT: Well, it seems to me that you would need inputs from two different actors that we don't have and that is the law enforcement folks, so CID takes a complaint from someone that something has happened; you would want to know what happened to that; you need to know data on who was the subject of that complaint. And then some decision about the staff judge advocate folks, whether they decided -- why they decided to bring the case or not.

On the law enforcement piece, I know those information exists. CID has all sorts of databases and you could pull that information out. There are obviously some confidentiality aspects with that. Of course, if this is a closed system and kept confidential like ours is, then you don't have that concern.

I worry a little bit about the prosecutorial piece, requiring them to say why they did or didn't bring the case I think would be challenging but that's clearly the other part of this, is why did they decline to prefer the
charges. And I suppose there's a third piece which is from the convening authority to know why he or she didn't refer the case. I suppose you could have those officers provide some sort of report that, again, would be coded in some way.

But I appreciate that on those last two points, that's a big challenge and it will be seen as a way to chill the discretion or the decision-making of both prosecutors and convening authorities.

But without information about those three steps, who gets arrested, how does the prosecutor decide, how does the convening authority decide, then you can't run the case through its process. And if you all perceive that the breakdown is in the decision to prosecute or the decision to refer, then that's where you could collect the information. If you're not worried what the sentences were, too high, too low, then if it's really about whether the case was brought, then that's where you should focus on the data collection and find some
way to standardize what it is they tell you
without asking them to tell you everything. So
maybe the prosecutor just has to say to you,
"evidence insufficient, victim's unwilling to
cooperate," or -- those would be the two that
come to mind.

MS. CANNON: My sense is we would want
to do from A to Z. This earlier part is a part
that we're very interested in but I think we want
to know the data so that at the end, we could
extract whatever questions and answers we needed.

MR. SCHMITT: Well, I certainly would
agree in general that it's always good to know an
entire -- all the aspects of a process, not just
the end. From my own experience, I will say to
you that I think there is great disparity among
judges and the sentences imposed and those always
disturbed me when I was an advocate. Obviously,
the point of the sentencing guidelines was to
narrow the amount of disparity in federal
sentencing that was perceived to exist before the
Sentencing Reform Act was passed. So this very
complex book is as complex as it is because of a concern that there were differences in sentencing that were not based on the facts and that would be unjust and I would agree. And so I think that concern also exists in the military and I hope that that has not lost sight of in the focus on the front end, which I also appreciate is a legitimate focus.

MR. MARKEY: First of all, thank you very much for the information. I appreciate it. In regards to Ms. Cannon's comment, I think you have described exactly what our -- what I feel our task is, to identify through the entire process a collection of information and data that's critical for analyzing and determining resources and whether the responses are appropriate or not.

I will piggyback on what General Schwenk was talking about, which is QC and QA, and I go back to your source materials which are five documents that you rely on. It sounds like your analysts and your researchers are driven by
the accuracy and quality of those documents that are given to them. And so I'm curious about the source of those documents. Are they -- first of all, who is completing those documents at the different court systems? How do you ensure that that information not only -- one -- I'd say one, do we have missing data and then two, is the information we have accurate? So there -- I see two different processes here. Easy for a computer to day we've got missing data, you need to fill this box in, but is that data accurate? I go back to the very 101s of collecting data. Are these documents electronically being entered by your personnel at that level, or are they in written documents that are being transmitted to your people to review?

MR. SCHMITT: The documents come to us now as PDF documents, so they're copies of the actual hard copy documents. Of course, some of these documents only exist in digits. They don't actually exist in a piece of paper someplace. But they are submitted to the commission through
electronic means, but when my people review them, they're looking at a computer screen and it looks like a paper document. And if we were to hit "print," we could print it out but we don't use paper documents. So they review that.

The documents, in terms of who creates them, it's a variety, of course. So the indictment is created by the prosecutor. We know that it is the indictment because it's got the seal of the court that it was the one that was filed. The probation officer in the case is the one who creates the presentence investigation report. It's reviewed by both parties.

MR. MARKEY: Right.

MR. SCHMITT: And, of course, the court makes a finding at sentencing as to whether he or she accepts the document as complete or if they find problems with it, they note in another document that we get, the statement of reasons form, any changes that they are making to that presentence investigation report. The judgment and commitment order is the court's own document
bearing the judge's own signature and so he has
or she has reviewed that as prepared sometimes --
most often by court staff but sometimes by
clerk's office staff. Sometimes courtroom staff
-- I mean sometimes clerk's office staff. And of
course, the plea agreement, the one I skipped
over, is written by both advocates, signed by the
prosecutor and the defender and the defendant.
So all these advocates, of course, have seen this
document and through the process would have
called to the judge's attention something that
was in error.

We receive the documents from one
place and so that may be part of your question.
When -- those documents are sent to us by court
staff who are the court staff involved in the
process, almost always the probation officers
send these documents to us. They obviously have
those documents in their system which they use
for their own purposes and they fire them off to
us. One district uses the court clerk's office
to send the documents to us, but we know that the
documents are real because a court official is sending them to us, and that person gets them from the court's official docket, whether they're in -- well, they're in the docket someplace. They're not always publicly available, of course, because they could be sealed. Have I answered your question?

MR. MARKEY: Sort of. So they're not electronically entering the information into one of these source documents and then transmitting those to you where that information could be populated into your database?

MR. SCHMITT: Right.

MR. MARKEY: That --

MR. SCHMITT: That's right.

MR. MARKEY: -- level of sophistication isn't occurring. It's some sort of document that they scan or got the PDF and then you read that original document?

MR. SCHMITT: That's right.

MR. MARKEY: Yes. I'm not questioning the validity of the document. I'm questioning,
you know, the process of how it gets to you --

MR. SCHMITT: Yes.

MR. MARKEY: -- okay. It seems -- you know, efficiency is always an issue.

MR. SCHMITT: The technology does exist that the data that they put in their system, we could pull into our system or they could push into our system, and I wouldn't even need to see the document, just the fields would come in. But we have chosen not to do that because we want to take a fresh look at it and read it for ourselves and understand it. And I will say that.

When we look and it says the person was white, we code it as white, there's not a lot of judgment that goes into that. That's what the document says. We don't ever change that. So there are some things where we could clearly pull the information in, but as -- but because there are some things that we really want our people to use their judgment on, we have made a decision that we'll do the whole thing ourselves. Again,
that's part culture, part our legal standing as an independent agency, but it's not necessarily the best practice. You could have a system where you are pushing or pulling in data from databases that the services collect -- keep, but you then have to be -- you then have to know who is putting the data in there. And if it's not reviewed or cleaned, then it is what it is, where we have the luxury of putting it in ourselves.

We can think about it every time.

MR. MARKEY: Oh, I have one just quick follow-up. You said there are situations where you would use judgment on something. Can you give us an example of where you would get information and then you'd make a discretionary judgment on how to answer that? And I'm assuming that's the process. What would be an example where you would get data, then you would interpret it a certain way and input it?

MR. SCHMITT: We have a field that we called the guideline high so is -- which is not something that the court determines. Let me give
you an example. When a person is convicted of
three separate crimes, there will be three
guidelines that apply in the case. So for
example, drug trafficking, money laundering, and
obstruction of justice, there will be three
counts of conviction. The court will have used
three different guidelines to determine the
sentence and then under the guidelines, they will
use one of those to drive the sentence. When the
document comes to us, it says guideline this was
used and guideline two was used and guideline
three was used. We look at -- we make our own
decision as to which was the one that drove the
court's decision-making, which was the one that
resulted in the highest sentence. And we then
say that's the guideline high that applied in
that case. It's not a -- it's a judgment
informed by the way the guidelines work. No
document -- there's no blank on the documents
that say guideline high was, you know, 2(d)1.1.
We make the decision that of these three, the
court had to have used 2(d)1.1 as the guideline
high because that was the one that resulted in
the higher sentence. That's an example but we
don't guess at anything.

MR. MARKEY: But you are interpreting?

Do you ever go back to the court and collect a
clarification?

MR. SCHMITT: On a rare occasion, we
will call and say what does this mean or this is
blank.

MR. MARKEY: Thank you.

JUDGE GRIMM: I'm not sure that we can
get an answer that is doable with time and
resources. One of the things that we have looked
at is percentages of charges in a certain
category that resulted in convictions. And if
you were looking at conviction rates, for
example, that were 25 percent for a particular
charge and you were trying to figure out why is
it that for these type of offenses, the
conviction rates are at this level which in the
federal system would be considered a surprisingly
low number of convictions for the resources
brought to bear. Are there any suggestions that you could give us as to how we might try to capture that information you have to get from the decision-maker and it's unlikely that the judge or the members are going to feel as though a form that requires them to explain why they did or didn't do something was not an intrusion into their functions? So I'm not sure we can ever capture that but if -- since you have a foot in both of our -- the worlds of how trials go and how the data from those and records are performed and you also have been a part of that process yourself in your military capacity, do you have any thoughts that might help us with that?

MR. SCHMITT: Well, I think the largest single driver of whether a charge to count is then a counted conviction has to do with the plea agreement in the case. And in the federal system where 97 percent of the cases plead out, every one of those pleas takes things off the table. And so the fact that a particular statute was charged and isn't the count of
conviction has no bearing on whether that's a --
was good evidence or whether that was a good
statute. It's just what the deal was. To me,
you would have to have at least that
understanding of was this a plea agreement case
or not. And I think the only way you can really
test whether certain articles are successful or
too hard to prove or whatever is to look only at
contested cases when that was on the table and --

JUDGE GRIMM: Yes, sir.

MR. SCHMITT: -- then they acquitted
them of them. Or you can see what the punishment
was for that, and I think that's another item of
interest. Some people may say well, I think that
the average sentence for these articles are way
too low. Well, that's the question; what is the
average sentence for those articles? And then
you might want to make a distinction between in
plea cases when that person pled guilty to that
versus fully contested cases where they didn't
plead guilty to that, because that makes a
difference. It makes more of a difference in the
federal system because you get a little of the
discount if you cooperate, if you pleaded guilty
I should say, you accept responsibility. But
surely, it also makes a difference in the
military if you accept responsibility versus
oppose everything.

Beyond that, I don't think you can get
farther into the mind of the judge or the panel
on --

JUDGE GRIMM: That's true.

MR. SCHMITT: -- why they decided to
convict of a particular article, and I don't
think you should.

CHIEF MCKINLEY: Sir, kind of
piggybacking on his question. With your
experience as a JAG, do you think that possibly
convening authorities will just go ahead and give
the benefit of the doubt and refer something to a
court martial versus a civilian prosecution
wouldn't take that to court?

MR. SCHMITT: I don't know that I
would hazard a guess. I would hope that
convening authorities are informed by their staff
declare advocate who has done his or her duty to
ensure that justice is done and not to suggest to
the convening authority that he or she refer
something where the evidence was not sufficient.
I hope that that's happening all the time. I
think there is tremendous pressure on convening
authorities at the moment to refer everything
that comes to them.

I don't -- in my experience, military
prosecutors, on the whole, exercise the same
amount of discretion as civilian prosecutors. The
only difference, in my judgment, in my experience
was that oftentimes military prosecutors are much
younger, much earlier in their career and
sometimes a little overzealous, and civilian
prosecutors, with the benefit of age and
experience, are a little better able to make
informed judgment that somebody who's only been
out of law school for six months.

MS. GARVIN: It is actually a question
for -- the panel starting early on with -- you
know, about the wording that you get when you're filing a document, about you're responsible for redacting, you're responsible for the privacy aspects of this. I'm just curious if you have -- as someone who files those documents, you know, I pay attention to that. Obviously, I'm a victim's attorney. I'm paying attention to it very carefully but I also see other documents where I'm like, "ah, oh, gosh," and then I'm filing motions to try and fix it. So I'm just curious if you have recommendations as folks are thinking about a system, a database, putting all of this and systematizing it, what your recommendations are for privacy. I know in your testimony, you had said, you know, algorithms are not going to catch everything, there's no substitute for people, but what are all of the suspenders that you might recommend across the board?

MS. McCaleb: Well, I could say one thing that we're looking at is there are some software that will look for patterns, and so Social Security numbers, the obvious example. So
even though it is the attorney's responsibility to redact that information, it doesn't always happen. So we're looking at software either off the shelf software or creating it our self to go through and review the document at the moment that it's filed. In some courts, the policy is no matter what, the attorney is able to file the document even if there are mistakes in it and they can get corrected later. But we're looking at warning the attorney -- you're not preventing them from filing it -- but warning the attorney that the software detected a Social Security number, for example, and giving them a chance to not finish that filing, go back, correct it, and then do it -- get it just right the first time. That works well for something like a Social Security number but for name of a minor child, no software is going to find that. But there are some things that can be done that way and it's -- you know, we also can get software just to see if the title of the document -- when the document is filed, it has a case number on it, obviously;
does that match the case that the attorney
selected when they addressed the file? So things
like that we can have software that can identify
errors before they're filed. Attorneys do
occasionally file into the wrong cases and then
the docket is -- that's another way that you can
prevent some error at the beginning through
software.

MR. KRAMER: I don't know if this is
a local variation or national but if we file --
and this goes back to your -- if we file
something and realize that something should have
been redacted, we can call the clerk's office and
they'll log the document off until the corrected
--

MS. McCALEB: Yes.

MR. KRAMER: -- redacted version is
filed. Is that a national --

MS. McCALEB: I think our --

MR. KRAMER: -- thing or just a local?

MS. McCALEB: -- I -- well, it's -- I
think it's local but I do think probably all
courts -- I mean I certainly have heard about
that and the clerk's office will go through and
they'll -- it depends on the local practice but
they'll either go through the document and allow
the attorney to file it again. Or in some
courts, if it's filed, it's filed so then they
just add a note to that entry that says filed in
error, so you know something was done. So there
are two ways of doing it but I think almost every
court does allow that.

MR. KRAMER: So you can do that very
quickly, somebody could call and say --

MS. GARVIN: And we do that. I mean
obviously, if we see something before I even
filed a motion on someone else, I have called the
court and asked them to do something -- and the
other party.

DEAN HARRISON: As a follow-up, is it
possible to structure the software so that it
goes live for all of the parties and the clerk
and the judge but public access is delayed for 24
hours --
MS. McCaleb: We have looked at that. We have not had a clear requirement from our
groups -- from our courts to do that. But there
is -- it's certainly been discussed among some of
our working groups and our expert panels. We
have these groups that advise us, that I spoke of
earlier, about how the software should work, and
that is one of the things that we've looked at.

Dean Harrison: It's possible to do
that --

MS. McCaleb: It is possible to do it.
We haven't done it. They call it "lodging." And
there are times, too, when I think an attorney
will call the court and, you know, just talk
about what they need to do and if they -- it
should be sealed, just get advice on how to do
it. Sometimes they email the document to the
court rather than file it themselves.

Chair Bashford: Before I let you go
with the thanks of the committee, I just want to
see if there's anything that the staff would like
to have clarified from the remarks --
MS. PETERS: Yes, ma'am.

CHAIR BASHFORD: Ms. Peters.

MS. PETERS: A few questions. First, for an administrative office of the courts, I think before the meeting, you were kind enough to provide the staff and the Committee with a code book from the Federal Judicial Center, the Criminal Integrated Database. It has a series of codes that I think are in the system. Do you have any comment on how we could do further research with this or what we can take away from a code book like this or how we could further our research on the information available in the federal court system as pertains to trials as opposed to sentencing?

MS. McCALEB: Well, so there are a lot of different -- so there's the nature of suit codes that Wendell mentioned for example. So there's a standard list of those and one of the ways -- when you talk about quality control, one of the ways of handling that is there's like a drop-down box and all of the codes that are
applicable are available to select, but somebody can't just type something in. They must choose from one of those codes. Whatever codes that you have, if they are available in that way to the software so that the end user has specific choices to make and can't just type something in, that's a very valuable way of using the codes that you've got.

Another way is with date validation.

So our software knows what day it is so you don't have to have somebody enter a date. It just automatically -- it captures it from the operating system really, server. But if you need to enter a date, a future date, if you can put a calendar icon on that field so you can then select a date but you can't enter a date and get the year wrong or, you know, when you enter from the keyboard, you know, you're typing in 2017 all day, you'll type in 2018 by mistake, but if you have a calendar icon that they just click on -- there are a lot of different ways like that that you can use codes and different kinds of
mechanisms to make sure that the field and the
data that you're getting are as accurate as they
can be.

MR. SKIDGEL: I would also add that
the codes that are in that code book is, as Mr.
Schmitt mentioned, is a trade-off in terms of the
offense codes, it grabs a five that are there at
the opening of the case and the five that are
considered the most important at the end of the
case. Your fields could contain more than that
or less. The -- also, by having those codes, we
talked about standardization and how some events
and motions are different in one court versus
another, but under the code, there's a conversion
table so all of these motions of a certain type,
no matter what I call them, all go to a same
specific code which shows up in the statistical
data that we have, and that's how we're able to
provide that aggregated statistical data to
Congress yearly and also allow researchers to use
it as well.

And the other thing I'd mention is on
the public access side, you do want to have
controls on the -- your date ranges because if
someone puts in the year, they're pulling a huge
amount of data, it's taking a lot of time and
resources, and if you end up billing for it, it's
my credit would be crushed type of situation.

MS. PETERS: The staff had a note to
ask what is the cost of opening a PACER account?

MR. SKIDGEL: There is no cost open a
PACER account. There are two ways to do it. One
is if you provide a credit card. What that does
is we use that credit card to validate the
address because in effect, the Government is
issuing credit. You're going to use the system.
If you use less than $15.00 worth of code,
there's no bill. If you don't want to supply a
credit card, you can supply a name and address
and we will -- the system will send you, within
24 hours, U.S. Mail, log-in and separately a
password which you can then use the system. If
you use a credit card, you have access within 15
minutes or less. If you go without using a
credit card, it's just however long it takes the 
mail to get to you, but we send it out within the 
day.

MS. PETERS: And I do have one more 
question and this is for the group. An issue 
that arises in the military is the handling of 
classified information, and you all spoke 
extensively about sealed matters, sensitive and 
confidential information. But can you, through 
your experience, expand upon how classified cases 
would be handled, like they may not involve 
sexual assault but certainly it's possible that 
they might so I think it's of relevance. And 
from the military's experience, there's often two 
etirely separate networks that never talk to one 
another to make sure that classified information 
is never inadvertently or intentionally disclosed 
on that other platform. So if you could speak to 
how your systems might address one of those 
issues involving classified information, that 
would be helpful.

MS. McCALEB: In CM/ECF, it's all on
one network. There are firewalls between the inside and the outside. There is a judiciary intranet but the attorneys file from internet. So we have a lot of securities built into the system. For sealed cases, you know, I talked about the levels of security as depending on the document or the docket entry or the entire case, but when you build the system, you need to know how many levels and how wide it would be so that you can, from the beginning, architect the system.

MR. SCHMITT: The courts are required to submit to us all documents even if they're sealed, and so about 10 percent of the documents that we receive every year have been ordered sealed by the court because there is not remote access into our system and because only Commission employees see these documents, there's a tremendous level of security, of course, for that. In the 12 years I've been at the Commission, I've not come across a case where there was classified information in a PSR, for
example, I would say wouldn't need to be in the judgment or commitment order or the statement of reasons form. It would only be in the PSR. I suppose the court would just decide not to send that to us. It might be in that fraction of cases we don't get.

But classified information that might show up in a court document, I think, is somewhat rare; it might be debated in court; it might be in the record -- it be in the -- you know, in the record of the proceedings but on the five documents we get, I think it's unlikely. So I don't know that our experience can be very informative to you where I -- I appreciate that there will be many more classified matters in the military.

MS. PETERS: Thank you.

CHAIR BASHFORD: Ms. McCaleb, Mr. Skidgel, Mr. Schmitt, thank you so much. Your testimony has been very informative.

MS. McCALEB: Thank you.

CHAIR BASHFORD: And we're on recess.
Whereupon, the above-entitled matter went off the record at 11:20 a.m. and resumed at 12:16 p.m.)

CHAIR BASHFORD: Before we move to the case reviews, there have been a couple of requests that we have a little chance to sort of talk and digest what we just heard. Some people thought at the end -- I thought maybe if we could take 10 minutes now, if there is anybody who wants to comment on what they heard or digested in a group. And we're now -- we have now been joined by Ms. Long, too. I just wanted to get that on the record.

Okay. I'll kick it off. I thought one of the most important things that we heard was the benefits of having a document-based system where the documents go to a central location. I suppose it could be multiple central locations, but the people who that is their job to do, then do the coding from these documents. I thought that was very valuable.

MS. CANNON: It seemed to me that --
that there was a lot of experience on how to do this, and they went through some different iterations to finally get to some very sophisticated networking capability.

And one of the things that struck me was that as few documents as can be suggested to be critical to inputting is important. So figuring out what the most important data we want to know, because we want to capture it both at the beginning and at the end, as well as in the middle.

So what would best -- what would those documents best be, and try to streamline those, so that they could fit across the different forces and be uniform.

Otherwise, I mean, the one person talked about beginning in 1995 and 17 years later they had their system. And those in the federal know what I'm talking about. I don't think we want to have that kind of timeline, so that's what I got from it.

JUDGE BRISBOIS: Some of that timeline, though, is a function of changes in technology. So
it would be a much more compressed timeframe, given
the status of data systems now compared to 20 years
ago.

CHAIR BASHFORD: But I think, you know, we don't have to reinvent the wheel. There are
systems that have been developed, but all of -- if
I counted right -- and I very well might have -- I
mean, they were getting five documents at the
Sentencing Commission, and their -- their possible
field had how many possible entries?

Yeah. So if you have -- you know, if
you have 10 documents, you know, it goes on.

Any other thoughts, things that they
wanted to digest as a group?

MS. TOKASH: Yeah. I disagree with the
potential for impact on prosecutorial discretion.
You all know I'm a prosecutor. I think that asking
for a reason at the investigative level, the judge
advocate level, and the command level, as to why a
decision was made does not impede on discretion.

And I think that that's the very heart
of what this committee is trying to get at,
especially when we did look at conviction rates.
I think that the only way we can get to that is by
understanding, was there evidence that could
sustain and maintain a conviction? Maybe not. And
if not, was there another reason?

And if the commander says, "Well, the
reason why I referred a case that I believed, even
though my judge advocate was telling me could not
maintain and sustain a conviction, I believed that
there was an interest of good order and discipline
to send it forward anyway."

I think that that information is very
valuable, and I don't think that that's impeding on
discretion. I think it's doing that which this
committee is charged to do in finding out, you
know, why we have a problem with military sexual
assault cases.

And unless and until we know that, we're
just not going to know what the root of the problem
is. And it appears, at least from the early onset,
that that might be one of them. It could be victim
expectation or victim expectation management with
regard to the quality and the credibility of the
evidence going forward. I mean, a myriad of
things.

But unless and until we are able to
examine those three things from the investigative
level, the judge advocate level, and the command
level, I don't think that we really are going to be
able to wholly complete our mission.

JUDGE GRIMM: Could I respond to that?
I think you're right, but I -- if I -- if I use as
a comparator the process that Walton and I and all
the judges who are familiar with doing this in
terms of the felony cases, we have to explain the
reasons for our sentences.

So if I vary above or below what the
guideline range is, I have to say that. And I have
some boxes I could check, but I also, if I had to,
I have to have a narrative. But I also know that
while that data is collective, the general
information is published but not the individual.

You're not going to get, or if you have
a commander who says, "The real reason why I
referred this, despite the fact that my judge advocate said that I don't have a case is because I'm afraid that if I don't I'm going to get my promotion," they're not going to say that or say anything that would allow you to decide if that's what is going on, if it's going to have their name on it and it ties back to them.

So if you want to know the real reasons, then you need to consider whether or not the information that you get from those people who are making decisions is anonymized, so that they -- so it doesn't go back to that one individual person, so that he can say, "Well, we're going to go back to Colonel So-and-So when he was a brigade commander and find out why it is that these occurred."

So there is a tradeoff there. I don't know if it can be done, but if you know -- you know, there's a principle of physics that says that observed behavior, particles -- particles observed behave differently. And when you think that your name is going on it, I don't know if there is some
force going on there other than what is going to be
in the dropdown box you're not going to capture if
it ties back to what they're -- they could be
pointing out to that.

MS. TOKASH: But perhaps that -- with
the example that you used with, you know, that CG,
I mean, I had that happen to me in the Army as a
special victim prosecutor where the commanding
general, despite his advice of his judge advocate,
his SJA, decided to refer the case forward.

And the defense filed a motion to
dismiss for the appearance of unlawful command
influence the morning of trial, and the commanding
general of that installation refused to come to the
courtroom to get on the stand and explain why it
wasn't the fact that he was pending nomination for
a fourth star, right?

So not coming -- you know, not coming
over to the courtroom because I couldn't proffer as
to the trial counsel. I had no evidence to the
contrary and the case was dismissed. But perhaps
if there was that transparency to actually say the
reason why these commanders are doing what they're doing, then maybe they wouldn't make what in my opinion was an improper referral decision. And I think the court got it right in that case.

BGEN SCHWENK: Could I comment on that? I think the unlawful command influence is the concern, and the concern is, to make a decision, you don't have a reason, people can criticize it or what have you. But it's less obvious than when you make a decision and people say you've decided it or she decided it based on what.

And so I think that's the basis for the traditional approach of no reasoning, just make a decision based on whatever your reason is. You have complete discretion. You're the convening authority. So I think when we do our analysis and we talk about this in more depth, we're likely to conclude what everybody said. It would be helpful if there were a reason. It helps you with your analysis. It helps you decide how the system can be made better.

But we have to -- I think we're going to
have to ask the services to come in and talk about unlawful command influence and what their views are on, if we go that direction, what is the effect on military justice? Because it's different than federal judges.

It's one of those systems where people say aye-aye and do what the senior person wants. And if somebody senior criticizes a decision over in left field for one reason, then all of the other people who make similar decisions realize there is a right answer and a wrong answer here. And then you have a problem within the system.

So I think the concern or the desire to have a reason is a good one. But I think we just need to hear about it and not let it influence any other concerns the services have, so we can balance it all in making our final decision.

One thing I'll say on this -- since I'm talking, one thing I'll say on a way to approach the 140A thing is one approach might be from the consumer of the data in order to do analysis for improving the military justice system; in our case,
sexual assault.

In the case of the Military Justice Review Panel, I believe it will be called, the entire military justice system. And in that way, we would start with, what do we think the system ought to look like to give the analyzers what they need?

And we heard a lot of great things this morning about what ought to be in a system, and that -- if you take that approach, then you have to worry less about all of the fundamental details and the ins and outs, but you instead focus on the data that you need and the way you need it in order to be able to accomplish your purpose, and then we can add all of these great ideas that we heard from the panel this morning on how you get there.

So that's just one way we might approach it, but keep it in mind. Thank you.

CHAIR BASHFORD: All right. I think we'll now hear updates from the various working groups.

So, Mr. Mason, you are providing --
MR. MASON: I am, but I believe --

BGEN SCHWENK: I believe someone told me that I had to go first since I was just talking.

CHAIR BASHFORD: Okay.

BGEN SCHWENK: Okay.

CHAIR BASHFORD: Excellent.

BGEN SCHWENK: Here we go. So next slide, please. All right. So let me just tell you where the Case Review Working Group is and where it thinks that it's going.

Last time we talked we told you that we were gathering investigator files of penetrative cases closed in 2017 with adult subjects who were subject to the UCMJ, and we were going to try to go through and extract data from which a criminologist could conduct an analysis to determine if there were any predictive factors from the data we collected with decisions. And the decisions basically are no action, prefer the charges, take some kind of administrative action, do NJP, what have you.

So that's what we started doing, and you
can see on the first -- on this slide that we have
done real well with the Air Force cases thus far,
we are starting on the Army cases, we have done
some Marine, some Navy, and so we're moving along.
But we've done over 300 cases already, and so we
have more to -- more on the docket.

Next slide, please.

Okay. That's from the staff. This is
from the members. As a double-check on the system,
in order for the seven members of the CRWG to
better appreciate exactly what we're talking about,
we have a random sampling that we are going to look
at, 115 cases. And the members have already done
60, so we have 55 more to go.

And I believe Dr. Spohn has agreed to do
those 60, and so --

(Laughter.)

BGEN SCHWENK: No, somebody did.

Okay. Next slide, please.

Okay. So this is a summary thing. The
no action taken, there were 1,300 cases of the
category I described, 400 preferred. The admin
action, the NJP, much smaller numbers, but we're
going to end up doing a total of 2,000 cases.

And for your information, the
anticipated completion dates are over on the right-
hand side, and we're driving for those dates so
that the criminologists that were -- the staff is
hiring for us and for the Data Working Group,
Chuck's group that he is working on, can use that
expertise to look at the numbers and see what
correlations there may or may not be.

That person hopefully will be -- I guess "hope" is not a course of action, but hopefully in
a course of action he will -- he or she will be on
board in the next month or two and can spend the
summer, while we're still -- while we are still
generating data to populate the database, studying
the categories, the database categories, and
deciding what kind of analysis that criminologist
is going to want to do to help us look for
correlations.

And so if that happens, then -- and we
can get this populated, that will give him or her
time at the end of the year for a couple of months
to do the data crunching, provide it back to us,
and then that would give us a chance to come up
with our thoughts and present it to the DAC-IPAD at
the January meeting, so the DAC-IPAD could debate
it and decide what findings and recommendations, if
any, the DAC-IPAD wants to make in the March report
next year.

And then we'll stop doing investigative
files because we'll be tired of them by then.

Okay. Next slide, please.

Now, so besides doing that, the other
thing we thought we would bring to you at the end
are any issues we saw that we thought the DAC-IPAD
might want to consider to look at in more depth.
And so right -- these are off the cuff. These are
our first look. So it's entirely possible that
next January we will be sitting here and telling
you, "Remember those seven we told you about?
Forget all seven of them." Or you may hear more.

So let me just run through them, so that
you have them in the back of your mind, something
you can think about. Victim and subjects experience adverse effects from lengthy investigations. All right. Right now, we're seeing investigations that -- and this is just up to the initial disposition decision. I mean, the decision is go further, and the delay is that much longer. Four months, six months, eight months, sometimes 10 months.

So there is no doubt the data is showing, at least initially, those take a long time to get to initial disposition decision. And we have all heard from witnesses that have been in here and in front of the CRWG, there is an adverse effect on the victim having to wait this long, and there is an adverse effect on the accused. Can't get promoted, can't get this or that, waiting for an outcome.

So that's one we'll look at and see if we have data to support looking into that more, too.

Influence of alleged victim's desire to go forward on the command legal decision. Okay.
That's an issue that has been brought up. There is a perception, you know, that that influence, it's supposed to be an important factor, but it's not supposed to be dispositive. Some people tend to think it's dispositive.

In the sense of a victim who does not want to cooperate, it may well be dispositive, because there may be no case without the cooperation. In the case of a victim that wants to proceed, it should be an important factor for a convening authority but not dispositive. If there is a perception it's dispositive, we will look at the data and see if there is a correlation there or not.

Number three, prosecutor case analysis and additional investigation is generally not captured in command action documents. So we're looking at the investigative file. We're going to make an assessment based solely on the investigative file of whether that initial decision, whatever it is, is reasonable based on that file.
Now, we know that there is stuff the initial disposition authority considers that's not in the investigative file -- a prosecutorial merits memorandum, the input from the staff at the command, who knows? Advice from a judge advocate. We may sit down and talk about it.

So what we intend to do is go through and make that assessment based solely on the investigative file and on any cases we come up with that several of us, because we'll look at any unreasonable cases in our view, that several of us will look at. If we have those, we'll go back to the services and say, "Do you have anything more that might explain the decision?" And they may have something or they may not.

Okay. Number four, next slide.

Okay. Apparent inconsistency between the judge advocate's probable cause determination and command action submission. Okay. So the investigators come in and say, "We're ready to take fingerprints and make this person a subject of the investigation. You, Mr. or Ms. Judge Advocate,
tell us whether there is probable cause."

And so they say there is probable cause; go forth and investigate this case. And the investigators continue, and they give it to the commander and the commander makes a decision and says no probable cause.

So, apparently, something happened in there that was probable cause and disappeared or has been overcome by events and there isn't. So we are going to look at that and see if we can find any data on that because that does happen.

Number five, lengthy delays between final investigative ROI, command disposition action, and investigative case closure. That's not, as you might think, investigation finished, here is my decision, and close the case. There are big gaps in there, so we'll look at that.

Full investigation -- number six, full investigation triggered by third party and command required reporting. This is particularly the instance where the victim does not want there to be a case, but inadvertently tells somebody in the
command and so, therefore, cannot have a restricted report anymore, or it tells a third party or third party sees it or does -- and makes a report and the victim goes "I don't want to do that."

We've heard from investigators and commanders they wish there was a way to unring that bell, and so we're going to look at the data to see -- on that issue, see if there is any data that we can present on that.

And the last thing, usefulness of character interviews in case files. Many of the members of the CRWG and the staff have commented that they sure -- the investigators sure do a terrific job of interviewing everybody who knows either a victim or the subject, and they have really great things to say about whether they're good people, not good people, you know, really smart, not so smart, whatever.

But it doesn't seem to be particularly relevant to the elements of any offense that is being investigated, but it does indicate a lot of investigative time and effort. And so we're going
to look into that also.

There we are. That's it.

CHAIR BASHFORD: Thank you. Any questions or comments from the committee members?

BGEN SCHWENK: I'm not taking any.

(Laughter.)

BGEN SCHWENK: But you all can have them. That's okay.

CHAIR BASHFORD: If not, we'll go on to the next report. Is that you, Mr. Mason?

MR. MASON: That is me, ma'am.

CHAIR BASHFORD: Okay.

MR. MASON: The Data Working Group would like to provide just an update of where the data project stands at this point. Previously, we discussed the past RFI process that we have participated in or utilized was developed by the JPP, which we would send a request out to the services, as well as SAPRO, asking for SAPRO to cooperate with the services to provide information that the services already provided to them, then provide the information to us, and then we go out
and get the case files and add them to our database.

At our last meeting, we told you about the FY2017 data that we had requested, and the SAPRO had declined to participate at that point because they said the report was going to be coming out in May, and they did not want to release information from SAPRO to anybody until that report was released for Congress.

So DAC-IPAD agreed to issue a new RFI, which is for the FY17 data still, where we severed any mention of SAPRO, and asked the services to access their own internal databases and to provide the cases that would meet our requirements.

We had a request that the case list be presented to us on 26 February, and that we have access to the cases 26 March. We received responses from the services that they declined to participate with RFI until after the SAPRO report was released.

So even though the RFI did not reference the SAPRO and we asked them to use their own
internal systems, they were unable to participate until the SAPRO report comes out in May. Where this is interesting with and what the working group is concerned about is that we are not able to access any data until at least seven months after the end of the fiscal year.

So we're behind the eight ball in trying to do analysis. By the time we actually get the data, have it in our database, and start doing our analysis, we're going to be a year behind. And it's kind of hard to make recommendations to the Secretary of Defense and back to the Hill when we're using data that's outdated.

So where the working group has decided to move forward is we will be coming back to the DAC-IPAC in July to ask for a new RFI. We anticipate we'll have the FY17 data at that point because in May we'll have -- we'll have the information coming in.

But for the FY18 data, we're going to try to get ahead of the game at this point, and we're going to be asking for an RFI that will
release in August asking for case files, the list, immediately after the end of the fiscal year, and then asking for access for those files in mid-November, which will, if that holds true, if that schedule is met, we will then be able to, in the FY19 report next year, be able to at least have FY18 demographic data like we did this year.

So we're going to try to get caught up with the process, and that will get us closer to what the Case Review Group is doing with cases that are closed, because they are already accessing FY17 investigations that were closed. So we're behind them. We're going to try to get caught up.

We don't know how that is going to play, but that's where we're heading towards.

Another issue that has come up that we are extremely proud of and wanted to share respects data calls. In the last week, we've had two different data calls that have come in. One was a request from Capitol Hill, a House member, that was interested in modifying the Uniform Code of Military Justice, but they didn't have any data to
support what they were thinking of doing.

And they contacted us and we were actually able to use the report that you just published to provide all the data that they needed, and they realized that it wasn't the right time to introduce that type of legislation because the data doesn't uphold what they were thinking.

So we have a product that works. The second data call is even more fascinating. It came from one of the services, and they were responding to a data call from somebody on Capitol Hill, and the service came to us and said, "It's easier for you to give them the information than for us to do it," because we are a document-based system and they had asked for the documents related to 14 specific cases.

So what they were going to have to do were find those 14 cases, take them apart, scan them, create the PDFs, and then provide the information to the member that was looking for it. In two hours, we were able to pull those cases,
weren't attached to it, and provide it on a CD.

So you heard this morning about the document-based system. It works, because we have it and nobody else does. And our data system is meeting the needs of our consumers, our customers, and we're proud of that. And once we get this next set of data, we're going to be able to do even more, which takes us to the strategic planning component of the Data Working Group.

We're going to continue the data project as we have been doing for the remainder of this year. By calendar year 2019, so the first meeting in 2019, we should at that point have FY2012 through 2018 data in our system, with a higher confidence level with the 2015 to 2018 data, since we are able to collect more information and it's more robust.

Based on that demographic overview, and the multivariate analysis that our criminologists that we're bringing on board is going to be able to do, the Data Working Group will at that point be able to hopefully identify emerging trends, not
actual trends because we only have, you know, a four- or five-year block to work with, but maybe something that is emerging that we can look at. And the DAC-IPAD, in the beginning of next year, will be coming back with more recommendations on these emerging trends that we may want to explore further, and maybe do additional data calls or manipulation to see if there is something that the DAC-IPAD would like to focus on.

CHAIR BASHFORD: Mr. Mason, I am assuming that the RFIs that were not complied with, it was made clear that no data would be released in advance of the SAPRO report?

MR. MASON: Yes. Yes, ma'am. It was made clear -- clear they still responded with that they want to wait until the report is released in May. And we anticipate, based on their comments, that right after that report is released we're going to get information coming into us, and Stacy and I will then start the retrieval process to get it into the database.
CHAIR BASHFORD: But you've been hampered by how many months?

MR. MASON: We originally asked for January/February, so we're going to be five, six months behind schedule.

BGEN SCHWENK: In talking to the services and SPRO about releasing that data without it becoming public, did we talk to them about marking it? I mean, they own the marking, so they can mark it For Official Use Only, not to be released until they tell us.

And then once it's marked like that, we have to deal with it that way. So then we couldn't release it to the public. I mean, that's the way advisory committees deal with that kind of information. And confidential, classified information, same way. It gets marked. That's how you deal with it.

So then if you have a meeting to discuss it, it's a closed meeting. The public can't sit in that part because we're going to discuss, in our case, FOUO, For Official Use Only information. So
it doesn't leak out that way either. Can we talk about doing that with them?

MR. MASON: We did not -- I did not specifically participate in a conversation where we mentioned marking it in that manner. We currently mark every file that comes in as belonging to that specific service, and then if anybody wants it released, they have to go to that service to get the information. We are not the release authority.

We just assured all the participants that the information we are receiving, that we were working towards analysis for the March 2019 report, that there was no way we could do anything with it that quickly, just because of the fact it has to get into the database.

But I was not participating in -- I did not participate in a conversation where we used that specific language.

BGEN SCHWENK: That might be an approach. I'm not -- I don't know what they'll say, but --

COL WEIR: General, it's the same
information we've received before, so there is no
issue with how it's marked. It's just that the
services were told not to release the information,
and so we decided, as a staff, not to push back on
that decision and wait until the report was issued.
And that's -- and if -- we can obviously attack it
in a different manner with the chair's -- she's got
the ability to make those requests right to the
Secretary of Defense, so maybe that's how we do it
the next time.

BGEN SCHWENK: I'm not suggesting we
elevate it. I'm just suggesting that they may not
have thought of the fact that they could actually
mark it, and then that marking would be binding on
us, and it would be an additional safeguard.

Because I understand full well that
there is death to anybody in the Department that
releases that report before it gets to the
Congress. And so they are all worried then; should
be. But the markings, maybe not. I don't know if
it helps or not. Just an idea.

CHAIR BASHFORD: The chair is just
suggesting that we get the information in a timely manner, in a way that's most useful to the functioning of this committee.

Thanks, Mr. Mason. Sounds like you're making great progress.

MR. MASON: Yes, ma'am. Thank you.

CHAIR BASHFORD: Policy Working Group?

CHIEF MCKINLEY: Yes, ma'am. The Policy Working Group is currently focusing on two issues. The first is making recommendations to the full committee regarding the implementation of Article 140A UCMJ, and the second is examining expedited transfer policies in order to complete the working group's assessment of several specific issues that we highlighted in the committee's report of March 2018.

In addition, the working group is still interested in developing findings and recommendations on the topic of training that military commanders and non-commissioned officers should receive in order to assist them in handling sexual assault cases and related issues that arise
in their units.

We will take up these issues after concluding our work on Article 140A and the expedited transfer of programs.

The Policy Working Group held a meeting yesterday, April 19, 2018, to develop a timeline for reviewing each of these topics. Based on the information provided to us in their written materials received on Article 140A, and the testimony that we hear today, the working group would like to propose findings and recommendations to the full committee at its July 2018 public meeting with these five areas of focus.

The first is the definition of "case" for the purposes of Article 140A, for example, when does a case actually start?

Number two is specific issues related to sexual assault cases that should be recorded in Article 140A system, noting how the information should be obtained. For example, identify specific trends and outcomes of cases, conviction rate, prosecution rate, et cetera.
Second is identifying administrative
data, expedited transfer requests, that should be
analyzed in the Article 140A system.

The third is recommending best practices
for sexual assault data collection.

The fourth is to identify the federal
reporting requirements that should be incorporated
into an Article 140A system.

And the fifth is to recommend whether
DoD should clarify the role that various DoD
databases that collect sexual assault case data --
for example, DIBRS and DSAID -- should have in
relation to the system development under Article
140A.

Under the expedited transfer program,
the Policy Working Group will hold a preparatory
session on May 24, 2018, to receive additional
information from DoD and the services on several of
the remaining expedited transfer topics that were
not resolved in the DAC-IPAD's March 2018 report.

We will hear testimony from DoD and
sexual assault prevention and response program
managers, special victims counsel, and victims legal counsel program managers, DoD and sexual assault response coordinators, service defense counsel assistance program leadership, and service military criminal investigation services on the following issues.

First, whether the expedited transfer option should be available to service members who make restricted sexual assault reports.

Number two, expansion or clarification of the approval standard and purpose of DOD's expedited transfer program.

And the third is whether service members who initially receive an intra-installation expedited transfer policy are penalized if the transfer does not resolve the problems and the situation and they subsequently request a second expedited transfer to leave the installation.

Should the term "expedited transfer" be reserved only for moves to a different installation?

That's all.
CHAIR BASHFORD: Comments? Okay. Thank you very much. You've got your work cut out for you for the next few weeks.

We're a little bit ahead of time. Do we have our personnel for the 1:00?

MS. PETERS: Yes. We just need a moment to set up the table here for the witnesses.

CHAIR BASHFORD: Okay. Great.

(Pause.)

CHAIR BASHFORD: Commander McKinley, did you have other remarks on your --

CHIEF MCKINLEY: I do have a couple more. Yes, ma'am.

CHAIR BASHFORD: While we're setting up, you could --

CHIEF MCKINLEY: Okay.

CHAIR BASHFORD: -- continue on your --

CHIEF MCKINLEY: We actually had another page. We have a lot of issues to work through.

BGEN SCHWENK: Can we have a vote on whether we want to hear this or --

(Laughter.)
CHIEF MCKINLEY: Okay. We're looking forward to it.

Issue number four, whether the expedited transfer policy should be expanded to include service members whose civilian spouses or children are sexual assault victims, as they may face exactly the same difficult situations at the installation. And that's mostly with the FAP program.

How often and under the circumstances is the accused subject to the -- an expedited transfer? How does this affect the investigation, prosecution, and defense of the case? Whether victims who lose the ability to make a restricted report due to a third party reports or because they were unaware of the consequences of reporting to a member of their chain of command, should be able to restrict their report and prevent further disclosure or investigation of the incident if they wish to protect their privacy.

That concludes it.

CHAIR BASHFORD: Thank you. I'm glad we
I heard that.

I just want to point out that in my remarks I thought I was being all military by going 140 Alpha, and I see Commander McKinley and General Schwenk said 140A. So I just can't get it right.

(Laughter.)

BGEN SCHWENK: Alpha is probably correct. If you're relying on the two of us --

(Laughter.)

CHAIR BASHFORD: If the speakers could come on up? We are at your pleasure.

DR. BECK: Good afternoon.

CHAIR BASHFORD: Good afternoon.

DR. BECK: I'm Allen Beck. I'm the senior statistical advisor at the Bureau of Justice, Statistics, and Agency within the Department of Justice. Okay. And I'm delighted to be here. I am a last-minute fill-in, but that's okay. It's my job.

I have been with the Bureau for 33 years, six presidents. I cannot count the number of attorneys general, but I have been delighted to
work for all of our presidents and our leadership over time.

I get involved in most things at the Bureau related to development of information systems, ensuring efficiency of design, addressing data quality, ensuring the accuracy of the estimates that are produced by our agency. I review the reports, and so I am responsible for ensuring that we meet our responsibilities.

I have been particularly involved with issues on rape and sexual assault. Over the last decade and a half, I have led the effort for measuring rape and sexual assault in prisons and jails across the country, as a result of the Prison Rape Elimination Act, a very challenging Act for us, its very specific data requirements, one of which is to measure the incidence and prevalence of rape and sexual assault, all forms of sexual assault within facilities, to rank those facilities, and identify facilities with the highest rates, and those facilities are then subject to call before a Prison Rape Review Panel.
within the Department of Justice.

I'm sure you might guess that when you do this work, you've got to get the numbers right because there are consequences for everyone.

The work we've -- I'm also working on related to measurement of rape and sexual assault in the general population. We conduct the National Crime Victimization Survey, and we have been looking at our measures of rape and sexual assault and trying to ensure that those measures provide a full measure of the extent and nature of rape and sexual assault within the general population. I've been working on that for about five, six years.

So let me begin by saying that I think you face the same issues that we face, and it has to do with uniformity of definitions, it has to do with basic counting rules, to ensure that the counting rules represent those definitions.

Ultimately, you're trying to harmonize data from diverse groups as we have, in the civilian sector, we have about 18,000 law enforcement agencies, 7,000-plus correctional
facilities across the nation, including adults and juveniles, and many of them define things uniquely, they embrace their uniqueness, and they have different information systems, different capacities to provide that information.

And our job is to make sense of all the data, to harmonize the data as best we can, and to ensure that what we count is comparable across those reporting agencies. Not a small task.

And so as you build information systems, you build them and you never stop. You have to be diligent. You have to pay attention to all the possibilities that you didn't anticipate, all the nuances that fall out, having collected data and analyzed them along the way.

But for me it has been a life's work, and people who follow me will continue doing that same work. We are a very diverse country, very decentralized, and, as such, we have -- we value independence of our law enforcement agencies. And with that independence comes the complexity of trying to measure and trying to make sense out of
what these agencies do and how they do it.

So I am certainly able to speak to any
questions you may wish. We certainly have fairly
deep experience measuring rape and sexual assault.
The information systems are based on reports of
victims, as well as collecting data
administratively from the agencies and offices
responsible for various parts of justice.

So you have, I believe in your packet,
a piece on the profile of intimate partner violence
cases in large urban counties. You also have the
National Crime Victimization Survey that calculates
and estimates the incidence and prevalence of
domestic violence and intimate partner violence.
Rape and sexual assault is a component of that.

We also work extensively in the area of
NIBRS and NIBRS conversion. We’re trying to launch
a national crime -- criminal justice statistics
exchange to augment incomplete coverage that NIBRS
currently has. Currently, NIBRS is adopted by
about 5,900 law enforcement agencies. There are
over 18,000 of them nationwide, so we have quite a
gap. The FBI and BJS have worked together to try
to implement NIBRS and to develop the statistical
system to estimate crime by type and nature in the
absence of their coverage.

NIBRS would -- the summary UCR will
cease January 1, 2021, at which point the
recommendations, crime statistics, will rely on
NIBRS, and the work that we do for estimation
through the NCSX exchange.

And, finally, we have the Federal
Justice Statistics Program that integrates federal
data across reporting units, whether it be the U.S.
Marshals or the Administrative Office of the U.S.
Courts, Executive Offices of the -- of U.S.
Attorneys, BOP, Sentencing Commission, so we can
track a case from the initial investigation through
outcome, through sentencing.

So with that, I will stop and certainly
make myself available for questions from the panel.

CHAIR BASHFORD: You are gathering data
from so many different agencies with differing
definitions. What have you found works well for
collecting that, and what have you tried and found did not work? If there is anything.

DR. BECK: Well, some of our work is about leadership, and part of our mandate is to provide a standard to those law enforcement agents or to those correctional agencies and other criminal justice agencies as to what the various terms mean and how they should be measured and reported.

The capacity to be in harmony with that varies though oftentimes it takes real money, it takes assistance, technical assistance, financial assistance, to change from what the local definitions or data system can do to what we ask for. And so it's an iterative process.

Now, when it comes to NIBRS -- Incident-Based Reporting System -- it started with the FBI back around 1985 or late 1980s. There was a rush of adoption that went on. The FBI provided standards, provided training, and -- but NIBRS stalled, and NIBRS stalled in large measure because it costs money.
It was difficult for particularly large law enforcement agencies to convert and meet those standards, reporting that the FBI required. In order to move away -- in order to more fully adopt NIBRS, we developed a program to assist states, state UCR programs, Uniform Crime Reporting programs, to accept incident-based data, and we have funded local law enforcement agencies, large, medium, and small, to convert their incident-based systems into a standard system.

So that technical assistance is as important as the financial support, but both are important. Conversion -- collection of data and conversions of systems are not free.

Now, we can't possibly meet the demands of everyone financially for that conversion. So what is really important is demonstration of the impact, demonstration of why the information is better needed and how it can be used. Insofar as you can link data and information to operations, the more likely you are to get an embrace of data collection.
CHAIR BASHFORD: I have another question. The military I guess is both blessed and cursed by having everything under one roof. And one of the things I think that is -- that leaps out to people is the what seems to be low percentage of cases that move on from reports of investigations to -- actually into charges being brought.

With the UCR, can you do a similar analysis in the civilian work in sexual assault, rape, of where -- how big the drop-off is from reports to police to prosecutions?

DR. BECK: Well, we only have that capacity at the federal system, not at the state system in the bulk of crime, and the bulk of rape and sexual assaults fall under state jurisdiction and not federal jurisdiction.

What we have is snapshots of processing. So the UCR provides the snapshot of the time that the crime was reported or known to the police. And we can track results and the closure of a case, typically an arrest. It stops there.

And, unfortunately, the UCR for much of
its life has been a summary report. So all we can
get at is rape, kind of the high-level, more
serious form of sexual violence. It does not
capture many of the things that are injurious,
serious, but don't rise to the level of the formal
definition of "rape."

And so you get a snapshot at that level,
and then of course you have intervening decision-
makers, prosecutors, courts, ultimately
corrections. The challenge, of course, there is
separation of power, distinction between executive
branch and judicial branch, problems with
information systems, particularly in courts that
are not standardized.

Oftentimes, you know, judges value their
independence and worry about incursions on that
independence, if you will. The information systems
are not set up to be statistical in nature, and so
you have all of the challenges of trying to obtain
data from the ports. And prosecutors are even less
involved in the sense that they are not really set
up to provide an accounting of all of the cases
they touch and manners in which they dispose of them.

So that intervening portion of the criminal justice system, prosecutors and courts, it's the least developed in the country. On the back side, corrections is much more uniform, and we are able to impose uniformity based on criminal statutes, codes used by corrections, and can track intake, as well as any -- the stock population and the flow out of correctional supervision.

So it's the middle gap that is I think missing in the civilian sector for the kinds of things that you might envision.

CHAIR BASHFORD: What sort of a drop-off do you see from reports to arrests? You can't really tell what happens until afterwards, but do you see a significant drop-off in reports to arrests?

DR. BECK: Well, that's true. You also see a significant drop-off between the experiences of victims and the victims -- you know, the reports to us, and notification of the police.
About half of the incidence of rape and sexual assault in the calendar year actually get reported to someone, to the police particularly. So you see an initial drop-off right there.

There are approximately 10 million persons arrested in the United States each year, adults and juveniles, much more crime than arrests. I don't know exact drop-off on rape, in terms of reports of rape versus arrests for rape.

So I think we lack a real system for tracking cases through the criminal justice process. At one point, we had something called a fender-based transaction system back in the '80s when I first started. And we were tracking cases from point -- arrest through prosecution through courts.

And the real challenge was -- is the deterioration of the data, as you went along that path, the quality of the data dropped off, and at the end you didn't quite know whether the information was accurate or representative or not.

So we moved primarily over to an
emphasis on a series of snapshots, cross-sections
that we would have on a regular basis.

CHAIR BASHFORD: I'm going to suggest
that we hold questions for the service members
until we've heard from all of them. We're at your
disposal, however you choose to do it.

LTC COATS: Good afternoon, Madam Chair.

Thank you for the opportunity to speak about and
explain the Army military justice case management
systems and to discuss today the solutions going
forward to implement Article 140 Alpha.

The Army JAG Corps creates and executes
and manages military justice utilizing primarily
two applications, and I'll give a description of
each of those. First, the Military Justice Online,
or MJO, is a secure-based application developed to
provide general court-martial convening authorities
and special court-martial convening authorities, a
more effective, convenient, and standardized means
to create, record, track, and administer military
justice.

Military Justice Online serves three
purposes primarily: to create and produce standardized documents and facilitate the processing of five types of actions, investigations, administrative separations, military non-judicial punishment, and courts-martial.

It also creates reports for pre-trial, trial, post-trial phases of courts-martial within a GCMCA's jurisdiction, to facilitate the supervision and management of those cases. And it produces statistical data for internal use in identifying gaps and trends concerning the execution of adverse administration actions in military justice, as well as external requests for information concerning it.

Users access military justice through a secure JAG Corps portal using their CAC credentials. So they have to log into that. And without a JAG Corps portal username, you can't access the Military Justice Online portal.

Access to the GCMCA profiles is controlled by that legal office. A user is
assigned a specific role within the system, and so
they can either create actions in it or simply view
actions in it, create reports, or just view reports
in it.

The interface -- actions are created by
JAG Corps personnel at the special court-martial
level, so at the brigade level. Actions are
organized within the system by both the subject's
name and the type of action.

Once the user creates a new action and
selects what type of action is to be created, the
left side of the interface populates with the
various steps involved in that type of action. The
first screen the user must complete, which is
common to all types, has the basic data of the
accused. Then that basic data for the accused can
either be hand-typed into the system or it also has
the capability, which is mainly used, to pull from
our Army Human Resources database.

So there is no -- it pulls it in, so
there is no error in the data that goes into there.

The user enters information into the
numerous data fields in multiple ways, by using
drop-down menus, calendar, radio buttons, and then
free text.

Military justice -- sorry. Military
Justice Online builds an action in stages, so the
data screen for a later stage is not available
until the earlier stage entry screens are complete.
There are also mandatory fields distinguished to
the user, so that you can't move past that screen
or save that screen until the certain mandatory
fields are completed.

MJO has numerous memoranda and
Department of the Army and Department of Defense
form templates uploaded into the system. So, for
examples, users can generate the charge sheet or
the report or results of trial, and chain of
command recommendation transmittals all within MJO
if the information is uploaded into those data
fields.

This template capability facilitates the
consistency and uniformity across the Army. Once
documents are executed, the user can then upload
them as attachments into the MJO action. So a charge sheet, for instance, you input the data fields, so the charges that you want to prefer against the individual, hit generate -- a generate button, it generates the form.

You have some additional information that you would need to input in that, and then to execute the charge sheet, preferred charges, you print it out, the commander prefers the charges, and then the completed form you would then upload as a PDF into the system.

Case management and report generation in MJO. MJO also provides military justice supervisors the capability to generate numerous reports that aid in the effective and efficient management of not only individual cases in each stage of the court-martial but also the overall workload and productivity within the office.

The MJO system has three report capabilities. First, pre-trial and post-trial reports. The purpose of these reports is to give the military justice supervisor a snapshot of each
courts-martial in its respective stage, the time period involved in the case, and the individual prosecutor responsible for the case.

Supervisors use these reports to manage prosecutor workload and direct resources to gain attention. Pre-trial and post-trial reports are generated in Microsoft Excel, making them easy to filter and reorganize.

Second, MJO also has a number of other management reports meant to display to the supervisor efficiency and productivity across military justice regarding all types of actions. Supervisors can generate these reports based on a jurisdiction, a time period, a type of action, a type of offense, and a menu of other options.

Reports may be generated in Excel, Adobe PDF, and HTML. If they are -- if they are generated in HTML on the website, they are all hyperlinked, so you can drill down into particular actions.

And, thirdly, which has been recently updated, is our custom reports capability where you
can go into the system and you can filter -- every
data field in the system you can filter by that
system to narrow it down.

So if I want to do a custom report on
just one particular article of the UCMJ, I can do
that, or over a certain period of time, I can do
that. And it allows you to generate that in an
Excel format and reorganize it how you'd like.

MJO is also the primary system for -- so
then it has also connectivity aspects to it, so MJO
also has a defense side, so documents by the
government. So preferral packet is served on the
defense through MJO. You simply click a button in
MJO, and it pops into the defense office's in box.
And so that's how they receive the preferral packet
items.

MJO also has connectivity with our human
resources command database. So now our Army human
resources command, anything that needs to be
permanently filed into a soldier's permanent file,
HRC, Human Resources Command, will only receive
through MJO. So it used to be email their inbox
with an attachment PDF. That no longer is the case. It goes to them in a redacted form. The government is responsible for redacting that as necessary before it goes in there, and then they accept it and it goes into their system in the permanent file of that individual.

Lastly, for connectivity, currently we are developing the capability, so our criminal investigation, CID, agency has their ALERT system. And I apologize, I don't know what alerts. I can't recall what ALERT stands for, but that is their criminal investigation database.

We're currently developing the capability to share information between those systems. So the ALERT system will be able to push investigations, and we'll be able to input those into MJO for initial -- initiation of an action.

And then as the action goes through disposition, whatever the type of disposition is, we'll be able to push the information back into the -- for acceptance into the ALERT system, so they can close out and they know how the case was
finally disposed of.

So that is -- that is MJO in a nutshell.

We've got approximately -- and this is a couple of months old, but we've got approximately 2,700 active users. About 500,000 actions have been completed in MJO. MJO has been around since 2008. It initially had all of those types of actions except courts-martial, and courts-martial actions were added in 2011.

And we've had about -- since we have been able to talk to our human resource command in June of '15, we have submitted about 10,000 documents for permanent filing through that connectivity.

The second system is our Army Courts-Martial Information System, or ACMIS. ACMIS is a secure web-based case management tool developed to give the Army Court of Criminal Appeals and trial judges the ability to monitor, track, and document every step required to maintain official court-martial case reports, or CMCRs.

It monitors that from trial terminations
through the appellate review to final action.

Trial judges create a CMCR in the ATMIS system for every general and special courts-martial that has had arraignment. Petitions for extraordinary relief under the All Writs Act are also captured in ACMIS.

ACMIS has the capability to generate reports designed for tracking case progression and workload management within ACA, as well as reports designed for external requesters, such as JAG Corps leadership, Congress, or requests under FOIA.

CMCRs are created by the trial judge after trial completion, and they are submitted to ACA for approval within ACMIS. Once the CMCR is approved by the Clerk of Courts, a case number is generated and the case is populated with data from that CMCR.

As the case progresses through the post-trial and appellate review, data relevant to each section is captured. Data such as the convening authority's action, panel referral, decisions by ACA, the Court of Appeals for the Armed Forces, and
Supreme Court, if any, are also captured.

Although ACMIS is not used for document generation, numerous post-trial and appellate documents are stored within it, documents such as the promulgation order, promulgating order, briefs and motions, court orders, and decisions are uploaded to the relevant sections within ACMIS.

After appellate review has been completed, data related to the final processing of a court-martial is captured, including the final order or DD-214, closing of the case, and eventual retirement to Suitland, Maryland, of the record of trial for storage.

ACMIS contains numerous pre-built reports designed mainly for internal use that provide ACA with the capability to track general courts-martial and special courts-martial as they progress through post-trial and appellate review, allowing effective workload management.

These reports can be generated in either Excel or PDF. In addition to the pre-built reports, ACMIS contains a very robust database
engine which allows for the generation of complex
statistical reports on any of the over 300 data
fields it contains for requesters such as the DA
and Congress.

So that's a snapshot of both MJO and
ACMIS. In addition to those two systems, we also
have an e-docket that is public facing for our
trial judiciary, and so you can go to that
calendar, and it's sortable by the jurisdiction or
by the judge or by a case name, and you can find
what is docketed for that case.

It gives you the parties involved as
well as what type of hearing is going to be
scheduled. That is public facing, although because
of security and firewall issues it hasn't been
publicly available recently, but we're working to
correct that.

And then, lastly, we also have a monthly
results of court-martial report that we publish and
is publicly available. So also through the
Military Justice Online application, each
jurisdiction, upon completion of a court-martial,
submits a statement of the result of that trial.

So it includes the convicted individual's name, the location of the court-martial, the type of court-martial, the plea and form of that court-martial, as well as what they were charged with, what they were convicted of and acquitted of, the sentence, and any effect the plea agreement had on that.

We get those individually in my office every month, and we generate a report that covers the Army -- Army-wide, and then by the end of the following month -- for processing purposes, by the end of the following month, that report is published on a publicly available website.

And with that, subject to your questions.

CHAIR BASHFORD: We're going to hold our questions until we've heard from all services.

Are we going to the Navy next?

CAPT LUKEN: I believe so. Madam Chair, distinguished panel members, fortunately or unfortunately for you, I left my talking points on
the printer at the office, so I will speak from the heart.

(Laughter.)

CAPT LUKEN: So I've been in this organization for over 18 years. I've had Time Matters, I've had HELM, I've had HELM 1, I've had HELM 2, I've had Compass. I've had Access database. I've had SIPTAS. I've had CMS, and I have what may become, before I leave, NJIS.

We have gone through a plethora of different data type tracking within the Navy's court-martial system. Unfortunately, much of it has been focused on data entry and pulling or bean-counting, as many of the trial counsel refer to it as, affectionately, of course.

What needs to happen is that whatever systems we have in tracking it needs to be user-focused, because that way the individuals find value in inputting the information that we ultimately need in order for them to manage their cases.

We currently use the CMS, case
management system. I always stress to my leadership management is a case manager, not a case tracker. We need to focus on the lieutenant who is down in the trenches trying to move their cases along.

So whatever information they are putting in, and whatever it is that they find valuable to put in, required to, we then plop them backside without them really having to see it. But their focus is moving their case and adding value to what they are doing in their prosecutions.

So, in 2013, the gentleman sitting next to me and his crew of Marines showed us CMS when I was down in Norfolk, Virginia. We were at the Beta site down in Norfolk, Virginia, found value in being able to track our cases and manage our cases and found value for -- at the user level, as well as for the senior trial counsel, to track their cases.

Today we -- when I came on board as director of TCAP, I wanted to shift the focus. I heard NJIS was coming on board, supposed to be
coming on board, and I was concerned because I heard that the focus of that was to not lose a case. I said, "We need to focus on the users."

Again, over the last two years, we have managed to find different ways to tweak CMS, so it gets value to the users.

So, for instance, now we can generate reports that shows how long a case has been on board, how long since we were notified to the point where we got a substantive ROI for results of an interview or, excuse me, report from NCIS, to the point of once it's actually on board for us, how long has it taken us to get the recommendation to the command? How long has the command had it since we gave them that recommendation? And, ultimately, now how long has it taken them from -- taken the preferral to 32 to general court-martial to trial?

That is benefit at the higher level, so I can oversee it -- look and see where there's common treads. I can see where there is manning issues, who is carrying what type of cases, where it's -- cases may be stuck.
For instance, if I see it has taken one office, let's say, 120 days to develop the recommendation to the -- to convening authorities, I know we have an issue. At that point, we can reach down, either add a search capability to that command or find out maybe their processes are broken and we need to fix that.

So we set aspirational goals, so that the senior trial counsel in that office can try to meet those aspirational goals. I have found that competition is a good thing. When you put up a track of who is doing what, where the average overall, over their organization, those above the track want to get below the track, and that pressurized system for us to do better and profit -- make better processes.

So our -- taking it at a different level, so you have higher level, which is managing from a top, being the backstop. For instance, each week I received a report dealing with speedy trial. I can look across the enterprise and just see if there is any cases that are coming close for us --
too close to that 100 -- magic 120-day clock.

So I can pick up the phone and call the senior trial counsel and go, "What's going on with that case U.S. v. Luken? What are you guys doing with that? Oh. There's excludable delay. No, there's not."

"Yes, there is."

"It's not in CMS. Get it in there."

So that pressurizes the system as well.

I can look at trends, like I said, use it for my Article 6 purposes. Taken one step down, now senior trial counsel can look and figure out who -- what level their docket is, the complexity of the case, and the number of cases each individual has.

If that fine lieutenant comes in, we -- and says, "Can I have liberty for the weekend or for the next few days," they pull the report, look at their prosecution merit memos and say, "Wait a minute. You have four that are over 100 days. You can have liberty or leave when you knock those out." And so that is a tool for them to be able to use at the senior trial counsel level.
Now, down at the trial counsel level, we have managed to get it so that, for instance, VWAP, we have our VWAP -- rather than them having to do it on paper all the time --

BGEN SCHWENK: VWAP is Victim Witness --

CAPT LUKEN: Witness Assistance Program.

BGEN SCHWENK: -- Assistance Program.

CAPT LUKEN: Yes, sir. Thank you. So Victim Witness Assistance Program. So rather than have to fill out your checklist there, as you're doing your interview or you're handing over your DD Form 2701, 2702, 2703. It's right there, and you're able to put it right into the system automatically.

So it frees up time and labor and measures so that we're capturing the fact that we had completed VWAP.

The nice thing about CMS is it stays with the case. When does the case start? The case starts when we get first notified. As soon as we're notified by NCIS or by the command that they have a case that they want reviewed, the command
wants reviewed, but NCIS lets us know about sexual
assault cases, it automatically goes in -- the
accused's name and the data information we have.

The business rule we have set up is if
a regional legal service office or RLSO, which is
our prosecution office, if we give advice on any
case to recommend it for prosecution, it must be in
CMS, to show that we officially gave advice on that
case.

So every single case that comes in, even
if an NCIS agent calls us and says, "I'm not really
sure this is a crime. What do you think?" If we
speak to that, that case goes into CMS, we're able
to track it, and later on refer back to it before
we're asked about that particular case.

When initial case comes in, it goes into
CMS, we fill out as much data as we can, senior
trial counsel then assigns it to a counsel, counsel
then is responsible for keeping track and providing
updates, put in the chronology, and then inputting
the various bullets -- excuse me, the different
tables and different checkboxes, if you will,
Throughout.

There are several different tabs within CMS. There is the accused's section, the case section. There is also a section dealing with VWAP, Victim Witness Assistance Program, charges, post-trial processing as well.

There is also a section not only for just the trial counsel, there is a section for the court reporter, so they can track their post-trial, there is also a section for the NMCCA, our appellate courts, and so the case flows throughout the -- throughout the entire time.

The benefits of CMS -- obviously, we are able to track cases, manage cases a little bit better and also upload documents that would pertain to that case.

When I was a lieutenant prosecutor, we would get those calls "Tell me about this case that you did seven months ago." I go digging into the files, and I have to try to figure out what happened.

We recently had a case that got a little
more visibility than we would have liked, and the initial reaction was look how long it took us to move this case. That's why the victim didn't want to continue.

I was able to go within 10 minutes into CMS where I was, look at the chronology, look at the history, and look at the notes and come back and go "Actually, this is what happened. Give it to leadership, so we can answer that question quicker."

That used to take us 24 hours, 48 hours. When we'd get the questions such as "How many cases did you prosecute that were 120 that went to 120 pre-trial agreement in the South Pacific Region on a Tuesday?" I can now at least do most of that from the headquarters as opposed to shutting down the shops and going back and trying to get that data call.

The concerns we have to be careful about is when we receive these inquiries or data calls, that we start adding more and more and more to CMS, and so the person in there trying to fill every
single block, it takes their time and it's important for us to make sure that they are getting value.

So the questions are: are they nice to know, or are they need to know? We track the need to know, and what needs to be done in order to prosecute cases.

I provided a few snapshots of what the CMS -- I lost my track. A few screenshots. Screenshots. I'm not a techie, as you can tell. A few screenshots for your consideration, which is in the back of the packets, 9 through 12, that provide -- show you all of the -- I said that to you -- I brought your attention to number 11, which is the VWAP.

Just think of the sheer volume of boxes, and that's what we're always trying to be careful of. I now take the position of, if you want to add something, what are you taking out of there? So that way I make sure that the CMS inputs don't get too large.

As for reports, I draw your attention to
page 13. This is what our active case looks like, and this is for -- so you'll have it broken out by cases pending investigation, so these are the cases that the NCIS agent just notified us about, and that they are -- the senior trial counsel is able to track.

We then staff -- once the case has been provided for recommendation, or, excuse me, once we receive the substantive ROI on board, the case then goes on board and now it's on our clock.

MS. PETERS: Excuse me. Captain Luken, if I may, I want to make sure that the panel is aware or the committee is aware of the information. Staff should have already forwarded it in your -- in your day-of folders on the left-hand side are these slide materials, and there are two packets.

The first one he is referring to is sort of a horizontal view of slide and it says types of reports on the first page, and I know that following our speaker, it started on -- I think it has been highlighted starting on slide page 11. I think these are back-to-back pages, so you can flip
around. But I know that this information is
prepared for you today.

I want to make sure we orient you to
what you have to reference from what he has talked
about.

CAPT LUKEN: Awesome. Thank you.

So what -- to show how they matured a
little bit, for instance, when I first came in many
years ago, I would see things about how CMS wasn't
helping us manage the case.

We made changes to these reports, so,
for instance, now on the active cases for -- on
page 13, cases pending investigation, we have a
timeclock there that shows me, hey, we first
received a case on, say, December 8, 2017, and
since we have received that notice it has been 128
days.

That now gives us a marker, for
instance, if we're at 120 days, it's time to pick
up the phone and go, "Is there any updates? What
are we doing?" And so we're able to also try to
push the investigator or law enforcement side of
it.

Once we then get the case on board, and we're at the recommendation, then we can track how many days it has been on board. And within these reports, it's used in order to manage their people, if you will.

If I may -- I'm going backwards, because I'm all over the place, of course. If I can draw your attention to page 5. This is a slide I use when I'm speaking with commanding officers. And page 5 is the manning on this one.

So this slide tells you basically when you're looking at trends over time, so June -- or May 2015 we were getting roughly 700 cases on board. I was able to show our leadership that by March -- within a year later, approximately, we had increased another 27 percent of cases that were coming on board. That's important for us to remember when we're dealing with the same manning situations at each of the offices.

So something has to give at some point or somewhere, so we focus on processes, because if
you could have better processes you can then manage more cases and move cases along. So that's how we're able to use CMS at -- more on the leadership side.

Going to page 6, for instance, this gives us a month by month how many cases we have on board at each of the offices. The two red lines over to the right side shows you within trends -- those were the high points in 2015.

Here we are in 2017, and you can see we've obviously pushed these cases up to a point where it's 10, 15, 20 percent of our cases. A 20 percent increase is significant in each office because you're dealing with manning constraints.

And, finally, I've brought your attention to the other page, page 7, which I can look at metrics by stage -- stages -- last year we were up -- identified that we were probably taking too long to get the recommendations to the command.

Not probably; we were.

So what was causing that? Part of that was garbage in, garbage out. What was the
information that was going into the CMS? It was working out right. They were getting bad metrics. So we had to focus that over the last year.

As you can see, we were at 80 days. We're now down probably -- I know I've put a big old flash in front of you, but I did that purposely. From 80, we got it down to where we're tracking at 60.

What's nice about this tracking is I can look at all of those above 60 and go, what's going on? What's wrong? And a lot of times it's just basically people factor in the wrong numbers.

So, overall, CMS has been a great utilization for us. It has been very helpful for us. We need improvements, though. The areas we improve it -- much how the Army has done, which I am impressed with, is having that document integration.

So as soon as I type in the accused's name, whatever document I print out, the accused's name is on there automatically. I don't have to fill it in 13 different times, not that we do that
in CMS now.

And just the idea is that when law enforcement inputs the information at the cradle point, and it shifts over to the prosecution side, that information is already in there. We don't have to refill it out, which would include reports, so we can ultimately transition that into discovery and move that on.

Then it goes into the post-trial and obviously to DIBRS, so that cradle to grave would be outstanding. Again, we need to -- I highly encourage/recommend -- we've got to keep the user interface and the user in mind when we're developing these systems. And having lawyers develop the systems, there's a reason I went to law school and I didn't go to computer school.

And I think sometimes we lose that and we try to get the lawyers to develop it, or, unfortunately, sometimes we get contractors who don't know the military justice system. And ours is so unique between convening authorities and actions and non-judicial punishment versus special
court-martial, we need to integrate that too as well as we develop these systems.

    So I've taken up enough of your time.

Subject to your questions, I'll stand by.

    CHAIR BASHFORD: We'll hold them until the end.

    CAPT LUKEN: Thank you.

    CHAIR BASHFORD: Major Schweig.

    MAJ SCHWEIG: Good afternoon, members of the committee. So I'm Major Jessie Schweig. I am the director of Marine Corps TCAP. But in true Marine Corps fashion, I am also the IT Department for Judge Advocate Division. So I build and maintain the Marine Corps' legal hub. I develop the database. I am sort of an amateur coder. And as the exception that proves the unequivocal truth of what Captain Luken just said, I did go to computer school and I now simply happen to be a lawyer.

    But I approach these problems from the perspective of someone that would have to both build code and maintain whatever system were to be
developed.

And since the Marine Corps and the Navy use the same underlying case management system, I will simply say ditto to everything that he just said. The one thing I will add is that the Marine Corps recently transitioned from version 1 of our prosecution merits memorandum to version 2 now known as the case analysis memo. That distinction is important because we have applied a more rigorous framework for our special victim prosecutors to analyze a case.

The special victim prosecutor will now give advice to the convening authority for all sexual assault cases in a two-step format. First, the special victim prosecutor will let the convening authority know whether there is or is not probable cause. And, obviously, if there is no probable cause, then the case is effectively -- is done.

However, if there is probable cause, that special victim prosecutor will go on to state whether there is a serious evidentiary defect that
would preclude prosecution, suppression being the most obvious.

The other option that the prosecutor can select is whether or not there is a lack of victim participation, which would render prosecution either inadvisable or perhaps impossible, depending on the situation.

Obviously, if you're out in Okinawa, you may not even be able to subpoena the victim to attend the court-martial.

Option 3 is if prosecution -- if there is probable cause but prosecution is, nonetheless, inadvisable because of one of the enumerated factors listed in Appendix 2.1 of the Military Justice Act of 2016.

And then option 4, of course, there is probable cause and prosecution is advisable based on an analysis of the factors included in Appendix 2.1. So I wanted to get that out there just to point out that we have transitioned and we are now applying a more structured and rigorous analysis to whether we proceed or withdraw in certain sexual
assault cases.

And that, in my opinion, is somewhat uninteresting. What I do find interesting is Nicolaus Copernicus. And so I bring that to your attention because I think it was somewhere in the early 16th century, 1506 or something -- somebody can fact-check me on that -- but Copernicus made the somewhat astounding observation at the time that, you know, the sun does not revolve around the Earth, but the Earth revolves around the sun.

And the importance of that analogy to this discussion is that there are really two ways to develop the sort of data system that everybody wants. One of those ways involves the methodology that you heard from -- took testimony on this morning, which is really a headquarters-centric top-down data system, where everything occurs and then someone else collects the underlying documents and induces a data set from those documents for data analysis.

That is a way to do it. It is not an efficient way to do it. It is a difficult way to
do it. And if you want to perform more in-depth data analysis, you have to revamp your procedures. The other way to do it is the way modern data systems work -- something like anything you currently have on your cell phone, any application you have. It gives you a tool.

When you use that tool, whoever created the tool simply derives the data they want from your use of the tool, and then they use that data for any purpose they see fit. That's kind of a modern user-centric bottom-up data system.

And in my opinion, that is the only way this problem will ever be solved. You will either find a way to give everyone involved in the process the set of digital tools they need to do their job, or if you've done that, you can deduce whatever data set you want. You can make any sort of calculation you want, provided they have accomplished their task within your data system.

And then you don't really care what permutation of RFI you receive because you -- you know, just by virtue of the fact that they've done
the work in the system, you will have that
information on hand. Not necessarily.

And so I'm going to hold my remarks
there, but I think it would be very interesting for
the committee to entertain something that was not
an example of a top-down data system, but something
that was an example of a bottom-up data system.
And I -- I don't think that that can be found, or
at least I've never heard of it, in any sort of
justice type of system.

I think the answer to that is going to
be found, honestly, in someone who creates
applications for cell phones, and sort of how do
you do that, and how do you get the person to do
their task, and then you kind of steal the data you
want.

CHAIR BASHFORD: Major Horton?

MAJ HORTON: So my boss doesn't really
trust me to go off the cuff, but I did prepare some
remarks. I've written them down to make sure I'm
--

CHAIR BASHFORD: And brought them back
from the printer.

MAJ HORTON: So good afternoon. I want to thank the committee. Like everyone else, I'm happy for the opportunity to speak with you. My name is Major Noel Horton. I'm currently serving as the executive officer for the Air Force Judiciary over at Joint Base Andrews. Prior to that, I served for two years in the Military Justice Division, which is collocated with the Judiciary at Andrews -- at Joint Base Andrews.

Now, before that, I served for about four years at various legal offices, three legal offices, one in a deployed environment doing all sorts of matters there, including administration of military justice.

Prior to that, in a prior life, I actually had time as a communications officer where one of my jobs that I had as a communications officer was OIC of the Network Control Center where I was responsible for the administration of network operations, network administration for an installation. Specifically, in my case, I already
have -- but enough about me. You don't care about me, so what about -- what about what we do? So --

  BGEN SCHWENK: We do care.

  MAJ HORTON: Oh.

  (Laughter.)

  BGEN SCHWENK: We don't care about Major Schweig at all, though.

  (Laughter.)

  MAJ HORTON: As a judge advocate, and specifically in my time here at Andrews, I have become intimately familiar with the Air Force's system, military justice tracking system, and the case management system, Automated Military Justice Analysis and Management System, or AMJAMS as I'm going to continue to refer to it, and that's how we refer to it in the JAG Corps.

  So AMJAMS collects data during all stages of military justice actions on offenses, procedural matters, and processing timelines, as well as information on the participants, investigatory, court-martial, appellate, and non-judicial punishment processes. It's an essential
tool for advising commanders and leaders on the
status of discipline and the timely processing of
cases, which are key components of readiness.

The reports and information from AMJAMS
provide effective management and analysis tools for
use by practitioners at installations as well as at
headquarters, major commands, the judiciary, and
then the appellate divisions. AMJAMS supports
efforts to eliminate or highlight excessive
processing delays and provides the capability to
monitor the current status of our military justice
actions beginning from the investigation stage,
working all the way through the appellate process.

Now, AMJAMS is a relational database.

It's sequel-based, and it's managed and
administered kind of jointly by the Military
Justice Division at Andrews, and then the technical
aspects, IT aspects of the -- of the system are
managed actually by the Legal Services Directorate,
which is at Maxwell Air Force Base in Alabama.

The system is accessed similar to what
Lieutenant Colonel Coats briefed about his system
as a web-based secure interface. It's CAC-enabled, and it's a closed system and it's limited -- access only to JAG Corps personnel. So trained judge advocates and trained paralegals responsible for administration of military justice cases.

Data entry is predominantly done at the field level, so at our lean legal office level, similar, again, to the court system and the other systems you've heard about. That being said, the regional headquarters, the numbered Air Force legal staff, the MAJCOM legal staff, and headquarters staff has the ability, of course, to look in and do data entry, to validate, to administer corrections as needed.

Now, system functionality of course has improved over the years with certain modules being added over time, probably the most recent being an appellate module to ensure continued tracking through the appellate process of the case, and including when -- those rare cases when a case gets returned for retrial and hearing.

The system currently does not have -- it
does not serve as a repository for completed cases. It does have a functionality of form generation to create the documents, but it doesn't serve as the final repository, though I will say that there are discussions now within the Air Force of adding that functionality, similar to our sister services.

And, in short, AMJAMS has great utility in sort of a dual way. Really, the first way predominantly as a case management system for the field for the very purpose -- and I won't echo everything you've already heard about its utility for the field and making sure that cases are shepherded and processed in a timely, efficient manner certainly within justice.

But also, of course, as a headquarters, whether that be a regional headquarters or a central headquarters, be a function of analyzing trends, analyzing data, and analyzing caseload, and making inquiries or making changes or looking deeper into cases at -- or making Manning or -- Manning or training recommendations based on what they see.
And also, of course, it says in responding to internal or external employees we get at headquarters.

I could go on. I know you've been provided some materials. I think it's in Tab 9. Recently, the Air Force introduced certain -- in its update to the JPP RFI produced some information about our system which includes some clever screenshots that might be helpful to -- similar to what Captain Luken provided you.

So I really would like or really would recommend that you take a look at those, so you get an idea of some of the forms and some of the reports and some of the queries that AMJAMS can produce, both for headquarters and for the field.

Some things I would like to add, in light of some of the things I have heard, it also has the ability, similar to the Army, of pushing data into a public docket, that's a public facing docket, publicly accessible but not required. CAC access or military account access.

It's a pool of information. It's not a
two-way communication, so it just takes information
and depicts it in a fairly easy-to-understand way
as far as what cases we have pending with the
court.

Similarly, recently, I believe it was in
2015 there was a functionality added to
automatically pull the results of trial. So you
get a summary in kind of a similar format as the
docket of what all of the results of trial are.

And similarly, also, to the Army -- they
also produce a monthly summary of court-martial
results.

But I know your time is limited, so I'll
just stop there and I'll entertain any questions
you may have. And I, again, want to thank you for
the opportunity to speak with you today.

CHAIR BASHFORD: Mr. McCleary.

MR. MCCLEARY: Good afternoon Madam
Chair and members of the Committee.

CHAIR BASHFORD: Good afternoon.

MR. MCCLEARY: It's always great to go
last.
(Laughter)

CHAIR BASHFORD: You could have went first. You told me last.

(Laughter)

MR. McCLEARY: I wanted to break my remarks up into two pieces. One is a very brief summary of the two systems that we use to track our cases.

And then I wanted to offer some information related to some work that the Coast Guard has done concerning Article 140a, and the electronic case management aspect of Article 140a.

And I think it relates to what you've heard this morning. And I think you'll find it useful.

The Coast Guard legal program uses a commercial off the shelf program called Law Manager that we first acquired in 2000. And that we have been using ever since.

And it's tasked that the legal program uses primarily to track our cases. It is capable of tracking cases from the inception of the
investigation. Although it is more common that we open cases in Law Manager when there's referral of charges.

The Coast Guard investigative service, and I have with me Ms. Stephanie McFarland, who works with CGIS. And works a lot with FAP in case there are some specific questions about that.

Since they have to be brought into any sexual assault case, FAP is the system that CGIS uses to actually do their investigative work and generate their reports from it. Although they have only had FAP use since December 2014, I believe.

So, that's a quick summary of the Coast Guard system. The other information that I wanted to pass to you is that about a year ago we started looking into the potential for using an electronic case management system for the court martial system in the Coast Guard.

There are a couple of reasons for that. One was Article 140a. The other was that Law Manager, the company that makes it had recently been acquired by a different company who was giving
us indications that they were possibly going to 

cease supporting that software. So that we needed 

to start looking at a possible alternative. 

In 2009 at the instigation of the Navy 

Appellate Division, there was actually a 

collection that took place amongst all five 

services and the Administrative Office of the 

Courts about the possible use of CM/ECF in the 

Armed Forces. 

And so we went and re-approached the 

Administrative Office of the Courts about the 

possibility of using CM/ECF. It might help us with 

the issue if Law Manager became unsupported. 

And we also thought that given our 

pretty small case load that it would be relatively 

easy to work with as an end case for the system. 

In case the other services wanted to use 

that for the compliance with the Part 140a that 

requires the services to develop electronic case 

management and work on public availability for the 

court martial records in the manner similar to 

PACER.
So we actually had a meeting with the Administrative Office of the Courts. We actually met with Ms. McCaleb and her staff. And we laid out to them, this is what we're interested in doing.

And what they told us was that it's very interesting. We will not make CM/ECF available to you.

And they had three reasons why. One is that they were in the middle of working on the next generation of CM/ECF. And all of their staff time was devoted to working on that.

The second one was that they have had an experience with modifying CM/ECF for another user in the executive branch. That from their perspective did not go well.

They made CM/ECF available to the Court of Appeals for Veterans Claims. And the Court of Appeals for Veterans Claims only uses the appellate module.

And because that court has a very narrow range of cases, CM/ECF had to be very significantly
modified in order to work with what that court
does. And that work was done by Ms. McCaleb's
staff. And from their perspective that actually
put them behind the development of the next
generation of CM/ECF.

And so they were reluctant to get
involved with what would likely be a much bigger
project working, well, not so much with us, but if
the other armed forces were involved with it as
well.

And then the other thing that her staff
mentioned was that one of things that they've
learned, or it at least came up, and was reinforced
to them significantly in working with the Court of
Appeals for Veterans Claims is that CM/ECF is a
complex software system.

It kind of has to be because it is
highly configurable. They are capable of
customizing CM/ECF to a very high degree in each of
the districts and the appellate courts because some
of the individual judges insist on that.

And so part of their concern was, given
the relatively narrow range of cases that the court martial system deals with that CM/ECF is a far too complex system for us to use.

And so those were the reasons they gave us why they were -- they didn't -- they basically said that we're not going to make it available. And we don't think it's a good idea either.

They did then refer us to the National Center for State Courts. Who we then did speak with. And have had somewhat ongoing conversations with them.

And they pointed out to us that there are a number of commercial software vendors that develop software programs for state and local courts. Some of which -- some of those courts are courts of very narrow jurisdiction.

And they thought that our talking with some of those commercial vendors might be more relevant to, you know, a type of system that we might need. And as a result of that recommendation, we went to -- there's a biannual court technology conference that we attended.
We got to speak with a number of the vendors. We got to see what is out there. And the National Center for the State Courts had the almost identical recommendation as the Administrative Office of the Courts was.

Is that they were very familiar with CM/ECF. They have worked with the Administrative Office of the Courts on it.

And they said that it's just way too complex for what you all really need. The analogy that one of them gave me was you would be buying an F-18 when what you need is a glider.

And so we have continued working with the National Center for State Courts. And are -- but at least we the Coast Guard, when we have been examining this, have been mostly looking at the potential for a commercial vendor.

Although our experience with Law Manager also indicates that that may perhaps not be, you know, a solution that takes care of the issues permanently if your -- the vendor ceases to support the program that you're using.
So, with that I will conclude my remarks and will be happy to answer questions.

CHAIR BASHFORD: I have -- I'm going to start with Major Schweig. Can you query your system so that you have the, you know, PC but? PC but, you know, batch search? PC but victim declination?

Can you query that and see how many of the victim declination cases you had in a particular year?

MAJ SCHWEIG: So we have not added those specific data fields to the system. The way we are dealing with that is we are requiring the actual case analysis memo to be uploaded upon conclusion.

And we're sort of debating as to whether or not we actually want to put those data fields in the system. Because as soon as we do, then presumably they become subject to disclosure.

Which, in a round about way, might lead one to infer the prosecutorial evaluation process that went into the case. Because of course it is possible for a prosecutor to say, there is probable
cause. However, I do not recommend prosecution based on the factors indicted in Appendix 2.1.

A committee authority can take that and say well, there is probably cause. And that's the standard. So therefore I'm referring this case.

We think there could be a danger in revealing the other part of the prosecutor's analysis.

CHAIR BASHFORD: And what do you -- this is statute probably. Do you track victim declination? And if so, what do you base it on for the services?

Mr. McCleary, did you track how many cases victims choose not to go forward on?

MR. MCCLEARY: Well, we require of trial counsel if there is a victim declination to be aware of the request from the victim that something in writing saying that they don't wish to go forward. Or that the trial counsel will forward it in writing.

So we keep that in the file. But the way that we have to track that in Law Manager is
just a quick form with text entry.

So that then is part of the big --

there's not like a drop down menu.

CHAIR BASHFORD: Does the Air Force track that?

MAJ HORTON: The Air Force tracks very similar to the Coast Guards. It's required to be maintained as part of the case file.

CHAIR BASHFORD: Can you speak up please?

MAJ HORTON: So, the Air Force's practice would be similar to Coast Guards. In that we ref -- that information might be in a free form text field. But there's not like a data button that indicates that specific information.

But as part of our procedures and regulations, they're required as part of the case file, trial counsel to memorialize whether a victim declined or obtain the victim's preferences in writing.

CHAIR BASHFORD: In writing?

MAJ HORTON: Yes.
CHAIR BASHFORD: And other than your PC yes/no/but, do you document declination?

MAJ SCHWEIG: Yes, ma'am. So it's part of the case analysis.

And I know the prosecutor will have to obtain a preferably written, but if the victim will decline to provide a written preference, then document whatever preference they were able to obtain. And whatever information they were able to obtain.

And that is documented on the case analysis memo form. Alternatively, if the victim was non-responsive, that's also documented. As well as the number of attempts made to contact the victim.

BGEN SCHWENK: But is it a data field? Or is it just in the memo? So, if I were to ask you how many last year, would you have to go through all the memos to find out?

Or is there an easy way to look at the data fields and say here's the answer?

MAJ SCHWEIG: Right now we'd have to go
through the memos to look at them.

BGEN SCHWENK: Okay.

CHAIR BASHFORD: Navy?

CAPT LUKEN: For -- we collect a lot.

We work very closely here, because we're the smarter half, obviously.

CHAIR BASHFORD: So the same thing?

CAPT LUKEN: Same thing.

CHAIR BASHFORD: Try to get it in writing. But ask if not.

CAPT LUKEN: Yes. It's required that for all sexual assault -- for all special victim crimes, they have to be prosecuted out, that has to be uploaded to the system instead of a metric.

CHAIR BASHFORD: And so then you wouldn't be able -- you would have to go case by case and see how many in a given year?

CAPT LUKEN: Yes, ma'am.

CHAIR BASHFORD: Army?

LTC COATS: Ma'am, our units are required to memorialize it. And we have spent two months, maybe a month and a half, we have added it
to our database along with another -- a number of other victim related data fields to the NKO.

So the field's now using that. And so we don't have any historical data. But going forward we have.

CHAIR BASHFORD: So going forward you could look through it?

LTC COATS: Yes, ma'am. It's a drop down menu of a number of options based on the victim's participation.

BGEN SCHWENK: I think that question raises the issue of developing a system for case management versus developing a system for analysis. You know, so when you get the Military Justice Review Panel, is that what it is?

The one that comes onboard in 2019, or whenever it comes onboard and it does the every four year, periodic review. And every eight years, off years, comprehensive review of military justice.

They're obviously going to want to know, well, how's your case management system going? But
they're also going to want to do their own analysis off, you know, data.

And not have to do what the JPP did.
The RSP tried to do, the JPP did, and what we're doing, which is ask for a whole bunch of files and populate our own database.

You know, so I guess as you look at it, is there much thought about setting up a system that not only takes care of case management, but the things that you all are doing now so that you can make the system operate more efficiently and effectively?

But also, start, I guess what the Army started doing anyway, maybe the Air Force will. Start populating more data fields so that the committees that are charged with looking at a broader view of things, and they don't worry about individual case management, they worry about broader view.

Have data that's readily pullable. And analyzable. I make up words all the time. To allow some real evaluation.
CAPT LUKEN: I agree, sir. And it's
things like that --

BGEN SCHWENK: That's really scary when
you agree with this. You know?

CAPT LUKEN: Well, you know. Things
such as having that database for victim declination
that is a, in my opinion, would be a loaded app.
You know, we could add that onto it.

As I turn to the guys who are probably
going to do it for me. Would be within the view
app tab. Because you have to have the information
there anyway on the victim in which they've got
that accessory tab.

And the solution is that push and pull
type thing of, is this going to add value to the
trial counsel? If not, why are we doing it?

Because obviously there is that
oversight. So in that case there, so I already
have it.

Give you another example, recently I was
asked as to race-based prosecution. How many cases
are this race, that race? And my response was
like, I don't know.

They're like well, why don't you know?

And then I didn't real -- I personally didn't
realize in CMS there is actually we have, you know,
what race is the accused.

My opinion, I would really like to take
that out. Because I don't prosecute based on race,
gender, or anything else. I don't care.

In fact I don't even track that. And I
don't know if I should be doing it as a prosecutor.

However, overall people want to know
that type of data. So it's in there. My thought
is, that should be done by the law enforcement.

Because they actually do have that
information anyway. So why would I be tracking it.

That said, I understand that oversight
wants to sometimes ask those type of questions.

So, we do have it in there.

And it's both left to the grand scheme
of things.

DEAN HARRISON: I'm not good with making
hypotheticals.
(Laughter)

DEAN HARRISON: I'm going to start with you Colonel. I live in Savannah, Georgia.

And it occurs to me that if Mr. Jones sells cocaine or meth or an opioid down the street from me, if he's arrested and prosecuted by the Savannah police. I can go online and track the progress of that prosecution.

If he's arrested and prosecuted by the U.S. Attorney, I can actually see some of the filings that are made in that prosecution.

Supposed this Jones is Sergeant Jones, the shop steward. Could I do the same thing?

LTC COATS: Sir, so I -- we do have our e-docket. So when that --

DEAN HARRISON: Which tells me the docket number.

LTC COATS: Well, we'll tell you the schedule of hearings.

DEAN HARRISON: Will this tell me the documents that are filed?

LTC COATS: It will not, no. We don't
have that ability right now.

DEAN HARRISON: So I'll have to drive an hour to Fort Stewart to gain access to the facility and actually go to the trial counsel's office and ask to see more.

LTC COATS: Yeah. I mean, in the military --

CHAIR BASHFORD: And you're not going to get --

(Off mic comments)

(Laughter)

LTC COATS: Yeah.

DEAN HARRISON: So what I'm getting at, and like I shouldn't even ask this, it seems that you've got, I guess you have to decide whether or not they're wonderful.

But you've got systems that are designed solely for your internal consumption. How about me as a member of the public?

I happen to understand you may not think race is an issue. But as a researcher, I do.

CAPT LUKEN: No. I understand.
DEAN HARRISON: But I'd like to know what I can do to -- I'm not in the military. I'm just a lowly member of the public.

I'm trying to follow the criminal justice system in my area. Can I see anything from any of your systems that is of any use to me?

LTC COATS: And answer -- the short answer is no. The only two things that you can see from the Army's perspective is the docketing of that case. And in the end, the result of that case.

So, that is one thing that I don't think any of our systems do. Is have a PACER like public like -- publically accessible to documents.

DEAN HARRISON: Or even historically. If I wanted to research to see what's going on at the local military base over the past ten years, is there anything that I can do other then file a FOIA request?

LTC COATS: No. But FOIA is the mechanism, sir.

BGEN SCHWENK: But under 140a, that's
something that somebody's looking at right? The
JSC subcommittee or somebody?

LTC COATS: Yes, sir.

MR. MARKEY: Thank you very much for
being here today. And I want to thank you for your
service, for everything, for all your years.

The statistics, we appreciate that. So,

I ran one of the most -- one of the busiest sexual
assault units in the nation, in the civilian world.

So, I know how important numbers and
statistics and information was for me to understand
what resources I needed. What I was short. And

how to address certain issues.

It sounds like with NIBRS, which has
been struggling for 30 years, in a microcosm that's
what I see here. And as far as 18 thousand, but we
only have five services that are basically working
in silos. Not communicating with each other.

I think that our goal is the same as
your goal. You all -- everybody falls under the

UCMJ. Everybody investigates sexual assaults.

So there's not much that -- there's not
that disparity of my service is unique in that we
do things this way.

    What we're seeing through the process
now that it's opening my eyes, is definitions.
Lack of standardization. Lack of reporting.

    The other thing I noticed is the systems
that you're describing are after a whole bunch of
information has already been collected through the
investigative process.

    So there's a lot of data that I don't
even know if it's making it to your systems to look
at. It sounds like you're not really getting
information until the MCIO submits their
investigation to you to start entering that into
your system.

    So, there's a disconnect between the
cradle and what's going to happen. Ultimately the
disposition of that case.

    And so that seems to be one of the
things that I know personally all that information
is there. Why isn't it in a position where
everybody has access to it? With restrictions.
I don't disagree with your iPhone, android system of entering data. That may work in silo.

But I don't know with the way the system is set up with everybody's unique way of investigating, of reporting, of identifying certain things, I don't know if that would work in that particular scenario.

But, I think there's a way to make that work. If in fact everybody would come to an agreement that this is how -- this is the information. These are the forms. These are the standardization.

Everybody contributes to this system. Now that would go to your, well, we don't want somebody having this information that's going to use it or control it, whatever the concerns are.

And I understand that. But, we're in a position where that's not happening now. We're struggling to get information just on requests for information.

And a perfect example for the data
working group, when there's a request from the Hill, the services are coming to us to ask for that data. That's data that should be right there at a keyboard. That anybody should be able to access within your organization.

And so I think there's -- I think we're on the same path. I'm hoping that we'll all be able to make it a win-win for the type of system that's going to be able to identify how we're responding to sexual violence.

Are there gaps and challenges? And are there ways that we can improve our response? Because ultimately that's what we want to do.

Less about the data collection and what it is. But that's tell -- that tells us how we're doing things and where we can improve.

So that's kind of my little tirade, I guess.

(Simultaneous speaking)

MR. MARKEY: And I don't think there was a question in there or anything. If you have a response to this, bring it on.
(Laughter)

CAPT LUKEN: I do. I agree. There is a Uniform Code of Military Justice, so why can't we get kind of under one large umbrella?

Anyways well, we're different. We're this and that. Each of the services at our level has a challenge getting a form changed at the DoD level.

And there's so much change in the practice over the last eight to ten years, you have a pivot to add these different things, the different metrics that we want to start tracking and things like that. It's just a great challenge going across the services.

And I would agree. We're working in silos. I find CMS, while it's nice, it's clunky. I need something added to it, and it takes months.

A simple thing such as one office has a new command, that they have new cues for a new command. But to get that added in there, it takes two or three emails, and a couple of phone calls, and a week or two before it finally gets in there.
When it probably should already have
been in there in one form or fashion. We're just
not there yet.

MR. MARKEY: Well, and if we're trying
to pull statistics and data out of narratives, and
that's what we're seeing in the justice files.
That's from the 60s and 70s.

CAPT LUKEN: Correct.

MR. MARKEY: Not 2018. And so that
concerns me. Because then the accuracy of that
information that's in narrative form then it
becomes interpreted by somebody who maybe give that
information out.

And so -- and plus it -- yourselves have
admitted that a lot of that information on
deciliation involving victims, you have to pull
every report and look at it. And read through, I
don't know how many pages perhaps, just to get to
that one piece of information.

And there are systems out there that
allow for the electronic gathering of that
information. And you press a couple of buttons and
you do a query.

You see -- it's looking --

UNKNOWN: Your time is up.

(Laughter)

MR. MARKEY: That's a cue. And you query it. And so I think we would like to provide assistance in maybe getting to that next level.

CAPT LUKEN: Well, that would be great. I think direct to declination because it's a value for pulling information.

Declination should and can be added.

But it's the okay, what's this month? What's next year? And continuing to add it.

And then go back well, can you tell us the last five years how many people have declined? No, I can't. Why? Because five years I wasn't tracking this.

I can and will now. And that's the benefit we've gotten through CMS. In that transition from the system -- whatever system we had at the time.

Try this issue in CMS, I can now, now
that I have about five years' worth of data, I can
start seeing trends. I can start seeing
differences.

And we need to get better at it. It's just a very big challenge because you have the
attorneys trying to work out what's best for the
prosecutors to be able to prosecute cases in case
management.

Versus, what does Congress and others want to see and have that transparency. And I
understand that.

When it comes to transparency, we're all for 100 percent transparency. But also we have the
accused, we've got to watch their rights as well.

And we have a Privacy Act in there. And that were tampered with at times too. It's just
challenging.

But, it's something that can be worked through. I will not sit here and tell you we can't
do that. That's absolutely not true.

We can. We just need to get the right
people doing the right thing.
MS. CANNON: Are there other comments before we move onto another?

MAJ HORTON: I just wanted to add one thing on behalf of the Air Force. I'll say that the Air Force has struggled with that very issue of which issues are -- which data entry points are the points to track for trend analysis.

We have data reliably and the evidence that goes back to the 90s. And we've been doing that very thing, identifying as we go, because of the interest we get in a particular, you know, from a particular Congress person, or because of the media, or because of a particular case, we begin to track.

But we have the same issue of well, we can't go, you know, to the past. But going forward. So, it's always been a challenge.

Now I'll just say it's a challenge. And I agree with what you're saying. It's just a struggle to continuously adapt and find those data points that need the analysis.

BGEN SCHWENK: How hard is it to make a
change to add a data point in AMJAMS?

MAJ HORTON: I will say that it's not terrible to add the data point in terms of programming. I will say the difficulty becomes in deciding how best to train the field and where it's at.

BGEN SCHWENK: Right. What the guidance is going to be. What the definitions are going to be.

MAJ HORTON: And how to proc -- because ideally you want the system to -- to -- I don't want to say force the issue. But maybe, you know, make it very evident.

So that it's clear. It's fairly intuitive. And sometimes that becomes difficult. So, it's not so much adding the data field itself that generally speaking is, you know, our programmers can do that fairly easily.

It's the other part of thinking from the user perspective, from the case management perspective, how to make it intuitive. And makings sure you're capturing it at the right phase too.
BGEN SCHWENK: What about in the Army?

LTC COATS: Well, I would agree. It's adding all the victims, I think we added eight or nine victim-related data points to MJO. It took all of three weeks for the developers to move through that.

And for me as kind of the legal counsel on that, to make sure that it was put into the system in an intuitive way. But the training aspect is the key part.

It's not hard. It's just you have to focus on it and give the proper attention to it so the field does understand that the field is now there first of all. And what the definitions of those fields are.

We went through multiple iterations of defining a victim, you know, before we decided what victim definition we were going to use. And then had all these subsequent fields open up that had to be filled in.

But, so that's mission and training certainly.
CAPT LUKEN: I get my two year prosecutors every three years. So, but you've just got to get at it. It's not surmountable, but you have to get at it.

DR. BECK: If I may?

CHAIR BASHFORD: Of course.

DR. BECK: I worked with directors at corrections, state correctional agencies. They face some of the same issues of getting from their case management --

JUDGE GRIMM: Can't hear you, doctor.

DR. BECK: Getting from their case management systems the minutia in those case management systems to how they want to be judged. How they want to be evaluated.

And the desire to weigh in on that evaluation. And so ultimately, I think, the distinction between the case management systems out there that are oftentimes unique to each of the states or each of the services, and will continue to be.

But there has to be agreement on how we
all want to be judged. Whether you're in
corrections, or law enforcement, or in the armed
services.

So that involves some discussion of
metrics. Basically, what are the metrics of
justice? What are the metrics of good management?

And the correction administrators have
struggled with that. And I think they certainly
were instructed along the way.

So you have metrics, you have targets,
you have indicators to the extent to which you meet
those targets. So you have to set the targets.
That's leadership.

You have to agree upon the indicators.
And to come up with some kind of consensus with
respect to those indicators.

And underlying those indicators is a
notion of common language. You have to speak the
same language.

And that means having the same kinds of
classifications and definitions so that you -- when
you talk about sexual abuse or unwanted sexual
contact, or you talk about rape, you're talking
about the same thing.

It's a common, common language. And
correctional administrators struggle with that. I
think anyone committed to evidence-based management
struggles with that.

One thing I observed along the way is
that simplicity is a virtue. If you try to collect
every piece of information on every aspect in very
process and every decision point, you're never
going to collect anything.

You're never going to get any good data.
You have to set priorities. You have to say this
is more important than these other things.

And that's again, about leadership. And
it comes from the commitment to how you want to be
judged. So that would be my soapbox.

Is to how to approach thinking about
developing a system that actually speaks to the
issues at hand.

MS. LONG: So, I have a question. First
of all, thank you very much for your testimony
today. And your work. It's very interesting.

And as a former prosecutor I also really appreciate how difficult it is to get a handle on what you're doing. And Captain Luken, you made a -- but maybe others have some other feedback.

But, you in your remarks made a reference to complexity when you're trying to figure out how your individuals are working. And how much time it's taking.

CAPT LUKEN: Yes.

MS. LONG: And I thought you said you recognized the complexity. I'm wondering what in your management system, if that was it, that you're using to flag more complex cases or cases that you would expect to take a little bit longer than others.

Because I imagine that you're trying to balance this work.

CAPT LUKEN: Yes. I've thought about that. How do we, you know, a drug pop case isn't the same thing as a murder case. I recognize that.

When I first came into the job, the
metric was for a regular counsel to have eight
courts-martial a year. To push eight courts-
martial a year.

   My response was, what does that mean?  
What is eight? Is eight a drug pop, special
courts-martial? Or eight murder cases?

   So using CMS we were able to start
looking at it and go, the metric really should be
how many cases are you touching at one time that
are in various portions, if you will.

   The metric now is about 18 to 20 cases
that you rotate two or three times through the
year. There are exceptions. So we have them
marked as high visibility cases.

   And then at TCAP we can monitor the --
we, you know, we do monitor those type of cases.
So, I know for instance our northwest just finished
a child murder case.

   I know that the -- when I look at their
total numbers and I see a dip in their efficiency,
I know it's because for two weeks they were -- that
that team was in a two-week trial.
So, when I get questioned by my leadership of why do you see this, or why is this bump in there, I can say, just through knowledge of looking at the reports and talking to the field, I know what's going on in different places.

For instance, like some of those graphs, you'll see people -- things spike and spike down. What that tells me, a low number of cases because it's a smaller docket.

But maybe they just had a first -- oh, I just finished a child -- a high vis child sex case. Where the guy got 30 years.

They put a lot of time and effort in that. That case took about a year and a half to get to finish, which caused their metric to spike.

Just having that knowledge and ability to talk about that, you've got those outliers, you know what I'm talking about.

MS. LONG: And one follow up. And then I'm interested in hearing from others if you have any other comments.

Do you find value in looking at --
across sexual assault cases, for example, and
trying to look at the variance and complexity
between them?

For example, at gun-point, stranger
sexual assault, not to rank things, might be more
straightforward then a non-stranger with alcohol
involved, something else. Is there value to you as
a manager?

Or do you think as a broader service of
knowing who's handling what? I mean, what cases
maybe?

CAPT LUKEN: So, yeah. It's important
for me to know. And that's where I use their
reports. Their stat fields where they talk about
what the general facts of the case that I get to
see.

So for instance, we have a case now
going on at Great Lakes which is a domestic
violence and a sexual assault case. I look at
who's up there.

And say, you know what, I want to bring
in some extra expertise. So I called down to some
place else have -- or TCAP may get involved to act as a surge capability.

So, those high -- those cases come -- are marked within the system. So I get some visibility as well as my boss gets visibility. And we can analyze, do they have the right people and at the right time for those particular cases.

CHAIR BASHFORD: I was going through one of the problems that's coming up here is case management is like what is going on? And some of the data points that people are interested are later, why are things going on?

And I agree. You don't really care if you're just trying to see who's got what cases and how long they're taking.

Is one overloaded and one understaffed?

CAPT LUKEN: Yeah.

CHAIR BASHFORD: You don't care about a lot of the data points. Because it doesn't matter. It just matters what cases you have and what's happening to them.
And I think maybe trying to push
everything into a dual purpose, you have to have a
lot more data pieces. But it may just be that
they're at odds with each other.

CAPT LUKEN: They're a bit at odds.

But, just finding that middle ground and kind of
put Mr. -- or excuse me, Dr. Beck said, it's what's
important and what's not important.

I would agree. Victim declinations is
important. So we can see if there's trends of why
are they declining?

Is there a surge in numbers all of a
sudden in these last two years versus the two years
before? How can we explain that?

I just on my way up here to speak got a
call from our Deputy JAG asking -- looking at the
DoD numbers and maybe relations to those numbers of
cases going forward versus not going forward.

And talking through why do we think
there's been a bit of a surge since 2015? Our
response there is, well first of all, we've been
trying to elevate from a probable cause standard to
a probable cause plus a reasonable prospect of conviction at trial.

As well as we had case law which then gave us a greater explanation on what is one who is incapacitated. And so that's affected some of the numbers in our evaluation cases.

So, I think there's a way to get there. It's just that we need to prioritize what's important. To get into prior acts.

Plus, to add that into the military justice -- to CMS. Because that's always something that we need to get at and get better at.

So we've added that in there. Which was a new tracking.

MS. LONG: Can I just go back and make -- I thought Major Schweig was just going to say something.

MAJ SCHWEIG: Yeah. I had just a very quick comment. Which is that -- and I know that the committee is well aware of this.

But it's worth, I think, restating. Is that in the military we don't prosecute who done it
cases.

Like we almost always know who done it.
Our questions always, is it a crime? We're
prosecuting is it a crime cases, to who done it.

And, you know, I think that's important
for consideration as well.

CHIEF MCKINLEY: We have joint
deployments, joint assignments, joint PME. We have
joint marriages. We even have joint cases of
between -- sexual assault cases between services,
you know.

But yet when it comes to data, coming
from different services, you have different SAPR
programs. You have input with data differently.

And our committee here, we have a
difficult task in a very short period of time, of
providing recommendations on 140a. And I'm sure
each one of you has an opinion on which way we
should go.

For instance, should we have, you know,
five different systems that remain out there. That
you input the data that's required for you to
input.

Or do we come up with one system that you are required to fit this one system? And I'd like to get from each one of you, what's your opinion? And what direction we should go?

BGEN SCHWENK: Recognizing now that you're in a court in the U.S. representing your respective Service.

(Laughter)

BGEN SCHWENK: With no instruction.

(Laughter)

CAPT LUKEN: Yes, sir. Is that it?

(Laughter)

(Off mic comments)

MR. McCLEARY: In the end, while I think that it is possible that if you define a set of data that everyone is going to be required to mention, then you could have five different systems and it could work.

For the purposes that Congress has said, why can't we tell what's going on across the Armed Forces? And then also being able to tell whether
or not there's problems either with people in the
services or individual cases.

    I think all the stuff they want, we
would probably need a single system in order to do
that better.

    MAJ HORTON: So, I think in my opinion,
speaking from what I see from our system, I think
I would disagree. I think that you could have five
systems so long as you could come together, no
kidding, a common like, you know, a common set of
standards.

    Which is, you know, one of things that
140a is driving towards. I think that there are,
you know, I think there are very real differences
in how each of the services process their cases.

    But either way, I would say there is
value in the system. And there's less intrinsic
data to support it. Historical data.

    And ours is a system, Air Force has a
system again that's -- it's been in place since
1970s in some form or fashion. And has reliable
data going back to the 80s and 90s.
So, one of the big things we struggle with when deciding whether to abandon our system and upgrade it and move to something different, whether it's a part of this initiative or not is, ensuring that the integrity of all that historical data is there.

And while that sounds simple to say out loud, I'll tell you, from a contracting and an acquisitions perspective, it's not necessarily as easy as it sounds.

And it takes a lot of time. And it takes a lot of effort. So, I think it can be done in terms of five separate systems, as long as it's clear. So that means we have that common language.

Not that there aren't other ways. And not that that's what the Article 140a subcommittee is looking into. That's my opinion.

MAJ SCHWEIG: I serve as the Marine Corps, and I guess, continue to serve as the Marine Corps representative to NJIS, Naval Justice Information System development.

Which is the -- which is -- it is the
idea that we can somehow track a case from cradle
to grave. From inception of investigation or time
of report perhaps, until final release of at the
top.

And I will say that that has proven to
be mind-bogglingly complex. Even between two
services that, you know, are very similar with how
we process things.

We are constantly having to develop and
change the way we understand certain terms. So,
for example, in the Marine Corps your job is known
as your MOS. In the Navy it's known as your Rate.

So, here we are trying to figure out
what do we name this data field? And you know, do
we just call it your job?

And that's just between two services.
You know, if you tack on three others, you'll, you
know, you'll back up -- it will be orders of
magnitude more complicated.

So, to answer your question though, the
only way to categorically solve this problem is
with a single, uniform data system. Doing it would
require probably an act of God.

BGEN SCHWENK: Is that like the Secretary of Defense?

(Laughter)

BGEN SCHWENK: Or some other God?

MAJ SCHWEIG: Some other God. I'll withhold comment on that.

(Laughter)

CAPT LUKEN: I agree with the Uniform Code of Military Justice obviously. But the challenge we have is within the Uniform Code of Military Justice you have the different Secretaries having the ability to have certain decisions or certain practices in place.

So you have that as a challenge. Our -- for instance, our Article 15 is different from what the Army is obviously.

You also have differences which committees that are --- the other calls we get is, maybe courts-martial related, but what happened at the end.

So now you're looking at NJP's,
Administrative separations and realizing those details, which are completely different. And those are tracked at the -- with the, often by the prosecutor, so they're being prosecuted -- or excuse me, tracked by the Staff Judge Advocate.

So, yes, this is very tough. So while we have the uniform --- I think you said marriages, sexual assaults, all these different common interests, just the history of the services, the cultures, and then how they're each arrived at both under the Uniform Code of Military Justice and NJP process, and the administrative process, is very different.

And then what data you want, it makes it very difficult to be able to address all the wants, while going back to the user. Putting in what's the value of me as a prosecutor putting this in to help me move my case and address and prosecuting my case?

LTC COATS: So the downside of going last is that everybody else in front of you takes all your ideas. No.
(Laughter)

LTC COATS: So, I'll echo a couple of things. And then I'll offer one other thing.

First, I think it's important to note that, you know, military justice between each of the services is different. We have different interests, you know, different things are more prejudicial to good order and discipline in one service then they are in the other.

So you have that aspect. You have different processes in place. And so it is, it would be difficult to have one same case management system.

I think as Noel said, one important -- one important aspect, I think the most fundamental important aspect is we have to have the same standards and definitions.

If you can accomplish those and reporting requirements, then it doesn't really -- I think it's less important the system that you're using to collect it, so long as the product coming out of that system is comparable between the
services.

And so -- and I think -- I think we could get there. I know I've talked with the Air Force a number of times and the similarities of our system. They're fairly similar in their capabilities to generate information.

And then the last thing is, I also think it's important, you know, we're talking about this one system solution. I frankly don't feel there is one system solution.

No one has one system solution. You heard this morning of two different systems, and a third system on top of one of those.

So you have CM/ECF, and PACER on top of that system. Which is not data collection at all. It's document movement. And then access to those documents.

And then you have the commission's who takes documents and inputs data. There was no rep -- the U.S. Attorney's Office has a case view system, which I would say is most similar to our MJO and AMJAMs as far as managing a case at the
And so no one has that one system that's going to give you access to files, public access to files that's going to collect all this data for you to conduct analysis on, and help a prosecutor or a supervisor manage case load. There isn't.

And so, that would be, you know, I think there is a place for, you know, any form of hybrid where it's just a -- you know, there are service systems and then additional services -- or systems to get to the other data requirements that we have in 140a.

JUDGE GRIMM: An observation and a question that perhaps you can give us to help us focus on what I sort of see as our struggle.

Those of us who have prior military experience ourselves, and by virtue of the year that this committee has had the privilege of listening to your experience and very dedicated service men and women talking about how the system operates, we understand that the function of the military justice system is different then the
function of the criminal justice system in the civilian community.

We understand that discipline and good order and judgment is important. We also understand that when you create your systems, you are creating them system wide.

So you've got to have a system that looks for AWOLs. You've got to have a system that looks for homicides. And you've got to have a system that looks for sexual assault cases.

The problem is, is that those individuals who have started asking questions about how the system works in the last ten years, do not understand necessarily the way in which this separate operates in a dual capacity.

And the challenge is when they are saying, we need to have this kind of information on this one particular type of case. One class of cases.

You know, they're not asking you about AWOL cases. They're not asking about your substance abuse cases. They're not asking about
failure to appear.

They're sexual assault cases. And the challenge that it seems to me that the services face is if we are unable to provide a mechanism to answer the questions that they have about this class of cases, there is a solution that they can think of to that problem.

Which is remove the ability of the services to handle those kinds of cases. And that has been something which for a lot of very good reasons has been an argument, no.

This is integral to what we do. It's part of what we have to do in part because of the population.

Your population is a disproportionately large population of young people increasingly of opposite genders, who are forced under stressful conditions and close quarters, to deal with complex problems. And sometimes in environments that are very hostile, charged with protecting the safety of this country.

And the challenge that we have is how do
we figure out systems that allow the reporting of
this information at the same time, it doesn't
underscore the way in which you're having to manage
these systems for the purposes for which you have
to do your job.

Not all of which is, ga -- I mean, the
only thing the courts do is bring cases, collect
the data, and resolve the cases. That's all we do.
We're not charged with defending the country.

And so the challenge that we have here
is, how do we make recommendations to the
organization, which is trying to explain to
Congress, we need to keep this function here, when
the questions that they want answered, we have a
challenge getting our arms around them.

And as General Schwenk said, for us to
go get into it, they have to look at two thousand
files, one document at a time. Because it can't be
captured.

And that's how we're struggling with how
we can fashion recommendations that recognize the
reality that you live with. But, respond to
questions from those who may not fully appreciate
the challenges that you all have.

  CAPT LUKEN: And if I may add a layer to
that. The challenges also require --- appreciating
that we're here for sexual assault cases, the same
questions are being asked of us for data in gun
cases, hazing cases, sexual harassment cases, child
abuse cases, child exploitation.

  So, it's not just sexual assault cases
we're pulling all this data in, but we are tracking
for all types of cases. And whatever maybe five
years now or ten years of other interest.

  JUDGE GRIMM: Right.

  CAPT LUKEN: So, that is an actual layer
of challenge we have as well.

  JUDGE GRIMM: Right.

  CHAIR BASHFORD: Well, although I think
Captain Luken said it, it's important to have the
same definitions.

  CAPT LUKEN: Yes, the Lieutenant
Colonel.

  CHAIR BASHFORD: I'm sorry.
CAPT LUKEN: I agree with the Lieutenant Colonel.

CHAIR BASHFORD: It brings me to your entry of your results into DSAID, DSAY? However you say it.

CAPT LUKEN: DSAID.


Who's actually entering that information for your various services?

MAJ HORTON: So, I guess I don't -- I think it's similar across the services. But for the Air Force, that's a separate -- that's our SAPRO office.

So SAPRO --

BGEN SCHWENK: Sexual assault response coordinator would be doing that.

MAJ HORTON: That's correct. And the program that manages all that too.

BGEN SCHWENK: Right. Do this, sexual assault.

MAJ HORTON: But that's them. And I
know they have, at least at the headquarters level, some legal personnel that are attached to that function.

But predominantly it's the people who are trained in those functions and these matters that determine it.

CHAIR BASHFORD: So you're not the person that can tell me what DSAID means? What when it says something that's substantiated versus unsubstantiated?

MAJ HORTON: No, ma'am. But if you could though ask that question.

(Laughter)

CAPT LUKEN: So, what happens ma'am, often times is the cases go forward. And the command is left to complete the DSAID and they ship out.

I have seen cases where we've recommended not to go forward. Not because it didn't happen. But basically there's not enough evidence to go forward or have other reasons that prosecutors look at.
And if the command center looks at those, oh yeah, this is unsubstantiated. It's like whoa, whoa, no.

That's not what -- not saying it didn't happen. We're just saying that for us to prove beyond a reasonable doubt may have its challenges.

And so then the victim finds out, what do you mean? Are you saying I'm a liar? So that is a challenge.

And I think that is some of the language that we need to take a look at.

CHAIR BASHFORD: And what about the difference between insufficient evidence of any offense and unfounded? We see those seem to be thrown around in the DSAID all the time as well.

Do you in your services have a definition? Or do you distinguish between them?

MAJ SCHWEIG: The Marine Corps does. So, we -- and I don't know if you're familiar with it. But it's sexual assault disposition report, it's known as a SADR report.

And so we've centralized all of that,
sort of a nod to the Sentencing Commission model. The idea that unless you centralize it, you won't get consistent data input.

So, we have a very motivated and well Master Sergeant who intakes all of these forms and inspects them for consistency. And if they are wrong in any aspects, she will return them to the staff judge advocate for improvements.

And when she's satisfied that they're correct, she will then enter that information into DSAID herself.

CHAIR BASHFORD: So how do you distinguish between insufficient evidence of an offense and unfounded?

MAJ SCHWEIG: Regrettably ma'am, I don't have a copy of the plan here. But if I did, I'd read you the definitions from the help side of the form.

And I don't want to risk getting them wrong at this time.

CHAIR BASHFORD: Is it different for any of the other services? Are there drop down menus
that tell you what the difference is?

    LTC COATS: Ma'am, I'm sorry. I'm not
    -- I'm not our DSAID PO -- subject matter expert.

    DR. SPOHN: Well, just a follow up to
    that, we've been reviewing the investigative case
    files. And one of the things that we're concerned
    about is outcomes.

    How was this case closed? Or what was
    the eventual outcome of this? These are all cases
    where no action was taken, the ones we're looking
    at now.

    And DIBRS might have one case closure
    type. And then you look at the case file, and it
    says something different.

    So it might be unfounded in DIBRS. And
    no probable cause, or insufficient evidence, or
    something like that in the investigative case file.

    So, how do we know what the outcome
    should be in these cases when DIBRS and the
    investigative case file have inconsistent data?

    MAJ SCHWEIG: That's unknowable without
    knowing exactly where in the process the case fell
off. So, for example, if it was after the
preferral of charges, but prior to referral, --

DR. SPOHN: These are all no actions.

MAJ SCHWEIG: Okay. So, you're on no
actions for these things.

UNKNOWN: Initial disposition. It's
initial disposition.

MAJ SCHWEIG: In that case I've no
answer to your question.

(Simultaneous speaking)

CAPT LUKEN: Within the Navy I think
you're getting a disconnect. Because that, DIBRS
and the SADR is held through the convening
authority.

Whereas, our case closure is being
handled within the prosecution, which is different
events. So you're seeing a different language even
within the service.

And there's no one marrying that up. I
do know when I see a SADR and I see an unfounded or
some other words similar, I take a little bit of
issue -- I do take issue with that.
So, and then when it comes out to training, I make sure we're using the same language.

UNKNOWN: So, and what do you think --
oh, go ahead.

DEAN HARRISON: If we were inclined to say without the service of the SADR collective, hundreds of new data points. But we're also smart enough to know that the TJAG offices are not the people to do this.

What office in your service branch or in DoD would you recommend be responsible for collecting and maintaining this type of data other than the TJAG office?

Who would you like to stick it with?

(Laughter)

CAPT LUKEN: I fear my own --

DEAN HARRISON: Yes.

(Laughter)

CAPT LUKEN: I don't even know who you are right now.

BGEN SCHWENK: Just remember, it's the
highest grade satisfactorily served.

(Laughter)

CAPT LUKEN: Yeah. There we go. Well, I'm thinking Justice Cole, because he's in academia.

(Laughter.)

CAPT LUKEN: It would really come down to what are the data points you're doing. And who would have the best oversight for that.

Because it could be law enforcement. Or it could be our Op Nav personnel people. So it really comes down to what hundreds or thousands of things you want us to start tracking.

DEAN HARRISON: Right. And they probably asked the JAG officers for the information.

CAPT LUKEN: They would.

DEAN HARRISON: Would they also be asking the investigators? They might be asking the counselors.

But they would be the maintainers of the data. And they would be the ones responsible for
responding to Congress. If Congress wants to know something.

MR. MARKEY: And I'll add if I can. So, one of the things you learn is, if you don't try to fix the issue yourself, someone's going to tell you how to fix it. Satisfactorily or unsatisfactorily.

And so we would call them unfunded mandates. I don't know if that's a term you're familiar with in the civilian world.

So, the question was, obviously, you know, we're going to make recommendations. We want to be on the same recommendation team.

But, I also feel that we don't want to make recommendations that are unrealistically as far -- unrealistic as far as resources and the ability to accomplish those recommendations.

So, I don't know if it's appropriate to talk about what resources. And I know you're probably processing, if this happens, or if something changes, what resources are we going to need or are we going to lose, or that we would expect to help us resolve this issue or this
question that's being asked?

So, I don't know if that's something you thought about as far as this is the impact it's going to have within my branch or within my unit, if and when a particular change occurs.

UNKNOWN: What's the question?

MR. MARKEY: So the question is --

(Laughter)

MR. MARKEY: Did I create a problem?

BGEN SCHWENK: So how resource constrained are you guys?

MR. MARKEY: Yeah.

BGEN SCHWENK: But what sort of re -- do you have the people that you need to do your -- I mean, you're doing four things, right?

MR. MARKEY: So you see a lot of push back at the --

BGEN SCHWENK: Because your case is beyond this.

MR. MARKEY: The push back I've seen has been, was I don't have the time, the people, and the money to do this.
So, if you were given the time, and the money, and the people to do this, what would you need in order to accomplish that task?

And maybe that's something that you need to process. To think about.

CAPT LUKEN: So, I'm looking at paralegals. Because I don't want the prosecutor having to input all the time.

I want to have support staff to do that. So that way taxpayer money is being well utilized for what you're paying that individual to do.

So, I need a good task -- I need paralegals and good administrative staff to go there. I need streamlined processes as well.

And a system that works. Another layer that I can --

MR. MARKEY: IT factors.

CAPT LUKEN: IT. Huge IT. And not IT that works in Norfolk or DC. But IT that works in Bahrain, Japan, Germany and other places as well.

MR. MARKEY: Right.

CAPT LUKEN: So, those are all the
different layers you got. You know, now you've got
cyber and you've got protection and security and
those things.

So, layers on layers. It's not
impossible. It's just not as easy as we would like
to think it is.

So just -- as long -- I just ask that,
I mean, consider that whatever you ask for, please
make sure it's valuable that's something that's
truly, truly needed versus a nice ask.

MR. MARKEY: Right.

MS. LONG: Then what's the point Dr. Beck made? I think it was you who said you have to
link the data to operations.

It's no -- there's a real disconnect.

A lot of things of what you're saying help you
manage your prosecutors are the things they want to
know.

But if they're not, maybe some of them
are. But it's not linked right now. So, I
understand why it just seems more for you.

And some of it might be. Because it
seems like you're being asked for extra work that
has no value to your on-the-line work, perhaps.

CAPT LUKEN: This is new to us too. I
mean, this is stuff -- these metrics we're pulling
now a days are not something we were pulling five
years ago.

So, I'm sitting here teaching my
leadership that this is what this means right here.
So, it's -- we're in the crawling phase.

MS. LONG: Right.

MAJ SCHWEIG: Yeah. And I'll add this,
stream it down. If you really think about in the
greater scheme of things, the Sentencing Commission
has been working since I -- maybe since 1995. Some
of you probably know the exact number.

CMS has been running since 2011. I
think MJO is even a little bit younger than that.

LTC COATS: Yeah eight. But really
courts-martial has only been added since '11.

MAJ SCHWEIG: And we look at MJO has
approximately 1,800 data elements. CMS has 755
data elements.
And you know, we are just now to a point
where people are -- they are in the habit of using
it regularly. So they're actually knowing when and
how they're supposed to input the data.

Quite frankly, if you ask us these
questions in five years, we can probably give you
a very, very solid answer. But we just haven't
been doing it long enough.

And we are about to have wholesale
changes to the UCMJ starting on 1 January. So you
might as well push the reset button on everything
we've done for the past five years that's really.

CAPT LUKEN: And one -- within my nine
offices, as of two years ago, I had three of them
operating on their own personal da -- on their own
local database.

And I had to get them all off that. And
said no. Get on CMS. Get onboard. But then I
hear, oh, CMS this, CMS that.

Now, yesterday I was talking to the
senior trial counsel, they're like, we love CMS
because we now know how to use it as a tool to
manage.

But it took us a couple of years to get
where we are now. So, sorry.

MR. McCLEARY: One thing that I will
just mention to the council, resources to consider
when you're looking at one part of 140a. Which we
were kind of talking about this morning to
consider, and filing documents and then making them
publically available.

Is that there are no standing courts.
And there isn't the equivalent of the clerk
function. All right.

You know, there's going to be an impact
somewhere in making documents publically available.
Okay.

CHAIR BASHFORD: Captain Luken,
unfortunately you pushed one of my buttons on your
--

CAPT LUKEN: I'm sure you're not the
only button I pushed.

CHAIR BASHFORD: Page 13. What's the
difference between blue on blue alleged sexual
assault and blue on blue sexual assault?

Both of those appear on there.

CAPT LUKEN: So, I purposely tried
pulling out all kinds of different things. What we
have here on the -- it's the descriptions you're
referring to, correct?

CHAIR BASHFORD: Yeah.

CAPT LUKEN: What those really are is
that is the individual trial counsel putting stuff
in for --

CHAIR BASHFORD: Well hold on. We're
the ones alleging it. If you're trial counsel, why
are you -- why does some of it say alleged?

CAPT LUKEN: I agree. It is and I have
some very sensitive junior prosecutors who I'm
still working on language.

And so, if I have my way, I will put a
hold on that. For instance what bugs me is when
and you'll see the whites because I have to pull
someone out.

When I hear someone who goes yeah, he
choked her. I'm like, he didn't choke her, he
strangled her. So that is 100 percent just simply
going, for prosecutors use our language.

But that is actually work product more
so then anything. So, but I want the prosecutors
to have that ability to have that description.
Because that is a workspace for them.

CHAIR BASHFORD: I was just about you're
the ones alleging it. Of course it's alleged.

CAPT LUKEN: Yeah. I underst -- I
completely understand. And I would --

CHAIR BASHFORD: It's not meant to be --
it's not meant to be a statement about the strength
of the case then?

CAPT LUKEN: That's absolutely correct
here.

CHAIR BASHFORD: Okay.

MS. LONG: But it provides that training
piece. Because he can look at that. And then he
knows he has to go back to someone and explain to
them.

CAPT LUKEN: Yes. Absolutely.

MS. LONG: Which is like I don't --
CAPT LUKEN: Choking and strangulation is exactly one. I told them, I go, take choking out. I want strangulation unless they took a bottle cap when they threw her down and they're choking on it. Now that's choking.

So, but it's educational.

CHAIR BASHFORD: That's a hard lesson to learn.

MS. LONG: Yeah. I know. I know.

BGEN SCHWENK: Let me make sure I get that, strangling --

(Laughter)

BGEN SCHWENK: Bottle cap.

(Simultaneous speaking)

CHAIR BASHFORD: Yes.

MR. KRAMER: Major Schweig, can I ask you a question? You said something that was very interesting to me.

That it's not a who done it type of system for the most part. That it's a -- the question is whether there was a crime.

So, if it's not a who done it, which is
-- the civilian system is somewhat of a who done it
sometimes, for certain crimes. And much more so
obviously.

Why is the conviction -- we've seen
conviction rates around 20, 25 percent, I think.
If that's the -- why is the conviction rate so low?
You may not know the answer. I'm just
-- why is the conviction rate so low if it's not a
who done it system?

MAJ SCHWEIG: Well, on a certain level
I think the who done it is an easier situation to
deal with. Because you know there's a crime.

And provided you can prove that you have
the right defendant sitting in the chair, there's
going to be a conviction. Presumably there's going
to be a conviction of that person.

In our situation, we know we've got the
right person. The question is whether or not the
facts, as we know them, actually equal a crime.

And that's always going to be a
judgement call in the minds of either the Judge or
the members. Because really, there's often no
dispute as to the facts. Or no real dispute, just
the facts.

It's just a question based on the
elements that I've been instructed on by the judge
and the facts I have. You know, if we can put
these together, do I actually have a crime?

And because that's the question, it's
not possible to resolve that with a paper for
example. And it's always going to -- I mean, it's
not really whimsical, but it may feel that way when
you're up presenting the case to the judge or the
members.

CHAIR BASHFORD: I saw a lot of rustling
from the staff table earlier. And I felt -- feel
like I short changed you this morning.

Do we have questions or discussion from
the staff?

MS. PETERS: I do have a question.

Taking things that the services track one step
further, can anybody give us, I guess, an example
-- or I'll give an example and see what are you
interested in tracking.
You don't just track the things. Can you take something and analyze it? That's the question.

Can you see how convictions or acquittals are affected by changes to the UCMJ? Are you able to somehow measure your systems?

A before and after effect of the changes to the Article 32 procedure? That's something maybe the committee staff and the committee is interested in seeing if our data can address on some broad level.

And I think that just makes the question to the services, do you count numbers? Or do you do analysis of at least the procedural posture of cases.

Because you say you find trends. But is there an analysis to explain the trends? At least internally?

Is that what your systems help you do? Or is that just bringing the right lines together to do that off the grid, off of the system?

What's your approach there, you know,
using your systems? But somehow using data you have to generate an analysis of what's going on in the system.

My example provided was the Article 32 changes let's say.

CAPT LUKEN: Can I give a different hypothetical?

(Laughter)

MS. PETERS: Sure.

CAPT LUKEN: So if I look at trends and I take all my nine offices and I build up alternate dispositions versus cases that are going forward. And if I see one office that has a --- across the path, way more alternate disposition cases, that could tell me that they're afraid to take hard cases forward. And I want to find out why. So I have to go through that policy and draw out the counsel.

What's going on? I want to start seeing some of these cases at this level.

If I look across where their last year and I see an office that didn't have one single
conviction, or has a very low, 20 percent conviction, I want to know why that is.

Let me start looking at some of the cases. Maybe I need to get TCAP in there to sort of bring in some extra training or something of that sort.

So, those are the type of trends that I can look at. Thirty-twos, they're kind of a -- well, you know, I can look to see how many more maybe this year have been waived, versus previous years.

I know defense counsel have told us nowadays that kind of 32 it's in their best interest sometimes maybe just to waive it. And the government's stuck with the charges.

But that also causes me to get -- to tell my trial counsel, if you see a defense counsel waive, you better figure out why they're waiving. Because there may be something wrong with your charge sheet you need to fix right away.

So, it depends.

MS. PETERS: So that's not statistical
analysis per se. But it is a way to analyze. It prompts analysis --

CAPT LUKEN: It prompts analysis.

MS. PETERS: Of some sort.

CAPT LUKEN: Yes.

MS. PETERS: Okay. Thank you. Anyone else have a comment on analysis you can do right now to give a deeper level of explanation of a change or something going on with the system?

LTC COATS: So, I mean, our system -- our system does reflect changes in the rules or the Articles.

So, if we're looking, you know, a change in Article 120, we can analyze prior to the change and after the change. And any other change that we put into MJO.

And we can also -- I'm not exactly sure I understand your question. But, we can take multiple, and we do, take multiple data fields that we're interested in to try and correlate the two data points.

So, we may look at, you know, types of
offenses and the prevalence of Chapter 10s. Chapter 10's the administrative separation in lieu of court martial.

So, yes. I guess we do that multiple data fields within the system. And then try and draw comparisons or explain why one data field is resulting in a certain trend based on potentially the trend of another data field.

MS. PETERS: That is what I'm talking about.

LTC COATS: Okay.

MS. PETERS: Yeah.

COL WEIR: Can you look at your systems and query them and say, how many of your sexual assault cases that went to court martial did the suspect or subject use alcohol, in the commission of the offense?

Are your systems able to do that?

MAJ HORTON: I'd like to answer that. So, no. I'll say the answer is no at this point. And the Air Force just doesn't do that. I think that's probably because the -- our system
isn't a menu driven system.

But what does that mean? So, you may have a case where it starts as an investigation that involved one fact pattern. It evolved. And it involved other victims, other offenses. And you have a radio button is this now called an offense? Yeah.

So, you're looking at your data at a particular point that may not actually be true later on in a case. Then oh, I see. So the answer to that, is add a second radio button that you know, at every stage we track it.

So, I'll say that the system doesn't have that, to answer that specific question. But we do have the capability of saying like sex offender registration requires it.

That's a data field in AMJAMS. It's very similar to ones that have special entrance data fields.

But even then when you're looking at it, you've got to be very conscious of how a case evolved. And not necessarily any sweeping
conclusions based solely off of percentage.

And similarly, going back to the question in terms of analysis, that is something that Air Force leadership and JAG leadership has struggled with in analyzing our system.

Okay, we have a percentage. And we see a drop or we see a raise. But what does that mean? So do some attempt to analyze that. But we're very conscious of not necessarily jumping to conclusions based solely off of a percentage bump or a percentage drop.

CAPT LUKEN: If I could draw your attention to page 12 of the Navy one. So we break out -- as you saw in this memo, we break out some different of interest data fields.

So, if I was looking for a sexual assault case that involved alcohol, that page at the top, I would expect to see alcohol related check, as well as sex offense dual checked.

And so we're able to then pull that up there and sort of do that. Now again, I have to rely on the trial counsel to make sure they -- or
the paralegal that they did that.

And that's part of our Article 6 process. I go in and do spot checks as well as look to see the data.

So, it goes, is this all we have? To the best of my knowledge, yes. Subject to garbage in, garbage out.

CHAIR BASHFORD: But if it's checked, you could then query that?

CAPT LUKEN: Yes.

CHAIR BASHFORD: So you could say in 2016 we had X number of cases where alcohol was involved.

CAPT LUKEN: Yes.

CHAIR BASHFORD: Assuming it was checked correctly.

CAPT LUKEN: Yes.

CHAIR BASHFORD: You would have to go case by case by case.

CAPT LUKEN: Correct. Yes.

UNKNOWN: How about the Army?

LTC COATS: The Army -- I think this is
a perfect example. The Army does not have a data field for al -- whether the offense involved alcohol or not.

And I'm sure we could come up with a list, you know, predicting what is going to be of interest a year from now, two years. I think that's going to be a fault in any system.

Whether it's a document-based system, or I'm trying to go back into documents to determine, you know, a data point. But, as in all of our systems, it's an easily added field that we can begin tracking it anytime.

And then yes, all of our data fields are reportable. So that we can generate a report, you know, all alcohol related offenses. Or all alcohol related 120 offenses.

MR. MARKEY: So, this particular -- the page you brought our attention to it, Captain, --

CAPT LUKEN: Yes.

MR. MARKEY: Are charges.

CAPT LUKEN: Yes, sir.

MR. MARKEY: So, if there was an alcohol
related charge that will show up.

CAPT LUKEN: Yes, sir.

MR. MARKEY: If it was not charged, if there was no alcohol related charge but the course of the investigation revealed there was alcohol involved that would not show up here. Am I correct or not?

CAPT LUKEN: That is incorrect. Alcohol related means there was alcohol within the inves -- I would expect my prosecutors to where if alcohol is related to, whether it was a theft or a sexual assault, alcohol related would be checked in there if there was alcohol even in the --

MR. MARKEY: I'm looking under charges. And so, I'm assuming that that was charged.

CAPT LUKEN: There's no charges there. So, I'm --

MR. MARKEY: Okay.

CAPT LUKEN: I see what you're saying. You got it. Under charge type that is a matter of --

MR. MARKEY: Under uncharged behavior or
other acts.

CAPT LUKEN: It is. Correct. So, that's not --

MR. MARKEY: But it didn't really go there.

CAPT LUKEN: It does. Based on my training and talking with like -- and that's the challenge we have.

MR. MARKEY: Okay.

CAPT LUKEN: Right. Because CMS is owned by the Marines -- and I love the Marines -- but also, is that something that I can live with?

Or do I, do I go to Schweig and go hey, you guys change this. And like, no. We're using it for this purpose. But for the person we use it on.

And so it goes to my training when I go talk -- and our business rules, which we've published to the council is I would expect that if a defense type involves, has -- is alcohol related, meaning the investigation there was something in there that had alcohol related, I would expect that
to be checked.

MR. MARKEY: And if I were one of your prosecutors, I would hope that I had that information. So I would accurately document that.

This is not a charge of mine. This is something that I read in the investigative file.

That there were drugs somewhere.

CAPT LUKEN: Correct. Oh, yes.

CHAIR BASHFORD: Well, do we have more comments or questions from the staff?

MS. PETERS: Yes. This is for Dr. Beck.

If you could just share your perspective on what you have found in your research is important to know about a sexual assault case in order to understand its outcome.

What have you found has been influential or important to know?

DR. BECK: Sure. Actually I was prepared to discuss that, but didn't. Well, let me speak a bit about alcohol, and alcohol involvement.

A huge issue for rape and sexual assault is consent. And the ability to consent. And when
there's alcohol involvement on the part of the victim, consent becomes ambiguous.

And important to also identify the use of alcohol by the defendant. And so alcohol is a huge issue. It's not new.

It's central to an investigation. And you have to capture it at the point of the investigation.

The -- so, much of what you want to collect is related to the nature of the incident. And so in the civilian world, history of abuse.

Past violence, experience of violence. Past reporting of abuse to the police. Very strong correlates of, if you will the probability of conviction.

Nature of the injuries. Again, the alcohol and drug involvement by the defendant. Those are big correlates of the probability of conviction.

The -- less important is, you know, the statement of the victim. More important is the statement from the defendant. If you get
information from the defendant, largely the
defendant is revealing involvement, culpability.

And so in the process of investigation
and at the time of the arrest, you're obtaining a
statement from the direct -- from the defendant
seems to enhance the probabilities of successfully
pursuing the case.

The -- so we have in the data, from
administrative data based on prosecutors' records
and based on court records, those kinds of core --
some basic correlates.

Presence of a witness. Often times
children. And when you have a witness present,
it's very much linked to the successful prosecution
of the case.

In terms of substantiation process,
unfounded versus un-substantiation. Now the
problem when you have -- when you can't
substantiate whether a crime occurred or not is
that there is absence of evidence.

And so the case hasn't been developed or
-- properly. Or the investigators have not
recorded. Or simply the time between when the incident occurred and when it comes to the attention of the authorities.

It's so long that there's nothing other than a claim. A claim of -- an accusation.

So, much of -- many of the cases that are not substantiated are linked to that absence of evidence. Timing is very much a part of that.

There of course is unfounded. And largely a determination that the claim by the defendant -- by the victim is unclear.

It's simply there's evidence to suggest that a crime didn't actually occur there. And then there of course there is the founded cases, the substantiated cases. And significantly determined by the process.

So, that's what we know. We know that the bulk of the rape and sexual assault cases are misdemeanors. And they come into state courts.

And consequently upon conviction the sentences reflect that. And this is all contained in our study of cases of intimate partner violence
in state courts that track for what year since the filing in the state court.

CHAIR BASHFORD: Terry, did I see you standing up? Did you have a question?

MS. GALLAGHER: Yes, ma'am. It actually it's kind of a couple of parts. If we could turn to the command disposition reports, and whatever each service is calling them.

And the question I have is whether or not the command disposition report is being maintained in your database? And if it's not being maintained in your database, where is it being maintained?

Is there any legal involvement in the population of those command disposition reports? And do you see as a user, your trial counsel, do they see any value to the command disposition reports? The forms that are being used?

If I could actually get an answer from each of you, because I believe they are all different.

CAPT LUKEN: Are you referring to the
monthly disposition report that is published?

MS. GALLAGHER: I'm talking about the disposition report that seems to be required to close out an investigative file.

COL WEIR: That would be the 4833. And in the Air Force you have that through a two star memo.

MS. GALLAGHER: And then the same question Major?

MAJ HORTON: So for the Air Force, to answer that question, I think multiple documents. But I think the document you're referring to is maintained by the Air Force Office of Special Investigations in their case file.

That specific document is maintained by them. So it's not maintained by our system. Because it's an investigatory.

Now we do have other documents that doc -- memorialize command action. And that's maintained in the local legal office, not in our system.

CHAIR BASHFORD: How about the Coast
Guard?

MR. McCLEARY: They normally CGIS only reflects like the disposition information at the command level when it's sent back to them. So, it's not normally kept in the CGIS system.

It usually -- the document that would reflect command decision of the disposition is actually -- is maintained in the legal office that was working that case.

CHAIR BASHFORD: Marines, please?

MAJ SCHWEIG: The Marine Corps, no prosecutor will touch that form. And they probably do not know it exists. It's completed by the Staff Judge Advocate. And it advised that particular command. And from there it's submitted to Headquarters Marine Corps, where it is entered into the DSAID database.

But really, for our purposes, the only reason we do it is so that we can have a complete DSAID entry. Well, that's not the only reason.

But, really the primary reason is to ensure that we have good fidelity with data that
DSAID requires.

CAPT LUKEN: So Navy just changed our practice about six months ago. From a prosecution standpoint, we don't touch those forms.

Those forms are a command. It goes through our OP NAV. What we are finding though is some of the commands weren't turning those in timely. And they were kind of hanging out there.

So we made a new business rule within the prosecution shop that if the case is pending alternate disposition, we will not close it out in our CMS system until the command has provided us a copy of that for us to upload.

So there's really two places where that document is kept now. Through the DSAID process at OP NAV. And then our trial counsel will have it with the CMS, just as a business report.

COL WEIR: Does that get -- that form, does that find its way into the NCIS case file?

CAPT LUKEN: Not through us. That would -- most -- I believe it does. Because I believe they're copied on it anyway.
But that's through the SJA and through the command. I'm not necessary -- I know my office -- offices, not mine.

But, real access would not be -- I might be giving those to NCIS, but I believe NCIS would be cc'ed on it.

CHAIR BASHFORD: Army?

LTC COATS: So for the Army ma'am, until recently that 4822 was completed by the command. Except now we have the ability, the JAG Corps has the ability to provide disposition documentation in order -- it's a criminal investigation division form.

We are able to provide disposition data so they can close that form out without the commander. Because ultimately, the commander made the disposition. And we have, as the prosecutor, or the legal office, have that disposition document that can do that.

One of the main -- one of the reasons that we are now working and will have our alerts, our criminal investigation division data system
talking with our military justice online, is for
the completion of that form. So, when we dispose of
a case in our system, we are able to push the data
back to the criminal investigation division system,
where they can populate their form, that 4833 with
our data. And so, that's how that -- those command
dispositions will be completed.

CHAIR BASHFORD: Colonel, anything
further?

BGEN SCHWENK: No. I think we're done.

CHAIR BASHFORD: Okay. Well, this
meeting promptly, that is closed at 3:15 on the --
Major King?

MAJ KING: Yes, ma'am. We still have a
nine minute quick hot spot for a session this
afternoon.

(Laughter)

MAJ KING: But, for my part I'm going to
say that this meeting of the DAC-IPAD is officially
closed.

(Whereupon, the above-entitled matter
went off the record at 3:15 p.m.)
Additionally 40:11
65:22
da
13:8,8
15:1 141:13,17
142:19 253:13
280:15,18 308:10
address 135:2
addressing 181:5
adequate 44:5
Adjourn 3:22
adjust 20:16
admin 156:22
administer 192:20
230:13
administered 229:16
administration 193:13 227:14,20
227:21 230:5
administrative 7:13
9:7 26:15 29:7
30:22 31:6 38:3
41:12 64:17 69:4
81:22 97:2 99:9
138:4 155:20
176:1 185:13
193:4 236:7,11
237:2 240:4,7
280:1,12 298:13
312:2 321:9
administratively 184:7
administrators 265:7 266:4
admitted 258:15
Adobe 197:16
adopt 187:4
adopted 29:14
184:20
adoption 38:18
186:19
adult 155:13
adults 183:1 191:7
advance 170:14
advanced 62:19
advantages 91:2
adverse 159:2,13
159:15 193:13
advise 18:17,21
42:11 56:18 68:14
79:8 80:16 137:16
151:9 161:5 211:6
218:8 222:13
advisable 223:17
advise 5:10 7:8
137:6
advised 325:14
advising 229:1
advisor 2:9,11,12
2:15,18,20 180:15
advisory 1:3 2:16
4:5,19 29:22
171:15
advocacy 61:4
advocate 49:15,16
117:9 119:18
132:2 147:19
148:8 149:6 150:2
151:9 161:5,22
221:13 228:9
280:5 291:8
325:14
advocate's 86:1
161:18
advocates 123:7,9
230:4
Affairs 54:6
affect 6:21 33:4
66:6 179:12
affectionately 205:15
affidavits 43:4
afraid 150:3 309:15
afternoon 180:12
180:13 192:7
221:9 227:2
233:18 20 328:16
age 65:19 71:21,22
74:12 86:17,17,19
109:12 132:17
agencies 39:12
61:2 63:20 64:10
65:1 95:15 182:22
183:9,20 184:1,7
184:21 185:21
186:6,7 187:2,8
264:8
agency 21:12 56:16
63:4,16 81:21
83:22 126:2
180:16 181:7
199:9
agendas 42:13
agent 211:11 215:4
agents 186:5
aggregate 50:10
54:22 92:9
aggregated 51:2
98:14 110:12
140:19
ago 36:15 147:3
212:19 216:9
235:15 300:6
301:14 326:3
agree 51:17 84:8
119:13 120:4
248:1,4 257:2,15
261:19 263:2
265:14 271:14
272:9 279:9 288:1
303:14
agreed 156:15
165:10
agreement 8:19
58:10 64:4 92:2,4
94:12 123:6
129:18 130:5
204:8 213:14
255:11 264:22
agreements 43:10
69:10
ah 133:9
ahead 109:6 112:7
131:17 166:21
178:4 294:5
aid 196:15
aim 114:10
Air 70:17 156:2
227:6 228:11
229:20 230:10
231:5 232:6 243:4
243:6,11 247:14
261:4,5 276:19
282:3 288:13
312:21 314:4
324:6,10,13
al 316:2
Alabama 229:20
alcohol 270:6
312:16 314:17,18
315:12 316:3,15
316:15,22 317:4,5
317:8,9,10,12,13
318:20,22 319:20
319:20 320:1,4,4
320:17
alert 49:18 199:9,11
199:15,21
alerts 199:10
327:21
algorithm 72:9
algorithms 43:19
44:2 133:15
alien 65:15
aligned 88:13
all-in 22:3
allegations 5:12
alleged 13:10
159:21 302:22
303:13 304:8
alleging 303:12
304:8
Allen 180:14
allow 10:6 11:7,18
44:12 47:7 52:16
62:2,4,5 70:7 72:6
110:15 136:4,10
140:20 150:5
247:22 258:21
286:1
allowed 51:9
allowing 22:6
202:19
allows 11:15 12:1
27:12 45:22 54:14
113:6,8 198:7
203:1
Alpha 111:22 180:4
180:7 192:11
categorized 278:21
categories 16:5
33:21 157:17,17
category 128:15
156:22
catch 167:8,13
causation 93:19
cause 40:12 161:18
162:1,2,6,8
227:17,18,20
223:12,17 242:1,4
272:22
273:1
292:16
coped 269:15
causes 310:16
causing 218:21
cc'ed 327:6
CD 169:1
case 185:6 236:2
cases 240:21
cell 225:5 226:13
center 1:11 29:8,9
31:8 42:1 50:15
82:1 138:7 227:19
239:9 240:3,14
290:1
centers 24:2,11
70:13
central 57:10 84:1
98:15 108:16
109:17 145:17,18
231:17 320:6
centralization 84:1
centralize 113:22
291:2
centralized 290:22
cents 39:13
century 224:6
certain 29:15 40:13
71:18,21 76:11
85:22 102:14
104:11 105:21
126:19 128:14
130:7 140:15
195:10 198:6
223:22 230:16
232:6 253:13
255:6 278:10
279:13,14 306:2
306:10 312:7
271:9,19 287:17
287:22 288:3,7
289:7 290:12
291:12,21 302:16
302:21 303:7,11
304:7,11,16 305:7
305:15 306:14
307:13 315:8,11
315:15,18 319:9
323:3 324:22
325:10 327:7
328:8,11
chair's 173:7
Chairman 8:18
challenge 43:19
118:7 189:10
191:17 257:7,13
260:5 261:17,18
279:11,15 284:16
285:3,22 286:10
286:15 287:15
290:9 318:8
challenges 35:22
189:19 256:11
287:2,4 290:6
challenging 117:21
181:15 260:17
chamber 12:2 16:8
change 103:21
125:17 168:22
186:13 257:9
262:1 278:10
297:5 311:9,13,14
311:15,15 318:14
changed 23:13
29:14 257:7
307:15 326:2
changes 6:21 7:2
36:8 122:20
146:22 216:11
231:19 296:20
301:10 308:5,7
309:5 311:11
changing 57:3
Chapter 312:1,2
character 163:11
characteristics 66:10
86:6 89:7
charge 40:16 93:2
93:3 94:18 97:21
99:10,11 128:18
129:16 195:15
196:2,8 310:20
317:1,4,20 319:5
charged 15:7 39:12
39:18 93:15 94:9
100:9 129:22
148:15 204:6
247:16 285:20
286:9 317:3,15
charges 64:3,6
94:13,16,22 95:3
96:4,5,6,11,22
97:7,20 98:3
106:8,8,10 110:12
118:1 128:14
155:19 188:7
196:3,8,9 212:5
235:3 293:2
310:15 316:20
317:14,16
charging 58:8
92:13 97:22
charts 80:9
CHAYT 2:10
check 43:15 49:20
149:17 314:19
check- 107:18
checkboxes 211:22
checked 314:19
315:8,15 317:12
319:1
checklist 210:10
checks 315:3
CHIEF 131:14
174:8 178:12,16
178:18 179:1
274:7
child 90:15 134:17
268:18 269:11,11
287:7,8
children 179:5
321:13
enacted 6:19
encompassing 38:13
encourage/reco... 220:12
enforcement 63:19
95:15 117:4,11
182:22 183:20
184:21 186:5
187:2,8 216:22
220:3 249:13
265:2 295:10
engine 203:1
enhance 321:6
enhancement 71:22 72:4
enlistment 107:6
108:2
enormous 31:13
91:18
enormously 31:16
ensure 12:16 57:21
121:5 132:3
182:10,17 183:8
230:18 325:22
ensuring 43:18
181:5,6,9 277:5
enter 13:2 48:11
57:20 92:1 139:11
139:14,16,17
291:10
entered 13:16 48:3
48:17 105:17
121:13 325:16
entering 107:8
124:9 254:14
255:2 288:9
enterprise 208:21
enters 194:22
entertain 226:5
233:14
entire 20:10 21:6
47:15 119:14
120:13 143:7
154:4 212:12
entirely 39:7
142:15 158:17
entities 40:14
entrance 313:18
entry 16:3 58:6
136:7 143:7 195:7
205:13 230:6,13
243:1 261:6 288:4
325:20
enumerated 223:13
environment 227:13
environments 285:19
envision 190:13
envisioning 107:4
EOUSA 99:20
100:5,21
equal 306:19
equally 89:14
equivalent 302:11
era 55:9
error 114:7 123:12
135:7 136:8
194:21
errors 135:4
especially 74:10,10
148:1
essential 228:22
establish 57:6
established 38:16
42:2 56:11
establishes 12:21
establishing 27:1
estimate 60:17
185:3
estimates 58:18
181:7 184:13
estimation 185:8
et 24:19 43:10
175:22
ethnicity 88:9
93:12
evaluated 264:15
evaluating 114:7
evaluation 109:11
241:20 247:22
264:17 273:6
event 12:19
events 25:19 60:6
77:18 140:12
162:9 293:17
eventual 202:11
292:9
everybody 24:19
152:18 163:14
224:13 253:20,21
254:22 255:10,14
280:21
everybody's 255:5
evidence 15:10
44:12 67:5 119:4
130:2 132:5 148:3
149:2 151:20
261:8 289:21
290:13 291:13
292:16 321:20
322:8,12
evidence-based 266:5
evidenced 42:8
evident 262:13
evidentiary 222:22
evolution 42:8
evolved 38:20
313:4,22
ex 43:6
exact 191:8 300:15
exactly 17:10 72:20
98:6 120:12
156:11 179:7
292:22 305:2
311:17
examine 149:5
examining 174:12
240:16
example 10:20 11:9
12:6,16 25:3 27:7
42:16 59:5 64:11
65:12 71:8,19
77:2 90:5 99:13
126:14,17 127:1,4
128:2,17 133:22
134:13 138:18
144:1 151:6
175:15,20 176:12
226:6,7 248:20
MOS 278:12
motion 12:6 17:5,7
27:8,10 29:15
44:12 45:13 46:13
55:7 136:15
151:11
motions 9:11 12:4
26:4,5 33:19 43:8
133:10 140:13,15
202:6
motivated 291:4
mouthful 4:8,22
move 45:3 145:4
165:18 187:4
188:6 195:9 206:4
213:3 218:2 220:8
261:2 263:5 277:3
280:18
moved 22:16 45:4,9
191:22
movement 282:16
moves 177:20
moving 15:1 68:15
113:2 156:4
206:10
multiple 20:21 26:3
145:18 195:1
263:16 311:19,19
312:4 324:11
multivariate 169:19
murder 267:21
268:6,18
murders 77:7,12
myriad 58:1 149:2

N
N 1:11
name 9:4 13:7,7
37:22 44:3 47:11
50:17 63:16
134:17 141:17
150:6,22 194:9
203:10 204:3
211:3 219:20,21
227:5 278:14
names 50:19 60:2
168:22
naming 53:8
narrative 149:18
258:11
narratives 258:5
narrow 119:20
198:3 237:21
239:1,16
nation 32:19 183:1
253:9
national 5:9,20
10:10 20:17 42:9
135:10,18 182:7
184:12,18 239:8
240:3,14
nationally 11:5
19:18
nationwide 184:22
nature 15:6,9 51:20
52:5 57:3 71:9
90:19 97:6 138:17
182:11 185:3
189:18 320:10,16
Nav 295:11 326:6
326:16
Naval 277:20
Navy 156:4 204:19
222:2 236:4 245:3
278:12 293:11
314:13 326:2
Navy's 205:11
NCIS 207:11 210:21
211:1,11 215:4
326:19 327:5,5
NCOERs 109:19
110:2
NCSX 185:9
near 71:3
nearly 14:16
necessarily 126:2
226:2 277:9
284:14 313:22
314:9
necessary 10:22
199:4 327:2
need 6:12 10:20
17:4,4,9,9,11 20:1
21:15 24:3 36:6
37:1 82:2 91:20
99:19 102:5,10
115:6 117:2,6
121:10 125:9
137:15 139:13
143:8 144:1 150:9
153:15 154:7,13
154:13 178:6
196:7 205:20
206:3 207:3 208:7
214:5,5 219:15
220:11 221:1
225:15 239:20
240:10,12 257:17
260:4,21 261:21
273:8,12 276:4
284:17 286:13
290:11 296:21
297:14 298:3,4,12
298:12,14 310:4
310:20
needed 11:3 16:13
119:11 168:4
187:19 230:14
236:2 253:12
299:10
needs 14:9 19:16
30:5 38:8 51:16
99:19 169:5
198:19 205:16,17
214:6
nefarious 41:11
neither 75:10
net 84:9 85:10 86:3
network 27:2 40:7
143:1 227:19,20
227:21
networking 146:4
networks 142:15
never 65:7 85:15
111:20 142:15,17
183:11 226:9
266:10,12
new 35:13,15,19
42:2 77:1 79:3
89:20 103:1
116:13 165:10
166:16 194:10
257:19,19,19
273:14 294:8
300:3 320:5 326:9
news 27:22 94:9
NIBRS 184:17,17
184:19,20 185:2,5
185:8 186:16,20
186:21 187:5
253:14
nice 111:17 210:18
214:4 219:9
257:16 299:10
Nicolaus 224:4
nine 10:7 15:22
113:17 263:4
301:13 309:11
328:15
NJIS 205:9 206:22
277:20
NJP 155:20 157:1
280:11
NJP's 279:22
NKO 246:2
NMCCA 212:10
nod 291:1
Noel 227:5 281:14
nomination 151:16
non- 14:18 228:21
non-anecdotal 29:19
non-commission... 174:20
non-judicial 193:5
220:22
non-responsive 244:13
non-stranger 270:6
nonprofit 40:14
Norfolk 206:14,15
298:19
normally 325:2,5
northwest 268:17
notation 48:21
note 5:14 122:18
136:7 141:7 281:4
notes 213:7
notice 12:7 41:7
43:12 216:16
noticed 31:13
254:6
presenter 8:13
presenters 8:17
presenting 68:20
307:11
presently 44:1
president 56:17
presidents 180:21
181:1
presiding 1:12
press 258:22
pressure 132:7
pressurized 208:15
pressurizes 209:9
presumably 72:13
241:18 306:15
pretty 47:21 53:9
75:17 104:20
113:3 236:15
prevalence 181:17
184:13 312:1
prevent 135:7
179:18
preventing 134:10
prevention 176:22
previous 51:8
66:10 310:10
previously 75:3
164:15
primarily 191:22
192:13 193:1
234:21
primary 198:9
325:21
principally 56:22
principle 150:19
print 122:4,4 196:9
219:20
printer 205:1 227:1
prior 66:6 76:6
77:18 90:11,20
103:15 227:7,16
227:16 273:9
283:16 293:2
311:14
priorities 266:13
prioritize 273:8
priority 60:11
prison 64:8 86:14
181:14,22
prisons 64:14
181:13
privacy 38:15 41:7
42:14 43:13,19
133:3,14 179:20
260:15
private 44:14,16
privilege 283:18
pro 16:19 17:2,9,14
pro-scripting 53:1
proactively 42:5
probabilities 321:6
probability 320:14
probable 161:18
162:1,2,6,8
222:17,18,20
223:12,17 241:22
272:22 273:1
292:16
probably 18:14
26:20 77:2 78:13
78:17 113:22
114:9 135:22
180:7 218:18,20
219:5 230:17
242:4,10 248:9
258:1 276:4 279:1
295:15 296:19
300:15 301:6
312:22 325:12
probation 64:16
82:11 83:1 122:11
123:17
problem 95:8
111:12 148:16,19
153:12 225:13
278:21 284:11
285:7 297:9
321:18
problems 107:7
122:18 177:16
189:12 221:20
271:10 276:1
285:19
proc 262:10
procedural 6:19
228:19 308:14
procedure 13:11
308:8
procedures 11:9
12:21 25:11 42:9
225:2 243:16
proceed 160:10
223:22
proceedings 6:11
39:16 144:11
process 31:19
48:18 53:8 62:7
63:18 64:14 68:16
70:10,18 74:3
77:21 78:1 80:22
83:12 91:6,22
103:15 104:16
113:6 12 118:15
119:14 120:14
123:10,17 125:1
126:17 129:12
149:11 164:16
167:9 170:21
186:15 191:12
225:14 229:13
230:19 241:20
254:3,9 266:10
276:15 278:8
280:12,12 292:22
298:5 315:3 321:3
321:16 322:16
326:15
processed 231:13
processes 10:16
12:15 15:20 121:9
208:6,16 217:22
218:1 228:22
281:11 298:14
progressing 13:14
188:17 193:3
202:9 204:12
212:6 228:19
229:2,10 296:19
produce 29:18
193:1 232:15
233:11
produced 181:7
232:7
produces 193:11
product 168:8
281:21 304:3
productivity 196:18
197:11
products 20:6
professional 60:6
87:2
professionals 62:14
proffer 151:19
profile 184:10
profiles 193:21
profit 208:15
program 3:17 38:2
38:5,12 39:6,20
57:7 64:7,15,18
68:1 76:21 106:19
116:1 176:15,22
177:2,4,12 179:9
185:11 187:5
210:6,7,9 212:5
234:16,17,20
240:22 288:19
programmers 18:12 102:2
262:18
programming 262:4
programs 115:11
175:4 187:6,7
239:14 274:14
progress 174:5
202:18 250:8
progressions 13:15
201:18
progression 201:8
project 9:5 18:8
30:16 51:11 62:16
73:7 113:9 164:15
169:10 238:8
promise 92:6
<table>
<thead>
<tr>
<th>Word</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>similarity</td>
<td>68:22, 233:5</td>
</tr>
<tr>
<td>similarly</td>
<td>11:1, 233:5</td>
</tr>
<tr>
<td>simple</td>
<td>257:18, 277:7</td>
</tr>
<tr>
<td>simplicity</td>
<td>266:8</td>
</tr>
<tr>
<td>simply</td>
<td>194:2, 198:13, 221:18</td>
</tr>
<tr>
<td>simultaneously</td>
<td>23:6, 28:20, 97:11, 101:3</td>
</tr>
<tr>
<td>simultaneously</td>
<td>23:6, 10:1</td>
</tr>
<tr>
<td>single</td>
<td>14:12, 39:14, 63:4, 65:6, 97:13</td>
</tr>
<tr>
<td>size</td>
<td>32:21, 73:10</td>
</tr>
<tr>
<td>SJA</td>
<td>151:10, 327:1</td>
</tr>
<tr>
<td>Skidgel</td>
<td>14:20, 34:21, 35:5, 37:17</td>
</tr>
<tr>
<td>sit</td>
<td>34:22, 206:15</td>
</tr>
<tr>
<td>site</td>
<td>34:22, 206:15</td>
</tr>
<tr>
<td>sitting</td>
<td>30:20, 111:21, 158:18</td>
</tr>
<tr>
<td>sit</td>
<td>171:20, 260:19</td>
</tr>
<tr>
<td>site</td>
<td>306:14</td>
</tr>
<tr>
<td>situated</td>
<td>89:14</td>
</tr>
<tr>
<td>situation</td>
<td>141:6, 177:17, 223:7</td>
</tr>
<tr>
<td>situations</td>
<td>126:12, 179:7, 217:20</td>
</tr>
<tr>
<td>six</td>
<td>29:21, 33:17, 20, 77:5, 6, 7, 9, 10, 10</td>
</tr>
</tbody>
</table>

**Punctuation**

- Periods (.)
- Comma (,)
- Colon (:)
- Semicolon (;)
- Exclamation Point (!)
- Question Mark (?)
- quotation marks (“”)
- parentheses ()
- brackets []
- ellipsis (...)
- dashes (--)
specifically 17:15
specky 77:15
speedy 208:20
spend 157:14
spent 29:21 245:21
spike 269:7,7,15
Spohn 1:20 68:5
90:22 91:2 156:15
292:4 293:3
spoke 137:6 142:7
spot 315:3 328:15
spouses 179:5
Stacy 170:20
staff 2:7 8:4 10:2,6
12:2,9 13:2 16:8
18:3,6,14 19:8,12
21:16 23:5,5
36:12 41:21 42:2
57:16,19 59:3,17
60:5,7,12,15,20
61:20,22 62:4,9
62:14,18,19 63:5
63:6 65:6 70:15
70:20 71:4 74:19
77:19 78:3 81:5
82:4 83:20 85:11
101:22 102:8,18
110:19,22 114:20
116:6 117:9 123:3
123:4,4,5,16,16
132:1 137:21
138:6 141:7 156:8
157:6 161:4
163:12 173:4
215:7,14 230:11
230:11,12 237:3
237:11 238:3,11
280:5 291:8 298:9
298:13 307:14,17
308:9 319:10
325:13
staffs 18:12
stage 94:12 195:6,7
196:17 197:1
218:17 229:12
313:12
stages 195:5
218:17 228:18
stake 79:21
stakeholders 60:8
61:6
stalled 186:21,21
stand 151:15 221:4
standard 27:20
69:22 70:1 79:5,5
79:6 104:20
105:13 138:19
177:11 186:5
187:10 242:5
272:22
standardization 25:1,2,10 27:4
113:6,7 140:12
254:5 255:13
standardizations 29:11
standardize 119:1
standardized 24:18
25:5 69:16,21
70:19 81:3 108:11
189:14 192:19
193:2
standards 5:22
112:21 186:20
187:3 276:11
281:17
standing 48:15
126:1 302:10
323:4
standpoint 326:4
stands 164:15
199:11
star 151:17 324:6
start 74:7 92:13
154:5 166:9
170:21 175:16
210:19 213:21
236:3 241:4
247:13,15 250:2
254:14 257:12
260:2,2 268:7
295:13 309:19
310:3
started 18:6,22
36:14 101:6
155:22 186:17
191:14 215:20
235:15 247:14
284:12
starting 132:22
156:3 215:21
301:10
starts 210:20 313:3
stat 270:14
state 23:12 41:22
187:6 188:13,15
222:21 239:9,14
240:3,14 264:8
322:19 323:1,2
stated 73:17
statement 30:13
58:11 69:3 87:10
105:5 122:19
144:2 204:1
304:12 320:21,22
321:5
statements 42:22
states 1:1 39:8 56:9
60:18 83:15
100:22 187:5
191:6 264:20
straightforward 270:6
stranger 270:4
strangled 304:1
strangling 305:11
strangulation 305:1,3
strategic 169:8
stream 300:12
streamline 146:12
streamlined 298:14
streamlining 104:16
street 1:11 250:5
strength 304:12
stress 114:13 206:1
stressful 285:17
strike 42:6
strong 26:11
320:13

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In the matter of: Public Meeting

Before: DoD DAC-IPAD

Date: 04-20-18

Place: Arlington, Virginia

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]

Court Reporter