

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

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PUBLIC MEETING

+ + + + +

TUESDAY
DECEMBER 3, 2024

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The Committee met at the E. Barrett
Prettyman U.S. Courthouse, 333 Constitution
Avenue, NW, Washington, D.C., at 9:45 a.m. EST,
James Schwenk, Vice Chair, presiding.

PRESENT

BGen (R) James Schwenk, Vice Chair
Ms. Martha Bashford
Mr. William E. Cassara
Mr. A. J. Kramer
Ms. Jennifer Gentile Long*
Ms. Suzanne Goldberg
Dr. Jenifer Markowitz
SGM Ralph Martinez
Dr. Cassia Spohn
Ms. Meghan Tokash
Hon. Reggie B. Walton
Sgt. Lisa Shepperd *
MGen (R) Marcia Anderson

ALSO PRESENT

Mr. Pete Yob, Executive Director
Ms. Meghan Peters, Deputy Director
Mr. William Sprance, Designated Federal Official
Ms. Stacy Boggess, Senior Paralegal
Ms. Valerie Danyluk, Attorney Advisor
Ms. Theresa Gallagher, Attorney Advisor
Ms. Nalini Gupta, Attorney Advisor
Mr. Blake Morris, Paralegal
Ms. Terri Saunders, Attorney Advisor
Ms. Lauren Torczynski, Attorney Advisor
Ms. Breyana Franklin, Communication Specialist *
Ms. Amanda Hagy, Senior Paralegal
Ms. Marguerite McKinney, Management and Program
Analyst
Ms. Rebekah Stuyvesant, Administrative Officer
Mr. Lanny Acosta, Attorney Advisor *
Ms. Rachel Ferguson, Attorney Advisor
Ms. Alice Falk, Technical Editor
Ms. Jennifer Campbell, Chief of Staff

*present via Zoom

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Public Meeting Adjourned

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

2 9:45 a.m.

3 MR. SPRANCE: Good morning, everyone.

4 This public meeting of the DAC-IPAD is
5 now open.

6 Mr. Vice Chair, the floor is yours.

7 VICE CHAIR SCHWENK: Thank you, Mr.
8 Sprance.

9 And good morning.

10 I would like to welcome the members of
11 the DAC-IPAD and everyone in attendance today to
12 the 38th Public Meeting of the Defense Advisory
13 Committee on Investigation, Prosecution, and
14 Defense of Sexual Assault in the Armed Forces, or
15 the DAC-IPAD.

16 Today's meeting will be in person with
17 video-conference via Zoom also available for
18 members, presenters, and other attendees.

19 The DAC-IPAD was established by the
20 Secretary of Defense in 2016, in accordance with
21 the National Defense Authorization Act for fiscal
22 year 2015, as amended, for a 10-year term. Our

1 mandate is to advise the Secretary of Defense on
2 the investigation, prosecution, and defense of
3 allegations of sexual assault and other sexual
4 misconduct involving members of the Armed Forces.

5 Judge Smith, our distinguished Chair,
6 is unable to participate in this public meeting.
7 The Secretary of Defense has appointed me -- you
8 can question his judgment -- to the position of
9 Vice Chair of the DAC-IPAD, so that I can lead
10 the meeting in her absence. And reading is a
11 challenge, but I'm trying. We look forward to
12 seeing Judge Smith at our next public meeting.

13 It is with gratitude that I welcome
14 the military justice experts from each of the
15 Military Services' criminal law divisions who
16 generously serve as the DAC-IPAD's Service
17 representatives and who have joined us for this
18 meeting today in person and virtually.

19 To summarize our two-day agenda, at
20 today's meeting, we will begin with deliberations
21 on the DAC-IPAD Report on Enforcement of Crime
22 Victims' Rights.

1 After that, we will hear from four
2 panels.

3 The first panel consists of military
4 health care providers who will share their
5 perspectives on the provision of mental health
6 services.

7 After a break for lunch, the Committee
8 will hear from two military panels on issues
9 raised during the DAC-IPAD's installation site
10 visits.

11 The first panel includes the Chief of
12 Trial Defense Services for each military service
13 and the second panel includes the Lead Special
14 Trial Counsel for each military service and the
15 Chief Prosecutor for the Coast Guard.

16 Finally, at our last panel for the
17 day, we will hear from civilian experts on best
18 practices for conviction integrity units. During
19 that session, we will hear from organizations
20 that assist victims after wrongful convictions
21 and aim to address systemic issues that lead to
22 errors in the criminal justice system.

1 Tomorrow, the public meeting will
2 begin in the afternoon. We will start with
3 deliberations on the feedback we received during
4 military installation site visits.

5 In September, the Committee began
6 identifying high-level issues that might warrant
7 further review. During tomorrow's session, we
8 will continue that discussion and determine the
9 issues we want to focus on from site visits that
10 can lead to meaningful improvements in the
11 investigation, prosecution, and defense of sexual
12 assault in the military.

13 Following deliberations, the Committee
14 will receive public comment from four
15 individuals. After a break, we will receive
16 updates from the Special Projects, Case Review,
17 and Policy Subcommittees.

18 Now, for a few housekeeping items.

19 To those joining by video, I ask that
20 you please mute your devices' microphone when not
21 speaking.

22 If any technical difficulties should

1 occur with the video, we will break for 10
2 minutes, move to a teleconference line, and send
3 the dial-in instructions by email.

4 Today's meeting is being recorded and
5 transcribed, and the complete written transcript
6 will be posted on the DAC-IPAD website.

7 Thank you all for being here today.

8 And I will now turn the meeting over
9 to the DAC-IPAD staff Deputy Director, Ms. Meghan
10 Peters.

11 Thank you, Meghan.

12 MS. PETERS: All right. Thank you,
13 Brigadier General Schwenk.

14 I just want to announce we have a
15 quorum today and the members present are Major
16 General Anderson, Ms. Bashford, Mr. Cassara, Ms.
17 Goldberg, Mr. Kramer, Ms. Long, Sergeant Major
18 Martinez, Dr. Markowitz, Brigadier General
19 Schwenk, Dr. Spohn, Ms. Tokash, and Judge Walton.

20 And we'll have some other members
21 joining us on Zoom a little bit later today. But
22 that is a quorum of members.

1 And now, I'm going to turn it over to
2 our staff attorney, Ms. Terri Saunders to conduct
3 deliberations on your report.

4 Terri?

5 MS. SAUNDERS: Thank you.

6 Good morning.

7 So today, we're going to go through
8 the Enforcement of Crime Victims' Rights Report,
9 which you have at tab 3 of your bound materials.
10 And we're going to do this in three parts.

11 First, I'll summarize what happened at
12 the September meeting and the vote that you took
13 on the recommendations there.

14 And then, we have two recommendations,
15 or more accurately, portions of two
16 recommendations that still require a vote from
17 you here today.

18 And then, finally, we'll go through
19 the body of the report itself and answer any
20 questions or take any comments you have on that
21 before you vote on whether to approve the report.

22 So, we'll start with the

1 recommendations. If you turn to pages 2 and 3 of
2 the report, these are the most recent version of
3 the recommendations.

4 And Recommendation 1, you approved
5 Recommendation 1, Part 1, at your last meeting,
6 and that is just that the victim should be -- it,
7 basically, gives the victim standing at the trial
8 court level.

9 We're going to get to Subpart 2 of
10 that recommendation in just a few minutes,
11 because that does require a vote.

12 Recommendation 2, you voted to adopt,
13 which would ask the Joint Service Committee to
14 amend Rule for Court-Martial 309 to provide that
15 a victim may file a motion preferral with a
16 military judge to assert their rights under
17 Article 6b.

18 You also voted to approve Draft
19 Recommendation 3, which would give the Court of
20 Appeals for the Armed Forces jurisdiction to hear
21 victim writs.

22 And there had been an additional

1 Recommendation 4, which is not present in this
2 version, and that would have established
3 timelines for the appellate courts to review
4 victim writs or victim petitions.

5 The Committee voted not to adopt those
6 recommendations and to leave the wording in
7 Article 6b as is, which is that they should be
8 given priority.

9 So, Recommendation 4 here, this deals
10 with the standard of appellate review. At the
11 last meeting, you voted that, for the rights
12 enumerated under Article 6b, subparagraph (a),
13 that the ordinary standard of review, which is
14 legal error or abuse of discretion, should be
15 applied. However, the higher standard of review,
16 which is clear and indisputable error, should
17 apply to review of the Military Rules of Evidence
18 412, 513, 514, and 615.

19 And then, finally, Recommendation 5 is
20 a housekeeping, kind of a cleanup recommendation.
21 Because these recommendations, when put together,
22 are, essentially, a legislative proposal. And

1 so, Recommendation 5 really just consists of
2 renumbering paragraphs or rewording things. So
3 that, in light of the recommendations that you
4 approve, everything fits together and makes
5 sense. And there is one portion of that that
6 does require an additional vote.

7 So, the portions that require a vote,
8 we'll go back to Draft Recommendation 1,
9 subparagraph 2, and when we looked at this
10 portion at the last meeting, this, essentially,
11 would give the victim of an offense who has been
12 required to submit to a deposition -- the way we
13 originally had this written is, after the
14 military judge or the convening authority ordered
15 the deposition, then the victim would have the
16 right to be heard.

17 And I think Mr. Kramer correctly
18 pointed out that it would make a lot more sense
19 for the victim to be heard prior to the order
20 being issued. So, we reworded this portion of
21 the recommendation so it reads as follows:

22 If the victim of an offense under this

1 chapter is subject to a request to submit to a
2 deposition, notwithstanding the availability of
3 the victim to testify at the court-martial trying
4 the accused for the offense, before the military
5 judge or convening authority orders a deposition,
6 the court-martial or military judge of pre-
7 referral must afford the victim a reasonable
8 opportunity to be heard. If the court-martial or
9 military judge denies the relief sought, the
10 victim may petition the court of appeals for a
11 writ of mandamus.

12 The way it's currently written in the
13 rule as it exists is that the victim has the
14 right to go to the Court of Criminal Appeals to
15 apply for a writ of mandamus. So, this,
16 basically, would allow the victim to assert the
17 right to be heard at the trial court level rather
18 than having to immediately go to the Court of
19 Criminal Appeals.

20 Are there any questions or comments on
21 the wording, the revised wording, of that portion
22 of the recommendation? Okay.

1 MR. CASSARA: This is Bill Cassara.
2 I have a question.

3 MS. SAUNDERS: Certainly.

4 MR. CASSARA: And my school teacher
5 brother would have said, there's no stupid
6 questions. There's just stupid people who ask
7 questions.

8 (Laughter.)

9 So, that would be me.

10 MS. SAUNDERS: No.

11 MR. CASSARA: Under the new OSTC
12 standard, can a convening authority order a
13 deposition in an OSTC-covered case? Or does the
14 convening authority have power to order a
15 deposition limited to non-OSTC cases?

16 MS. SAUNDERS: I don't know the answer
17 to that question.

18 MR. CASSARA: That's good to know.

19 MS. SAUNDERS: I don't know if --

20 MR. CASSARA: I'm not sure that it
21 matters in terms of our vote, but I'm thinking it
22 might.

1 MS. SAUNDERS: You're probably right.
2 The residual duties that had to, I think, be
3 looked at when OSTC took effect are dealt with in
4 the Manual for Courts-Martial, and I'm just not
5 sure if it's a final change or a pending change.
6 But we need to get back to you on that.

7 MR. CASSARA: Okay.

8 MS. SAUNDERS: But we know that that's
9 a point that we can get back to you on and
10 verify.

11 MR. CASSARA: Okay.

12 MS. SAUNDERS: And I know that the
13 current version of Article 6b as it exists right
14 now does speak to both the convening authority
15 and the court-martial or the military judge. So,
16 I, basically, just worked with the existing
17 language to --

18 MR. CASSARA: Sure.

19 MS. SAUNDERS: -- to revise that.

20 MS. PETERS: So that, in any case,
21 whoever --

22 MS. SAUNDERS: In any case, right,

1 whoever orders it, this will be covered.

2 MR. CASSARA: And that's why I'm
3 saying I'm not sure if it matters for our vote,
4 but I would like to at least -- maybe we need to,
5 first, think about that: does it matter in terms
6 of how this is written?

7 MS. SAUNDERS: So, the way this is
8 currently written is, regardless of who would
9 have the authority to order the deposition,
10 whether it's the military judge or the convening
11 authority, it's the victim has the right, the
12 reasonable right to be heard.

13 So, if it is the case that the
14 convening authority does not play a role in OSTC
15 cases, then the victim would have the right to be
16 heard by the military judge. Does that help?

17 MR. CASSARA: I think, yes, it helps.

18 MS. SAUNDERS: Okay.

19 MR. CASSARA: Thank you.

20 MS. SAUNDERS: Okay.

21 Any other questions or comments on
22 that portion?

1 If not -- or, General Schwenk, do you
2 want to take a vote?

3 VICE CHAIR SCHWENK: Okay. So, we're
4 going to vote on Draft Recommendation 1, the part
5 of Article 6b(e)(2), the second part that Terri
6 just talked about.

7 Anybody opposed to the recommendation
8 as edited?

9 DR. MARKOWITZ: So, this is Jen
10 Markowitz. I'll be abstaining from all votes on
11 this matter.

12 VICE CHAIR SCHWENK: Okay. Okay.

13 DR. MARKOWITZ: Thank you.

14 VICE CHAIR SCHWENK: Anybody opposed?
15 Going, going, gone. Approved.

16 MS. SAUNDERS: Okay.

17 VICE CHAIR SCHWENK: Okay?

18 MS. SAUNDERS: And then, the next, if
19 you look at Draft Recommendation 5 on page 3,
20 again, this is the cleanup recommendation. This
21 is the same as what you had voted on at the last
22 meeting, with the exception that subparagraph (b)

1 there, renumber what is currently Article
2 6b(e) (3) (A) through (C) to be Article 6b(e) (4) (A)
3 through (C). And that's because a new paragraph
4 has been inserted, per one of the previous
5 recommendations.

6 Looking through the transcript from
7 the last meeting, that had originally been part
8 of the recommendation that you did not approve,
9 and I realized that you did not actually vote on
10 that little piece of it.

11 So, I will turn it over -- or I guess
12 I should ask if anyone has any questions or
13 concerns or comments on that piece of it. It's
14 really just renumbering the paragraph.

15 And if not, I'll turn it over to you,
16 General Schwenk, for a vote.

17 VICE CHAIR SCHWENK: Okay. So, we're
18 voting on Draft Recommendation 5(b) and just
19 changing the numbering of a paragraph.

20 Anybody opposed to making that change?

21 Nope.

22 And Jenifer Markowitz is abstaining.

1 MS. SAUNDERS: Okay. Now, we'll turn
2 to --

3 VICE CHAIR SCHWENK: That is approved.

4 MS. SAUNDERS: Oh, thank you.

5 So now, we'll turn to the actual
6 report, which is similar to what you had
7 previously reviewed at the September meeting,
8 with the exception that we've included the
9 analysis and a conclusion in this report.

10 We had sent this to you several weeks
11 ago and we did receive two member comments. They
12 were very minor.

13 The first one is, if you look at the
14 proposed amendments to Article 6b, the line-
15 in/line-out legislative change, on page 4,
16 subparagraph (d), which is in red at the bottom,
17 General Schwenk pointed out that we had forgotten
18 to include the actual standards of appellate
19 review in that paragraph. So, we added those in,
20 which is legal error or abuse of discretion on
21 line 2, or clear and indisputable error, which is
22 on line 4. So, we've included those.

1 The next comment we received was on
2 page 10, and you see that in track changes in
3 that middle paragraph. And it just says changing
4 from the judge has already violated her rights to
5 has already violated their rights. So, making
6 that gender-neutral rather than her.

7 Those are the only two comments that
8 we received from the members leading up to the
9 meeting today, but I want to give you all the
10 opportunity now, if you have any additional
11 comments or questions on the body of the report.

12 Well, hearing none, I guess I'll turn
13 it over to you, General Schwenk --

14 VICE CHAIR SCHWENK: Okay.

15 MS. SAUNDERS: -- for a vote on the
16 report.

17 VICE CHAIR SCHWENK: Okay. So, we're
18 voting now on the entire report, including the
19 recommendations.

20 Anybody opposed to the report as
21 currently written?

22 No? Then, the report is approved.

1 And, Meghan, you can make it
2 disappear, however you do that.

3 MS. PETERS: All right. Thank you,
4 Committee Members.

5 We're going to look to publish this
6 report this month, in December. We'll put the
7 appendices to it and push it through our
8 publication process. So, you should see it
9 coming in the next few weeks.

10 Thanks to Terri.

11 MS. SAUNDERS: Oh, thank you.

12 We're a little early, well, actually,
13 quite early ending this session. The next
14 session I think begins at 10:30.

15 Do we want to just take a break until
16 then or?

17 MS. PETERS: Yes, absolutely.

18 VICE CHAIR SCHWENK: Yes. I don't see
19 we have much option.

20 MS. SAUNDERS: Okay.

21 VICE CHAIR SCHWENK: I think if the
22 two presenters get here, then we can start as

1 soon as they get here.

2 MS. SAUNDERS: Okay. Well, I know one
3 of them is here.

4 VICE CHAIR SCHWENK: Okay.

5 MS. SAUNDERS: I'll do a check to see
6 if the other one is on the way. But we'll
7 reconvene then.

8 VICE CHAIR SCHWENK: Okay.

9 MS. PETERS: And before we break, Mr.
10 Cassara, to the point you raised, that's
11 something we're going to get back to you on the
12 record.

13 MR. CASSARA: Yes.

14 MS. PETERS: I don't want to muddle
15 the issue by -- if I misphrased the issue during
16 our discussion, but it's a good legal point to
17 clarify. So, we'll get back on the record and do
18 that and it won't affect the report or the
19 discussion.

20 VICE CHAIR SCHWENK: In the IRC report
21 that recommended the establishment of what's now
22 the OSTC, it recommended that all the functions

1 that the Convening Authority had already
2 performed for covered offenses go to it,
3 including it specifically said depositions.

4 But, as Terri said, I looked up
5 Article 6b yesterday and it's not there. So, I
6 don't know why.

7 MS. SAUNDERS: I suppose, for the non-
8 OSTC offenses, the convening authority would
9 still have that authority.

10 VICE CHAIR SCHWENK: Yes, well, not
11 Article 6b, but whatever the article is that --

12 MS. SAUNDERS: Right, right. Okay.

13 VICE CHAIR SCHWENK: -- the deposition
14 article.

15 MS. SAUNDERS: Okay.

16 VICE CHAIR SCHWENK: And it still says
17 the convening authority and judge.

18 MS. PETERS: Right. And one note, as
19 we go on break. Because the microphones are live
20 throughout the room, it can get quite loud in
21 here. And if you wish to hear each other, we
22 just encourage you to step out in the hallway or

1 an adjacent room on this break.

2 And we'll reconvene at 10:30 for our
3 speaker panel.

4 VICE CHAIR SCHWENK: Very good. Thank
5 you.

6 MS. SAUNDERS: Thank you all.

7 (Whereupon, the above-entitled matter
8 went off the record at 10:03 a.m. and resumed at
9 10:22 a.m.)

10 VICE CHAIR SCHWENK: Okay, everybody,
11 we're going to get started again with our next
12 panel. I'd like to welcome our panelists and
13 thank you for taking time out of your schedules.
14 You may not know this about military personnel
15 law, but apparently the DAC-IPAD has promotion
16 authority.

17 (Laughter.)

18 VICE CHAIR SCHWENK: So, you're out of
19 uniform, Lieutenant Commander or Captain, as the
20 case may be. But take that with you as a memento
21 from us.

22 (Laughter.)

1 MS. SAUNDERS: So our first panel today
2 consists of a primary care physician and a
3 psychologist who will provide their perspectives
4 on mental health treatment and factors that go
5 into diagnosing and treating individuals for
6 mental health conditions. These topics relate to
7 the Policy subcommittee study of Military Rule of
8 Evidence 513, the psychotherapist-patient
9 privilege and whether the privilege should be
10 expanded to include diagnosis and treatment of
11 mental health conditions and whether it should be
12 expanded to include non-mental health medical
13 practitioners when engaged in the treatment of
14 patients for mental health conditions.

15 You have the members bios in your blue
16 folder and you also have the proposed questions
17 in the blue folder as well. Our panelists are
18 Captain Adam Saperstein, who is a medical doctor
19 who serves as the Associate Professor and the
20 Vice Chair of Medical Education in the Department
21 of Family Medicine at the Uniform Services
22 University of the Health Sciences in Bethesda,

1 Maryland. Lieutenant Commander Jonathan Heller,
2 who serves as the Program Director of DoD's
3 Forensic Psychiatry Fellowship Training Program
4 at Walter Reed National Military Medical Center.

5 Lieutenant Commander Heller is
6 responsible for training general psychiatrists in
7 the intersection of mental health and the law.

8 Captain Saperstein and Lieutenant
9 Commander Heller will each spend a few minutes
10 providing opening statements covering mental
11 health treatment from the perspective of a mental
12 health provider and from a primary care
13 practitioner. Following that, General Schwenk,
14 it's over to you and the committee to ask
15 questions of the two panelists.

16 VICE CHAIR SCHWENK: And the staff.

17 MS. SAUNDERS: And the staff, thank
18 you.

19 LCDR HELLER: Good morning,
20 distinguished members of the committee. I
21 appreciate the opportunity to be here.
22 Lieutenant Commander Dr. Heller, physician as

1 stated.

2 To start off, discussing the
3 perspective as a psychiatrist, evaluating and
4 developing a diagnosis and treatment plan for
5 individuals seeking healthcare, consistent with
6 the training guidelines from the American Board
7 of Psychiatry and Neurology, which provides our
8 board certifications as well as the Accreditation
9 Council of Graduate Medical Education, which
10 provides the accreditation standards for training
11 physicians in this country. I'd like to just
12 provide a quick overview of what it is to arrive
13 at a diagnosis and treatment for a mental health
14 patient presenting for psychiatric care.

15 Initially, of course, we care about
16 the patient's own report of why they came to
17 clinic. A person might state something directly
18 like they're having difficulty with a spouse or a
19 loved one, or they might have experienced some
20 kind of trauma or depression. The goal is to be
21 an active listener at first. Sitting quietly
22 listening, giving the patient five to 10 minutes

1 to talk and describe why they're there. It's not
2 to cut them off. However, a component of the
3 active listening that is requisite for the
4 diagnostic process is that we may be giving
5 feedback or eliciting some kind of questions to
6 clarify or scope what the patient is telling us.
7 That is, their statements to us are equally
8 communications that we're providing to them.

9 After identifying the reasons and the
10 goals of care for the patient, we need to index
11 their background history, identifying the general
12 things that people are used to when they talk to
13 a physician. I'll ask about allergies,
14 medications, surgical history then diving in to a
15 place where many physicians probably don't go,
16 which is a more intimate or detailed discussion
17 of what we call the biopsychosocial profile.

18 Essentially, we're going to ask about
19 family histories, where a person grew up, the
20 greatest traumas, the triumphs of a person's
21 life. Their worst nightmares, their worst
22 memories, their relationships, their religion.

1 All of the most intimate private parts of a
2 person's life, I think the only people that get
3 it otherwise might be a chaplain. We're the
4 holder of secrets for patients, especially in
5 that component of the dialogue of what the
6 patient tells us.

7 We discuss with the patient a number
8 of options essentially of what these symptoms
9 might mean. Now, we're not here to pathologize
10 everything. It's normal to feel anxiety. It's
11 normal to feel depression or to have worries.
12 All of this is within the normal range.

13 The next component is figuring out how
14 the symptoms that have caused the patient to
15 present have impacted their life. We're looking
16 for the functional impairments. Whether these
17 cause an impairment in relationships, occupation,
18 other areas of social function or cognition. We
19 get that robust picture of what these symptoms
20 mean.

21 We'll often seek collateral, for
22 instance, if a person is having issues at work,

1 we might seek the patient's consent to speak with
2 an employer, a peer, a family member or a friend,
3 to help understand what that patient's issues
4 really look like outside of an office where
5 things are truly artificial. It's kind of like a
6 lab scenario talking to a psychiatrist behind
7 closed doors.

8 The goal, of course, talking to the
9 patient behind closed doors is that they can feel
10 that those things stay behind closed doors. I'll
11 defer comment on that one for a moment.

12 The next piece after we have
13 sufficient data to have the factual basis to
14 render a diagnosis is to have the conversation
15 with the patient about maybe the proposed
16 diagnosis and what we call the differential
17 diagnosis. A differential diagnosis is
18 essentially explaining our alternative courses of
19 action or the alternative explanations that might
20 unify the reason that the patient has presented
21 as they have.

22 After talking that through with the

1 patient, we'll then talk about other studies that
2 we might need to do. Sometimes we need to draw
3 labs to check if people have anemia, infections,
4 perhaps a cancer. We might do head imaging, like
5 an MRI of the brain, to see if someone has, for
6 instance, a brain tumor, that could be causing a
7 new set of psychiatric symptoms.

8 Working out the plan for those labs,
9 those imaging studies and also psychological
10 testing, sometimes we'll refer to additional
11 colleagues. Our psychology colleagues might do
12 things to give us a broader index with objective
13 testing to look at elements of the character and
14 personality of the patient to help elucidate
15 further what that diagnosis really looks like.
16 We can't get to a treatment plan without the
17 diagnosis, so we have to walk through each of
18 those steps.

19 The final step in this, of course, is
20 arriving at a proposed treatment plan. We use
21 evidence-based studies that look at the
22 effectiveness, for instance, of medications that

1 I might prescribe to a patient to help with a
2 variety of symptoms. They're often used off
3 label, that is, different than the initial
4 indication from the manufacturer and the Food and
5 Drug Administration.

6 We also engage in therapy. As a
7 psychiatrist, I'm trained to engage in individual
8 and group psychotherapy with individuals. Where,
9 again, we're doing more than talking about here's
10 a medication, here's a dose, maybe we can titrate
11 or adjust the dose of that medication. We might
12 really start working into people's core beliefs
13 or more into their core conflicts, depending on
14 the psychotherapeutic model that we use.

15 Before we can do any of that treatment
16 though and throughout the entire process, it
17 turns on informed consent of the patient. Absent
18 those rare cases of a court order for a compelled
19 treatment, the patient has to consent or, in the
20 case of those with severe cognitive difficulties
21 or intellectual disability, a court appointed
22 legal guardian needs to consent to that

1 treatment.

2 Part of the consent means that we have
3 to discuss the nature of the illness itself, that
4 is, I have to tell the patient what I'm
5 diagnosing them with. I have to tell them what I
6 proposed to treat them with. I have to talk to
7 them about the risks, the benefits, the
8 alternatives and what it looks like if they seek
9 no treatment whatsoever. A failure on my part to
10 do so, to communicate that diagnosis and
11 treatment specifically to a patient is
12 inconsistent with the standard of practice for
13 the practice of psychiatry and mental health more
14 broadly, and likely constitutes a statement of
15 malpractice that I wouldn't want to engage in.
16 I'll reserve my comments further there and pass
17 it to my colleague, Captain Saperstein, subject
18 to your questions.

19 CAPT. SAPERSTEIN: Good morning, I'm
20 Adam Saperstein. As mentioned before, I'm a
21 family physician assigned to the Uniform Services
22 University. Thank you very much for letting me

1 attend this morning.

2 To dovetail with Dr. Heller and before
3 I do that, I do want to state on behalf of both
4 of us that what we're sharing with you this
5 morning represents our opinions, not necessarily
6 the opinions of the DoD, the Navy or individual
7 institutions and if that's not the case, we'll
8 specify as we offer our comments.

9 Dr. Heller talked about the
10 biopsychosocial model. I think it's worth
11 pausing for a moment. It's kind of one of the
12 center points of family medicine and primary care
13 throughout the country. It's a component that's
14 basically says that we assess somebody's biologic
15 issues that are going on, the psychological
16 issues that are going on and the social issues
17 that are going on.

18 In the context of primary care, we
19 take that from the beginning of our conversation,
20 whether you have hypertension or you're coping
21 with depression, not addressing each one of those
22 three components is likely not to lead to

1 effective care. For that reason, as he was
2 talking about in terms of a social history, doing
3 our job well means asking questions about
4 somebody's biopsychosocial situation. In primary
5 care, we often are addressing and helping people
6 to cope with various issues that include
7 psychological issues.

8 Whereas in mental health specialties,
9 when one thinks of therapy, they usually think of
10 a longer period of time of working with a patient
11 and a provider. We typically in primary care
12 engage in brief therapeutic interventions which
13 use similar approaches, but are subtly different
14 in some ways and substantially in others. So,
15 there could be a question well is mental
16 healthcare being delivered outside of mental
17 health providers' offices and the answer is
18 definitively yes. That's happening throughout
19 the country and in primary care offices.

20 We also collaboratively work to ensure
21 that patients are getting the level of care from
22 the individual that they should be getting that

1 care. Whether that is due to the severity of
2 one's illness or the illness itself, sometimes
3 results in my placing a consult, for example, Dr.
4 Heller, for further evaluation and treatment.

5 The other piece of this from a
6 military perspective is that the social history
7 and the biopsychosocial approach is critical from
8 a readiness perspective. So, we're assessing an
9 individual's health, but also what's that impact
10 on the mission and are they ready. For that
11 reason, we often ask questions that potentially
12 might not be asked in other spaces because of
13 that context.

14 Then, last, we also are embedded much
15 more than we would be in other workplaces in the
16 civilian sector. There are some civilian
17 workplaces where you have embedded providers, but
18 usually not the extent that we have in the
19 military. Where we have military medical
20 officers who are embedded with units around the
21 globe and so from a primary care perspective,
22 typically individuals in those roles are either

1 operationally specific, so flight surgeons,
2 undersea medical officers, etc. and/or are in the
3 primary care spaces. Other specialties do play
4 in those spaces, primary care disproportionately
5 does so.

6 Hopefully, that gives you a little bit
7 of background about the way that we collaborate,
8 the way that we approach, the way that we think
9 about this and the fact that mental healthcare
10 delivered to, and I do want to specific, to
11 patients who cope with mental health issues, not
12 mental health patients. It's not a defining
13 point, it's a descriptor. Patients who cope with
14 mental health issues occur in multiple different
15 spaces inside of our healthcare system.

16 DR. MARKOWITZ: General Schwenk, can
17 I ask a question just to sort of get a
18 foundational sort of lay of the land here? That
19 may help.

20 VICE CHAIR SCHWENK: Do we take a vote
21 on whether or not -- go right ahead.

22 DR. MARKOWITZ: Thank you. I think

1 this will help us in the questions that we ask
2 from here and this is specifically for Captain
3 Saperstein.

4 CAPT. SAPERSTEIN: Yes, ma'am.

5 DR. MARKOWITZ: Can you give us -- I
6 think people often consider mental health drugs
7 as being something that are being prescribed most
8 often by a psychiatrist, but the research is
9 fairly clear that primary care providers are
10 often the ones who are prescribing those.

11 Whether they're being used specifically for
12 mental health disorders or they're being used for
13 off label purposes. Can you give the committee
14 sort of a general understanding of how frequently
15 primary care providers are prescribing mental
16 health medications and what that looks like in
17 comparison to your counterparts in psychiatry
18 within DoD if you know that or just sort of
19 generally speaking. Just so that we understand
20 what the lay of the land looks like from a
21 prescribing perspective.

22 CAPT. SAPERSTEIN: Yes, ma'am. I

1 think the shortest answer would be frequently.
2 We frequently are treating patients who are
3 coping with mental health issues and frequently
4 prescribing psychotropic medications to help them
5 to cope with those issues.

6 I can speak for myself in the course
7 of a typical clinic day, we talk to about 20
8 patients in the course of the day. It would be
9 unusual for me not to take care of approximately
10 two or three patients for whom I'm prescribing
11 psychotropic medications if not more. I would
12 say two to three at the low end of my typical
13 practice.

14 Whereas as a proportion of my
15 practice, I am likely prescribing for fewer
16 patients percentage wise than Dr. Heller is, it's
17 still a regular part of practice throughout the
18 country and specifically in my own individual
19 practice, the regular part of what I do. Does
20 that answer the question, ma'am?

21 DR. MARKOWITZ: It does, but I guess
22 my question, and it was rather inartful, I guess

1 the percentage of patients who are making contact
2 with primary care and accessing mental health
3 medications through primary care advice, through
4 psychiatry, within DoD. Any sense of what that
5 looks like?

6 CAPT. SAPERSTEIN: Yes, ma'am. I
7 don't have those numbers specifically available.

8 DR. MARKOWITZ: Sure.

9 CAPT. SAPERSTEIN: As far as what that
10 is. I did do a literature search to take a look
11 and see what the most recent data was in the U.S.
12 I have the article that I can cite and share.
13 This was all pre-pandemic numbers and those
14 numbers were roughly one in five patients who
15 presented to a primary care space had a diagnosis
16 that was a mental health diagnosis listed at the
17 end of that visit.

18 My own individual perception and
19 opinion is that this is substantially higher
20 inside of the military system for some of the
21 reasons I mentioned before and also because there
22 are some locations where we may be the only

1 provider available at that moment in time for a
2 patient. So, there's a component of that as
3 well.

4 Again, all this underlining, I think,
5 your point, but also question before which is
6 there's a substantial amount of mental healthcare
7 that's being delivered in primary healthcare
8 spaces in America in general and in the DoD in
9 particular.

10 DR. MARKOWITZ: Thank you.

11 CAPT. SAPERSTEIN: Yes, ma'am.

12 JUDGE WALTON: Let me just ask, if
13 you're treating an individual who either is a
14 crime victim or someone suspected of a crime,
15 what, if any, impact has the Mellette decision
16 had on what information you think you have an
17 obligation to disclose to them prior to provide
18 intervention?

19 LCDR HELLER: Sir, from the psychiatry
20 standpoint, Mellette's impact is that it changes
21 the nature of the informed consent conversation
22 that we have to have at the beginning. Even pre

1 Mellette, of course, we would describe that the
2 bounds of confidentiality, for instance, the
3 thing that I'm obligated to report to a
4 commander, like a person reporting that they're
5 suicidal or some threat or risk to a mission.

6 Post-Mellette, the changes and
7 patients need to know that what was a prior
8 bubble around a specific diagnosis and treatment
9 that may bear further scrutiny via an in-camera
10 review, essentially that expectation of privilege
11 to the diagnosis and treatment isn't there. So
12 prior to making disclosures in those
13 communications and engaging in the conversation
14 with me that could result in a diagnosis, the
15 patient needs to know that up front and it's
16 their option whether they want to proceed with
17 that encounter or not. I'm certain that primary
18 care perspective may be similar or close to that.

19 CAPT. SAPERSTEIN: Very similar, sir.
20 I mean we have an obligation to share that
21 information and I would offer that again
22 individual experience and, Jonathan, feel free to

1 jump in here as well, it's not uncommon for
2 patients to be anxious about having conversations
3 when they need to seek care for their mental
4 health.

5 As we offer consent and talk to them
6 about that in the very beginning, I feel
7 obligated to list all of the scenarios in which I
8 would not be able to provide confidentiality.
9 Prior to knowing Mellette, I didn't understand
10 that. Now, understanding the implications, it's
11 one more potential barrier for people engaging to
12 receive care in the first place.

13 JUDGE WALTON: Do you think it's
14 having an impact on the willingness of
15 individuals to submit to intervention?

16 CAPT. SAPERSTEIN: In my case, sir, I
17 can't answer the question because I didn't know
18 about Mellette until I was asked to prepare for
19 this panel this morning. Then, I read more about
20 case law, I think, in the last couple of weeks
21 than I had in my life. Maybe to the joy of my
22 son, who is applying to law school right.

1 What's interesting about that is that
2 moving forward, I now need to inform my patients
3 of this. It's my ethical obligation to do so. I
4 can't answer the question has it, but I can
5 answer the question, do I think it will and I
6 don't know if that's a question on the table.
7 I've been told to make sure that I answer the
8 questions that are asked.

9 So, if that's the question, then I
10 think yes, it will.

11 MS. TOKASH: Can I ask you a follow up
12 to that? What would you actually say to a
13 patient?

14 CAPT. SAPERSTEIN: That's a great
15 question. I have thoughts.

16 (Simultaneous speaking.)

17 MS. TOKASH: I know that it's like
18 brand new, but --

19 CAPT. SAPERSTEIN: No, no, no --

20 MS. TOKASH: I was just curious.

21 CAPT. SAPERSTEIN: It's a fair
22 question. It's a fair question for sure. Do you

1 want to take this first or me take it first?

2 LCDR HELLER: I'm glad to. So,
3 outside of the other bounds of confidentiality
4 that we discussed, but specific to one, what I
5 would tell the patient is understanding
6 especially within the military, under the UCMJ,
7 that rules are different. Similar to how there
8 are things that I need to report to a command,
9 things that might limit your fitness for duty.
10 There are other limitations to the
11 confidentiality that you might expect in your
12 conversations and your care with me.

13 Specifically, if for any reason, you
14 were to become a witness in a case, be suspected
15 of or charged with a crime or become the victim
16 of a crime, understand that the limitations that
17 you might expect around even your mental health
18 diagnoses and treatment, don't presently exist.

19 CAPT. SAPERSTEIN: I think I'd say it
20 is possible that if you were engaged in legal
21 proceedings in the future, that the
22 confidentiality that exists inside of this space

1 would not be protected based upon what might or
2 might not be requested by counsel. They would
3 probably ask what that means and I would try to
4 explain as best I could and then it would be up
5 to them to make a decision on whether they wanted
6 to engage in care at that point in time, which
7 already, as we know, has some barriers and some
8 hurdles for people just to engage in the first
9 place.

10 MS. TOKASH: Thank you.

11 CAPT. SAPERSTEIN: Yes, ma'am.

12 VICE CHAIR SCHWENK: Cassia?

13 DR. SPOHN: I guess this is more
14 relevant to Captain Heller, have you had requests
15 for this non-privileged information and how do
16 you decide what to release?

17 LCDR HELLER: Yes, ma'am, so we do it
18 and both from just the general clinical
19 standpoint, I'll set aside my forensic psychiatry
20 hat, but whenever we receive a request for
21 information from someone's defense attorney, my
22 first route is to tell them they need to contact

1 the medical records office of the servicing
2 military treatment facility for a number of
3 reasons.

4 Number one, it ensures that we have a
5 documented reason to breach HIPAA or other
6 privacy and confidentiality laws and also so it's
7 an authenticated record. I am not a person that
8 can sign an affidavit and say, this is a complete
9 and true accurate copy of your medical records.

10 The medical records office is who needs to
11 provide that to legal counsel so usually that's
12 going to be the first step and counsel tend to
13 understand that in the criminal cases at least.
14 I have not had a request outside of that
15 happening.

16 DR. SPOHN: Thank you.

17 CAPT. SAPERSTEIN: Yes, ma'am.

18 VICE CHAIR SCHWENK: Suzanne.

19 MS. GOLDBERG: Thank you both for your
20 very helpful presentations. I have a follow up
21 question to your response to Ms. Tokash and I
22 guess the same question for you, shall I call you

1 Captain or Doctor? I'm not sure what the right
2 protocol.

3 CAPT. SAPERSTEIN: Ma'am, you can call
4 me Adam. Whatever is comfortable for you.

5 (Laughter.)

6 MS. GOLDBERG: Captain Doctor --

7 (Laughter.)

8 MS. GOLDBERG: -- you said you thought
9 it would make a difference to your patients in
10 terms of their decisions about what they disclose
11 to you or the treatment they pursue under the
12 Mellette standard where the diagnosis and
13 treatment plan, including prescription
14 medications, are not privileged.

15 My question is why do you think it
16 would make a difference and what kind of
17 difference do you think it would make and I have
18 a similar version of that question for you,
19 Captain Doctor Jonathan Heller.

20 (Laughter.)

21 CAPT. SAPERSTEIN: Ma'am, if I said
22 would then I misspoke. I should have said could.

1 MS. GOLDBERG: Could?

2 CAPT. SAPERSTEIN: That it could have
3 an impact. So, if an individual -- I'll just
4 give an example, if an individual who is a
5 potential victim of sexual assault. Someone who
6 states that they were a victim of sexual assault,
7 and is coming in for care and worries that their
8 diagnoses and/or their treatment might be used as
9 a way to undermine the authenticity of their
10 testimony. I could see a scenario -- again
11 could, I don't know if it will happen or not --
12 could see a scenario in which somebody might
13 either not present for care or might seek care
14 outside of our system because they would worry
15 that it would undermine their efforts to seek
16 justice.

17 MS. GOLDBERG: Thank you and a quick
18 follow up. I know you haven't been providing the
19 Mellette warning --

20 CAPT. SAPERSTEIN: Yes, ma'am.

21 MS. GOLDBERG: Up to this point and
22 that you don't know specifically how patients

1 will react. Based on the kinds of conversations
2 you've had in the past with your patients, do you
3 think the scenario you just described is likely
4 for some patients? That is, that they will
5 decide based on the Mellette standard, not to
6 seek care or to seek care outside the system?

7 CAPT. SAPERSTEIN: Thank you for the
8 question. I think it's a difficult question to
9 answer with any certainty because I don't have
10 facts to back it. I can share that patients, as
11 humans, have lots of different factors that come
12 into play in terms of whether they do or don't
13 seek care. I do think that, again, it's possible
14 that this would result in their choosing not to.

15 There are many scenarios that both of
16 us have encountered in the past whether that is a
17 concern about any number of things. Command
18 being aware of what's happening and wanting to
19 serve the mission, et cetera, where there can be
20 hesitancy and the place that we often will see
21 it, is with leaders in the units who are trying
22 to reassure individuals that we are here to

1 support and to help them, who then do come in for
2 care and will tell us. I came in for care
3 because other people in my unit reassured me that
4 you really are here to help me. I have these
5 concerns that existed, but I understand that
6 you're here to help me.

7 I think anything that could increase
8 the anxiety of an individual to seek care could
9 therefore impact their willingness to seek that
10 care.

11 LCDR HELLER: Presuming the same lines
12 of enquiry, ma'am --

13 MS. GOLDBERG: Yes.

14 LCDR HELLER: In responding to that,
15 again personal and professional opinion only
16 because there are a few things I want to comment
17 on in the system as it exists already. We
18 already offer patients an off ramp if they're
19 concerned about things going into their medical
20 record because we want people to access care. In
21 the hypothetical where maybe a service member or
22 a dependent, someone we're evaluating has been

1 thinking about harming themselves. They're not
2 actively, but they don't really want to discuss
3 that in a way that it goes into their records.
4 There are options like Military OneSource, where
5 they can speak to a counselor that doesn't
6 document anything in the medical record.

7 If it's related to family issues, they
8 might speak with the Family Advocacy programs,
9 which is segregated and that's something I can't
10 even see as a psychiatrist. I can't see what's
11 in those records.

12 We have other programs in the
13 services. The folks within the Marine Corps,
14 MFLCs, basically they're counselors that are
15 attached and might deploy forward with the units,
16 that similarly are there to provide counseling
17 quasi, if not genuine, psychotherapy to
18 individuals who don't want their care to be
19 reflected for privacy concerns.

20 So, do we know how Mellette will
21 impact care seeking behaviors, requests for
22 referral to network outside of the TRICARE

1 Defense Health Agency? That's kind of
2 forecasting. I tell people always that
3 predicting is a word to use to describe things
4 that I can't do. However, I would say that this
5 question is much less hypothetical given the
6 standing existence of programs to provide
7 increased confidentiality to people concerned
8 about their diagnosis and treatment being
9 documented in the military electronic medical
10 records.

11 MS. GOLDBERG: Just one point of
12 clarification. In terms of the Military
13 OneSource, the Family Advocacy Center and MFLCs,
14 do those sources have the professional capacity
15 to diagnose and treat?

16 LCDR HELLER: They will say that
17 they're not doing that and that if someone needs
18 a diagnosis and treatment, then they would
19 recommend that they come back into the healthcare
20 system. However, I think that's an unknown block
21 of what actually happens in the encounters
22 because it's designed for the rest of the system

1 to not know what happens in those encounters. It
2 would be hard --

3 (Simultaneous speaking.)

4 MS. GOLDBERG: Just for my clarity,
5 like, can people there write prescriptions for
6 medication or is it that they're having
7 conversations that might be more akin to an
8 informal diagnosis, but not by a medical
9 professional or psychiatric professional in
10 particular?

11 LCDR HELLER: Yes, ma'am. The latter
12 case. They would not be prescribing medications
13 to individuals in those settings.

14 MS. GOLDBERG: Are those offices
15 staffed by people with your level of training or
16 comparable training?

17 LCDR HELLER: Generally not. They're
18 going to be individuals maybe with a Master's
19 degree in Social Work, that's usually what those
20 folks have as far as background training.

21 MS. GOLDBERG: Thank you.

22 VICE CHAIR SCHWENK: Bill?

1 MR. SPRANCE: No, nothing.

2 MS. BASHFORD: Captain Heller, I just
3 wanted to follow up on one thing you said. If
4 you get a defense subpoena for records, you can't
5 certify that they're a full and accurate copy.
6 You send it off to a medical records group. Is
7 that what they're doing just they get the
8 subpoena and they send everything out certifying
9 it's a full and complete record? Or, is
10 somebody, if you know, parsing through it and
11 seeing what could be turned over and what
12 couldn't?

13 LCDR HELLER: Yes, ma'am. Well, while
14 I can't speak for the internal function of the
15 medical records offices within the MTS, I simply
16 don't know their policies, I'm familiar by the
17 case law and what's going through the appellate
18 chain right now of issues post-Mellette of
19 requesting partial records and full sets of
20 records without the requested root actions from
21 the military judge being released.

22 So, in practice what's happened I mean

1 that's a matter of public record how it's worked
2 out, but I don't know the internal operation of
3 the medical records offices and their awareness
4 of Mellette.

5 MR. CASSARA: I'm trying to come up
6 with an analogy and I think this will work, if a
7 service member comes to you and says, I'm using a
8 real life example of one of my cases, they have
9 significant PTSD and is smoking pot to alleviate
10 her symptoms or manifestations of PTSD. Is that
11 something that you are required to report? I
12 mean you said that there are some things that
13 have to tell the command if it's something that
14 could be mission adverse. Are you required to
15 tell the command so and so is actively smoking
16 pot? Is that a yes?

17 (Simultaneous speaking.)

18 CAPT. SAPERSTEIN: I would say --

19 (Simultaneous speaking.)

20 MR. CASSARA: Okay, I really don't
21 know the answer so I'm trying to sort of draw an
22 analogy between that and a Mellette situation.

1 CAPT. SAPERSTEIN: No, impact to
2 mission is one of the criteria in which
3 disclosure will occur.

4 MR. CASSARA: Okay.

5 CAPT. SAPERSTEIN: The minimum amount
6 of information necessary to communicate and
7 specifically to the commanding officer. I can
8 say functionally in those situations, what I do,
9 again, individual Adam Saperstein's practice, is
10 I encourage the individual to go to their command
11 themselves. In the vast majority of cases they
12 do.

13 MR. CASSARA: Okay.

14 CAPT. SAPERSTEIN: Typically at that
15 point in time, they can get care that the command
16 encourages and supports and that's where we go
17 with that.

18 MR. CASSARA: And so if the service
19 member is coming to you for say addiction therapy
20 because they say I'm addicted to whatever drug I
21 am taking as a result of my PTSD, do you find
22 that patients are unwilling, less willing to

1 speak with you about that knowing that it could
2 go to their CO?

3 CAPT. SAPERSTEIN: I'll offer and then
4 I'll hand it over to you. It depends, I hate to
5 offer that answer, but it depends on the
6 individual and depends on the situation, it
7 depends on their history. So, an individual --
8 there are situations in which somebody has more
9 concern or less concern, where the substance
10 could be different. Their history of prior
11 substance use could be different. Their standing
12 inside the military and likelihood that they
13 perceive of being retained could be different.
14 Just to specifically address this scenario, so I
15 would say it's a very individual one.

16 Nonetheless, at the end of that conversation, my
17 encouragement nearly universally, if not
18 universally, is to encourage them to go to their
19 command, inform their command and then seek care.

20 LCDR HELLER: To follow on that one,
21 sir, there are military regulations, Air Force
22 instructions, Army regulations and Navy

1 instructions that explicitly require disclosure
2 to the command if known or suspected substance
3 use or abuse. Impairments and things that impact
4 judgment, trustworthiness or a liability, a.k.a.
5 the ability to maintain the security clearance,
6 they're explicit. For instance, not to misquote,
7 if I do it's purely on me, the Navy instruction,
8 in fact, reminds us that it's a penalty under
9 Article 92 if the UCMJ not to report known or
10 suspected substance use.

11 So, if I become aware of it, I'm
12 mandated to the command. Additionally, if I
13 wanted to refer someone, for instance, to a
14 residential treatment facility for substance use
15 disorders, maybe the dual diagnosis tracts where
16 sometimes people with PTSD plus maybe an alcohol
17 use disorder. In order to get them there, they'd
18 have to be TDY, the command has to know where
19 they're going so they're not in a de facto AWOL
20 state, so the command will become aware of those
21 as well, sir.

22 MR. CASSARA: Okay.

1 MR. KRAMER: Thank you very much for
2 all of this. Following up on that, if somebody
3 says something that alerts you that they're about
4 to reveal something like that, would you tell
5 them, look if you're going to start talking about
6 this issue, you should be aware that I'm going to
7 have to tell command about that? Or does that
8 come at the very beginning before they even start
9 talking to you? If somebody says something that
10 makes think there must be drugs or alcohol or
11 something and they're about to go down that road,
12 do you advise them first that if you go down this
13 road, I'm going to have to reveal this?

14 LCDR HELLER: Yes, sir. From the
15 psychiatry take, certainly in the initial consent
16 at the beginning of the encounter when we're
17 talking about the limits of confidentiality, we
18 do disclose to them that if they require
19 treatment for an alcohol or other substance use
20 disorder that their command may need to be
21 notified of that. Clearly if there are duty
22 impairments, the command would need to know about

1 those.

2 Part two, however, is that, yes, sir,
3 also during the evaluation sometimes people bring
4 things up that we don't anticipate and if we get
5 that feeling, a hypothetical is when we're
6 evaluating patterns or history of reckless
7 behavior. For instance, that's a criteria for
8 things like borderline personality disorder and
9 the way I'll typically ask the question is
10 without specifics, I don't want to know when or
11 where, anything that could cause harm to you, but
12 what's the fastest you've driven a car. Then
13 they'll tell me they went 105 or whatever, but
14 then whatever I might document in the record, I
15 don't have a time or a place or anything.
16 Because as a clinician, again, my goal is to
17 obtain a diagnosis, provide treatment and care to
18 the patient. I'm not there to generate criminal
19 evidence.

20 CAPT. SAPERSTEIN: I think, sir, from
21 a primary care perspective and again from my
22 individual perspective, it's very, very nuanced.

1 One of the risks of somebody who is about to
2 disclose something, anything, that could be
3 happening is that my jumping in and saying, oh by
4 the way, let me remind you of this piece --

5 MR. CASSARA: Yeah.

6 CAPT. SAPERSTEIN: Is also a way of me
7 saying, please don't tell me this because I don't
8 want to hear it, which also completely starts to
9 violate their relationship and the trust that
10 exists inside of the relationship which is
11 critical for a therapeutic relationship.

12 So, I think when I say it's nuanced,
13 a lot of it depends upon what's happening in that
14 moment in that relationship with those two
15 individuals. There are moments where somebody
16 might say I'm not sure that I want to share
17 information with you and then in those moments, I
18 may say, well, what are your thoughts? What are
19 your concerns? Then we may talk about that, but
20 if somebody is going on and wants to share
21 information, my own individual practice is to
22 trust them to share that and not to stop them

1 because I would fear that it would, as before
2 mentioned, undermine their own agency in seeking
3 care and wellness.

4 SGM MARTINEZ: Ultimately, you're
5 there to care for the service member no matter
6 where they're at and you mentioned earlier, I
7 believe, in your opening remarks in reference to
8 similar to chaplains. Is there like a referral
9 that you refer to when you get to those points?
10 Say, hey, look I have to report these things, but
11 there are some situations, you know, we want to
12 make sure we take care of the service member to
13 refer them to the chaplain where confidentiality
14 is a little bit different. It's absolute within
15 that one relationship between the client and the
16 pastor. Does that occur a lot with y'all? I
17 know the problem is that in the last four years,
18 they ask what's a suicidal and making sure that
19 those individuals got the care that they need.

20 CAPT. SAPERSTEIN: Thank you for the
21 question, I'll start here and then pass it over
22 just because we're asking from a referral

1 perspective and I think in primary care that
2 makes sense.

3 Just want to differentiate that when
4 I think of referring, I'm putting a request in
5 the system for another specialist to assess a
6 patient. In situations in which I'm informing
7 somebody about options that exist to include
8 chaplains, MFLCs, etc., it's not a formal
9 referral that I'm putting. I'm informing them of
10 the options that exist. I do inform them of what
11 other options exist inside of our healthcare
12 system on a routine basis.

13 LCDR HELLER: And to follow on that,
14 maybe I evaluate someone and I may prescribe
15 maybe an antidepressant, whatever the case may
16 be. So, I'm prescribing and then we talk about
17 the other component, because usually we want to
18 look for a combination medication plus
19 psychotherapy.

20 If an individual says I don't really
21 want to talk a therapist, but in gathering your
22 history we come to understand that they have

1 significant religious beliefs or spiritual
2 beliefs and that's an important component of
3 their background. We may document it. It may
4 become part of their plan is that they're going
5 to seek pastoral counseling on the side. So,
6 again, it's not as if I were referring someone to
7 a surgeon or ordering a lab, though I will say on
8 the inpatient settings within the hospital, there
9 is a process where I enter a consult and it says
10 chaplain consult and they'll contact a chaplain
11 in a more clinical sense, who will come by and
12 who document merely patient seen. It may well be
13 and that has played out numerous times in my own
14 clinical experience with patients, where the
15 pastoral counseling replaces more traditional
16 therapy, maybe with a licensed clinical social
17 worker or psychologist.

18 VICE CHAIR SCHWENK: Suzanne?

19 MS. GOLDBERG: I know we talked
20 earlier about the possibility which you can't
21 predict one way or another necessarily, but the
22 possibility that a patient might be deterred from

1 seeking a diagnosis or treatment for mental
2 health conditions related to a sexual assault.
3 Setting that aside, as a provider, do you have
4 any other concerns about your diagnoses or
5 treatments being provided for use in a court-
6 martial related to a victim's or use, you know,
7 in connection to test the voracity of a victim's
8 testimony? So, say that the victim's reluctant,
9 the individual patient -- let me try to put the
10 question more clearly. Setting aside the
11 possible reluctance of an individual patient in
12 an individual case to seek care from you related
13 to mental health, do you have any general
14 concerns about your diagnosis and treatment plans
15 being shared for purposes of use in a court-
16 martial? Possibly to raise questions about a
17 victim's capacity to remember or speak accurately
18 about what happened.

19 LCDR HELLER: Yes, ma'am, first of
20 all, as a forensic psychiatrist based on the
21 experience that I've seen and had a case court-
22 martialled, I think that the concern there arises

1 that once there's light on a diagnosis or a
2 treatment, the natural questions become what are
3 the features of that diagnosis? Does it relate
4 to impulsive behavior? Does it include lapses in
5 memory? Impairments of judgment?

6 Similarly, the treatments, are there
7 side effects to this or say, a person was
8 drinking alcohol at the time they were taking the
9 medication, how do those interact? All of this
10 comes into play and enter the expert consultants
11 to talk about whether it's possible that a person
12 experienced a memory impairment based on
13 something and we find ourselves frequently, you
14 know, almost everything has a less than one
15 percent chance of occurring as far as a
16 medication side effect.

17 So, it's a very common consult
18 question that I receive as a forensic
19 psychiatrist, is how do these diagnoses and
20 treatments potentially impact the credibility,
21 voracity of a witness or alleged victim or an
22 accused's memory.

1 MS. GOLDBERG: Just to follow up so
2 I'm clear, you said that these various kind of
3 consequences may have a one percent or less
4 chance of actually affecting a person. Do you
5 find if you make that point in courts-martial,
6 how is that -- what is your impression of how
7 that information is received?

8 LCDR HELLER: I think that would be
9 too speculative on my part to say how it's
10 received, ma'am. I hope it's received in the
11 spirit that it's offered, that it's a less than
12 one percent chance, but that also means that it's
13 possible.

14 MS. GOLDBERG: And I guess maybe just
15 to ask my initial question again. Does that sort
16 of shape your view about, as a provider, whether
17 you would prefer to have this rule in place or if
18 not have this rule in place that the information
19 be shared with the court in the context of a
20 court-martial or are you indifferent?

21 LCDR HELLER: I tell people I'm
22 impartial, I'm not indifferent, to that point,

1 that is how I view it. As a clinician and as a
2 forensic expert, I understand my role is to
3 understand what the rules are in place and then
4 operate within those bounds and ensure, as a
5 clinician, that my patients are aware of those
6 limitations.

7 Now, anything that presents a barrier
8 to care, clearly as a clinician perspective, if
9 it's deleterious to the care of my patient, I'm
10 not in favor of it. However, there are all kinds
11 of other regulations to the practice of
12 healthcare in this country that we stay within
13 bounds of. I think the more important component
14 for us as clinicians is to understand what is the
15 rule, what are the bounds of practice and then we
16 can communicate those effectively to have the
17 therapeutic rapport and an actual relationship
18 with consent with our patients. Whether there is
19 concern as to impacts in a courtroom setting or
20 whether criminal or civil frankly, it's a
21 litigation that could be touched on beyond what
22 we're talking about specifically. That's really

1 on the patients' side, but that may be something
2 that they want to disclose to us.

3 MS. GOLDBERG: Okay.

4 VICE CHAIR SCHWENK: Jen Long?

5 MS. GOLDBERG: I just wanted to --
6 (Simultaneous speaking.)

7 CAPT. SAPERSTEIN: Well, the beginning
8 of your question kind of parsed, I perceive, it
9 parsed us an area for identifying outside of the
10 impact to patient care, I was trying to make sure
11 that I understood the question.

12 MS. GOLDBERG: Sure. Outside of an
13 individual patient, just in general as a provider
14 --

15 CAPT. SAPERSTEIN: Yeah.

16 MS. GOLDBERG: Do you have any
17 concerns outside of the context of treating an
18 individual about --

19 CAPT. SAPERSTEIN: Okay, thank you for
20 that clarification. I would say second and third
21 order effects for sure. That individual patient,
22 there's that scenario, but the implications that

1 exist for individuals who know that individual
2 are substantial. Meaning, you know, if I know
3 somebody who went and sought care and this is
4 what happened, so I'm not seek care and they have
5 a conversation with six more people, who say,
6 gosh I heard about that. Well, I'm not going to
7 seek care either.

8 I think the second and third order
9 effects are not to be underestimated, especially
10 inside of a cohesive community such as the
11 military.

12 MS. GOLDBERG: Thank you.

13 CAPT. SAPERSTEIN: Yes, ma'am.

14 VICE CHAIR SCHWENK: Jen Long?

15 MS. LONG: Thank you, and thank you
16 both for being here. If I'm asking a question
17 that's impossible to answer or it seems like a
18 legal question, please just say it. I'm just
19 wondering from your perspective as practitioners,
20 can you define the clear line between your
21 communication with patients and then the point
22 where the communications become diagnosis and

1 treatment? I know there's some feedback so I'm
2 sorry about that. I don't know if that question
3 made sense.

4 CAPT. SAPERSTEIN: It does, ma'am.
5 I'll be brief and hand this over to Dr. Heller,
6 who I think is better suited to answer this
7 question. The short answer for me would be I
8 cannot.

9 LCDR HELLER: And I will concur with
10 that also. In brief, sometimes the process of
11 arriving at the diagnosis ideally it's part of
12 the treatment in a mental health setting and the
13 way that we communicate a person's diagnosis to
14 them can be therapeutic as well, where we may be
15 acknowledging some suffering that that person has
16 had and we may be the first person that done so.
17 Really, the way we make those communications is
18 the treatment. They're inextricably bound.

19 JUDGE WALTON: I mean if you have
20 someone who is a crime victim, a rape victim, and
21 they are vehement about wanting to have the
22 person who did this held accountable for what

1 they did, but you also have a concern that if
2 they go forward with that matter, it's going to
3 have an adverse impact on their mental health.

4 Are you saying that you don't make a
5 call as to what the best path is for the patient?
6 You just sort of leave it to them or do you tell
7 them, I think if you pursue this, it's going to
8 have a tremendous impact on your mental health
9 going forward and, therefore, maybe it's in your
10 best interest not to pursue the matter, even
11 though it's something they vehemently want to
12 pursue.

13 CAPT. SAPERSTEIN: Sir, in my own
14 practice, it's an ongoing dialogue. In most
15 cases, individuals with whom I've had this
16 conversation, there are negative and positive
17 implications of both courses of action,
18 proceeding or not proceeding. So, I don't
19 attempt to guess or to predict what may or may
20 not happen in their future. I endeavor to have a
21 dialogue with them so that they can process as,
22 again, sense of agency, so that they continue to

1 have agency in the decisions that they're making
2 and that they can get the support that they need
3 to be able to make the best decision they can for
4 them at that moment in time. So, they have as an
5 informed decision as possible. That's my own
6 individual practice.

7 Often that involves conversations with
8 advocates, conversations with people in the legal
9 side of the house, conversations with my
10 colleagues who may be psychiatrists,
11 psychologists, et cetera, but my true north in
12 those situations, this is again just me, is to
13 reinforce the agency they have to make that
14 decision and to make it what's best for them.

15 LCDR HELLER: To build off of that,
16 it's similar to questions people who might be
17 contemplating a divorce or do they retire, do
18 they take the promotion or do they get married on
19 the positive side. But similarly, do they report
20 or seek prosecution and one certainly referral to
21 a victim advocate or special victim counsel who
22 can walk them through more of what the legal side

1 would look like. My role certainly is not to
2 make the decision for that person for their life.

3 I've had very lengthy conversations
4 over the course of multiple sessions with
5 individuals trying to make a major life decision,
6 helping them understand how they're making the
7 decision rather than making the decision for them
8 is truly where my goal is at.

9 Even if I push more to the forensic
10 side I would say I don't want any third party
11 liability or vicarious liability if, for
12 instance, I say, oh I suggest that you sue
13 someone. Well, I imagine that third party might
14 take an interest in my statement to that effect.
15 Especially when we're talking about individuals
16 who've experienced a sexual trauma, if one of the
17 core components of that is that loss of sense of
18 agency or loss of control, regaining those
19 options and giving the choice back to that person
20 that they lost in a critical moment, in that
21 traumatic moment, that's also part of the
22 therapy. It's part of the relationship is to say

1 no one is here to force things on you, that's
2 probably why we're talking in the first place
3 clinically.

4 VICE CHAIR SCHWENK: A.J.?

5 MR. KRAMER: I guess this is for Dr.
6 Saperstein. How often -- you said that there's a
7 number of patients, I forgot what you said, maybe
8 20 percent are treated by you for mental health
9 issues, how often do you decide I don't know if
10 that's right, if I'm remembering correctly,
11 doctor.

12 CAPT. SAPERSTEIN: Oh, I just said
13 that the small number out of the 20 patients in
14 the course of a day, typically two or three.

15 MR. KRAMER: Gotcha. How often do you
16 decide that you need to refer that person to a
17 mental health specialist, to a psychiatrist or
18 psychologist? Are there psychologists and
19 psychiatrists in the military? Are both
20 available and how do you make that decision to
21 which to refer to?

22 CAPT. SAPERSTEIN: Yes, sir. So, in

1 terms of medication management and therapy, I've
2 offered that we engage in brief therapeutic
3 interventions, but not in therapy.

4 In the majority of cases, my patients
5 benefit the greatest from a combination of
6 medication therapy and from talk therapy if you
7 will. So, in those situations, I will refer
8 usually to a psychologist, perhaps a licensed
9 medical social worker, other individuals who
10 provide that therapy. In some situations, we
11 have what are called EBHCs or embedded behavior
12 healthcare providers who are inside of our clinic
13 and I can even refer same day in that moment to
14 that individual or at least in a very short
15 period of time to have that happen.

16 In situations in which the care of
17 that individual is beyond my comfort level and my
18 capacity, then I will also refer to psychiatrists
19 for evaluation with medication management, second
20 opinion. In some cases, I may refer to Dr.
21 Heller and he may assume care. In other cases,
22 Dr. Heller may evaluate my patient and say, hey,

1 my recommendation would be to make these
2 adjustments. I would then continue the care and
3 then reach back out again at a later point in
4 time, should I need additional support.

5 MR. KRAMER: So, I guess that answers
6 the second question I had, which is then you
7 continue to work together, although sometimes the
8 psychiatrist will take over the primary part of
9 the mental healthcare?

10 CAPT. SAPERSTEIN: Right and that's
11 similar to kind of any relationship inside of
12 healthcare between two providers is there are
13 times where it could be even in the operating
14 room, where someone is having surgery. It may be
15 an OB/GYN who calls a urologist in. Urologist
16 says, okay, I'm now going to take primary on this
17 component of this care, but there's still
18 collaboration that exists between the two of
19 them. I think that happens throughout and
20 specifically in this situation, my experience in
21 multiple different locations has been that's
22 always been an ongoing dialogue between multiple

1 parties trying to deliver the best care for the
2 patient.

3 MR. KRAMER: This sounds terrific, but
4 when we went on some of our site visits, we heard
5 about how hard it is to get appointments for
6 mental health care and how long it takes. That
7 discourages people. Obviously, I know that
8 varies around the country and around the world,
9 I'm sure, depending. Have you run into that
10 issue? The availability or know about it?

11 CAPT. SAPERSTEIN: Yes, sir. I mean
12 no question, I've had three overseas tours, two
13 in Japan, one in Italy. I've been in Kuwait,
14 other places stateside as well and so they are
15 unique to each individual location.

16 MR. KRAMER: Yeah.

17 CAPT. SAPERSTEIN: In terms of what
18 resources are available. In situations in which
19 less resources are available, there's two
20 questions that we have to ask. One is, what is
21 this patient need at this point in time and the
22 second one at some level what's the best use of

1 Dr. Heller's time. The best benefit for the most
2 people in that kind of a situation.

3 Some of that are things like Dr.
4 Heller may come into my clinic and I may say,
5 hey, can you give a series of in-service talks on
6 a given topic so that we become more capable. We
7 may do that internally and give our own talks in
8 that space. Oftentimes it is at a primary care
9 space as we have individuals who have spent a
10 little bit more time and a little bit more
11 training on dermatology, on mental health, on
12 cardiology. You can name the topics. So, we do
13 that as well. Grand rounds talks are happening
14 on a monthly basis in most locations.

15 For all those reasons, we adjust to
16 the environment that we're in and I think what
17 has happened nationally over the course of time
18 is the need for mental healthcare has risen over
19 the course of time. We've all seen those
20 statistics. It's a combination of a supply
21 demand challenge that exists, but of course in
22 primary care, patients come in regardless of the

1 additional resources that do or don't exist.

2 LCDR HELLER: The only thing I would
3 add to that is just completing this process when
4 we're talking about the referral. In an
5 idealized scenario, a person who is referred to
6 me, for instance, as a psychiatrist, we identify
7 the medications. We work out a medication
8 regimen that's effective for that person, it's
9 well tolerated and once they're taking it and it
10 becomes more of maybe a chronic maintenance
11 medication, ideally once we identify that, I'm
12 able to return them to the primary care
13 physician, who continues to provide care for that
14 diagnosis and treatment.

15 They would refer them back to me if
16 they start having challenges. Maybe the mental
17 health symptoms get worse, problems with the
18 medication. In order to be able to accept the
19 next referral for someone that might need more
20 specific psychiatric care.

21 CAPT. SAPERSTEIN: And if I can offer
22 one more thought. It was coming to me as we're

1 talking about these dialogues, these dialogues
2 are often happening electronically as well as by
3 phone. I may send a message to Dr. Heller
4 electronically about the care of a patient which
5 begs the question, is that documentation part of
6 psychotherapy because you have someone who is --
7 and I'm just using the definitions that are in
8 the documents that we've looked at. So,
9 psychotherapist is listed as a mental health
10 professional verses an individual who is treating
11 a person who is coping with a mental health
12 issue.

13 I think the fact that there is that
14 distinction, at least in the documentation that I
15 read, it's something to consider because the
16 implication of that is that the protected
17 conversation or communication is between a mental
18 health professional and a patient, not between
19 providers taking care of individuals' mental
20 health needs and the patient. So, should that
21 gap not be closed? We're looking at two
22 different scenarios. Not based upon the

1 treatment that a patient needs, but based upon
2 who happens to be providing that treatment at a
3 given point in time.

4 MG ANDERSON: This may be for both of
5 you, I'm not sure. Post-Mellette, do either of
6 you have any concerns in terms of what you
7 actually write in your patient notes? This is
8 outside of your treatment plan. You write notes
9 on patients when you have an encounter, so do you
10 think that's going to have a chilling effect or
11 no effect at all on how you write those notes?

12 LCDR HELLER: I'll respond first.
13 Ma'am, actually after Mellette came out, I gave a
14 grand rounds at the Naval Medical Center in San
15 Diego in talking about recent updates and this
16 was exactly one of the questions that I was
17 asked. The question from the clinicians in the
18 room to me was what do I need to do differently
19 when I go back to clinic in 10 minutes after this
20 talk? What do my patients need to know? Do I
21 need to document differently?

22 I mean if I were to read it purely

1 from the clinicians' standpoint, I suppose I
2 could put everything in my note and say patient
3 states quote and leave it within quotation marks,
4 but that wouldn't be consistent with standards of
5 medical documentation, probably wouldn't be
6 effective clinical communication. If I wanted to
7 go all the way to that side of the pendulum in
8 terms of protecting my patients' privacy desires.
9 I could modify the way I wanted to document
10 hypothetically to do so. The things I can't do
11 though is I still have to code an encounter for
12 the things like some of the -- we mentioned, we
13 call them Z codes.

14 These are other clinical conditions
15 that might not be a diagnosis. Some of them are
16 initial encounter for adult victim of suspected
17 sexual abuse. That might be the diagnosis, the
18 ICD-10 code that I might have to enter will
19 directly reflect. So, even if I put the rest in
20 quotes, by the time I've coded the encounter, it
21 may not in that scenario matter what I put in
22 quotes or not.

1 CAPT. SAPERSTEIN: I put myself in the
2 patient scenario because I am a patient. I want
3 my providers to be able to communicate openly
4 about what's happening with my healthcare so that
5 they can communicate with each other. I'll come
6 back to that.

7 You asked if you think it might have
8 a chilling effect or modify the way that we
9 document. My own practice, I think the answer is
10 yes. I think there's a couple of components.
11 One of them is that patients often say what are
12 you putting in the record. I'm not comfortable
13 with this, I am comfortable with that. If you
14 put this in, I'm not sure that I want to come
15 back and seek additional care even though I know
16 that I need care. So, I have to find the right
17 way to be honest, truthful, forthright and also
18 maintain that relationship.

19 I think that inside of a system,
20 especially in the military where our patients are
21 rotating, our providers are rotating, when the
22 documentation becomes less specific and explicit,

1 the risk to a patient and now I'm putting myself
2 in that role, the risk to me as a patient is that
3 the lines of communication get missed over the
4 course of time. When I've gone back in my own
5 medical record to take a look at what I thought
6 was true and then found what actually was true
7 and saw the delta, it really made me happy that a
8 record existed so that facts were facts. It was
9 helpful for me. We misremember that's just part
10 of the human condition.

11 So, I think as a result, to your
12 question, yes.

13 MG ANDERSON: Thank you.

14 DR. MARKOWITZ: I'm curious, Captain
15 Heller, specifically because you have done grand
16 rounds on this topic, what do you think -- what
17 kind of education do you think clinicians need on
18 the topic of Mellette and which clinicians do you
19 think need to be at the table?

20 LCDR HELLER: Yes, ma'am. So,
21 education I would aim to provide -- the breadth
22 of it is the first issue knowing that a civilian

1 witness is also subject to these rules.

2 DR. MARKOWITZ: Sure.

3 LCDR HELLER: In a case where as you
4 remember, the UCMJ -- so, I'm talking more in the
5 plenary sense beyond DoD training, but whom needs
6 to know these? I think we're essentially saying
7 every healthcare worker that needs informed
8 consent and a discussion of confidentiality with
9 patients everywhere.

10 DR. MARKOWITZ: Okay. Thanks.

11 VICE CHAIR SCHWENK: Suzanne?

12 MS. GOLDBERG: One of the things that
13 we heard in our various site visits was that some
14 people were very concerned about both receiving
15 mental health treatment and then seeing a mental
16 health professional and then receiving treatment
17 in the form of medication would interfere with
18 their ability to have the career path that they
19 would like. That was voiced in a number of
20 settings and all in the context of the work of
21 this committee which is related to sexual assault
22 and sort of defense, investigation, prosecution

1 and also its consequences for people.

2 I wonder if you see that in your
3 practice that when people come to you as patients
4 and you suggest the possibility of treatment that
5 includes medication that they decline that
6 because they fear the potential consequences.

7 LCDR HELLER: Yes.

8 CAPT. SAPERSTEIN: Yes.

9 MS. GOLDBERG: Is that -- would you
10 say sort of -- I want to ask you for numbers, but
11 something more specific than common or uncommon
12 that you might be able to say about that?

13 LCDR HELLER: I couldn't pin a number
14 to it. If I say between the common and the
15 uncommon scenario versus it's not a rare
16 scenario.

17 MS. GOLDBERG: Okay. That's all.

18 CAPT. SAPERSTEIN: It's very
19 contextual. It depends on upon that individual
20 but I agree. In the scenario they're in and
21 where they're located and what the mission is and
22 when they're next deployment is coming up and

1 obligations to the unit and what's happening in
2 their family. I mean there are so many factors.
3 I think not rare is probably the best way of
4 describing it but I can't give a number.

5 LCDR HELLER: And it may be, I would
6 imagine, may be more common in my setting in the
7 mental health than primary care just because
8 there are certain other medications that
9 generally primary care might not prescribe that
10 they send them to psychiatry to prescribe. Most
11 of those involve duty limitations indirectly.

12 MS. GOLDBERG: Do you have a question?
13 Because I have another one. If you have
14 questions you go ahead.

15 (Laughter.)

16 VICE CHAIR SCHWENK: Thank you. So,
17 what are your thoughts from your perspectives on
18 pros and cons or however you look at it, if the
19 current system that protects communications in
20 the psychotherapist patient privilege was
21 expanded to include records of diagnosis and
22 treatment? Good, bad, indifferent? Think about

1 this as a caveat or something, whatever your
2 thoughts are.

3 CAPT. SAPERSTEIN: I'll speak on a
4 sub-component of it first, sir, and then the
5 larger idea. I do want to go back to the
6 psychotherapist provider privilege. I'm here as
7 a primary care provider.

8 VICE CHAIR SCHWENK: Right.

9 CAPT. SAPERSTEIN: In that context my
10 communication would not be protected.

11 VICE CHAIR SCHWENK: Right.

12 CAPT. SAPERSTEIN: And I deliver
13 mental health care.

14 VICE CHAIR SCHWENK: Right.

15 CAPT. SAPERSTEIN: So, I just wanted
16 to underline that point.

17 VICE CHAIR SCHWENK: Right and you've
18 been very eloquent on that one. If you care
19 about the privilege, you will expand it. Got it.

20 CAPT. SAPERSTEIN: Yes, sir. The
21 second question is kind of I think about it as
22 termed implications for care in terms of

1 communications excluding diagnoses and treatment.
2 I just want to reiterate, I can't differentiate
3 those two things. They are inherently tied
4 inextricably so. The diagnosis sometimes is
5 directly from the history and so separating those
6 two things out, I, Adam Saperstein, I don't know
7 how to do that.

8 Jonathan, I think you may be able to
9 speak on this a little more eloquently than me.

10 VICE CHAIR SCHWENK: I guess the law
11 says it's very easy. You don't tell us what you
12 talked about and we go to the records and pull it
13 out of there and thank you very much for putting
14 it in the records.

15 LCDR HELLER: Yes, I can think of a
16 couple of examples that you cited before where
17 the diagnosis is what was communicated.

18 VICE CHAIR SCHWENK: Yeah, well that
19 part's protected, but I guess when it makes in
20 the record it's no longer a communication.

21 LCDR HELLER: Sir, speaking again
22 solely to clinical impacts of this, the ability

1 to tell my patient that your diagnosis and
2 treatment have special protections, by itself
3 enhances my ability to elicit essentially the
4 comfort that they need to have an honest and open
5 conversation as part of psychotherapy.

6 The more protection, the safer the
7 area is that I can let a person know, clearly
8 that's one of my goals in a therapeutic
9 relationship is to make that as safe a space as
10 possible. If we're talking about trauma, I need
11 them to be able to talk about trauma but see that
12 just by talking about it, the trauma for
13 instance, in a safe place, they're not being
14 harmed now. There's not further harm going on
15 and we're working towards moving back towards
16 health.

17 I suggest that to the clinical
18 implication there that the special protection
19 bears special nature in psychotherapy.

20 VICE CHAIR SCHWENK: Okay. Thank you.
21 Any other questions because I think we're about
22 out of time.

1 MS. GOLDBERG: Just to the question
2 that really could open a can of worms but is not
3 intended to because we are out of time. The
4 question is have you had the experience of
5 patients admitting to perpetration of sexual
6 assault and seeking counseling related to that?
7 If so, is that in the rare category or occasional
8 or something more?

9 LCDR HELLER: I have, yes, ma'am, and
10 less common than alleged crime victims.

11 MS. GOLDBERG: By a large margin or
12 not so much?

13 LCDR HELLER: Significantly so.

14 CAPT. SAPERSTEIN: I'm trying to think
15 through my career. Very rare in my situation.

16 MS. GOLDBERG: Thank you.

17 VICE CHAIR SCHWENK: Staff, questions?

18 MS. SAUNDERS: I think that covers it
19 from the staff.

20 VICE CHAIR SCHWENK: Okay. Well,
21 Lieutenant Commander Captain Heller --

22 (Laughter.)

1 VICE CHAIR SCHWENK: -- and Captain
2 Saperstein, thank you both for being here.
3 Really appreciate the time. You've given us a
4 lot to think about and we wish you well.

5 Bill, do you want to shut us down?

6 MR. SPRANCE: The public portion of
7 the meeting is now closed. We will reconvene
8 this afternoon.

9 (Whereupon, the above-entitled matter
10 went off the record at 11:30 a.m. and resumed at
11 12:39 p.m.)

12 MR. SPRANCE: Good afternoon,
13 everyone. The public meeting is now open.

14 VICE CHAIR SCHWENK: And our first
15 panel this afternoon are the Chief Defense
16 Counsel of the services, and I want to welcome
17 many of you back to appearing before us. All of
18 you, welcome, and we look forward to your
19 thoughts on things we could look at to make the
20 provision of defense counsel services better in
21 the Armed Forces. So what do you - anybody have
22 a -- yes.

1 MS. PETERS: Ms. Nalini Gupta.

2 VICE CHAIR SCHWENK: Oh, Nalini.

3 MS. GUPTA: I was going to give an
4 introduction, but the mic didn't work.

5 (Laughter.)

6 (Simultaneous speaking.)

7 MR. CASSARA: This is why you are the
8 Vice Chair.

9 (Laughter.)

10 VICE CHAIR SCHWENK: And I'm willing
11 to abdicate to anybody.

12 MS. GUPTA: So as General Schwenk
13 said, we are very pleased to be joined by the
14 Chiefs of the Trial Defense Services. We have
15 Colonel Sean McGarry from the Army, Captain Brian
16 Korn from the U.S. Navy, Colonel Jonathan Vaughn
17 from the Marine Corps, Lieutenant Colonel Elgin
18 Dane Horne from the Air Force, Commander Jason
19 Roberts from the Coast Guard.

20 They will be speaking to you on a
21 range of issues including some of the topics you
22 heard about in the site visits such as resources

1 and experience levels. They will also be able to
2 answer questions about the advisability of
3 establishing a Conviction Integrity Unit as just
4 an ongoing project of the DAC-IPAD as well
5 support services for service members who are
6 accused of crimes and may be experiencing
7 suicidal ideation. Give it back to you with
8 that, General Schwenk.

9 VICE CHAIR SCHWENK: Okay. Thank you.
10 Anybody have a statement you'd like to make
11 before we get started with questions? No? Smart
12 decision on your part.

13 Okay. So OSTC has been up for almost
14 a year, and you no doubt have talked to your
15 people about a comparison of OSTC and defense
16 counsel, and where do you guys come down on what
17 needs to be done, if anything, to even out the
18 playing field? Sean, you're in the wrong seat.

19 COL MCGARRY: I know. I don't know
20 that I would say that anything necessarily needs
21 to be done. I know from the Army perspective,
22 you know -- and I think everybody shares there's

1 always an interest in relative resourcing. And
2 so -- and there was a math problem in so much to
3 go around. I know in the Army, they've committed
4 to, as recently as this week, a one for one
5 parody probably is what they're calling it in
6 terms of fills and so the positions that we have
7 are filled at similar rates going forward so
8 there's not --

9 VICE CHAIR SCHWENK: OSTC independent?

10 COL McGARRY: It's independent of,
11 yes, sir. So there's not an outsized balance one
12 way or the other with who is available to take
13 cases. One of the things that I would submit --
14 I would just say the Army, I don't think we have
15 ever insisted on actual parody. I don't think
16 it's necessary -- it's never -- it's not
17 necessary, it's just -- it's what's effective. I
18 don't think that the standup of OSTC has impacted
19 us too much in terms of who the referral
20 authority is. I still do the same job. The only
21 maybe contextual factor that we need to keep in
22 mind is who is doing what in each respective side

1 of the aisle. So for defense attorneys, we break
2 down our case load priority 1, priority 2,
3 priority 3; priority 1 being courts, priority 2
4 administrative things, nonjudicial punishment,
5 administrative separations, priority 3 is
6 everything else.

7 One difference, I think, with OSTC,
8 while, the referral authority might be different,
9 there's not much impact. I think the way that
10 structure has been developed, it has allowed OSTC
11 to take a larger number of their personnel and
12 devote them just to priority 1. So for the Army
13 TDS, for example, we have 10 people that have
14 been provided to us as overstrike beyond our
15 normally assigned billets, because the Army
16 recognizes that's an important function. So have
17 eight complex defense litigators in each of the
18 circuits, across the circuits. And then we have
19 two more that are TDS headquarters. Those
20 positions are scheduled to be sunset, but the
21 Army has allowed us to keep them. So we have 10
22 people who are engaged only in priority 1 for

1 just courts. Everybody else does that but they
2 also do priority 2 and 3. And the point of
3 context that we talk about sometimes and keep an
4 eye on is OSTC, they have, as I counted, 52
5 people engaged in just priority 1. They still
6 have other people who do priority 2 and 3 and
7 then for, again, context for OSTC, they'd have
8 more work up front because they're evaluating
9 cases that may not make it to referral.

10 So again, it doesn't necessarily have
11 to be an exact parody, but it's a data point that
12 we keep in mind when we're talking about wellness
13 issues, burnout, delay, bandwidth, and all. So I
14 think that's the only observation that I have
15 right away.

16 VICE CHAIR SCHWENK: On admin boards,
17 your guys do admin boards, right --

18 COL MCGARRY: Yes, sir.

19 VICE CHAIR SCHWENK: -- with their
20 client? But the OSTC guys don't, the trial
21 counsel do?

22 COL MCGARRY: I think those are

1 typically the trial counsel.

2 VICE CHAIR SCHWENK: Yes, okay. All
3 right. Thank you. Brian.

4 CAPT KORN: Thank you, sir. So I
5 think the Navy's biggest concern in terms of the
6 impact of OSTC is with regards to experience
7 levels in the counsel. We feel, from a defense
8 perspective, that we're adequately manned right
9 now. We have the right number of defense
10 counsel. Our concern is to ensure that our
11 defense counsel are as experienced as the --
12 relatively as experienced as the trial counsel
13 across the aisle from them.

14 So that -- it hasn't been a major
15 concern. I mean we certainly are, on the whole,
16 more inexperienced than the OSTC counsel are
17 right now. I don't think to a major detriment at
18 this point. It's more of a concern. We just
19 want to keep an eye on that going forward to make
20 sure that we don't continue to get the brand new
21 counsel while OSTC continues to get the
22 experienced counsel. But at this point, we feel

1 that there is good parody between the defense and
2 OSTC, sir.

3 VICE CHAIR SCHWENK: I guess it used
4 to be that the argument that we needed parody in
5 experience was somewhat undermined by the high
6 acquittal rate. You know, how much more do you
7 need if the acquittal rate is through the roof.
8 Has that changed any, acquittal rates, conviction
9 rates in the past year?

10 CAPT KORN: No, sir. I think it's
11 remained consistent.

12 VICE CHAIR SCHWENK: Around the same.

13 CAPT KORN: We feel proud of our
14 acquittal rate, and --

15 VICE CHAIR SCHWENK: You shouldn't.

16 CAPT KORN: And for that reason, we're
17 certainly -- you know, I'm not banging on the
18 table --

19 VICE CHAIR SCHWENK: Yes, right.

20 CAPT KORN: -- but I'm saying there's
21 an unfair disparity here. It is really just
22 perspective being concerned that we do continue

1 to get counsel with experience in order to
2 adequately represent our clients.

3 VICE CHAIR SCHWENK: Okay. Thank you.
4 Johnathan, long time, no see.

5 COL VAUGHN: Jim, it's been many
6 years. Good to see you and thank you to the
7 committee for having us today. I think the stand
8 up of OSTC on the Marine Corps side is really not
9 tied to a manpower challenge.

10 I think it's forcing us to refine our
11 business model and how we function. The
12 historical norm of four satellite regional
13 offices doing defense work in solo isolation to
14 themselves, relying upon their organic manpower
15 is gone to the wayside. It's forcing us to truly
16 implement a global law firm model where we're
17 managing assignments and detailing at the
18 headquarters echelon, more at the senior manager
19 of the law firm type construct. We're changing
20 how we formulate our -- what was historically
21 viewed as our OPSO (phonetic) is now my director
22 for management. My deputy is now director for

1 litigation to allow us to focus on areas where
2 historically we were not able to.

3 I think our past performance is
4 exceptional, but it's at the tactical echelon. I
5 think in the courtroom, we were doing great, but
6 our ability to manage an organization struggled.
7 I think our abilities to sustain the force and
8 sustain the training struggled. I think our
9 ability to attain the level of performance and
10 efficiency at our jobs struggled. And so we're
11 trying to reprioritize the efforts, not only how
12 we align ourselves but how we detail ourselves.

13 Currently, we sit at -- you know,
14 despite what you may hear from the field that
15 they don't have enough manpower, we're sitting at
16 105 to 108 percent depending on how you want to
17 count the numbers. That doesn't come without a
18 cost. I think 71 percent of my counsel are first
19 tour litigators, and I think right now I have a
20 gap of nearly 60 percent of my middle management,
21 my supervisory counsel, I'm gapped. We're fixing
22 that in this next assignment cycle, so we'll

1 balance that out.

2 But I don't think manpower is the
3 challenge. I think how we run the business but
4 then also, and Jim you'll appreciate this
5 analogy, in a normal Marine air-ground task force
6 unit, they will spend six months or more in a
7 training workup cycle. And every time they go to
8 deploy, they will spend six months purely
9 training, and they'll bring in evaluators for
10 themselves. They'll bring in external
11 evaluators. They'll participate in exercises,
12 and they will train themselves up to a level of
13 readiness, and then they will deploy for six
14 months. They'll do sustainment training while
15 deployed, but they're engaged in operations. And
16 then they have a six-month draw down cycle when
17 they return where they recycle, regenerate, and
18 take a break.

19 When you're a lawyer in the Defense
20 Services Organization, you have no break. You
21 are engaged from the moment you arrive until the
22 moment you leave. And so our ability to attain a

1 level of proficiency with training becomes
2 challenging, because every day I spend training
3 means that's a day you're not in the courtroom.
4 Every day I spend with my supervisory counsel
5 mentoring and training you means they're not
6 litigating or are they doing other managerial
7 functions to include managing all the civilians
8 that we've brought on to the formation.

9 I mean these, I think, are the
10 business model challenges. I don't think OSTC is
11 a problem in that regard. I think, if anything,
12 they're forcing us to be better at what we do,
13 and I think we're getting there.

14 VICE CHAIR SCHWENK: Thank you.
15 Lieutenant Colonel Horne.

16 LT COL HORNE: Yes, sir. In the Air
17 Force, sir, we haven't seen any real concern with
18 the stand up of OSTC. We looked across manning
19 levels across OSTC and the Trial Defense
20 Division. While our area defense counsel, our
21 base level defense counsel, have very little or
22 to no prior defense experience, they have had

1 prior litigation experience at the base level and
2 trial counsel side.

3 When we look at our senior litigators,
4 our senior defense counsel who are supervising or
5 mentoring our area defense counsel, we seek
6 experience levels that are very commiserate with
7 the OSTC attorneys, in some cases, more
8 experienced for our senior litigators. That has
9 caused -- or, you know, it does give our folks
10 the ability to go into court prepared, go into
11 court with the skills and experience necessary to
12 defend their clients at a great -- you know,
13 having great success there.

14 Additionally, our chief district
15 defense counsel also have the same -- essentially
16 the same experience level as the chief senior
17 trial counsel of each district in the Air Force.
18 In the Air Force, our district personnel, senior
19 defense counsel. Chief district defense counsel
20 are stationed in the same location as the OSTC.
21 That has contributed to great working
22 relationships between the two organizations when

1 working through cases, working through
2 investigations, and that sort of stuff.

3 So we really haven't seen any real
4 concerns. Our manning is above 90 percent right
5 now. We've worked with the professional
6 development directorate to get more defense
7 counsel to bump that manning up. And we have no
8 concern, sir.

9 VICE CHAIR SCHWENK: Good. Commander
10 Roberts.

11 CDR ROBERTS: Good afternoon, General.
12 We have no concerns with the OSTC. We call it
13 the Office of Chief Prosecutor in the Coast
14 Guard. We have to be different. But it hasn't
15 been --

16 VICE CHAIR SCHWENK: Is that a
17 Lederer-ism?

18 CDR ROBERTS: It -- possibly. One
19 good thing about the OCP, because there's been a
20 move to build it up, we've used that as a basis
21 to ask for more defense counsel throughout the
22 program, but we don't line our own defense

1 counsel service office. We provide billets to
2 the Navy as part of a longstanding MOU that we've
3 had with the Navy Defense Service Organization,
4 and that program is doing excellent. The Navy
5 provides excellent training for our judge
6 advocates.

7 The one drawback is that most judge
8 advocates for the Coast Guard only ever get one
9 assignment as defense counsel, so we're never
10 going to be able to build senior defense counsel
11 for our service members. I'm somewhat of a
12 unique exception. I'm doing a second tour in
13 Navy Code 45, but only in the role of being the
14 Chief of Defense Services for the Coast Guard.
15 Hopefully, we'll be able to build a pipeline in
16 that way with more trial or appellate experience
17 as we -- as the service builds more expertise in
18 court-martial practice. But as of right now, the
19 standup of the OSTC hasn't negatively impacted
20 our Division of Defense Services.

21 VICE CHAIR SCHWENK: Okay. Thank you,
22 all, very much. Questions?

1 MS. TOKASH: This is Meghan Tokash.
2 Are you seeing any difference in the last year
3 with the heightened referral standard in terms of
4 quality of evidence in the cases that your
5 personnel are defending?

6 COL VAUGHN: I think from the Marine
7 Corps perspective, the OSTC role in vetting cases
8 and its disposition authority decisions are
9 refining the target group and eliminating
10 distractor cases. And so I think the value of
11 the case is increased with the role of OSTC. I
12 think the Defense Services, it enables us then to
13 hone in on those target groups, which means we're
14 able to concentrate our expertise and our
15 manpower against, you know, one target instead of
16 12 or 8 different targets of cases that would
17 come forward that either were lacking in merit or
18 lacking in value or lacking in evidentiary basis.

19 So I think the business model, that
20 OSTC is applying the U.S. Attorney model will
21 refine that target group. And I think the
22 quality of the material in the cases will

1 strengthen and allow us to focus in on those.

2 CAPT KORN: Admiral Stephens can
3 probably give you a better answer this afternoon
4 from the OSTC perspective about what percentage
5 of cases they're preferring, some versus what
6 percentage were preferred with the traditional
7 convening authorities. But from defense
8 perspective, it's -- it really hasn't changed
9 much. I think that the great majority of cases,
10 when the trial counsel recommended to convening
11 authorities in the past to go forward, they went
12 forward; when they recommended to not go forward,
13 they didn't go forward. And I think OSTC has
14 taken that same perspective on cases and giving
15 the cases the same review.

16 So from a defense perspective, we
17 haven't seen a quantitative change, not enough
18 that we could notice. He may be able to give you
19 the specifics on the numbers, but I would say
20 it's remained at a steady state since before the
21 standup of OSTC.

22 COL McGARRY: And I would agree with

1 that. I don't think we've seen a significant
2 change that way. I think there is Marine
3 counterpart. There's some benefit in terms of
4 having the Office of Special Trial Counsel
5 generally more experienced as they're evaluating
6 cases. I think we had 1,790 preferred cases in
7 2024. Only 709 of them made it to completion.
8 And I think there are a variety of reasons for
9 that, but a big part of this is being more -- I
10 think the way that the cases are being evaluated,
11 as they continue to be by the government, I think
12 it's helpful to pare down things that needed to
13 be focused on. Over.

14 LT COL HORNE: I would concur with my
15 colleagues on the panel. In the Air Force, we
16 have the same thing going on at this point in
17 time, and that points to the change in referral
18 standards but knowing that we do have experienced
19 folks in OSTC reviewing the cases and making the
20 decisions to prefer and refer on those. Also to
21 add that they're very experienced. A lot of them
22 also have defense counsel experience, so looking

1 at it more thoroughly.

2 CDR ROBERTS: I would echo off what my
3 colleagues have said. It hasn't really changed
4 the quality of the cases that have gone forward.

5 MS. TOKASH: Thank you.

6 MS. BASHFORD: I have a follow-up on
7 Ms. Tokash's question. She asked about the
8 quality of the cases. What about the timeliness?
9 Have you seen any truncation of the time it's
10 under investigation or, you know, while an
11 accused's career is sort of all on hold?

12 COL VAUGHN: From the Marine side, my
13 last job was a commanding officer of a security
14 battalion at Camp Pendleton that had roughly 800
15 personnel. So I'm going to wear that hat for 30
16 seconds and say the decisions out of OSTC were
17 quite accelerated. A domestic violence incident
18 on a weekend, I could have a disposition from
19 OSTC within a week, sometimes as a commander.
20 And I'm not saying that's right or wrong. I'm
21 just saying the decisions were flowing fairly
22 quickly from a commander's perspective.

1 Putting on my defense counsel hat, I
2 would say OSTC spends a fair amount of time
3 investigating. I think the back side of that
4 from preferral to 32, you have some challenges of
5 making sure that defense has enough time to
6 perfect its own case and prepare itself to be
7 adequate when it walks into a 32 or proceeding.
8 We're working through those things. I don't
9 think there's any barriers or challenges there,
10 but I would say the disposition decisions are
11 coming quicker than they were historically
12 largely because you have a prosecutor making time
13 now decisions with investigators. That is
14 accelerating things. Over years past, you have
15 investigators investigating forever and a day and
16 then turn it over to a command who then turns it
17 over to a prosecutor and then turn it back over
18 to a command. That process was elongated and
19 causing exorbitant delay.

20 COL McGARRY: I don't think in the
21 Army we've seen significant differences.

22 VICE CHAIR SCHWENK: Okay. Suzanne.

1 MS. GOLDBERG: Thank you for being
2 here and for your testimony. Following up also
3 on Ms. Tokash's question in the beginning of the
4 session, in the field, when we were conducting
5 our site visits, we did hear from a number of
6 defense counsel who noted the disparity in their
7 experience level as compared to OSTC. And I
8 think I heard you saying that isn't really an
9 issue, and I appreciate your entering the field,
10 but the apparent quality and the self-confidence
11 of the less experienced defense counsel.

12 I wonder if you could elaborate at all
13 on the question whether you do see a disparity in
14 experience level, if you think it matters for
15 purposes of what you're able to do?

16 COL MCGARRY: I think it does matter.
17 I think there is -- we have 37 percent of our
18 current defense counsel have no prior military
19 justice experience. That is improved from 2022
20 when I started, and we had closer to 42 percent
21 and had zero either coming out of the basic force
22 or coming out of other jobs but not military

1 justice related. I don't think 2022, when we
2 first recognized this, you know, 20 out of basic
3 force and 22 out of other jobs, out of 102
4 defense counsel, I don't think we realized the
5 magnitude of that problem.

6 And so within the Army leader corps
7 personnel management, we've been fair and
8 deliberate and are trying to minimize that, cause
9 that has always been, I think, the equalizer
10 historically. You know, the government usually,
11 you know, has -- is better -- is differently
12 resourced than the defense. One equalizer is
13 experience level or it used to be defense counsel
14 was always the most experienced person there
15 short of the judge or clerk, not -- it's not
16 always that way.

17 So we still have a ways to go but I
18 think in the Army, we recognize that that is
19 something we are continuing to work towards to
20 make sure we have not just numbers but the right
21 experience that goes with them. So it's a
22 positive trend for the Army I would say.

1 MS. GOLDBERG: And if I could just
2 sort of ask an additional question, it will help
3 me understand and feel free to address it now or
4 down the line, sounds like you're saying you're
5 addressing it, no further action needs to be
6 taken. And I guess I'm asking that question.

7 COL MCGARRY: I don't know if I would
8 say no further action needs to be taken. It's a
9 continued point of vigilance, I think, as we go
10 through our assignments and we work through this
11 map, cause there's just -- and I don't think the
12 Army's different but just enough to go around, I
13 guess, within the military justice enterprise but
14 our other core functions as well. And so as our
15 overall requirements increase, we don't
16 necessarily fill all of our initial intake goals.
17 We just don't necessarily have the same numbers
18 that -- to spread around. So it's -- I wouldn't
19 say no action, but it's just -- it's a continued
20 point of vigilance.

21 MS. GOLDBERG: Thank you.

22 CAPT KORN: At the end of FY24, 48

1 percent of Navy OSTC counsel had at least four
2 years of experience while only 19 percent of Navy
3 defense counsel had a similar amount of
4 experience. At the -- on the flip side of that,
5 only 14 percent of OSTC counsel had less than one
6 year of experience while 50 percent of Navy
7 defense counsel had less than a year of
8 experience. So there is a significant disparity
9 in experience, but then I think the follow-up
10 question is, so what, what does that mean.

11 And from, I think, a programmatic
12 perspective, it's been fine. Our defense counsel
13 are performing competently, adequately, you know,
14 more than that.

15 The concern that I have is for the
16 individual cases. If somebody PCS's and the
17 experienced supervisory counsel isn't present for
18 a particular case, is that client not going to be
19 well-represented because he or she has an
20 inexperienced counsel who doesn't have an
21 immediate supervisor, you know, with experience
22 to go to?

1 So again, I don't have concerns
2 enterprise wide, but this is sort of what I was
3 taking about in my first answer where it's just
4 really critical that we -- every detailing cycle
5 we continue to look at this and made sure that we
6 are spreading some experience throughout the
7 defense enterprise, and it's not zero experience
8 constantly going to defense, four years of
9 experience constantly going to OSTC.

10 And I think the Navy detailers
11 understand that, the JAG understands that, so I'm
12 not concerned that that's going to happen. But
13 it just remains a point that we have to stay
14 vigilant about.

15 MS. GOLDBERG: Thank you.

16 COL VAUGHN: As I indicated, we have
17 70 percent of my formation is first tour
18 litigation, meaning less than 24 months of
19 experience litigating. General Woodward will be
20 able to speak to OSTC's numbers but by policy and
21 assignment process, no one gets screened for OSTC
22 that doesn't have 24 months or more. And so

1 inherently, you're going to have a disparity, but
2 I think our performance has outshined to date in
3 litigation.

4 I think the challenge is that 71
5 percent of new litigators' brains is who's
6 managing them and who's supervising them and
7 training them. As I said, I was at -- only about
8 60 percent of my middle management before this
9 last assignment process Marine Corps allowed --
10 it weighted my efforts in assignments so that
11 next year I'll be up to 97 percent, my middle
12 management by next year. So I'll cover down on
13 that gap in experience.

14 But then I also highlight the role of
15 the RLSO investigators and the attorney advisors
16 that compensate for any lack of experience that
17 an individual trial defense counsel level may
18 have. They have a depth of experience behind
19 them preparing them for going into the courtroom
20 and even sitting in on proceedings routinely. So
21 I don't see an impact of that at this time. I do
22 not think there are any needed changes to address

1 that. I think the system is working through that
2 sufficiently and the performance is showcasing
3 that.

4 JUDGE WALTON: The -- one of the
5 concerns I had expressed was inadequate
6 investigation support. Is that a reality and if
7 it is, what can be done to address it?

8 CAPT KORN: I don't think that's a
9 reality for the Navy. So we have the Navy -- the
10 defense investigator program that we set up a few
11 years ago. It is now well-staffed. We have
12 eight defense investigators across the
13 enterprise, and we're in the process of hiring
14 additional investigators and the existence of
15 these investigators.

16 And it's really hard to qualitatively
17 measure whether they're doing a good job or not,
18 but from the perspective of defense counsel, they
19 are competent going into court based on the
20 support they're getting from the defense
21 investigators. They feel they have the
22 information they need. They feel they are able

1 to do the investigation they need to do without
2 having to ask the trial counsel, to ask NCIS to
3 look into something like might have happened, you
4 know, 10 or 20 years ago. So from a Navy
5 perspective, we feel as though we have effective
6 and adequate investigative support.

7 COL MCGARRY: Same for the Army. In
8 fact, I think we are the best resource in that
9 regard. Some people use the word fat. I don't
10 think I ask too much.

11 (Laughter.)

12 (Off-microphone comment.)

13 COL MCGARRY: So we have 28 authorized
14 with 24 on staff now, and I expect that the
15 remaining of that 28 will be coming this fiscal
16 year. And as Brian mentioned, the thing that we
17 sometimes struggle with is, you know,
18 anecdotally, universally, they -- our
19 investigators are very well received. And -- but
20 it's difficult to come with metrics, because it's
21 -- sometimes it's hard to measure -- you can't
22 measure case outcome. You can't measure how much

1 time they spend. If you have a 20-year
2 investigative veteran who has a brand new
3 counsel, he's watching the counsel go down a
4 rabbit hole of spending all kinds of time. A 10-
5 minute conversation can refocus that individual
6 to be more productive. The results may or may
7 not be defense friendly, but the impact --
8 positive impact is really hard to measure.

9 So outside of anecdotes, we do
10 struggle with that. It would be better to have a
11 more quantifiable measure of effectiveness with
12 your performance, but just we love our defense
13 investigators, and we're very happy with the 28
14 that we have.

15 LT COL HORNE: And, sir, I'd say the
16 same for the Air Force. We have -- also have
17 eight defense investigator positions, two at each
18 of our conus district locations, one at -- two at
19 Travis, two in San Antonio, and two at Langley,
20 and then we have one each at our European circuit
21 and our Pacific circuit.

22 And same thing, no real measurable

1 objectives that we can say yes, they're
2 successful, but we have received reports from the
3 field that our defense counsel, our senior
4 litigators are very happy with the services that
5 the defense investigators are providing. They
6 are, much like my colleagues from the Navy and
7 the Army, our defense investigators are providing
8 information that defense counsel have not had
9 before. They're providing mentorship to our
10 counsel to lead them down the right track. So
11 we're seeing great success from our defense
12 investigator program.

13 CDR ROBERTS: Thankfully, the Navy's
14 kind enough to use their defense investigators
15 for Coast Guard cases, and our plan is to
16 request, through future fiscal years, support to
17 the Navy for augmenting their defense
18 investigator program.

19 COL VAUGHN: So on the Marine Corps
20 side, we have four defense investigators at this
21 time. That was part of the recent table of
22 organization change request that went down in the

1 last two years. Business rule says you won't
2 come back to the well for two more years after
3 that, so we're utilizing the next two years to
4 try to evaluate how well those four investigators
5 are being utilized.

6 I echo the sentiments of Sean and
7 Brian about it should be extremely valuable, but
8 quantifying that in tangible data sets is
9 somewhat challenging. But I also think the
10 business model, how we use them, has to refine -
11 - we historically were using a poll model. You
12 know, when a trial defense counsel would contact
13 an investigator for help, then they would get
14 help. And we said that's wonderful except the
15 defense counsel doesn't know what they don't
16 know, and so we've changed it to a push model
17 where we're mandating the defense investigators
18 be contacted and engaged early and often
19 similarly with the attorney advisors pushing them
20 down to the defense counsel because the defense
21 counsels are their own worst enemy because they
22 believe they're great, and they are, but they

1 don't know what they don't know. And so we have
2 to help them become greater at what they do
3 pushing the resources down.

4 And then going back to what I
5 discussed earlier, I no longer utilize them
6 regionally. I'm starting to pull my attorney
7 advisors, my investigators, and sending them
8 globally and similar with detailing where the
9 best counsel is maybe the one on detail to the
10 most capital-related type case in order to draw
11 the benefit of the experience, not relying solely
12 on what's locally available.

13 VICE CHAIR SCHWENK: Jen. Jen Long.

14 MS. LONG: Thank you, General Schwenk.
15 Just a comment before I ask my question, and I
16 want to apologize. I think there's some
17 feedback. First of all, on the measures, I
18 really do appreciate everyone mentioning the
19 measures. And I would just offer process
20 measures as a way of capturing methodology that
21 outcome measures don't get that you might be able
22 to get data to at least talk about the process

1 that people are doing like the redirecting. I
2 know it can be challenging, maybe even
3 controversial for the research, but I think it
4 can be helpful in capturing what you're looking
5 for.

6 My question was on the plan for
7 filling -- I don't want to say filling the
8 billets but is a -- is there a plan in place, or
9 do you feel like there is an issue with
10 recruiting people generally to defense or
11 criminal justice, in -- in the different
12 services? Or is it -- are you just relying on
13 staff and there aren't enough staff and you're
14 just going to have to make do until the budgets
15 or whatever can support the personnel? (Audio
16 interference) there a possibility of trying to
17 recruit and get the numbers that you need?

18 COL MCGARRY: In the Army, we do have
19 -- we call them talent -- Bench Builders
20 (phonetic), talent management. We have it in
21 all of our functional areas. We have one overall
22 for military justice, and then we are also active

1 on our own within trial defense. I think we are
2 -- we are pretty good about generating interest,
3 in fact almost too good. The issue, I guess, is
4 when we have to have somebody move on to their
5 next assignment, sometimes there's bad feelings
6 because they feel like they're being discarded,
7 they want -- this is what I want to do. And you
8 have to explain to them there are other things in
9 our practice, and when you go through other
10 aspects of our practice, it makes you a better
11 practitioner.

12 And so we generally don't have
13 problems, at least initially, bringing people in.
14 Sometimes as you are more senior, the field grade
15 ranks, they look at things different just in
16 promotion rates. And there is greater concern
17 attracting people to some of those other more
18 senior positions. But at the company grade, we
19 don't have any problem at all.

20 CAPT KORN: We have no concerns about
21 recruiting Navy lieutenants into interest in
22 military justice or interest in defense. We have

1 lots of people who want to come to defense
2 billets, and we have lots of junior officers who
3 want to go into the military justice litigation
4 track in the Navy, so not a problem there at all.

5 From a more systematic recruiting
6 perspective, I think the military justice track
7 in the Navy would probably be healthier if we
8 were able -- if we recruited more experienced
9 litigators who had prosecution and defense
10 experience in the civilian world before coming
11 into the JAG Corps as opposed to most of our new
12 accessions are coming straight out of law school.
13 So that would certainly be advantageous and build
14 the experience level overall.

15 But the truth is, we have probably
16 more folks who are interested in doing military
17 justice and more folks who are interested in
18 doing defense than we have cases for them to try.

19 COL VAUGHN: I won't try to bore you
20 with the back side of manpower management and how
21 the sausage is made, but I will say the military
22 justice reform growth and structure across the

1 Marine Corps, it's taking us time to get there.
2 You created a structure of a major or lieutenant
3 colonel. Well, you have to grow that person over
4 time and -- to fill it, because right now across
5 the Marine Corps, regardless of specialty,
6 there's more jobs than there are humans, and
7 that's a reality of every MOS, military
8 occupational specialty.

9 But I think when you get just into our
10 occupational field, just the lawyers -- I sat on
11 the recent assignments board with the Judge
12 Advocate Division where we went through every
13 billet, and we were debating which ones are we
14 going to fill. The accepted positions, those
15 that we are required to fill with military
16 justice, and we weighted those, that left a lot
17 of positions in the Marine Corps on the Judge
18 Advocate community side unfilled, because there
19 are just not enough judge advocates. So this
20 comes at a cost.

21 I think the services doing right by
22 continuation accession programs, bonuses,

1 retention, recruiting. I'm even doing some
2 recruiting efforts, writ large, at the Naval
3 Academy and at some of the law schools to try to
4 promote not just litigation but the Marine Corps,
5 because I think the service needs help bringing
6 in the right people to fill out all the jobs we
7 have. Once they're on board and with the
8 service, they all want to do litigation and much
9 like what Sean said, they don't want to leave
10 defense once we get them into defense. So I
11 don't see that as a challenge at all.

12 LT. COL HORNE: In the Air Force, we
13 recently instituted the Career Litigation
14 Development Program which is a program that
15 allows individuals from their first assignment to
16 identify themselves, I want to be a litigator.
17 Colonel Landry, who will be speaking to you all a
18 little later, and I participated in the Air
19 Force's COVP Crew Litigation Development Program
20 state assignments over the past Fall, and looking
21 through those, you can see recommendations from
22 individual staff judge advocates, some of the

1 judges that they practice in front of about where
2 this person fits as a litigator, what stage
3 should they be assigned, stage one up to stage
4 five. And many of those COVP nomination forms
5 stated that individuals want to be involved in
6 the defense community, they want to be a base
7 level area defense counsel and in the future,
8 they see themselves as a senior defense counsel
9 and a senior litigator.

10 We utilize those nominations to sort
11 of highlight folks who would like to step into
12 the defense community, and we've had no problems
13 filling billets, matching names to billets, and
14 getting folks we need to mount a good defense for
15 our clients.

16 CDR ROBERTS: The Coast Guard has had
17 a lot of challenges with recruiting judge
18 advocates. Most people who join the Coast Guard
19 judge advocate program aren't looking to do a
20 career in military justice just because you're
21 not going to get a lot of experience doing it.
22 We're a very small service. Our courts-martial

1 usually hover around double digits, and by double
2 digits, I mean a one in front of a tens place.

3 But we've had actually probably better
4 luck bringing judge advocates in from other
5 services into the Coast Guard than from civilian
6 ranks just because once they're in the DoD, then
7 they hear about the Coast Guard, and they say,
8 oh, I never knew that service existed, that
9 sounds way better. And so -

10 (Laughter.)

11 We -- I mean there are a host of
12 reasons why the Coast Guard has problems
13 recruiting, which I think first and foremost, is
14 we just -- we just don't have the recruiting
15 budget, we don't have the recruiting program to
16 go out and visit schools. We're really treading
17 on just the name of the Coast Guard which, like I
18 said, is not well known.

19 So we have had people who have been in
20 the judge advocate program who want to get more
21 military justice experience leave the Coast Guard
22 to actually join the DoD. We've had at least one

1 officer over the past three years do that.

2 So it is a challenge to bring people
3 into the Coast Guard to build that experience.
4 We haven't had problems bringing -- when we have
5 the judge advocates, they want to do the defense
6 tour, and there's a number of reasons for that.
7 There's -- it's a joint opportunity rather than
8 doing it locally with the Coast Guard. And with
9 that comes just the understanding that the Navy
10 does it well. The Coast Guard doesn't have that
11 organic structure where we've -- we built a
12 pipeline of expertise. And so for those who want
13 to get that experience, they know that the best
14 place to start is going to be with the Navy.

15 And now we start to see some of the
16 judge advocates want to take on more of that
17 leadership role and building their profile as
18 litigators. We've had judge advocates go from
19 the Defense Service offices into the OCP Trial
20 Counsel shops. Not too many the other way where
21 we've had prosecutors go into the defense office.
22 One or two have done so, but we're starting to

1 see more, I think, move from their first military
2 justice assignment being a Defense Service tour
3 and they're not moving into the OCP role.

4 VICE CHAIR SCHWENK: Cassia.

5 DR. SPOHN: So shifting gears just a
6 little bit to the topic of conviction integrity
7 units, which are a relatively recent innovation
8 in the civilian justice system. So these are
9 units that address claims of actual innocence
10 based on problems with discovery, or misconduct
11 on the part of investigators or prosecutors,
12 newly discovered evidence and so on.

13 So it's a two-part question. First,
14 do you think that there is a need for these types
15 of units in the military justice system? And
16 then second, do you think it would be feasible to
17 set something up like that in your service?

18 COL MCGARRY: So from my perspective
19 with the Army, I don't think those are bad
20 things. I think in general, anything that helps
21 to ensure the fairness in the military justice
22 system is a good thing. You know, we have, as

1 you know, other systems. We have -- part of that
2 function is addressed by the appellate courts.

3 My personal issue or concern with it
4 is the level of resource intensiveness that
5 setting something like that would entail. And
6 it's my personal feelings. We talked about
7 bandwidth. We talked about resourcing not just
8 in the military justice enterprise but with a
9 trial defense organization, but within the
10 service overall filling all of our billets, I
11 would rather see those resources applied to what
12 we have currently rather than set up something --

13 DR. SPOHN: Something new.

14 COL McGARRY: -- new that we do
15 address, at least in part, for our analysis.

16 CAPT KORN: Yes. I concur with that.
17 I mean is there a need? If one person is
18 wrongfully convicted, then there's a need, but is
19 there -- you know, is that a dire need, and is
20 that need worth the resources it would require?
21 Very hard to say. I feel as though because of
22 the ability of our appellate courts to review for

1 factual sufficiency, there is much less of a need
2 than there is in the civilian world.

3 With regards to feasibility, we are
4 not trying a great number of cases, so that
5 probably says that it would be relatively
6 feasible to have a conviction integrity unit,
7 because we don't have that many convictions to
8 review. So I mean my opinion is I'm in favor of
9 anything that prevents people from being
10 wrongfully convicted or fixes the problem if they
11 are. I just -- I don't know that -- you know, to
12 put it -- that the juice would be worth the
13 squeeze in this situation.

14 DR. SPOHN: Thank you.

15 COL VAUGHN: Okay. Building off of
16 Brian's comment, I think the State of New York
17 uses factual sufficiency and is the leader in
18 exonerations nationwide due to the involvement of
19 its CIU units. I think our appellate system
20 assumes that role in a comparable sense. I agree
21 with Brian that, you know, one case could
22 justify, but it comes at a cost. And I think the

1 risk and the cost to manpower and the services
2 writ large, I'm not sure is outweighed here by
3 the benefit given what we already have in place
4 as protections.

5 But then to a side part of your
6 question, you said at the services. I would
7 advocate if there is such a unit established,
8 it's at the DoD level, at the appellate court
9 level echelon, not at the trial service, trial
10 defense services, or even appellate levels within
11 the Services, cause I think you'll create that
12 fracture side that we're talking about of
13 resource demand signals and issues and concerns.
14 I think it needs to be independent at the OSD
15 type echelon for review of courts. But again, I
16 think that comes at a cost, and I'm not sure it's
17 warranted at this time.

18 LT. COL HORNE: For the Air Force
19 Trial Defense Division, we don't know necessarily
20 there's a need for conviction integrity units.
21 Much like Captain Korn said, we're always
22 concerned. You know, if one person's wrongfully

1 convicted, that's one too many.

2 However, we are somewhat concerned
3 with -- or we know that some of the safety nets
4 that were previously present in the military
5 justice system have sort of been reduced. When
6 we're talking about the preliminary power of the
7 convening authority to grant clemency, the
8 changing standard of factual sufficiency review,
9 the change in relief available upon showing,
10 apparent unlawful command influence, those safety
11 nets have somewhat been taken away and given less
12 power to correct situations in this manner. So
13 again, we don't see the need, but we do see some
14 of these other safety nets that are in place
15 being reduced.

16 The feasibility of a conviction
17 integrity unit, I echo my colleagues here who
18 were discussing the resourcing. We don't have
19 these. Well, that would be giving resources that
20 we currently have.

21 DR. SPOHN: Thank you.

22 CDR ROBERTS: I agree with my

1 colleagues and I have nothing more to add.

2 DR. SPOHN: Thank you.

3 JUDGE WALTON: One of the other
4 concerns I heard expressed was not only by
5 defense counsel but also prosecutors is
6 availability or accessibility to expert witness
7 services. Do you perceive that as a deficiency?

8 COL McGARRY: In the Army, I don't
9 think we see that as a major issue, sir. I mean
10 I think we had -- we did have, as we went through
11 this last round of MRE, RCM revisions, an issue
12 with the 703 and sharing on your case synopsis
13 for an expert is on the resident -- on the
14 defense side. But we have addressed that with an
15 additional resource and have an additional
16 litigation policy that should -- knows that small
17 universal of cases where defense counsel wants an
18 expert but does not, for whatever reason, does
19 not want to disclose the reason why, we are able
20 to resource that independently from 703. So that
21 was a long answer to say I don't think we see it
22 as a huge issue now.

1 CAPT KORN: I think there is a
2 tremendous need for defense to have independent
3 funding to fund their own experts without having
4 to go through either the government or the Court.
5 So that has been going on for a few years now,
6 and it is budgeted for FY26 for the Navy at
7 least. I think it's really critical that we
8 continue to fund the independent defense funding
9 so that Navy defense counsel and all defense
10 counsel have the ability to properly research and
11 staff the defense team, research the case and
12 staff the defense team independent of going
13 through the government.

14 COL VAUGHN: I think the maturation of
15 the independent litigation resources continues.
16 On the Marine Corps side, by policy, we curtailed
17 its utilization, I argue overly restrictively,
18 and we're working with the SJA to the Commandant
19 to cancel that policy and give back broader
20 authority under the 549 Delta provisions of the
21 NDAA to give greater latitude to the defense in
22 how it uses the resources, not just at trial, but

1 really pretrial, post-trial, whether
2 investigative, experts. We had a recent example
3 where there is an exception to policy that we
4 were approved to utilize an expert in pretrial
5 proceedings that resulted in a judge commenting,
6 it's amazing when the defense brings evidence to
7 pretrial motions. They go remarkably well. You
8 know, anecdotal but I think to the point that we
9 do need independent resources. It needs to be
10 allowed to be controlled by the defense.

11 I think one of the challenges right
12 now, it's an unknown value. You know, most of us
13 understand the checkbook and I know what my --
14 how much money is in the checkbook. The Services
15 right now are still working through what that
16 looks like, and so there's no real -- I'm not
17 managing to a number such that I'm making
18 decisions. I'm going to the well every time
19 hoping that there's money in there. I think we
20 need to get back to managing to payroll in a
21 sense relative to what we need, what we expect
22 recognizing litigation oftentimes comes up out of

1 the blue and you don't -- you can't plan for that
2 very well. But there are baselines and
3 historical norms that we could point to to start
4 budgeting ourselves and managing it more
5 effectively.

6 LT. COL HORNE: In the Air Force,
7 while we don't have independent funding for
8 expert witnesses, expert consultants, we do have
9 an independent function to the defense, is our
10 divisions that can essentially force the
11 government to pay for those at a discount. So it
12 would come through either one of our chief
13 district defense counsel or myself requesting the
14 expert and consulting witness be appointed and
15 employed for them.

16 And then we will essentially review
17 that request in accordance with case laws,
18 approve it or deny it. And if we approve it,
19 then we send that information to the convening
20 authority who will be responsible for funding
21 that. And then they're obligated to fund it
22 based on our approval.

1 So through that process, the
2 government, trial counsel doesn't come to
3 understand anything about the defense's synopsis
4 of the request or why they need the expert.
5 That's kept completely within defense channels.
6 But the convening authority knows that he or she
7 has to pay for it.

8 CDR ROBERTS: Yes. The Coast Guard
9 still operates with -- basically within the RCMs
10 where most of the time, almost all of the time
11 we're making the request to the convening
12 authority or to the military judge. We haven't
13 really -- I haven't received any reports that
14 experts are being denied, but at the same time,
15 the Coast Guard, at least for the last fiscal
16 year, was able to provide some money to the Navy
17 as part of the independent defense fund.
18 Hopefully, we'll be able to do that once we get a
19 new budget, being able to continue resolution
20 we're not able to do that.

21 VICE CHAIR SCHWENK: Suzanne.

22 MS. GOLDBERG: Two things. One, we've

1 asked you a number of questions about defense
2 attorneys and their experience and manning and so
3 forth. Same questions about paralegal, defense
4 paralegals. We hear a lot about them in the
5 field and how valued they are, so it would be
6 interesting to hear your thoughts.

7 The part two is not really related,
8 but I'll just -- I would like to get it on the
9 table, which is we also heard a lot of commentary
10 about -- from both defense and trial counsel and
11 OSTC about the quality of government
12 investigators as opposed to defense investigators
13 and wonder if you can speak to that at all.

14 COL McGARRY: I don't -- ma'am, I
15 don't know that I'm in a position to talk about
16 government investigators so much. But on the
17 paralegal issue, I don't think we are alone that
18 we find paralegals extremely valuable, critical.
19 And in fact, when you talk about personnel and
20 bandwidth for attorneys, in the Army, we are
21 resourced very well by our Corps to include -- I
22 mentioned the 10 individuals, the complex defense

1 litigators across the circuits and the two at our
2 headquarters that are over strength so we -- or
3 if you count those authorized billets, we're over
4 100 percent for attorneys.

5 For paralegals, we have realized that
6 that is -- that's an area for improvement. We
7 are -- what we are currently authorized, our
8 manning documents, we're at 86 percent. But the
9 actual number is not sufficient for our workload.
10 So we have, you know, 28 out of 33 that are
11 authorized on TDS billets, and then we are
12 historically augmented with 44 additional
13 military manpower, and we have 39 of those, so 78
14 total for TDS. So it's -- I think they're at
15 like a 86 percent fill rate. But what we
16 determined -- we did this -- October, a year ago,
17 we completed a manpower study through the U.S.
18 Army Military Manpower Agency and it was
19 validated by our TJAG when we did full-time
20 equivalents workload requirements for what
21 taskings come through. And we determined our
22 actual demand signal is 137 paralegals. So that

1 would put us at the where we're closer to 48
2 percent.

3 And so our Army Tech Corps recognizes
4 that. They also recognize that while that has
5 been put into our total Army analysis process for
6 large Army growth, we are not -- the Army is not
7 unique. We're not really in an environment
8 that's conducive to the big growth, so we are
9 addressing it now in the short-term with
10 reallocation and just looking at where our
11 paralegals are in the military justice
12 enterprise, both government and defense, and
13 where we might be able to be more efficient with
14 what we have, and then for TDS, to get closer to
15 that 137. And in particular, the large number of
16 our military manpower paralegals, it's
17 problematic because those people -- cause they
18 don't belong to TDS. They belong to the
19 government offices, and they can be unilaterally
20 reassigned or changed or things that -- you don't
21 have control of the TDS office, and that is our
22 biggest resource in balance I think. But our

1 Corps recognizes that and we're in the process of
2 addressing that internally.

3 MS. GOLDBERG: Thank you.

4 CAPT KORN: Yes. I'll defer to
5 Admiral Stephens on the quality of the government
6 investigators. I can't really speak to that but
7 I'm sure he can talk about that --

8 MS. GOLDBERG: I'm sorry. I just want
9 to be clear. What I meant by investigators was
10 the first one -- the MCIO or whatever, those
11 investigative services, not special investigators
12 hired by trial counsel, independently hired or
13 additional investigation that takes place among
14 counsel, talking about the first-line
15 investigators. So that's probably --

16 CAPT KORN: So NCIS --

17 MS. GOLDBERG: -- who you were talking
18 about.

19 CAPT KORN: -- the CID --

20 MS. GOLDBERG: NCIS, yes. Thank you.

21 CAPT KORN: -- more so -- right. So
22 yes, NCIS obviously works closely with OSTC

1 counsel, and they can probably give you a better
2 feel --

3 MS. GOLDBERG: Okay.

4 CAPT KORN: -- or. But generally, I
5 would say that the quality of the investigations
6 that we ultimately receive are certainly good.
7 We use our own investigators and find more things
8 so not perfect, but they have a lot of cases to
9 investigate and do what they can with it.

10 As to the paralegals, certainly I'd
11 echo everything that Colonel McGarry said. We --
12 our defense billets, our defense counsel billets,
13 we are at 97 percent manning. Our paralegal
14 billets are at 82 percent manning, and they're
15 extremely effective. It would be helpful to be
16 fully manned. We utilize them. But much like we
17 spoke about earlier, I think maybe more important
18 than the manning itself is the experience level,
19 and we do see a lot of inexperience in our
20 paralegals at the defense and the trial level.
21 They're often new accessions, brand new legalmen
22 coming straight out of Naval Justice School.

1 I won't pretend to be an expert on
2 enlisted detailing. It's complicated and bottom
3 line, the JAG Corps doesn't control enlisted
4 detailing. The Navy controls enlisted detailing.
5 The JAG Corps controls officer detailing. So if
6 we need bodies in certain places, we can put the
7 officers there. It's more difficult to put the
8 legalmen there, but we're doing pretty well with
9 paralegal manning. We think they are critical.
10 We'd love to have more and have more experience,
11 but we do a good job with what we have, and I
12 think we are getting the job done with what we
13 have.

14 MS. GOLDBERG: Thank you.

15 COL VAUGHN: The Marine Corps is
16 staffed at 100 percent of our paralegals. We
17 have 88. There are, of course, multipliers of
18 great value. New -- coming back into the DCO now,
19 I think one of the challenges as I look at
20 reformulating the business model to a global firm
21 is also recognizing what actually needs to be
22 done in running an organization. I think the

1 focus on litigation becomes the bright shiny
2 thing in the room and you lose understanding of
3 what it means to have effective and efficient
4 management of an organization, performance
5 evaluations to training calendars to payroll to
6 travel, things that are not in the courtroom.
7 They are management. It's kind of the law office
8 management. You go to any major law firm and
9 they have people whose full-time job is law
10 office management.

11 Whether we call them paralegals or
12 admin support specialists, I'm kind of
13 indifferent to the title, but I do recognize
14 within our own formation that we have ignored the
15 management side of our formation significantly.
16 And so, as we try to reformulate the business
17 model, refine our processing procedures for such
18 and then looking at how we utilize all of our
19 people to get the most out them, because I think
20 all of them aiming towards the litigation lens
21 blinds us to maybe even the administrative law
22 side of the house, the admin seps or adverse

1 personnel actions to just the general management
2 side of things to include processing of
3 independent defense funds. That sounds great
4 until you realize the amount of paperwork that
5 goes into requesting and getting approval and
6 documenting and auditability of those types of
7 things, and I need people to do that. And so I
8 may end up in a situation where the title is
9 irrelevant to me, but I need people who do law
10 office management more.

11 LT. COL HORNE: In the Air Force our
12 defense paralegal billets are currently manned at
13 97 percent. So we're not seeing any issue there.
14 That percentage may vary from month to month,
15 given the PCS cycles. For officers we typically
16 fall in the summer PCS cycle, so that's when your
17 big rotation happens for defense counsel.

18 However, paralegals can move
19 throughout the year. They're not on any set
20 calendar for moving. So the percentage can ebb
21 and flow down to roughly 90 percent, but
22 typically around 95 percent, 97 percent manned.

1 This provides the paralegal support
2 that the defense counsels need to get their jobs
3 done. Echoing Colonel Vaughn here, the defense
4 paralegals also do a lot more than litigation
5 support in the Air Force. They are the loss
6 managers for the defense counsel office, managing
7 the budget, managing client intake, client
8 referrals when clients are referred out.

9 So we do look for experienced folks to
10 handle that. And the folks who come over are
11 typically individuals who have spent one or two
12 base-level assignments working in a legal office,
13 working in military justice before moving over
14 to a defense paralegal billet and aiding the
15 defense counsels to do their jobs.

16 CDR ROBERTS: The Coast Guard has no
17 defense counsel/paralegal billets. The defense
18 counsel assigns the defense service officers with
19 the Navy and are utilizing their paralegals. But
20 in the future, we are planning on making resource
21 proposals to augment the Navy's paralegal
22 program.

1 VICE CHAIR SCHWENK: Martha?

2 MS. BASHFORD: I just want to go back
3 to conviction integrity for a moment. I mean, in
4 civilian conviction integrity it often focuses on
5 who did it. And certainly in the military it
6 seems to be more of what happened, not who did
7 it.

8 Correct me if I'm wrong, I think
9 there's a three-year limit for newly discovered
10 evidence to be brought forward in the military.
11 And so what happens if, say, four years out, five
12 years out, there's recantations or witnesses
13 surface that couldn't be found at the time who
14 completely contradict the narrative that the
15 panel heard.

16 Is there a vehicle currently
17 available to a convicted offender who obtains
18 this type of evidence but past the three-year
19 limit?

20 CDR ROBERTS: Under the UCMJ, I don't
21 believe there is a mechanism. But I know that
22 Appellants have the option of seeking collateral

1 review in District Court. I've never seen any
2 case overturned through victory on collateral
3 review in a federal District Court, much like
4 what you had said about conviction integrity.

5 I mean, if it's an issue about who
6 done it, we're probably not going to see that.
7 If it's a recantation, again, I have yet to see a
8 case where that is in evidence that's come
9 forward, where an accused has, or an appellant
10 has wanted to bring that out of time.

11 LT. COL HORNE: My experience is the
12 same as Commander Roberts, ma'am. I have not
13 seen that evidence come up in any type of case. A
14 And I'm not aware of anything on the UCMJ that
15 allows relief past three or four years.

16 (Off-microphone comment.)

17 JUDGE WALTON: One of the issues we've
18 had raised by individuals who are minorities, and
19 prosecuting in the military justice system, which
20 is a problem we're experiencing in the civilian
21 world also. Because in D.C. we have a
22 significant issue now about the makeups of our

1 juries because of the demographics of the city
2 having changed drastically.

3 And as a result of that, we have
4 minority defendants who feel that they're not
5 getting a fair shake. Because the makeup of the
6 jury is not what they think it should be. And
7 we've heard the same thing in reference to the
8 military.

9 Do you perceive that there's a
10 perception among minority defendants that
11 they're not getting a fair shake because of the
12 makeup of the panels? And if that is an issue,
13 what could be done to address it?

14 COL VAUGHN: I don't have any specific
15 examples where that was raised, sir. I do know
16 in my time as a SJA, the changes to the convening
17 authority selection process are quite sterilized,
18 and they affect that you no longer can shape the
19 panels as you could 20, 30 years ago where the
20 convening authority by named every individual.
21 The process now sterilizes that.

22 But I also think it comes at a cost,

1 to your point where you're not able get diversity
2 on a panel, because if you're using an arithmetic
3 formula for selection of an individual, you know,
4 statistically many minority groups are not well
5 represented. So even using an algorithm you're
6 not going to get the right distribution.

7 And I use an example of BOIs where a
8 Navy side, there's a requirement that you have a
9 specialty type officer being sent to a BOI,
10 someone from their community must sit on the
11 panel, representational of that equity and
12 interest.

13 There were times as a convening
14 authority I advocated in minority cases that we
15 ensure that we have a fair representation of
16 minorities, male, female, race, religion, to
17 ensure fairness of the process. And I think that
18 meets challenges in today's system, because you
19 can no longer do that.

20 CAPT KORN: Yes, anecdotally the only
21 cases I'm aware of where accused have complained
22 about the makeup of the panel are the cases that

1 have made it up on appeal on that issue. So I've
2 just read the case law. I can't speak to
3 anything more than that.

4 True randomization of panels fixes a
5 problem. It fixes the problem of the convening
6 authority selecting the panel. But it doesn't fix
7 the problem of the makeup of the panel or what
8 the panel looks like.

9 And as Colonel Vaughn just said,
10 recent, I believe it's CAAF case law, says that a
11 commander can't even use race in sort of a
12 positive way. I'm trying to make the panel look
13 somewhat like the race of the accused. So I
14 don't have a solution for how to fix that.

15 I do think it is problem, and I'm
16 sure, even though I'm not aware of it, that there
17 is at least some feeling among accused that it is
18 a problem. I mean, I'm sure it must be, even if
19 it's not something that makes it to our level.

20 VICE CHAIR SCHWENK: A.J.?

21 MR. KRAMER: Can I ask you, it sounds
22 like both paralegals and lawyers -- first of all,

1 thank you very much for coming. And, boy, I wish
2 in the civilian world I could say we were fully
3 staffed.

4 (Laughter.)

5 MR. KRAMER: But we don't have enough
6 people.

7 It sounds like paralegals and lawyers,
8 many of them, their first assignment is on the
9 defense side as opposed to the prosecutors who
10 are more experienced. And it sounds like,
11 especially in the Navy for some reason. I'm not
12 sure, and I'm sorry to single you out.

13 But why is it that defense, both
14 paralegals and lawyers, their first assignment is
15 defense whereas it seems like more experienced
16 folks go to prosecution?

17 CAPT KORN: Truthfully, it's not just
18 defense in the Navy. It tends to be in the Navy
19 that the more inexperienced counsel and the
20 paralegals will go to either defense or the
21 region legal service office prosecutors who are
22 general crimes prosecutors.

1 And then the more experienced -- and
2 I don't want to speak for paralegals going to
3 OSTC. I'm not quite sure about the experience
4 level of the paralegals going to OSTC.

5 But often folks who have gained
6 experience, either in defense or at the regional
7 legal service office, the, sort of, more general
8 crimes, will, in a second tour, go to OSTC. So I
9 don't think that defense is being singled out so
10 much as OSTC, for some statutory reasons,
11 requires more experienced folks.

12 On the paralegal side, it's often
13 because we send our more experienced paralegals
14 to our fleet billets to work for commanders, you
15 know, in non-JAG commands. And we're hesitant
16 to, like if the Navy has to send brand new legal
17 men to, you know, PACOM or PAC Fleet so they'll
18 come to a defense or prosecution office, get the
19 experience and then go to a ship or to an
20 operational billet.

21 COL VAUGHN: I would echo Brian's
22 point. I think on the Marine Corps side the

1 Trial Services Organization is probably very
2 comparable to the Defense Service Organization in
3 terms of the amount of first tour litigations
4 coming out of NJS. Or, you know, newly in the
5 litigation you're going to one of those two.

6 OSTC typically is the ones who are
7 being earmarked for plus 24 months of experience.
8 So they're getting a little bit more. I'm not
9 sure I'm a huge fan of that, but I also recognize
10 the utility of that given the disposition
11 authority given to OSTC.

12 I don't want to do the making the
13 disposition itself. I want somebody with
14 experience and understanding of litigation and
15 courts-martial to be in those roles. And so I'm
16 not totally opposed to the concept that OSTC gets
17 a little bit more seasoned.

18 We're working through ensuring enough
19 parity and experience level. And I think in our
20 assignments process, if I can get my middle
21 management in, my special defense counsel and my
22 senior defense counsel, how have enough

1 experience, I'm not concerned about the
2 implications of it.

3 MR. KRAMER: I'm sorry, can I ask --
4 so should there be something similar to OSTC in
5 the defense side, if they're going to have people
6 who are more experienced?

7 But what you say is a good thing, and
8 I understand that. And especially with sexual,
9 and I want to know how sexual harassment cases
10 are going to affect you folks. And especially
11 with them coming into OSTC, should there be
12 something similar to them on the defense side?

13 COL VAUGHN: So the statutory language
14 for DSO or for defense counsel is well as OSTC is
15 the same, highly skilled and competent in covered
16 offenses. I mean, I think that the congressional
17 mandate of skill is there. You know, we're still
18 running into the practical implications of I have
19 a force of this level, of this much experience,
20 and I must rotate them through.

21 I think one of the ways we're going
22 after that is what are the accepted must fill

1 billets. And right now OPTC has the wake of
2 those, but the DSO and the military justice
3 reforms has got -- many of our billets are coded
4 now as mandatory fill. So I'm filling gaps that
5 I never had before.

6 And I told you I'm at 108 percent. I
7 think I'm at 163 percent of newbie judge
8 advocates, 4402s. And that's a great number,
9 because they compensated the for its lack of
10 experience with more depth, okay. So there are
11 mitigation measures.

12 And I think coding the senior
13 specialty counsel, senior defense counsels in the
14 Marine Corps, allows me then to force-fill those
15 and ensure a parity of experience echelon. It
16 may not be in the courtroom, but echelon.

17 MR. KRAMER: Is the sexual harassment
18 -- are the sexual harassment cases going to
19 affect you and affect your staffing?

20 CAPT KORN: I don't think so. It's
21 possible. We could see an increase in referral
22 of charges. But it seems unlikely that we'd see

1 significantly more cases go to court-martial.

2 I think the average sort of standalone
3 sexual harassment case typically isn't the sort
4 of case that would make it to a court-martial,
5 quite possibly administrative separation, unless
6 it's, you know, paired with also sexual assault
7 charges or something like that.

8 So I think it could tax us somewhat on
9 the administrative side, more administrative
10 separations, but I think it's unlikely on the
11 court-martial side that we'll see much of an up-
12 tic.

13 MR. CASSARA: How long are the tours
14 for defense counsel these days? And do you see a
15 need for constantly changing that? Because
16 there's all these, you know, when I was a
17 litigator back in, you know, the dark ages, you
18 knew that once you got to be a field grade
19 officer, you'd never see a courtroom again. And
20 that's why a lot of people got out before they
21 became field grade officers.

22 And if we're doing two-year tours,

1 which I think should be standard for the Army, is
2 that correct?

3 COL MCGARRY: So now it's three-year
4 tours now --

5 MR. CASSARA: You're doing three now,
6 okay.

7 COL MCGARRY: -- but with the ability
8 to move at two.

9 MR. CASSARA: Okay.

10 COL MCGARRY: I understand there's a
11 variety of reasons why somebody might move their
12 --

13 MR. CASSARA: Sure.

14 COL MCGARRY: Family issues --

15 MR. CASSARA: Sure.

16 (Simultaneous speaking.)

17 COL MCGARRY: -- or a wellness issue.
18 Not everybody can have this kind of work day in,
19 day out, for that period of time --

20 MR. CASSARA: It's exhausting.

21 COL MCGARRY: -- not just volume, but
22 it's the type of work, you know, types of cases.

1 And --

2 MR. CASSARA: Well, I'm not trying
3 cases anymore, so --

4 (Simultaneous speaking.)

5 COL MCGARRY: And, you know, so maybe
6 lesser -- there's an aptitude identification, or
7 an interest, or we don't want to walk people in.
8 So from the Army's perspective we always like to
9 maximize our flexibility and try to minimize.

10 Well, we have guidelines for things
11 like assignment length. We like to have
12 flexibility. Because we are -- even though we
13 are the largest organization here, we're still
14 small enough and closely enough managed that we
15 can apply individual attention and individual
16 circumstances. But our starting point is three,
17 but we can move to two.

18 MR. CASSARA: Okay.

19 COL VAUGHN: On the Marine Corps side,
20 as part of the military justice reform we created
21 monitored command codes, MCCs, for every echelon
22 within the litigation families. That essentially

1 allows you to identify, from a manpower
2 perspective, an organization and what its manning
3 levels are. And it creates a demand signal on
4 the system to backfill.

5 When you get orders to a command, you
6 get orders for three years. You know, so
7 historically Marine judge advocates went to a law
8 center as per a three-year assignment. And we
9 just rotated you through jobs for two to three
10 years, depending on one year in legal assistance,
11 one year in defense, one year in trial.

12 Well, now that they are receiving
13 orders to my formation, they are three-year
14 orders. We're still working through an
15 assignments process that says well, wouldn't it
16 be nice at the two-year mark that you let them
17 go?

18 And my answer is not until I'm at 100
19 percent. I'm not letting anybody go. But I hear
20 you. And so I think Sean's point is valid, that
21 we need some flexibility. I think if you look
22 across all the services, the time and grade

1 requirements for each rank are shrinking.

2 And so you don't have as much time to
3 grow as a professional before you're looked at
4 for the next rank. And if they leave you in one
5 job exclusively for too long, it doesn't allow
6 you to grow as a person. It may allow you to
7 grow as a litigator, but not as an officer. And
8 so it becomes more and more challenging on
9 promotion boards to show diversity of experience,
10 diversity of background, diversity of an
11 evaluator.

12 You know, you get the one boss who
13 doesn't like you, and you're getting the same
14 report all the time. Sometimes it's good to move
15 on and let somebody else evaluate you so that you
16 can then show I am actually better than what the
17 individual thought I was.

18 So I think flexibility is key, but on
19 the Marine Corps side we're aiming for three
20 years, and we're willing to come off that if we
21 have to.

22 LT. COL HORNE: So in the Air Force

1 our area defense counsel assigned the certificate
2 to your assignment so folks come in. And that's
3 sort of the standard. They're going to be moving
4 at the 24-month mark. Some of those may be a
5 little bit sooner due to mission requirements or
6 whatever.

7 Very rarely will somebody stay longer
8 than two years. Where we may see that would be
9 somewhere like Germany where it comes to a three-
10 year assignment. For our senior defense counsel
11 positions, typically those are two to three year
12 assignments. Three years going into it, much
13 like Colonel Vaughn said, with the flexibility to
14 move folks at two years based on career needs,
15 personal needs, that type of thing, so typically
16 at least two years up to three.

17 CDR ROBERTS: Because the Coast Guard
18 defense billets are detached duty, external,
19 they're going to be two years. We have had some
20 members extend in a year, but it's very rare to
21 grant an extension in a detached duty assignment.

22 VICE CHAIR SCHWENK: Megan?

1 MS. TOKASH: Meghan Tokash, and I know
2 we only have four minutes, but this is something
3 that's not quite on script but more recent
4 events.

5 Specifically for you, Sean, so there's
6 the Task and Purpose article about 100 Army cases
7 being revived, brought back for a look from the
8 OSTC. So I'm wondering are you or are TDS
9 feeling the brunt of that?

10 And then are any of the other services
11 seeing that where your OSTCs are reviving cases,
12 recalling people to active duty?

13 COL MCGARRY: I - you caught me on my
14 back foot.

15 MS. TOKASH: Oh, I'm sorry.

16 COL MCGARRY: I'm not familiar with
17 that article. And I -- it has not come to my
18 office.

19 MS. TOKASH: Okay.

20 COL MCGARRY: So I don't know that
21 there is not some concern with that. But I guess
22 I am not aware of that.

1 MS. TOKASH: I'm just thinking in
2 terms of the pending wave of sexual harassment.
3 But, I think --

4 CAPT KORN: So I have not -- I did
5 read that article. I have not heard the same
6 thing happening on the Navy side. I wouldn't
7 expect that to happen. Certainly we would be in
8 some trouble if all of a sudden there was, you
9 know, 500 preferred cases coming up next month.

10 But I don't anticipate that happening.
11 And what I suspect, even on the Army side, is
12 most of those will not end up as preferred cases.
13 But I'm not anticipating that on our end.

14 MS. TOKASH: Got you.

15 COL VAUGHN: Yes, I don't anticipate
16 that on the Marine Corps side. I think, if
17 anything, historically Marine commanders took
18 more cases to trial than they probably should
19 have. As a former commander twice over, I know
20 that to be true. I think OSTC, if anything, will
21 be bringing that back into a more manageable
22 number. So I don't anticipate any surge.

1 LT. COL HORNE: I'm not aware of
2 anything like that in the Air Force.

3 CDR ROBERTS: Likewise anywhere in the
4 Coast Guard.

5 MS. TOKASH: Thank you.

6 VICE CHAIR SCHWENK: Jen, did you have
7 something?

8 DR. MARKOWITZ: You know what, most of
9 my questions have already been answered. So I
10 will not ask them --

11 (Simultaneous speaking.)

12 VICE CHAIR SCHWENK: Suzanne, two
13 minutes?

14 MS. GOLDBERG: The lightning round on
15 your clients access to mental health resources
16 and concerns related to MRE 513 or anything else.
17 I guess everybody has, like, 35 seconds --

18 (Laughter.)

19 MS. GOLDBERG: -- for this important
20 issue.

21 COL MCGARRY: I don't have anything
22 specific on 513, but just wellness in general.

1 And I'm very happy to -- I don't think the Army's
2 alone, but in the Army overall, and the JAG corps
3 in particular, wellness in particular, behavioral
4 health and mental health has become a focus item.

5 And so we try to -- we're very
6 deliberate about it's not just for clients but
7 also for counsel. We still recognize that
8 there's still a stigma associated with that. So
9 our goal is -- my number one goal is to get to
10 more normalization, to seek treatment for that
11 kind of concern should be the same as spraining
12 your ankle. That's an iterative process.

13 The way that we approach it is we
14 started it off in our mandatory initial training,
15 DC 101, a formal block. We also empower our
16 regional defense counsel to start organizational
17 training. The Army has a wellness coordinator
18 that works with both government and defense to
19 help tailor individual programs.

20 And then we push, through our RDC
21 programs, that counsel, because there's still
22 potentially a stigma with a lot of -- they're not

1 necessarily interested in looking into resources
2 for themselves. We characterize it as, we need
3 to do this for your clients. So you're familiar
4 with available resources before you get to the
5 point of crisis.

6 Because these things don't ever --
7 they never happen 9:00 to 5:00. They happen
8 after hours, late at night, you have a younger
9 defense counsel who may be feeling their lack of
10 experience. And they know that somebody's
11 wellbeing is on their shoulders. And they are
12 very aware that they're not qualified to do this,
13 but they want to help with issue identification
14 and available resources, so we make them go
15 through a familiarity process by just, here's a
16 list of resources that you could go to that are
17 all different. And when you have that crisis at
18 whatever hour, going to a website doesn't work.
19 So it is a big point of focus for us for both
20 clients and counsel.

21 MS. GOLDBERG: Thank you very much.

22 VICE CHAIR SCHWENK: Anybody else want

1 to add anything to that?

2 COL VAUGHN: I want to offer one --
3 there are three or four questions you had in the
4 pre-package about mental health. I would just
5 offer a caution that attorneys are not equipped
6 or suited well to do mental health stuff for
7 clients and trying to blend the two together in
8 combined settings or group counseling, I think,
9 is challenging.

10 And I would just caution that we don't
11 cross lines, and we keep lawyers doing lawyering,
12 mental health professionals doing mental health
13 professional stuff.

14 I understand they work in parallel,
15 especially because the individual experiencing
16 it, both from the military justice as well as the
17 mental health, it's one human. But where they
18 receive that help, I think, we need to keep
19 stratified.

20 VICE CHAIR SCHWENK: Okay, thank you
21 all very much for being here. And we appreciate
22 the comments. And we'll consider them as we

1 decide what nefarious ideas to come up with.

2 (Laughter.)

3 (Simultaneous speaking.)

4 VICE CHAIR SCHWENK: It's 2:15,
5 please, for everybody.

6 (Whereupon, the above-entitled matter
7 went off the record at 2:01 p.m. and resumed at
8 2:15 p.m.)

9 VICE CHAIR SCHWENK: All right. Good
10 afternoon, everybody. And we'll come back to
11 order.

12 Thank you guys for showing up. We
13 appreciate it. And we look forward to you
14 telling us all about the ins and the outs of the
15 wonderful world of the Office of the Special
16 Trial Counsel.

17 So, thank you for being here.

18 Lauren.

19 MS. TORCZYNSKI: Thank you, sir.

20 I'm pleased to welcome the Lead
21 Special Trial Counsel Office of the Army, Navy,
22 Marine Corps, and the Deputy Special Trial

1 Counsel of the Air Force, and the Deputy Chief
2 Prosecutor of the United States Coast Guard.

3 Prior to today all of the services
4 provided answers to the questions regarding their
5 operations of the last year, as well as their
6 perceptions of their independence and operations.

7 The DAC-IPAD members and staff really
8 appreciated your answers to those things, and
9 thank you very much for providing those answers.

10 We know how much work is going into
11 building and operating these offices. I'm here
12 today to speak to you on the specific topics
13 relevant to your operations. Thus far there have
14 been just two at the DAC-IPAD.

15 All of the speakers have got bios in
16 your folders. And you have the answers to the
17 questions I just spoke about in your read-ahead
18 materials.

19 So, I'm going to turn it over to the
20 lead special trial counsels and deputy lead
21 special trial counsels to introduce themselves.

22 BG KENNEBECK: Good afternoon. I'm

1 Brigadier General Chris Kennebeck, Lead Special
2 Counsel for the Army. I'm going to save opening
3 comments and jump into the questions rather than
4 provide any opening statements.

5 I'm happy to be here.

6 Does anybody have an opening statement
7 that you just can't wait to deliver?

8 (Laughter.)

9 RDML STEPHENS: Good afternoon. Thank
10 you for having us.

11 Rear Admiral Jon Stephens, Lead
12 Special Trial Counsel for the Navy.

13 BGEN WOODWARD: Good afternoon. Thank
14 you again for having us here. We look forward to
15 the discussion that's going to take place.

16 I'm Brigadier General Scott Woodward.
17 I am the Lead Special Trial Counsel for the
18 Marine Corps.

19 COL LANDRY: Colonel Brett Landry. I'm
20 Deputy Lead Special Trial Counsel for the Air
21 Force. My boss, unfortunately, came down ill
22 yesterday. And that would be Brigadier General

1 Christopher Brown. He apologizes for not being
2 able to be here today. But I look forward to
3 answering your questions.

4 BGEN WOODWARD: We've already kicked
5 him off the island.

6 CAPT GULLO: Good afternoon on behalf
7 of Admiral Dwyer, who is not sick.

8 (Laughter.)

9 CAPT GULLO: So, Captain Ben Gullo,
10 also Deputy Chief Prosecutor. And definitely
11 appreciate the opportunity to answer your
12 questions here today.

13 VICE CHAIR SCHWENK: Okay. So, we're
14 one year into this. And you guys have been doing
15 your regular assessments. And everything's
16 wonderful as it is.

17 What do you see as the major challenge
18 that you are facing going into year two?

19 BG KENNEBECK: I'll start.

20 We've seen more domestic violence.
21 We've seen more domestic violence than I think we
22 anticipated when we built this organization in

1 2021.

2 I don't think it's because there are
3 more offenses happening. I think it's because we
4 are seeing them better and we are taking them
5 more seriously. And I don't mean that in a
6 disparaging way. I think that, you know,
7 understanding what the legality is, understanding
8 how you react to these types of cases impacts how
9 they're managed.

10 And greater training focus has allowed
11 us to spend more time with those cases. And
12 that, of course, adds to our workload in a way
13 that maybe was unexpected.

14 Number two, I think this is culture
15 change for our, for our military justice
16 practice. We have two entities basically looking
17 at every case together. We've had covered
18 offenses where special trial counsel are looking
19 at the offenses. So is the command and the staff
20 judge advocate looking at it if they have an
21 interest in that case as well.

22 It's not the most efficient. We're

1 trying to make it as efficient as you can is very
2 important. And at best makes it difficult to
3 assess resource needs.

4 We haven't fully refined the
5 efficiencies on the ground of those two teams
6 working together. And I think that's part of the
7 challenge.

8 Those are the two observations I would
9 make after a year.

10 VICE CHAIR SCHWENK: Thank you.

11 Jon?

12 RDML STEPHENS: Well, for us it's
13 similar on the domestic violence. I mean, I
14 think everybody anticipated that it would be a
15 lift. It's just been a bit heavier lift than we
16 also anticipated. And again, it was because
17 those were cases that weren't traditionally
18 coming through the respective trial offices.

19 And so, when we planned staffing, the
20 numbers we estimated we just didn't have a good
21 feel for them. And so, I think we've been able
22 to assess that. And I'm sure we'll get to that

1 later

2 But, so then drawing on that is also
3 the addition of sexual harassments. We have a
4 similar concern. We have some, I think, a little
5 bit more fidelity on some of the numbers. But I
6 expect that those numbers are at the baseline and
7 they're going to go up.

8 So, then you have to be ready to
9 manage that in addition to the cases now, moving
10 forward with sexual harassment.

11 So, I think that's the biggest two
12 kind of things that we've seen in the first 13
13 months now.

14 VICE CHAIR SCHWENK: Thank you.

15 Woody?

16 BGEN WOODWARD: Sir, you're going to
17 hear the same repeat here on the two major
18 topics, but I have a little bit of difference and
19 on both of them.

20 First, the domestic violence,
21 absolutely we're not, did not -- we planned for
22 what we knew, with a little bonus for what we

1 knew that we didn't know. But we really didn't
2 know was that there were a lot more incidences of
3 domestic violence than were ever being not just
4 making it to the law centers, but that were
5 actually making it into a commander for the
6 commander's attention.

7 So, those were folks coming in, self-
8 enrolled or whatnot into the different programs,
9 and that not making it over to the commanders
10 because they wanted to, to fix the problem.

11 That, we have made the inroads now so that with
12 those different stakeholders where those reports
13 are making it in to us.

14 The other thing is the, I would say,
15 the habitual intentional engagement of our local
16 law enforcement, not just our, you know, military
17 criminal investigative offices, but are actually
18 in the areas where we are located, engaging at
19 those local District Attorneys' Offices, with the
20 Sheriff's Office, with the local police
21 departments.

22 Engaging with them because a lot of

1 times if Lance Corporal Smith on a Friday night,
2 you know, cold pops his spouse, there's a
3 domestic report that goes out. The local PD
4 picks them up, puts them in the hoosegow for the
5 48-hour hold. Monday morning they were back in
6 formation. Nobody ever knew.

7 So, those now, through those habitual
8 engagements, through the communications we've
9 established, those are coming up.

10 I guess if you look for it, it will
11 find you. But that's part of that, that domestic
12 violence.

13 The other piece for me, or at least
14 for the Marine Corps on the domestic violence
15 piece is we do not have a dedicated criminal
16 investigative office to investigate domestic
17 violence. NCIS, for the Department of the Navy,
18 they will investigate certain allegations of
19 domestic violence: strangulation, threats, those
20 type of things. But that's a smaller percentage
21 of the run-of-the-mill domestic violence, which
22 is, you know, a slap, a push, a punch, you know,

1 those types of instances that someone can go to
2 jail for.

3 And it is a Article 128(b) and can be
4 proven. But we have found that our special trial
5 counsel, you know, will ask for the investigator,
6 go to NCIS. Nope, doesn't meet our threshold.

7 Go to Marine Corps Criminal
8 Investigative Service. Well, it's off base, so
9 we can't get involved.

10 Local law enforcement, for those areas
11 where we don't have a good relationship, nope,
12 you're not having our stuff, if you just want to
13 fire them.

14 So, we have to go to the command and
15 ask the command to investigate.

16 So, you know, if you want to know what
17 you can do to help, help us get to a single NCIO
18 who is responsible for domestic violence case
19 investigation. We did it with sexual offenses.
20 I think we can do it with the domestic violence.

21 So, that's the domestic violence.

22 With the sexual harassment, I note

1 that the OSTC, the Marine Corps OSTC plan is for
2 sexual harassment it is to evaluate formal
3 substantiated complaints of sexual harassment.
4 That is Article 130 for sexual harassment. But
5 I'm not sure, we still don't have a Department of
6 Defense instruction. We still don't have a
7 SECNAV instruction.

8 We have the Marine Corps prohibited
9 activities order.

10 But all of those are at different
11 stages. And none of them, none of those base
12 foundation documents that we really need to know
13 what the overall process is, it just still isn't
14 there.

15 So, we are, our plans are all based
16 upon, you know, our crystal balls that we shook
17 up and said, okay, we think this is what it's
18 going to look like. I can tell you, we all have
19 plans for how we are going to address it, but
20 those plans may change as soon as the DODEA are
21 signed, or soon as the SECNAV instruction is
22 signed, or as soon as the MARADMIN comes out.

1 VICE CHAIR SCHWENK: When do you take
2 over those cases?

3 BGEN WOODWARD: 1 January 2025. And
4 for the Marine Corps, we are going to take -- we
5 are going to only exercise authority for those,
6 for those instances of sexual harassment wherein
7 the farthest back of the misconduct or the
8 allegation it makes up started 1 January 2025.
9 Otherwise, we have this hybrid of things going
10 on.

11 And also we're, again, a pretty small
12 organization and not built to quickly absorb
13 that. And, you know, if we -- I certainly don't
14 want, and I don't think they would be, Marine
15 Corps commanders kind of holding away their
16 substantiation decision, they're waiting for the
17 1st of January to come. So, so on 1st of January
18 they may hit the substantiation button so they
19 could put it off to someone else to take a look
20 at it.

21 But 1 January 2025 is when sexual
22 harassment becomes a covered offense.

1 VICE CHAIR SCHWENK: Colonel Landry?

2 COL LANDRY: Sir, given the magnitude
3 of the change to the military justice system that
4 was the standup of the Office of Special Trial
5 Counsel, I want to start by saying I think it's
6 going fairly well.

7 There are some areas that we certainly
8 have to improve that we've identified. Those are
9 areas that we believe we can improve within the
10 existing big picture policy framework when you're
11 talking statutory law.

12 So, my first point in regard to your
13 question, sir, would be that I think we need some
14 more time to continue to push those efficiencies,
15 get a true body of cases that through the trial
16 phase that fell under our exclusive authority
17 post 28 December 2023.

18 And then reevaluate before we circle
19 for, you know, do we really need to get under the
20 hood, not to be too cavalier about it, to tinker
21 with the foundation of what we're building.

22 Challenges, though. A couple of the

1 challenges we've seen -- to steal from General
2 Kennebeck -- is managing integration with command
3 legal offices. That, given command's continuing
4 interest in maintaining good order and discipline
5 that is something that we have at times struggled
6 with in terms of who is doing what at any given
7 time.

8 And our OSTC manning concept is based
9 upon integration with those command legal
10 offices, with the wing staff judge advocates'
11 offices, for the purpose of doing a lot of the
12 administrative work that I believe some of my
13 colleagues have brought under their umbrellas
14 within manning for OSTC.

15 And we've done that for a variety of
16 reasons. I'm happy to get into it if anyone's
17 interested. Mostly related to continuing to grow
18 the next generation of special trial counsel
19 within the Air Force. But, certainly, with the
20 large scale change that's involved with special
21 trial counsel making referral decisions,
22 sometimes that has resulted in initial confusion

1 over who's responsible for what in the pretrial
2 phase as things move to trial.

3 We haven't run into anything that's a
4 showstopper that we've been unable to overcome.
5 But we are still seeing some of those growing
6 pains being worked out as we move forward. And
7 that's something that I look forward to
8 continuing to work on during my time in this
9 organization.

10 VICE CHAIR SCHWENK: Thank you.

11 Captain Gullo?

12 CAPT GULLO: Thank you, sir. I'll
13 start by echoing Colonel Landry in the sense that
14 I think talk about the challenges that some
15 incredible things standing up with the Coast
16 Guard's Office of the Chief Prosecutor.

17 My background lends itself to this is
18 kind of my fourth job between Brooklyn, New York,
19 as a prosecutor, an Army JAG, DOJ prosecutor, and
20 then back to the Coast Guard somewhere in the
21 middle. So, just to see it kind of move toward a
22 civilian construct in many facets has been really

1 impressive.

2 And we have a lower volume of cases.
3 So, for us a couple of cases in a week is a big
4 deal. And this week we, in fact, have two cases
5 that we're taking pleas on.

6 And you're seeing it in the timelines
7 of the cases, you know, maybe 9 months is shaved
8 into 5 or 6 months. And that means a lot to the
9 victims in terms of getting closure on cases.

10 So, I'm really impressed about how
11 we're moving forward and professionalizing.

12 In terms of the challenges, I put
13 three into our written response to this
14 committee. They kind of overlap with the rest of
15 the services.

16 I think the first is continuous
17 education of the fleet. We were ready for this.
18 You know, the rest of the services' people
19 weren't necessarily as ready for it. I have a
20 2-star general and a 1-star general. You
21 commanded units. And to sit across from him and
22 say, what do you mean, I don't have the authority

1 to do these things anymore, that's incredibly,
2 incredibly revolutionary.

3 And so, having to educate and then
4 reeducate our fleet on these new authorities has
5 been something that I think we'll get better over
6 time. You know, you have folks that PCS or
7 retire, and then the new ones just know what the
8 new system looks like.

9 But for the first year-and-a-half
10 Admiral Dwyer have been traveling a ton, which is
11 why he's not here today, to continue to remind
12 these general court-martial convening authorities
13 of the things that they still are responsible for
14 versus us. And that is a natural tension and
15 that's why we put it as our first challenge.

16 Infrastructure-wise, we were a little
17 different in the sense that my colleagues set up
18 shop here in Washington, D.C. We moved down to
19 Charleston, South Carolina, which is lovely, but
20 also presents -- yeah, I don't want anybody to
21 resent me -- but in all seriousness it is, it's
22 wonderful to set up a shop in new spaces. It's

1 also, from a deputy perspective, you start, you
2 know, having legal work and traditional executive
3 officer type stuff to stand up a new unit. And
4 those two things collide.

5 I think we're doing really well. We
6 just secured millions of dollars to construct a
7 state-of-the-art smart courtroom down there to
8 professionalize it more than, quite frankly,
9 creating a space like this and putting, you know,
10 a mock bench and a couple of tables and saying
11 go.

12 So, infrastructure I think was our
13 second challenge that we didn't anticipate how
14 much work that might have entailed deciding to
15 locate in Charleston.

16 From a staffing perspective, we're a
17 little different in the sense that our office is
18 responsible for all courts-martial, covered or
19 non-covered. So, the non-covered cases still get
20 worked through traditional convening authorities,
21 but then we're the sole clearinghouse for trying
22 the cases.

1 So, from a staffing perspective we
2 staffed to become fully operational for the
3 covered offenses in FY 24, but we didn't staff
4 to become fully operational for everything that
5 we've set out to do, which is make sure that
6 we're not just trying all the courts-martial but
7 we're attaching, essentially, legal advisors to
8 the service and legal offices to make sure that
9 they're doing the right things on your theft
10 case, or your drug case. You're collecting the
11 right evidence, you're interviewing the right
12 people, so that when it does come to us to try
13 it, we are better prepared to try it in an
14 expeditious manner.

15 So, staffing-wise we have some things
16 to do in the next couple years. And we've
17 submitted appropriate resource proposals for
18 that.

19 The fourth thing that's not in my memo
20 that is new, and I think this committee touched
21 on it in the last group, is vicarious trauma and
22 burnout.

1 And we all know it exists in this
2 business. And if you go to a prosecutor's
3 office, what you sign up for as a public
4 defender.

5 But most judge advocates I think if
6 you survey them say I expect to do one or two
7 tours as a military justice practitioner and then
8 move on. We're now asking them to do this full
9 time.

10 And so, we just received our climate
11 survey, our annual climate survey back, and we're
12 spiking in terms of stress and work/life balance.
13 So, I wasn't surprised to see in your site visits
14 where all these judge advocates and enlisted
15 personnel are seeing exactly the same thing,
16 which is hosted off the Office of Special Trial
17 Counsel down in Charleston.

18 And that was my first question to
19 everybody when they were down, and they echoed
20 the same.

21 So, it's a challenge. It's a
22 challenge that we all need to make sure that

1 we're monitoring closely, and we're giving people
2 what we can give them so that, so that they avoid
3 the burnout that comes with this job.

4 VICE CHAIR SCHWENK: Okay. Thank you
5 all very much.

6 Before we go and throw it open to
7 other people for questions, we had a question
8 this morning that none of us knew the answer to:
9 depositions.

10 So, is it true that depositions you
11 don't have the authority to do depositions in
12 covered cases?

13 RDML STEPHENS: I would say going again
14 to the book, it depends. So, I --

15 (Laughter.)

16 RDML STEPHENS: I think a lot of the,
17 so the statutory, there was the statutory
18 revision of 23 that said should provide OSTC
19 kind of take instead of the convening authority
20 for certain prosecutorial functions with respect
21 to depositions.

22 But then just because of bureaucracy

1 for changing the rules of court-martial they
2 didn't match up. So, sometimes they don't marry.

3 So, there was a change after the RCM
4 had been amended for the FY 22 NDAA. The
5 practical impact is it's very infrequent that we
6 do, at least on the Navy side, that depositions
7 become an issue. So, I think there's a bit of a,
8 there's a lack of agreement between the RCMs and
9 with the statutory intent. And we haven't had to
10 really go down that road yet.

11 But I don't think, you know, until the
12 RCMs catch up, if there were a judge who said we
13 need to go through the judiciary, that would
14 happen as it has always in the past.

15 BG KENNEBECK: And I would say if
16 special trial counsel needed a deposition and
17 needed GCMCA support to get it, we could get it.

18 So, I don't see any obstacles.

19 RDML STEPHENS: No. I do think --

20 BG KENNEBECK: I do think the rule
21 would be interpreted to provide it.

22 RDML STEPHENS: There's a lag. Just

1 because it was changing so much.

2 VICE CHAIR SCHWENK: Okay. They'll
3 catch up.

4 RDML STEPHENS: Right.

5 VICE CHAIR SCHWENK: Questions?

6 DR. MARKOWITZ: Thank you all for being
7 here.

8 So, we've already heard a lot about
9 domestic violence. So, I have a feeling that we
10 already know part of the answer to this.

11 But I would love for you all to talk
12 to us about what three or four offenses you all
13 are spending most of your time on in your
14 respective offices. And, Chris, start us off.

15 BG KENNEBECK: Abusive sexual contact,
16 domestic violence, and sexual assault.

17 RDML STEPHENS: It's the same for us.
18 I would say for us it's over the most recent
19 quarter the order was domestic violence, and then
20 abusive sexual contact and sexual assault were
21 even.

22 So, and the two of them, so domestic

1 violence, to go back to what I said at the
2 beginning, we just weren't expecting so 42
3 percent of our cases now are domestic violence.
4 And so, that 42 percent of our cases are either
5 abusive sexual contact or sexual assault. So,
6 those three make up roughly 85 percent of our
7 cases.

8 VICE CHAIR SCHWENK: When you say
9 cases, are you talking about the cases that you
10 assumed for responsibility for and still in the
11 investigative process? Or are you talking about
12 new referrals?

13 RDML STEPHENS: So, refer -- so, it's
14 the former, sir, only because we haven't had a
15 lot of time to get all the way through --

16 VICE CHAIR SCHWENK: Okay.

17 RDML STEPHENS: -- on some of those.
18 We did in the Navy, we did it a little
19 different. We assume authority over a lot of new
20 cases, roughly 900. And so, we were still
21 working through those cases.

22 But to answer your question, I'm

1 talking about the cases that we received in the
2 last, last quarter of the fiscal year. It was 42
3 percent sexual -- excuse me, domestic violence.
4 And then a combination 42 percent of the other
5 two offenses.

6 BGEN WOODWARD: And I'll say for cases
7 for me, for the Marine Corps, OSTC cases,
8 something that I have a special trial counsel who
9 is detailed to, whether it's investigation or
10 something we take over from the commander. But
11 that is, if I've got a special trial counsel who
12 is detailed, that is what I am considering a
13 case.

14 And that may be a case that we have
15 not actually exercised authority over because
16 there the pre-28 December allegations of covered
17 offenses that are still popping up, and will
18 continue to pop up, instead of exercise,
19 immediately exercising authority over those, what
20 we in the Marine Corps are doing are taking a
21 look at them and evaluating them against our
22 charging standard. And if it's something that

1 we, if it would meet our charging standard and
2 it's appropriate to handle in a criminal forum,
3 we will then exercise authority over it.

4 If not, if it doesn't meet our
5 charging standard or we don't believe it should
6 be settled in a criminal forum, administrative
7 more appropriate, we turn to, we just notify the
8 commander that we are declining to exercise our
9 authority over it. At least the commander, with
10 their full realm of military justice, you know,
11 their quiver is full. We haven't removed
12 anything from them on that.

13 So, but the three, right, there's
14 three. I like to group them into sexual
15 misconduct offenses. And that's the 120s, that's
16 the one -- the 117a, child porn, those types of
17 things.

18 And then for that, that's about 59
19 percent, anywhere from 57 to 59 percent over the,
20 over the last, at least this last quarter.

21 With regard to the next one, would be
22 domestic violence, which is about 30, 32, 33

1 percent.

2 And then everything else there's no,
3 for, you know, there's no real big third that
4 sticks out right now.

5 RDML STEPHENS: Much like the Navy, we
6 exercise wide discretionary authority once that
7 authority was given by Congress to reach back for
8 consistency purposes, take authority over cases
9 that were not near disposition decision, or
10 obviously where no disposition decision had been
11 made to that point.

12 Speaking only in terms of cases that
13 meet, that came on or after 28 December 2023, and
14 when I refer to cases I'll use a definition
15 slightly different than General Woodward, I'm
16 talking about any case that falls under our
17 authority, whether it's in the initial intake
18 triage process, what we call our investigation
19 prosecution support team process, in that we're
20 shepherding, helping, assisting investigators
21 through the case, or post-disposition.

22 What we've seen is pretty consistently

1 128b domestic violence being the number one
2 offense that we see, followed by sexual contact,
3 followed by sexual assault.

4 I would say that if you group together
5 the sexual misconduct offenses, 120, 120b, 120c,
6 and domestic violence, that would, added
7 together, make up probably somewhere just north
8 of 80 percent of the offenses that we have in our
9 queue at any given time, if you will. And very
10 similar with what was said in regard to the other
11 offenses that we see making up the other 20
12 percent.

13 DR. MARKOWITZ: And, I'm sorry, just a
14 clarification.

15 BGEN WOODWARD: Yes, ma'am.

16 DR. MARKOWITZ: General Woodward, you
17 said your 120b were about what percentage?

18 BGEN WOODWARD: No, so that's the 120,
19 the 128b, 120c, the sexual.

20 DR. MARKOWITZ: The sexual. Okay.

21 BGEN WOODWARD: I include, I'm just
22 grouping that altogether just to get a real feel

1 as to the, the difference in the victim side.

2 DR. MARKOWITZ: Okay. Thank you.

3 CAPT GULLO: To answer your question,
4 ma'am, so sexual assault is our number one,
5 domestic violence number two, and abusive sexual
6 contact is number three, in that order.

7 And then just as far as other metrics
8 I just got from my Pre-Litigation Division Chief,
9 about 70 -- this question about, you know, what
10 share of the offenses involve sexual misconduct,
11 and when you group 120s to 117a, and then a 134
12 for child pornography, that's about 75 percent of
13 our cases.

14 MS. GOLDBERG: Thank you very much for
15 being here.

16 There's certainly questions that you
17 might ask about deferrals. I want to focus on
18 one particular one, which is the question of what
19 guidance do you have or might you put in place
20 service-wide for, for your lawyers to give
21 advice, or views, or information to commanders
22 when they're sending a case back?

1 You know, when we were out in the
2 field we heard a, we heard a variety of
3 approaches. And wondering if you're aiming to
4 have some consistency in approach within your
5 branch and, if so, what that would be?

6 We also did, just for your awareness,
7 and you can read this in the notes on the site
8 visits, you know, heard an interest from
9 commanders in receiving information and guidance.

10 BGEN WOODWARD: I'll say from the
11 Marine Corps, because I think we're a little bit
12 different. I know we're a little bit different
13 than the Navy and the Coast Guard.

14 VICE CHAIR SCHWENK: Well, isn't that
15 shocking.

16 (Laughter.)

17 BGEN WOODWARD: It is shocking. You
18 put an independent-minded person in front of an
19 organization and they may do some independent
20 kind of things.

21 No, I'm also a very, you know, as an
22 appellate judge, military judge, you know, strict

1 constructionist kind of view of the law. What
2 does the law say? What are your authorities?

3 And knowing we're, at least for the
4 organization, word does that authority end. And
5 Congress is pretty clear, our authority ends when
6 we leave the criminal, the criminal forum.

7 I'm not an SJA. I'm not a staff judge
8 advocate. I am not a legal advisor to a
9 commander. The only commander that I advise -- I
10 really don't advise, I inform -- is the Secretary
11 of the Navy.

12 So, those commanders all have their
13 own staff judge advocates. So, when we make a
14 determination that we are going to either decline
15 to exercise authority over a pre-28 December
16 case, we'll tell them we're not, you know, we are
17 declining to exercise because it doesn't meet our
18 charging standard. We're declining to exercise
19 because it's more appropriate handled in a
20 criminal forum. Or we just decline to exercise.

21 That's code word for this is not what
22 you think it is.

1 The deferral, if we have -- for those
2 we have exercised authority over, or must
3 exercise authority over, those post-28 December
4 cases, kind of the same thing. When we defer,
5 when we just send it back to the commander, they
6 receive the deferral letter. We call it a 306
7 Alpha letter. It says this is deferred back to
8 you because no probable cause.

9 The allegation itself states an
10 allegation of a covered offense but there's no
11 probable cause.

12 There is probable, and then the next
13 one is there is probably cause but it doesn't
14 meet our charging standard.

15 And the next one is it meets our
16 charging standard but we believe it's more
17 appropriately handled in an administrative rather
18 than criminal forum.

19 Now, that's the written documentation
20 that goes back to them.

21 Those commanders we are continually,
22 as we are required to do, seeking the input from

1 the commanders before each, before each of those
2 decision points, those disposition decision
3 points. We make available to those commanders
4 and to the SJAs, their legal advisor, we are
5 making available to them the evidence in the case
6 through our discovery portal.

7 We're not spending hours, upon hours,
8 upon hours creating documents and summaries of an
9 investigation that we're saying we're not going
10 to handle. It's coming back to you.

11 And then we're also, and this is, this
12 is a me call, this is the lead special trial
13 counsel call, we're not advising commanders on
14 whether or not it should, this should be, you
15 know, it doesn't meet our charging standard but I
16 really think it needs, you know, preponderance of
17 the evidence so you can go. My recommendation is
18 you administratively separate.

19 They have a legal advisor. They have
20 a staff judge advocate who is the one with the
21 statutory responsibility, I might add, to do
22 that.

1 And the other thing is, those
2 documents that we're sending back to the
3 commanders about our dispositions -- and I see
4 Val in the back of the room back there, she's our
5 former Chief Defense Counsel in the Marine Corps
6 -- and I want to make sure that those who are the
7 subjects of those investigations, subjects of
8 those cases, that they had as well knew what was
9 happening and what the decision was.

10 And to have something if we return
11 something to the commander saying that there is
12 no probable cause for this, that because once we
13 send it back to the commander they can still
14 administratively separate if they want to, at
15 least provides something for them to say, okay,
16 OSTC looked at this, and this is the findings
17 from the OSTC.

18 So that, that's how we are, in the
19 Marine Corps are doing that. So, we are not
20 advising commanders. We're not SJAs. We are
21 criminal prosecutors invest -- we investigate, we
22 distill, we make a decision, and we either make

1 decision going back to the commander or we're,
2 we're in the courtroom litigating.

3 MS. GOLDBERG: Understood. And just a
4 brief question because this is the sort of
5 question you might have heard --

6 BGEN WOODWARD: Yeah.

7 MS. GOLDBERG: -- from various places
8 is, well, that is all true and you have also
9 spent a fair amount of time looking at this case,
10 and studying it and thinking about the evidence.
11 And it seems inefficient at least,
12 notwithstanding your other good points not to
13 show those views. And I assume you thought about
14 that, of course.

15 BGEN WOODWARD: I've thought about it.
16 I've heard that.

17 You're not the only one to voice
18 these, these concerns with us.

19 MS. GOLDBERG: I'm just sharing
20 questions that have been raised.

21 BGEN WOODWARD: Right, ma'am.

22 No, I under -- as a prior SJA I can,

1 especially with an SJA who does not have, is not
2 steeped with a military justice background, we
3 all Joe Schwenk I'm sure knows some, some of
4 those SJAs out there that you would not want --
5 they don't know what a Manual for Courts-Martial
6 is. They, you know, you work on a car with them,
7 right, or UCMJ. So, you don't want them doing a
8 military justice deep dive. They'll have a
9 deputy or whatever.

10 But there are some that you -- they
11 want to be spoon fed. And it's not our role to
12 spoon feed.

13 A) I don't have the time. Right? My
14 personnel don't have the time. They need to be
15 focused on investigating, evaluating, making
16 decisions. And for those that we charge in the
17 courtroom, doing that.

18 The commanders are getting the same
19 NCIS reports that we get. The commanders, their
20 SJAs, if they don't get them, they have it
21 available to them from the beginning of the, of
22 the case. As soon as we get that first ROI from

1 NCIS it's discovered to the defense.

2 If there is a subject who is pending
3 charge, who looks like we're going to go, we'll
4 engage and we'll get a defense counsel assigned.
5 But that commander at least has access to that.

6 So, an SJA has to do their job. I am
7 not going to relieve them of doing their job even
8 though it makes their ability, or they could do
9 their job more efficiently. Maybe my advice to
10 them is do your job more effectively. And if you
11 do it effectively, efficiency will come.

12 DR. SPOHN: Just a point of
13 clarification. If a case is deferred, is there
14 any mechanism for bringing it back to you?

15 BGEN WOODWARD: Yes, ma'am. There is.

16 If it is deferred, if we defer a case
17 because we believe it's most appropriately
18 handled in an administrative forum, a lot of
19 times we'll do a plea agreement to get it back.

20 And even if we don't do a plea
21 agreement to get it back, if it goes back and a
22 commander attempts to take those administrative

1 measures and the subject says I'm not going to
2 accept your non-judicial punishment, provide the
3 evidence has not substantially changed, we will
4 take, we will pull that back in process, process
5 in a court-martial.

6 I think most of us are pretty much on
7 the same planet. Yes, so, so there is that.

8 There's also we defer because it
9 didn't meet our charging standard. And then the
10 surprise witness from out of left field comes up,
11 or a forensic evidence exam comes back that has a
12 shocking, surprising something we did not
13 anticipate, and we had already made a decision to
14 defer, we can always reach over and pull that
15 back, exercise authority.

16 VICE CHAIR SCHWENK: What about the
17 rest of you guys?

18 BG KENNEBECK: I think I would say in
19 the Army we're lucky we are organized or
20 distributed and in all of our offenses we
21 typically have a trial counsel from the OSJA side
22 who's plugged in, I would say, as the covered

1 offense is being investigated, investigated to
2 pursue. And there's a conversation.

3 So, when it's deferred there is
4 generally an understanding of why it was
5 deferred. And it's a common understanding
6 between the two parties.

7 So, when it is deferred and over, the
8 trial counsel who advises the command has the
9 same understanding as the special trial counsel,
10 know what all the facts are. And then there
11 usually is a discussion about what if we offer
12 this person an Article 15, let's say for assault.
13 It's not, we can't prove DV, we can't prove
14 domestic violence, so we're going to just do an
15 Article 15 for assault.

16 If they turn that down, what are you
17 going to do, special trial counsel? Will you
18 take it back and take this through court-martial?
19 That conversation needs to be had then. And that
20 is what we're doing in the field to the greatest
21 extent practicable, you know, for -- you can't do
22 that, I mean we're at over 7000 cases we're

1 looking at so far in this 12 months.

2 So, I'm not going to claim perfection.
3 But especially in the serious offenses we're
4 having a very good understanding of what it means
5 when we defer and why we deferred. What options
6 will exist on the backside.

7 RDML STEPHENS: So, we have a form,
8 just a standardized form, right. So, we --

9 MS. GOLDBERG: Very good. Forms are
10 good.

11 RDML STEPHENS: I can, yeah, I could
12 use a form today.

13 And so it's a 2-page but it has kind
14 of the same thing. So, we'll go through. If
15 it's, especially if it's a notify that we're
16 going to refer the case, it's not a big deal. We
17 send them an email we're going to refer the
18 charges. And we're working with them. That
19 shouldn't be a surprise to them.

20 Again, it shouldn't be a surprise if
21 we're doing to defer. But we have kind of a
22 checkbox to kind of standardize and make it a

1 little easier and efficient.

2 So, you know, insufficient to
3 establish probable cause.

4 Evidence is insufficient to obtain and
5 sustain a conviction.

6 The victim has declined.

7 The suspects, sometimes it comes out
8 that the suspect has since left the military to
9 civilian.

10 Or sometimes it's the nature of the
11 offense we feel lacks the severity to warrant a
12 court-martial.

13 So those are, those are checkboxed,
14 and we send back to the commander.

15 I had similar discussions with SJAs in
16 the field. I found it interesting to me, the
17 SJAs were the ones who didn't want me to give
18 advice. The commanders did.

19 And so, my take was I'm going to give
20 advice just to the extent we have a block on our
21 form. If we do recommend NJP, we're going to
22 write that. And then they know that if, if they

1 want to come back if they were to do a refusal,
2 we will take the case.

3 Again, our advice is, just like -- and
4 maybe this is back to my time as a judge -- I
5 want to have all the information I can to make a
6 decision. And so, when I say advise, we've done
7 all the work. We're just checking a box that we
8 think it meets the standard and recommend X. Now
9 you and your SJA do whatever it is that you want
10 to do.

11 To your point about wasting time
12 starting over, we made an offer and we went
13 around training everybody that, you know, we've
14 done proof matrices before we decided what to do.
15 And so, you can have all of it if you want it.

16 So, some SJAs ask us for it. And some
17 SJAs feel like they don't want us to, and they
18 don't ask us for it. To a person the commanders
19 always said they would want it if they knew about
20 it. So, we told them that we have it.

21 And, again, that doesn't mean we were
22 right. They just have all of the information

1 that they want, and then they make a decision.

2 The same thing is we're not tracking
3 the decisions. One we've deferred, unless new
4 evidence comes up or there is a refusal, and then
5 we will, we will handle that.

6 But so, we are informing them why we
7 deferred and telling them if we feel an NJP's
8 appropriate we are making, or adsep, we're making
9 that as a recommendation, then the commanders
10 with their SJAs can do with that what they see
11 fit.

12 COL LANDRY: We're very, very similar
13 to the Army in that our integration should
14 resolve, Ms. Goldberg, what you mentioned a few
15 minutes ago, the idea of two completely separate
16 processes. Obviously, we are making that initial
17 disposition decision, but that base-level counsel
18 should be, or the command counsel should be
19 incorporated into that decision-making process so
20 that command input is fully accounted for through
21 that and then through direct communication with
22 command, when appropriate.

1 So, that cuts out the need, I think,
2 for a separate advice to be given or a long
3 explanation as to why a case was deferred when a
4 case is deferred. Although we certainly have
5 those same conversations in terms of if an NJP is
6 offered and there is a turn-down, we will be
7 willing to revisit based on the state of the
8 evidence.

9 And, finally, we do not do one of the
10 things that General Brown has been very
11 forthright about, similar to General Woodward, is
12 we don't do contingent deferrals, if you will.
13 You know, we're going to give you the case
14 contingent upon some action being taken for the
15 exact same reason General Woodward said, that the
16 statute's pretty clear, here's where our
17 authority ends. And we should not be
18 overstepping that aggressively.

19 So, happy to provide advice when asked
20 for should it be necessary based on integration.
21 And once it leaves us, it's up to command what to
22 do with it.

1 CAPT GULLO: So, I want to take the
2 second question first. Unlike diamonds,
3 deferrals are not forever.

4 (Laughter.)

5 CAPT GULLO: And, you know, we have a
6 case on our docket right now that we're about to
7 charge on because we have a victim of domestic
8 violence that decided a year-and-a-half later
9 that she does want to cooperate with us. So, you
10 know, that's a case that we deferred. And she's
11 back.

12 We couldn't prosecute it, you know,
13 without her, et cetera, and et cetera. So, we
14 can certainly look at deferrals as long as the
15 servicing legal offices are bringing it back to
16 us. That's their mandate. We'll take it back.

17 And with that, obviously, there's
18 always the delicate, like, hey when we're
19 deferring something obviously it's incumbent that
20 servicing legal office to understand if you go
21 ahead and adsep or you let the member end his
22 enlistment, you lose jurisdiction. Right?

1 So, that member could stick around and
2 get some other punishment or no punishment, and
3 then maybe we could get that deferral back, you
4 know. But those are, those are nuances, but
5 important decisions that the servicing legal
6 offices just need to be cognizant of.

7 So, the question about how we're
8 communicating back the deferrals definitely hit a
9 high point in our service between the servicing
10 legal offices and the Office of the Chief
11 Prosecutor earlier this year. In fact, we
12 brought in General Kennebeck to help facilitate
13 our annual conference in April. I would call it
14 mediate instead of facilitate.

15 (Laughter.)

16 CAPT GULLO: They wanted our homework.
17 They wanted our, you know, non-FOS memos or
18 internal work product.

19 And we're not doing that. You know,
20 we're consistent with the other services. We are
21 independent bodies. We're not going to give
22 those documents to attorneys who are assigned to

1 the very convening authorities that the law said
2 you no longer have the authority to work these
3 cases.

4 So, we weren't going to let the
5 sniping.

6 But at the same token, they did need
7 a feedback mechanism from us. And that's fair;
8 right? You know, if the investigation is 700
9 pages and we just defer it on a sexual assault
10 allegation, but there's maybe providing alcohol
11 to a minor, or an orders violation or something,
12 we felt like we owed it to them not to provide
13 recommendations, consistent with my colleagues
14 here, but at least to explain to them, like, hey,
15 this didn't hit because of Appendix 2.1 factors.

16 This didn't hit because there's just
17 no probable cause whatsoever here, and this is a
18 gross injustice.

19 So, we are having verbal conversations
20 via Teams or phone at the point at which we send
21 back a memo. We don't do a form, we do a memo.
22 And that's just because we're smaller and we have

1 less volume. And we find, we find the value of
2 the memo a little bit more personal to the case.
3 And when that alleged victim gets it, there's
4 somebody's name at the top of it and they signed
5 in blue ink. We don't even do digital signatures
6 on those forms.

7 So, it's just something that we do a
8 little differently. But it's because, quite
9 frankly, our volume allows us to do. We are a --
10 I don't, I don't know if we even hit a tenth of
11 the Army's throughput in an annual year.

12 But we did, we did make a
13 conscientious decision at the time which the memo
14 is emailed to the servicing legal office to get
15 on the phone with them and explain what exactly
16 was our basis for doing what we did.

17 If they ask us, hey, is this still
18 something that, you know, NJP or administrative
19 separation or something, it doesn't lock our
20 attorneys from saying, yeah, you know, that's,
21 that's your call. You know, there is some value
22 with that.

1 But it is non-binding input at that
2 point.

3 BGEN WOODWARD: And I want to make
4 clear that if for, I think for all of us, if a
5 command is -- a case is being deferred back to a
6 commander and that commander or their servicing
7 staff judge advocate is surprised that that case
8 was deferred back to them, we have failed in our
9 communication with our -- those to whom we're
10 still service providers. Right? We make a
11 decision, but at the end of the day we're still
12 litigating, making the -- you know,
13 investigating.

14 So, I will say that is there is a lot
15 of communication that happens between those
16 detailed, detailed special trial counsel and the
17 representatives of that staff judge advocate's
18 office. I mean, we're not embedded, or we're not
19 intertwined much like the Air Force and the Army
20 with their trial counsel being in the SJA's
21 office.

22 Our Trial Service Office trial counsel

1 may never know about what we're doing over here
2 with this case other than they may have heard it
3 in the hallway because we're in the same
4 hallways.

5 But I always tell my folks if a
6 commander is surprised, more importantly, if that
7 SJA is surprised that it was deferred, we failed.

8 VICE CHAIR SCHWENK: Meghan.

9 MS. TOKASH: I'll let Judge Walton go
10 first.

11 JUDGE WALTON: I'm going to ask a
12 question. I don't know if you developed a policy
13 in reference to what I'm going to ask about from
14 when I served on the local city court here in
15 D.C. as a judge.

16 One of my jobs was presiding over the
17 domestic violence unit. And it wasn't an unusual
18 occurrence where a decision was made by the
19 prosecution to proceed with a prosecution. But
20 then on the day of trial or several days before
21 trial the witness, the victim decides, he or she,
22 it's usually a she, doesn't want to go forward.

1 And when you do it, I mean, having
2 made the decision that the case should be
3 prosecuted, corroborative evidence supports the
4 allegations made by the alleged victim, but on
5 the day of trial she decides she doesn't want to
6 go forward, what happens to that case?

7 BG KENNEBECK: We are not afraid of
8 evidence-based prosecutions. I mean, we have --
9 these are very difficult cases. There's a lot of
10 times you know what we're talking about. So,
11 when it comes to day of trial, you do have
12 victims who say, I can't do this, I won't do
13 this.

14 And we've already made the call before
15 we get there, this is an evidence-based
16 prosecutable case, or is that witness case then
17 ended? And do our best to right all evidence-
18 based approaches.

19 So, that's our initial answer. We do
20 our very best to keep them onboard. I think
21 that's the importance of having an engagement
22 plan, and our Special Victim Liaisons who make

1 contact with the transitional compensation to
2 help the family in its time of need. And we use
3 all those tools to the greatest extent
4 practicable.

5 RDML STEPHENS: Similar answer. So, if
6 there's other evidence that we could, if we think
7 we can make the case, then we would likely go
8 forward with this. If we can't, then we would
9 likely not go forward.

10 BGEN WOODWARD: We've actually
11 prosecuted those cases where the victim has said,
12 I'm not going to participate. And even, you
13 know, have expressed their desire that it not go
14 forward.

15 But, you know, looking at the history
16 and the background, justice in the view of the
17 decision-maker, justice was it needed to go
18 forward. So, we have done those evidence-based
19 prosecutions.

20 And what happens if they pull out the
21 last minute and it is a very you've got to have
22 the victim in order to successfully prosecute

1 that case, at that point the charge is withdrawn,
2 dismissed without prejudice, and the case is
3 deferred to the commander because it no longer
4 meets our charging standard.

5 If it comes back later, we can always
6 grab it back.

7 Plus, supporting all of that is as we
8 are building our military justice, our data that
9 we track, our case management systems, you know,
10 at least now we know that there was an allegation
11 with regard to this individual and this, you
12 know, this subject and this victim.

13 And what we are seeing now is that we
14 have victims who are victims of multiple
15 subjects, and we have subjects who have multiple
16 victims, just through sheer data.

17 COL LANDRY: I would echo everything
18 that's been said to this point. And just say,
19 sir, as you know from your service on this
20 committee and elsewhere that the military justice
21 system is no different from what how you
22 described D.C., and that domestic violence is

1 probably one of the offenses where victim
2 participation it just always feels like it hangs
3 by a thread.

4 So, we're constantly working. And
5 that's one of the areas that we're constantly
6 seeking to improve: what can we do in terms of
7 direct communication with prosecutors, keeping
8 victims informed, to try to maximize
9 participation in those cases where we have
10 assessed the evidence as sufficient to, to go
11 forward.

12 CAPT GULLO: So, I started early in my
13 career, part of my initial assignments in
14 Brooklyn, New York, was a Domestic Violence
15 Bureau. And we tried regularly without the
16 participation of the victims.

17 When I came to the Army and then the
18 Coast Guard, people looked at me like I had three
19 heads, like, hey, what are you doing here?

20 But that's the beautiful thing about
21 these offices and professionalizing. You know,
22 we brought somebody in that has 20 years of

1 prosecution experience as a civilian for us that
2 can train newer judge advocates to go forward,
3 even on those cases without.

4 We just tried a case last month.
5 Regretfully, we got an acquittal. But we tried
6 that case. And that's everybody that in the
7 room, you know, there is some modicum of justice
8 in putting somebody through a process, even if
9 the outcome isn't what you had hoped for.

10 So, we, we are aligned with the other
11 services to try to find evidence-based
12 prosecutions wherever possible.

13 But the short answer to your question
14 is, if that person doesn't show up we will
15 withdraw and dismiss without prejudice. We are
16 no longer beholden to convening authorities who
17 say don't worry about it, just keep trying it and
18 see what happens in a courtroom. That's not what
19 we're doing anymore.

20 You know, we're applying a rigid
21 standard, and we're going up a legal chain of
22 command. And if we can't prove it beyond a

1 reasonable doubt, then we have no business being
2 in a courtroom.

3 JUDGE WALTON: What about, you know,
4 there are conflicting views about whether it's in
5 the best interests of a victim to go forward with
6 the prosecution if the victim doesn't want to
7 proceed, despite what the evidence may suggest
8 otherwise.

9 I guess that's going to always be a
10 debatable issue as to, you know, whether under
11 those circumstances you force the case to go
12 forward. And, I mean, it doesn't make a
13 difference. I mean, if you're talking about the
14 victim being in the military, then you have some
15 control over that person to force them to
16 participate in the process.

17 Do you do that?

18 BGEN WOODWARD: I think it, it comes
19 down to, you know, having the maturity and having
20 the understanding, and recognizing that those are
21 real concerns.

22 But also with the evidence-based

1 prosecutions where you see that this is not the
2 first victim of domestic violence, as you have
3 done your investigation there were previous
4 marital relationships that ended because of
5 domestic violence that was never brought to
6 light; previous dating relationships that ended
7 because of domestic violence that wasn't brought
8 to light; that there became an accountability, or
9 at least, you know, should we allow this to
10 continue?

11 So, I will say that was one of the,
12 one of the decision points that even though I
13 wasn't the decider, that my lieutenant colonel
14 regional counsel was the decider on that, he
15 certainly consulted my deputy and I about that.

16 And that's what's great about all of
17 our organizations is we're so flat that word from
18 the company grade officer in the fleet can get to
19 us in a matter of, you know, two texts or a phone
20 call. And we're talking to the young captains,
21 we're talking to the majors, to the 04s, the 05s
22 about that. Hey, this is, this is my experience

1 and what I'm thinking on this. Again, your
2 decision.

3 BG KENNEBECK: Enough to say I can
4 assure that I'm not, and I don't think any of us
5 are after numbers of referrals or numbers of
6 court-martials, certainly not after a conviction.
7 I want to do justice.

8 And every, each one of these decisions
9 is case-dependent. It's, you know, facts of the
10 case.

11 And then, of course, my number one
12 philosophical starting point: does the conduct
13 warrant a felony conviction? If the answer to
14 that question is yes, that helps define the
15 future path first.

16 VICE CHAIR SCHWENK: Meghan.

17 MS. TOKASH: So, I'm Meghan Tokash.
18 Thank you so much for being here. Good to see
19 some of you again.

20 I actually want to piggyback that and
21 give a nod to the Army. I was able to, as a DAC-
22 IPAD member, observe a court-martial in January

1 at Fort Gregg-Adams that was exactly this fact
2 pattern. It was a juvenile victim who's dad was
3 being tried for raping her. And they had his
4 semen DNA pulled from her vaginal swab; right?

5 That's a case that I think, like
6 General Kennebeck said, you know, you can't just
7 do nothing with that. But it's also
8 understandable what Judge Walton said, you know,
9 it creates a pretty sticky dynamic for the child
10 who, you know, and then the family is on
11 different sides.

12 But, anyway, I just want to give a nod
13 to the OSTC corps. You know, your
14 specialization, it's not really independence, but
15 I really I want to acknowledge your commitment to
16 specialization for making, you know, tough
17 decisions, but proper decisions.

18 So, with that aside, two quick
19 questions.

20 The first, do you think that there's
21 value in, I love the idea of the transmittal
22 sheet, that comes just in broad blocks that's

1 familiar to me as a former AUSA as well, do you
2 think that there's any merit or value in
3 standardizing that for the OSTC?

4 And then my second question is do you
5 have any temperature read on statistics regarding
6 command input?

7 So, for example, you know, OSTC's
8 ready to make a decision but you have that
9 mechanism for the command to be able to give
10 input. Just like in the civilian you have the
11 mechanism for victims to give an input. But as
12 the prosecutor we don't always see eye to eye,
13 and the prosecutor has the final decision.

14 So, I'm not sure if you have hard
15 numbers, but just even a general sense would be
16 kind of helpful.

17 Thank you.

18 BG KENNEBECK: Okay. So, first, for
19 standardization I think there are some are some
20 parts of the concept that could be maybe
21 standardized.

22 Like, what are the flags that indicate

1 a case warrants more attention before it's heard?
2 You know, is it are we talking about choke
3 domestic violence? Are we talking about someone
4 with prior history?

5 What should be red flagged to raise
6 the level of who has the authority to defer?

7 I think that type of stuff can be
8 standardized.

9 As far as documents, though, really
10 getting it to a document, a 2-pager like the Navy
11 uses, we're very different. We have counsel on
12 every case in 28 different locations we're
13 distributed, how we operate, might not lent
14 itself to standardization.

15 So, maybe there's a middle ground
16 there.

17 And then for command input, I mean, I
18 have no idea on statistics. But we routinely
19 get, because we have a trial counsel on the case
20 who is advising the command and plugged in
21 throughout the investigation, we're getting
22 feedback from that trial counsel, and just

1 indirectly from the command kind of throughout

2 And then when it's time to make a
3 decision about going to court-martial or not, we
4 will formally get out and say we've got it close
5 to 100 percent, we, this is just routine.

6 MS. TOKASH: Thank you.

7 RDML STEPHENS: I would say the same
8 thing for the, on the command getting input.
9 It's almost 100 percent where we really reached
10 out.

11 Sometimes, you know, the same thing
12 with the victims, we reach out and not everybody
13 responds. But it's part of these forms that they
14 have to at least reach out.

15 I think to me the more interesting
16 part of the question is and totally as far as I
17 think there was a lot of concern, you know, that
18 there would be a lot of this disagreement between
19 the commands and us, or one way or the other.
20 And I'd just say anecdotally it's very rare.

21 I mean, I had one, this was a legacy
22 case that we kind of assumed. And so at that

1 point we were only providing recommendations and
2 the commander was still moving. So, we just
3 talked through one case, or really one or two is
4 the only time that I've had any negative feedback
5 for, hey, we disagree, or did you think about
6 this?

7 So, again that's anecdotal. But as
8 far as are we receiving input? We are receiving
9 input on every case.

10 BG KENNEBECK: Can I jump on that real
11 quick.

12 One anecdote from the field for me was
13 a commander who said, yeah, you know, OSTC, you
14 sort of grab these cases and you take a little
15 bit of time to assess them. And I don't like
16 that. It feels like a long time.

17 But when I get it back I'm comforted
18 by the fact that you have made the decision that
19 none of these covered offenses can be tried at a
20 court-martial. So, I know that I can execute
21 what's within my authority. So, I'm comforted by
22 the fact that you have done that tough work. You

1 have engaged with the victim. And then I can
2 move on.

3 And that's, I'm getting more of that
4 as commanders what this is better, yes.

5 BGEN WOODWARD: So I'm going to add a
6 little bit to your initial observation. One of
7 the things I talk with my folks a lot -- a lot --
8 about is there is a big difference between
9 advising and deciding.

10 And our folks have really come to find
11 out that it's a lot -- a lot -- easier to advise
12 a commander on a decision for that commander to
13 make than for you, who are sitting in the chair
14 having -- you're the one making that decision and
15 -- all the way up to the decisions that we make
16 because all of -- you know, at the senior level,
17 there are certain cases that only we are making
18 the decisions in.

19 So it's not lost on everyone in the
20 organization just how difficult and what it is,
21 the responsibility.

22 And with that, the standardized form,

1 I think we're -- as you've heard, we're a little
2 bit different in our processes. There is enough
3 tweaks here that I think a standard form would
4 just get pulled apart, and I'd get my smart IT
5 guy, who could take that form and break it apart
6 and put it back into the way that I want it to
7 be.

8 So standardization, there are certain
9 standardized decisions, but a standardized form I
10 don't think is really necessary.

11 Commander input, sometimes we get it,
12 sometimes we don't. We can get -- when we do get
13 it, it's anywhere from go forth and do justice to
14 I have examined my -- I am an SJA. I have
15 examined this thing -- the investigation and the
16 facts in this case, and we propose to you the
17 following. Here's a six-page multi-charge charge
18 sheet with multiple specifications with a -- I
19 call it a reverse case action memo, which -- to
20 kind of say, hey, these are the why -- the
21 reasons why you need to charge this stuff.

22 So some captain over in the SJA's

1 office has probably spent a lot of time that they
2 would probably not -- shouldn't be doing that,
3 but we tell commanders the information that
4 really assists us, that non-binding input that
5 really assists us, is tell us something that we
6 don't know about this individual, about this
7 circumstance, that because it's not in their
8 record, it's not in -- it's not in the
9 investigation. What does the sergeant major
10 know? What has the sergeant major heard? Is
11 this the first time that Mrs. X has brought this
12 up?

13 And sergeant major says, no. Mrs. X
14 was in the office with the staff sergeant, with
15 the first sergeant, and now with the sergeant
16 major over this period of time.

17 They have this -- you know, they have
18 an exceptional family member that has not made it
19 into the exceptional family member program,
20 whether it's a witness or whether it's a subject,
21 right?

22 Those are important facts that we need

1 to take into consideration, victims -- from
2 victims' commanders, because we're not just
3 getting non-binding input from the subject
4 commanders, we are also getting it from victim
5 commanders.

6 And it ranges from we support whatever
7 the victim supports to we don't support what the
8 victim supports. We believe for the good order
9 and discipline, but that our unit and the
10 integrity in our unit, that this needs to happen.
11 And, as always, thank you for your non-binding
12 input, and then we make a decision.

13 And for the most part, I can tell you
14 at the higher level we are continually out on the
15 road meeting with and talking to the commanders,
16 you know, for the leads, the flag officers, and
17 the O-6 commanders sometimes, but overwhelmingly
18 positive.

19 You know, they're like, yeah, now you
20 really see how hard it -- how difficult it is to
21 make these decisions. Yes, it is. Yeah. Can I
22 get that expedited deferral from you, so I can --

1 it's like, you know, no, we'll move it at the
2 speed of effectiveness.

3 But it is overwhelmingly positive. We
4 do have those who sometimes disagree, and in true
5 Marine Corps fashion a lot of times when they
6 disagree they like to put their disagreement in
7 writing and send it to the wrong people, which
8 then gets turned around and sent to the Staff
9 Judge Advocate to the Commandant, who then
10 contacts the supervisor or the senior officer
11 that said, hey, probably shouldn't do that, and
12 at the same time I'm sending it off to the
13 Defense Service -- you know, the Chief Defense
14 Counsel said, hey, just so you know, got this.
15 It is not going to impact our decisions, but I
16 believe this commander may have cases that -- so
17 --

18 COLONEL LANDRY: In terms of
19 standardization of the transmittal sheet, and
20 meeting with my colleagues up here, we found that
21 independently we ended up coming up with
22 something that is very similar in every service.

1 For example, as General Woodward described his
2 transmittal sheet equivalent, we have something
3 very similar that we use in the Air Force. We
4 call it a Notice of Deferral that lays out the
5 basic reasons why a case was deferred.

6 I, too, it would be my personal
7 preference, and if I may speak for my boss, if he
8 were here, I think he'd agree with that, that
9 it's helpful to be able to maintain some service
10 specific discretion to deal with service specific
11 issues.

12 In terms of command input, we seek
13 command input on every case going back to things
14 that we've learned how -- that we need to improve
15 on, though, to dovetail off of General
16 Kennebeck's comment is, in terms of resourcing
17 and in terms of how we process cases, one of the
18 things that we're aiming to do better over the
19 next year is to not rely on -- essentially, it's
20 just oversimplification, but a first-in-first-out
21 concept.

22 There are cases, as all of you know

1 based on your experience that you can look at for
2 10 to 20 minutes -- the Report of Investigation
3 and say, this should never see the inside of a
4 courtroom. I can quickly defer it back to
5 command in less than 24 hours. Command takes
6 swift action. That benefits everyone, subject,
7 victim, unit, good order and discipline,
8 everything else.

9 And so as we step up to full manning
10 over the next four years, we will -- are aiming
11 to improve our triage process to have separate
12 tracks quickly for cases that can be processed
13 out after due diligence is done in cases that
14 need a little more attention.

15 We're doing well with that right now.
16 We're relying on a lot of reserve support. It
17 was -- we remanded a certain level. That is
18 predicted to increase over the next four years,
19 so as to not deprive the other essential
20 litigation functions in the United States Air
21 Force of personnel. And I think that's something
22 we're going to be able to do even better in

1 coming years.

2 MS. TOKASH: Thank you.

3 COLONEL LANDRY: Yes, ma'am.

4 CAPT GULLO: I already talked about
5 our deferral memo, so you probably know where the
6 Coast Guard stands on standardization. We would
7 prefer to kind of role with what we're doing, and
8 that seems to be successful, but certainly we'd
9 welcome the opportunity to discuss it further if
10 that's what the committee would recommend.

11 As far as the non-binding input, we
12 get it 100 percent of the time. There is
13 definitely some subtle irony of, you know, the
14 commands wanting to move quicker, and then
15 sometimes we ask for that non-binding input --
16 all the time we ask for that non-binding input,
17 and then you have a two- or a three-star that is
18 on the road, that is away, but really, really
19 wants to talk to their lawyers and provide that
20 non-binding input in a certain way.

21 So we have set up our suspense of
22 three weeks from the time which we want to make a

1 decision on whether we're going to court-martial
2 somebody, whether we're going to defer on the
3 case.

4 Hey, this is -- we would like your
5 non-binding input within three weeks. Please
6 provide them. We don't care how we get it. If
7 your lawyer wants to call our lawyer and just
8 have a verbal conversation, great. If you want
9 to write a memo, we'll take that as well.

10 I think, to the earlier point, we want
11 something meaningful. You know, sometimes we get
12 non-binding input in the form of rape is really,
13 really bad. Thank you. That's incredibly
14 helpful.

15 But, in all seriousness, we are
16 looking for, especially on that senior enlisted
17 side, you know, has there been a history of this
18 member, you know, being an underperformer or an
19 exceptional performer, and their, you know,
20 significant other has always been a challenge,
21 calling the command?

22 These are things that we don't know

1 that are not necessarily in our -- in a folder.
2 You know, maybe the alleged offender just had the
3 passing of a mom or a dad, and then there was a
4 trigger and our agents weren't necessarily keen
5 on, you know, kind of getting the whole person in
6 that investigation.

7 So that's the non-binding input that
8 we crave for, and we consider everything, but we
9 certainly crave for the stuff that doesn't
10 necessarily make it into a criminal investigative
11 report.

12 MS. TOKASH: Thank you so much.

13 VICE CHAIR SCHWENK: Okay. Jen Long,
14 and then Bill?

15 MS. LONG: Hi. Thank you for being
16 here today. I am wondering with the increased
17 specialization on domestic violence and the
18 increased caseload that you're now covering of
19 those cases.

20 If you found that your individual --
21 I don't want to say offices, but as an O-6 you
22 hope to be proactive around certain

1 presentations, and they have been mapping out the
2 -- you know, the different I guess systems that
3 the victim goes through.

4 We know from the research how
5 settlement is, how often it is -- and you had
6 mentioned victim engagement. I'm just wondering
7 if you've been able to be proactive and put that
8 specialization to use to try to identify things
9 that prevents them versus just feeling you're
10 reacting to cases and having to try them.

11 RDML STEPHENS: I guess for us knowing
12 when they're coming in, the victims, we're
13 getting -- it's relatively reactive. And so,
14 then, if we're trying to -- we can try to work
15 with the local entities. We have -- a lot of our
16 counsel are working -- trying to work with
17 interdisciplinary teams in each of their
18 respective AORs to address that, and working with
19 that, and those types of things.

20 But we have a lot of it just by
21 nature. When it comes to us, it is reactive. It
22 is a command reporting that there has been an

1 allocation of domestic violence. So then we're
2 trying to engage with the victim as soon as
3 possible, and sometimes, as Judge Walton said,
4 the victim, after it has come to our attention,
5 they don't want to participate anymore,
6 especially early on in the lower level domestic
7 violence allegations. And so that's a challenge
8 for us.

9 And so, then, if we have no other
10 information, it makes it difficult to go forward
11 at that early stage, but at least now the alleged
12 offender is in our system, like General Woodward,
13 and so now we have an IS, so we can then work
14 with it.

15 But it's a challenge for us to work I
16 think in a proactive sense before we hear of the
17 investigation. We can try to work with our VLCs,
18 with our victim witness representatives, to help
19 them find programs to steer them towards programs
20 to assist, but it's -- and, you know, we make
21 ourselves available, you know, basically, that is
22 to kind of talk with the services. But I'm not

1 sure that we have much of an opportunity in a
2 proactive sense with specific cases.

3 MS. LONG: I know proactively
4 identifying -- trying to identify/prevent witness
5 intimidation. And I am trying to I guess
6 benchmark it across the system and figure out how
7 to prepare your witnesses for it, but how to
8 identify even when it's --

9 RDML STEPHENS: So we have tried to
10 institute training, joint training, across to
11 look at these specific issues. We have training
12 where we bring in civilian experts to work with
13 that. And, again, we all have -- in the Navy, of
14 course, we have to be different, so we call ours
15 victim legal counsel. I think everyone else is a
16 special victims counsel.

17 So we work closely with the victim
18 legal counsel when they choose to have attorneys,
19 when the victims choose to have attorneys, to try
20 to engage early and often and make sure that the
21 victims legal counsel are tied into NCIS and to
22 our respective offices, and let us know early and

1 often if there is any threat or signs of witness
2 intimidation.

3 The challenge is just getting the
4 victims initially to want to participate at all
5 on a lot of the lower level cases.

6 BGEN WOODWARD: It is that. That's
7 the challenge initially is to get -- getting
8 that. And some of the ways that we are able to
9 do, at least not as the VLC, but we can be
10 advocates for, you know, protective orders from
11 the commands. We can be advocates for that to --
12 you know, for the command base. We will give a
13 no contact order, but there's a difference
14 between a no-contact order and a protective
15 order, right?

16 Well, if they can't contact them, then
17 they -- understand. But that is one of the
18 things that we're able to do to advocate for them
19 on their behalf on that. So by getting those
20 preventative -- I call that a preventative
21 measure with regard to witness intimidation,
22 understanding that that individual may be going

1 back at some point before that case is done with
2 the investigation, or if it goes to trial -- to
3 trial, back to the home for many different
4 reasons -- child, children, pets is another thing
5 that is -- you know, the bonds to those pets,
6 wanting to go back with the pets, but we do what
7 we can to report.

8 And if we see that, we certainly
9 report it, and our victim legal counsel are very
10 forthcoming with what they see when they talk to
11 their clients with regards to intimidation.

12 COLONEL LANDRY: The push for direct
13 contact, obviously, appropriately through counsel
14 for represented victims, is also very important
15 and not just defaulting to reliance on the
16 victims counsel.

17 And to go to the original question, I
18 believe that it would be very important because
19 you can highlight it in terms of demystifying the
20 process, number one, but then, number two, if
21 this person reaches out to you before it becomes
22 normalized in the mind of victim, let us know, to

1 try to identify early on things like the
2 questioner asked about, and to, again, keep
3 victims involved in cases whenever possible.

4 CAPT GULLO: Echo everybody else's
5 sentiment.

6 MR. CASSARA: We've done a lot of site
7 visits with trial counsel and defense counsel.
8 We're previewing anecdotal evidence, and in some
9 cases direct evidence. There is a perception, if
10 not a reality, that the defense bar is
11 undermanned, under lesser experience. We had a
12 couple of defense counsel say, we feel like we
13 are up against a goliath. We don't have the
14 experience that they have. We don't have the
15 personnel that they have.

16 So I'm using that as a background, but
17 I'm a defense hat guy, you know? I'm going to
18 probably wear that -- wear that badge of honor.
19 But is this an issue that is -- you know, and
20 nothing personal, but there are six flag officers
21 or five flag officers in your position. The
22 Chief of the Defense Operations are all field

1 grade officers.

2 So there is -- you know, there is a
3 perception of an unbalance there. And I'm just
4 curious, from your all's perspective, whether or
5 not the head shed, the SJA, you know, the TJAG,
6 et cetera, are -- have eyes on that and what, if
7 anything, you would recommend to either fix that
8 or fix the perception of that.

9 BG KENNEBECK: By the end of this
10 year, my special trial counsel team will have
11 reviewed between 8- and 9,000 offenses and
12 determined which ones need to go to trial and
13 which ones don't.

14 MR. CASSARA: That's a lot more than
15 the defense bar is doing, yeah.

16 BG KENNEBECK: When we're done, we'll
17 have about 600 courts-martial. So I think there
18 is one number to -- this is a parity question.
19 So if you want to talk parity, then I think we
20 should talk about numbers, we should talk about
21 function, skill set, rank.

22 Our defense chief works for a one

1 star, and she is the one star for defense, so she
2 is, you know, cordoned off from the rest of the
3 functions with that in mind. So I think there is
4 some parity there as well.

5 We grew our defense bar by about 65 in
6 the Army, and I think that gets at -- we
7 purposefully are looking at parity, and I say
8 that with, you know, defense in our mind and in
9 my heart. I think you can't have an effective
10 justice system if you do not have a strong
11 defense bar.

12 I think what you're hearing from folks
13 in the field is the same thing you would hear
14 from trial counsel, this is too much work. It
15 takes OATC too long. What you hear from our
16 special trial counsel, these are a lot of cases.
17 It's hard to get all the investigation done in a
18 timely manner and make these deferral decisions.

19 And that's probably tied more to it's
20 kind of new still. So I would say give it a
21 little time, and let's see where we are. Over.

22 MR. CASSARA: Okay.

1 RDML STEPHENS: On the Navy side, we
2 have the litigation track, right? So we've had
3 that since 2007, and the JAG, even as we were
4 setting all this up, when we were talking about
5 detailing, sits in on every decision and wants to
6 ensure that it's balanced. But not only the JAG,
7 we have the Chief Judge of the Department of the
8 Navy who is the capstone provider of and manages
9 the legal -- the litigation track.

10 So we just had our detailing session
11 this past summer, so we went in before detailing.
12 It was -- it's Captain Rose, who is our CJON
13 (phonetic), myself, and Captain Korn's
14 predecessor, and we all went in to try to make
15 sure that we address these issues.

16 And so from a leadership perspective,
17 in the Navy, going back 15 years, we have
18 identified all the kind of senior leader/field
19 brig officer management positions. There has
20 been parity across the board.

21 I think within the Navy DSO system now
22 they have more attorneys than we have in OSTC as

1 far as metrics go. So there is some concern I
2 think on the low end of experience being matched
3 across, and, you know, I think there is some
4 truth to that, and part of that was mandated by
5 the statute and we need to have experienced
6 people.

7 And I took Judge Walton's point of we
8 need to have experienced people on the defense
9 side as well to defend these cases.

10 We see that in the defense where a lot
11 of them are doubled up, and so a lot of the
12 junior people we have to bring them in somewhere
13 to train them, whether it's at the trial shop or
14 the defense shop.

15 The Navy has just transitioned this
16 coming April where we're starting to take brand
17 new attorneys into the OSTC offices as well, one
18 kind of -- at dual purposes. One will be to
19 train them as kind of the next level, see how we
20 do things, and then they can help maybe triage
21 some of the cases and work with that.

22 So then that work is going to balance

1 out a little bit, but the reality is within the
2 Navy DSOs are now -- I was the CO a couple of
3 years ago in San Diego. I loved that job. It
4 was great being in San Diego.

5 (Laughter.)

6 RDML STEPHENS: I love this job, too,
7 by the way. But the reality is that a lot of the
8 very new attorneys in the DSOs are handled
9 primarily by administrative separation boards.

10 And so we're not really comparing
11 apples to apples if we just say they have a lot
12 of the one year. When you look more to the core
13 counsel that are actually going into the
14 courtrooms, every one of them has been at least
15 has had a least a year of litigation experience
16 somewhere. And most of the time -- not all of
17 the time, but most of the time they are working
18 in conjunction with either more senior personnel
19 on their case or civilian counsel on a lot of the
20 cases, which also isn't factored in.

21 And so I do think that the JAG is
22 always concerned about making sure that we're

1 balanced. But to General Kennebeck's point,
2 having done defense multiple times, the system
3 isn't fair, and that was -- all this has arisen
4 from recognition that there's -- right or wrong,
5 there's a lack of trust externally in the system.
6 We don't manage that trust or improve that by
7 somehow tilting the scales in one way or the
8 other.

9 And so I think certainly the JAG is
10 interested in that, as an I. And, you know, the
11 reality is they get a lot of good training on the
12 defense side, and then they can come back and we
13 do -- with the litigation track, we send people
14 back to do defense quite frequently.

15 The deputy, our deputy, she is leaving
16 sadly, but she is going to go be the CO of the
17 defense office in San Diego. So we do
18 traditionally go back and forth to ensure that we
19 have experience up and down.

20 BG KENNEBECK: I want to just add that
21 I've painted sort of a rosy picture with my
22 answer. I do think we have to look at who is

1 taking defense billet positions, how many years'
2 experience do they have, and be more purposeful
3 about that, because we did suck up a lot of
4 talent to build this organization. So I do think
5 we have some leveling to do, but I think we need
6 a little more time, so --

7 BGEN WOODWARD: And I heard Colonel
8 Vaughn, JV, kind of give his assessment of it.
9 It's a management -- they're -- not too long ago
10 the Staff Judge Advocate to the Commandant would
11 be hard pressed to tell you exactly how -- you
12 know, who is in the defense organization, who is
13 in the trial services -- or who is in the
14 prosecution office.

15 Why? Because everyone was all the
16 lawyers were sent to the LSSSs, and then the OICs
17 and LSSSs would move people around, sometimes
18 asking the chief defense counsel about moving a
19 defense counsel, sometimes not asking the chief
20 defense counsel about moving them.

21 So we've tried to establish with the
22 trial service office to equate kind of

1 counterbalance with the defense service office.
2 Now at least we should know where all the
3 prosecutors are, where all the defense counsel
4 are, and if they're the victim legal counsel.

5 So in the Marine Corps we have the
6 families, and the newest child in the Marine
7 Corps family, military justice family, is their
8 Office of Special Trial Counsel. Are we more
9 experienced? Yes. Why? Because the statute
10 says you have to be -- you have to be a minimum
11 of this.

12 The perception I think is from
13 whatever fighting hole that you're looking at the
14 time. I know as a defense counsel I felt like I
15 was being beat up by the government time and time
16 and time and time again for many years. I mean,
17 there's the OIF/OEF war crimes. If they had a
18 Marine Corps name to it, I was probably involved
19 in it as the defense counsel.

20 So, yeah, they were overworking me,
21 and the prosecutors aren't working that hard.

22 I can tell you -- what I can tell you,

1 for the work that our folks put in from the time
2 that they are notified of a covered offense or
3 allegation, all the way up through the gavel
4 falls because we've made a decision to charge
5 that offense, our people put in some excruciating
6 and long days, hard days. And, oh, by the way,
7 they do that even up to that point where we make
8 the decision that we're not going to charge that
9 case.

10 So, defense counsel, I would say take
11 a look at that. It's a perception from the
12 fighting hole you're in at the time. And I think
13 as we grow and people become more familiar and
14 understand what the different roles are, sending
15 our folks off to be -- work on the defense, bring
16 the defense in to work in the Office of Special
17 Trial Counsel.

18 I sent out two of my -- two of my
19 majors last year I sent to the DSO. Well, the
20 Marine Corps sent to the DSO to be the regional
21 defense counsel. So, you know, I think that will
22 help with the perception, but I don't know if it

1 will ever fix the perception.

2 COLONEL LANDRY: I came to the shop --
3 had the unique opportunity -- I think the last
4 time I spoke to you, sir, I was the Chief of our
5 Trial Defense Division. And I'll say I -- I --
6 at that time, I certainly would have wanted to be
7 a flag officer. No.

8 (Laughter.)

9 COLONEL LANDRY: I will say that I
10 have -- since being with our assignments
11 division, I have won and lost recruiting battles
12 for people on both sides. And my thought would
13 be the level where you really need that parity is
14 that senior defense counsel level.

15 In the Air Force, that's what
16 corresponds to the special trial counsel who work
17 for me now, and I would say our assignments
18 division, our JAG Corps, and the Judge Advocate
19 General of the Air Force does a really great job
20 maintaining parity at that level.

21 The Air Force Trial Defense Division
22 has 198 people. Most of those people are at the

1 base level across 69 different Air Force bases
2 dealing with administrative work and growing into
3 the next generation of senior defense counsel and
4 STCs.

5 CAPT GULLO: I would like the names of
6 all the Coast Guard officers who said that --

7 (Laughter.)

8 CAPT GULLO: So we're so small that we
9 have an MOU with the Navy where we give them
10 eight attorneys every year, and they do all of
11 our defense work.

12 So I -- you know, I saw this question
13 and it actually is the exact opposite -- we're
14 upside down in the Coast Guard in this regard,
15 because we only send second and third tour judge
16 advocates to the Navy. We're not going to send
17 folks straight out of the Naval Justice School to
18 start representing folks at court-martial.

19 So they are getting more experienced
20 folks, and then the special victims counsel are
21 also -- you know, there was significant scrutiny
22 over sending first tour attorneys to those jobs,

1 so the Coast Guard has adjusted to say, hey, you
2 have to have at least a couple years of legal
3 experience before you go to those tours, too.

4 So in the assignment season, similar
5 to Colonel Landry and dealing with, you know, our
6 detailers, I actually lost folks last year that
7 wanted to come to my office, but they put a
8 defense job or a special victims job somewhere on
9 their list.

10 So what I got was seven new -- seven
11 attorneys last summer. One of them was -- is a
12 third tour. Another one has less than two years
13 of experience doing claims and litigation at
14 headquarters. And then the other five are brand
15 new. Okay? So I have to build a bear from the
16 ground up. So, you know, and these are hard
17 decisions that are beyond my control, and I don't
18 envy the folks that are up at headquarters.

19 This is a larger discussion on
20 recruiting and retention of folks to have enough
21 people to fill these very important positions.
22 But at least for the Coast Guard, we are in the

1 office of the chief prosecutor generally getting
2 the less experienced attorneys than some of those
3 other litigation assignments.

4 VICE CHAIR SCHWENK: Okay. Thank you
5 all, and we have one last question.

6 BG KENNEBECK: Could I just add one
7 comment before the question?

8 VICE CHAIR SCHWENK: No.

9 (Laughter.)

10 BG KENNEBECK: This is just to finish
11 up --

12 (Laughter.)

13 VICE CHAIR SCHWENK: I've listened to
14 you for so many years, it is kind of like I --

15 (Laughter.)

16 VICE CHAIR SCHWENK: Go ahead.

17 BG KENNEBECK: I want to just say that
18 I think one concept is that this -- this one
19 star, you know, panel you see here is really to
20 reflect I think the taking of authority from
21 commanders who are two, three -- sometimes two
22 stars, three stars, four stars.

1 And because we are interacting with
2 the secretaries of our military departments and
3 establishing an organization -- I am not in court
4 trying cases. And I think that's important when
5 you're comparing the defense sort of mission and
6 organization to this point.

7 VICE CHAIR SCHWENK: Thank you.

8 Martha?

9 MS. BASHFORD: Yes. If at the DoD
10 level a conviction integrity were to be stood up,
11 and five, six years after the conviction
12 conclusive evidence emerges that the narrative at
13 the court-martial was wrong, should there be a
14 military justice venue to address that wrong or
15 are we going to say everybody should go to the
16 civilian side?

17 And if there should be a military
18 justice venue, what should it look like?

19 COLONEL LANDRY: Yeah. I heard that
20 question earlier. Not to jump in --

21 VICE CHAIR SCHWENK: No, please.

22 COLONEL LANDRY: I heard -- I was in

1 the room when you guys had a question of a
2 previous panel, ma'am, and it's interesting -- if
3 you're interested in reading a case that recently
4 came through our appellate courts.

5 In Re Banker was a case that came
6 through the Air Force appellate court system in
7 which an individual sought a writ of coram nobis
8 to explore, in a recantation case, why a new
9 trial was warranted. And it provides kind of an
10 interesting insight into how that process works
11 in -- within the military justice system.

12 I would, to more directly answer your
13 question, say that before we get there, although
14 it could be that a process could be laid out,
15 before we get to the point where we're drawing
16 away resources from what we're trying to do now,
17 I believe that putting those people into places
18 where you avoid unjust prosecutions or enable
19 defense counsel to push back would be a greater
20 value for the limited resources we have to spend
21 right now.

22 And that's outside of the -- that's

1 probably a separate answer from developing a
2 process, which I'll -- I would defer to the
3 policymakers on that one.

4 BGEN WOODWARD: I was going to that
5 the part of the question about writ of coram
6 nobis, as a former appellate judge, I dealt with
7 those in the past. So there is always that
8 avenue, but, again, you have to establish -- meet
9 the writ's requirements.

10 So you want us to assume that one has
11 already been established, though. That --

12 MS. BASHFORD: Yes. It's an if thing.
13 Should there -- instead of having to go civil,
14 should there be an in-house military way of
15 dealing with this?

16 BGEN WOODWARD: I think no. I think
17 there -- and I say I think no because of the
18 cost. At what cost to establish that? Is it a
19 cost to our defense services? Is it a cost to
20 our prosecution services? Is it a cost to our
21 family services?

22 Is it a -- you know, at what cost when

1 there is -- that process, there is a process, it
2 may be a difficult process, but there is a
3 process with -- through the military justice with
4 the extraordinary writ at the appellate -- the
5 service courts of appeals as well as the federal
6 circuits. So that's why I would say no.

7 RDML STEPHENS: I think you could
8 address some of it. I'm not sure that there
9 would be -- I agree we wouldn't want to take it
10 from our office or the defense offices, so they
11 could focus on that.

12 I mean, again, I think it was
13 interesting when we -- I think this was raised in
14 the summer and we got a chance to opine on it
15 then, too, which is how many cases would you look
16 at? And so is it -- we already have some great
17 protections, which I know you are all aware of.
18 I mean, we -- guilty pleas, they have to admit
19 guilt and go through the whole care analysis, and
20 so that limits some of those.

21 So I think it's a very few number of
22 cases that we'd be looking at, so I think if you

1 -- if you decided to do it, you could do it
2 within DoD, as long as you resourced it, not from
3 us but in addition, like hopefully you would take
4 that many people.

5 I do think you could extend the
6 Article 73 or provide a caveat, you know, good
7 cause. This is our favorite thing as a judge,
8 when I was a judge, right? So Article 73, we
9 earlier heard the question, so that is three
10 years, but you could add some type of good cause
11 language which would be good cause, we have new
12 evidence.

13 It should -- I think everybody in this
14 room and everyone in this -- nobody wants
15 somebody to be wrongly convicted of an offense.
16 And so we should, if they went through the
17 system, if they served in the military and
18 there's something and we got it wrong, God
19 forbid, they should be able to fix it, I think.

20 And so there may be ways within the
21 system, so an integrity unit to fix that I don't
22 think would have to be that robust, and some of

1 the mechanisms -- we already have a factual
2 sufficiency review. You might be able to just
3 add a good cause requirement to Article 73 that
4 would then allow some -- that way without causing
5 too much change to the system in and of itself.

6 BG KENNEBECK: Agree. And if you
7 review from within, you're not -- you're not
8 viewing a system with skepticism like you
9 sometimes get from outside courts. Do you
10 understand the system? Do you understand the
11 rules? Do you understand the issues that are
12 being, you know, addressed or alleged in this CI
13 -- from the CIU? So if the CIU comes to life, it
14 probably shouldn't be military.

15 MS. BASHFORD: Thank you.

16 VICE CHAIR SCHWENK: Okay. Thank you
17 all very much. Once again, this was most
18 entertaining, and we appreciate all your insights
19 and how things are going. We appreciate the work
20 you and your people have been doing for the last
21 year, and we wish you all the best.

22 BG KENNEBECK: Yes, sir. Thank you

1 very much. Happy holidays.

2 VICE CHAIR SCHWENK: Okay. We have
3 one minute. If you need to go to the little
4 person's room, go ahead.

5 (Whereupon, the above-entitled matter
6 went off the record at 3:49 p.m. and resumed at
7 3:55 p.m.)

8 VICE CHAIR SCHWENK: Okay. Can
9 everybody please give your attention to our next
10 panel, and we'd like to thank you for coming and
11 visiting us. We look forward to hearing what you
12 have to say, and we'll ask you lots of questions.

13 Nalini, are we missing somebody?

14 MS. GUPTA: We just lost our second
15 presenter. If you'll just give me a moment --

16 VICE CHAIR SCHWENK: They were so
17 swept away by the offices of special trial
18 counsel.

19 MS. GUPTA: Well, I'll start the
20 discussion, and then I'm sure she'll come in as I
21 do that.

22 So today we are very pleased that our

1 last panel has been joined by three presenters to
2 -- who will be speaking on the topic of
3 conviction integrity.

4 Our first speaker is Ms. Katie Monroe.
5 She is the Executive Director of the organization
6 Healing Justice, and that's an organization that
7 supports victims during the post-conviction
8 relief process as well as those who were -- are
9 exonerated as they reenter society.

10 She will begin with a presentation.
11 You also have printed out slides if you'd like to
12 follow along in your day-of materials.

13 After hers, we have two attorney
14 advisers from AEquitas, who will be speaking
15 about best practices to ensure conviction
16 integrity from the start of the investigation or
17 prosecution. Mr. John Wilkinson is here, and
18 then we have Ms. Patty Powers on the -- on the
19 screen. You'll be able to see her when she is
20 speaking.

21 And then afterwards we will have time
22 for question and answer.

1 Let me get just one moment for a break
2 in place. I want to bring all our presenters to
3 one space at one time. We just need one moment,
4 one pause.

5 VICE CHAIR SCHWENK: That's fine.

6 MS. PETERS: Is this good right here?

7 VICE CHAIR SCHWENK: Sure. Anywhere
8 is fine.

9 MS. PETERS: Okay.

10 MS. GUPTA: Ms. Monroe, if you could
11 please say next slide, we will change slides when
12 you --

13 MS. MONROE: Okay. Great. And I
14 might have to look that way because I actually do
15 need to see the slides. Would you guys mind if I
16 --

17 MS. GUPTA: That's fine.

18 MS. MONROE: Okay. That's cool.
19 Thank you. I didn't try to bring my laptop.

20 VICE CHAIR SCHWENK: Do you want us to
21 wait so you can get a copy?

22 MS. MONROE: That's all right. This

1 is perfect. Thank you. It will keep me on
2 point.

3 VICE CHAIR SCHWENK: All right. Well,
4 thank you for being here today, and we look
5 forward to hearing what you have to say, and then
6 we'll ask lots of questions.

7 MS. MONROE: Absolutely. Well, thank
8 you for having me. So my name is Katie Monroe,
9 and I'm the Executive Director of Healing
10 Justice. And Healing Justice is a national scope
11 nonprofit organization that works with people who
12 have been impacted by wrongful convictions and
13 exonerations, and not just the wrongly convicted
14 and their families but the original crime victims
15 and survivors and their families.

16 Next slide.

17 Our organization was started almost 10
18 years ago -- well, it will be 10 years old next
19 year -- by a rape survivor named Jennifer
20 Thompson in North Carolina. She was brutally
21 raped and almost killed as a college student at
22 Elon, North Carolina, and discovered 10 years

1 later through DNA testing that the wrong person
2 had been convicted.

3 The actual perpetrator was a serial
4 rapist who had gone on to rape and harm more
5 women in the wake of not being apprehended after
6 Jennifer's rape, and the DNA testing resolved who
7 the perpetrator was and was able to exonerate and
8 free the wrongly convicted man whose name is
9 Ronald Cotton.

10 Jennifer and Ronald went on to become
11 friends and traveled the world together for a
12 long time, you know, telling their joint story as
13 people who had been harmed by this case. And,
14 through that experience, Jennifer decided she
15 wanted to work with more individuals in the wake
16 of exonerations, doing restorative justice and
17 healing work with the exonerated, their families,
18 the crime victims and survivors, their families,
19 and others.

20 And the work really took off very
21 successfully at first. We were able to bring
22 exonerated individuals and crime victims and

1 survivors together to sit in space and do
2 recovery and restorative justice work.

3 But one of the things we realized or
4 discovered really soon after starting the
5 organization was that we could find all of the
6 exonerated individuals, they could come to us
7 through the attorneys or the innocence projects
8 that had worked on their cases.

9 There is a registry, a national
10 registry, of exonerations that lists all of the
11 people who have been -- whose convictions have
12 been overturned based on evidence of factual
13 innocence. But the crime victims and survivors
14 were generally nowhere to be found. We couldn't
15 find them.

16 And when I talk about numbers, you
17 know, there were -- there's a registry of more
18 than 3,000 exonerated individuals that we could
19 engage in our healing and recovery programs, but
20 fewer than 25 crime victims and survivors from
21 those cases.

22 Next slide, please.

1 And this was kind of the biggest
2 discovery for us. We didn't understand what was
3 happening. What was happening in these cases
4 that no one knew who the victims and survivors
5 were, or if they knew their names they didn't
6 know where they were, they didn't know what had
7 happened to them, these exonerations were taking
8 place without the victims and survivors either
9 knowing or they were learning about them in the
10 aftermath and sometimes only through the media or
11 through other sources, and so we really needed to
12 get to the bottom of that.

13 And so we had to really move the dial
14 back to figure out not only what was happening to
15 victims and survivors in these cases, but how
16 were we going to make sure that they weren't
17 being reharmed by this important conviction
18 review process, and reharmed to the point that
19 they were, you know, marginalized and forgotten
20 and unable to be brought into healing and
21 recovery spaces after that.

22 Next slide, please.

1 We connected very early on with the
2 Office for Victims of Crime at the Department of
3 Justice, and we have been working with them
4 really ever since with funding to answer this
5 question. And we started by listening to victims
6 and survivors. We wanted to -- we were able to
7 bring, over the course of two listening sessions,
8 about 20 victims and survivors from around the
9 country all of whom had -- were also survivors of
10 wrongful convictions and exonerations.

11 We were able to bring them to D.C. and
12 listen to them, and here are some of the things
13 that we learned.

14 Next slide? I think we're on the
15 right slide.

16 We asked them what was the impact of
17 the exoneration on them and their families, and
18 these were the answers that we heard consistently
19 across this group. They were retraumatized.
20 They were angry. They were scared. They were
21 scared, both rightly and, you know, some of it
22 was just a perception of fear, but they were

1 scared for their families. They didn't
2 understand what was happening. They had
3 tremendous anxiety.

4 Next slide, please.

5 When we asked them what they needed --
6 this was a big one -- they needed information.
7 They didn't understand why they hadn't known that
8 the case was being reviewed. They didn't -- why
9 hadn't they known that there was a continuing
10 claim of innocence post-conviction? And why
11 hadn't they been told that the case was being
12 reinvestigated, that DNA testing was happening,
13 and that witnesses were being reinterviewed?
14 They didn't -- why were they the last to know?
15 And why were they given so little notice when it
16 came time for the exoneration and release?

17 Next slide, please.

18 We asked them who helped them, and
19 consistently across the board the answer was no
20 one. There was not anyone in this group of
21 murder victim family members and sexual assault
22 survivors who had had anyone provide them with

1 any measure of information or support before,
2 during, or after the exoneration.

3 Some of them had gotten some support
4 information, but that had usually been either
5 from the media or from the lawyers who were
6 representing the people with claims of innocence.
7 But the prosecutors, the victim advocates, both
8 systems-based and community-based, were nowhere
9 to be found, and there are reasons for that,
10 which I will talk about.

11 You know, our hope is that as you all
12 are thinking about undertaking conviction review
13 that you will be thinking from the very beginning
14 about how you're going to make sure the victims
15 and survivors are not marginalized, forgotten, or
16 unsupported.

17 Next slide, please.

18 And we asked them what they still
19 needed, 10, 15, 20, 30 years after the
20 exoneration, and these were the things that we
21 heard.

22 They needed empathy. Our founder,

1 Jennifer Thompson, talks a lot about this. There
2 is all of this emphasis, understandably, for the
3 person who has been wrongly convicted and is now
4 coming home and having to restart their lives and
5 all of the years that they lost, you know, to
6 these injustices.

7 But, equally, empathy for the victims
8 and survivors who were her -- in first instance
9 and are now being retraumatized or revictimized
10 or reharmed through discovering that a mistake
11 was made, the wrong person was convicted, or they
12 may be being released from other grounds as a
13 result of the conviction or sentence review, that
14 they needed empathy. They needed someone to
15 care.

16 And as we began to do training and
17 technical assistance work with conviction review
18 in conviction integrity and sentence integrity
19 units around the country, we would say, you know,
20 what about the victims and survivors? And almost
21 invariably the answer would be, oh my goodness,
22 we totally forgot about them, right? We forgot

1 about them.

2 We get so wrapped up in the -- in the
3 claim of innocence and the story of the wrongly
4 convicted that we forget that there are these
5 other people who are -- that are not only
6 directly impacted by what we're doing but that
7 need our information and support and services.

8 Next slide, please.

9 I think some of the things that we
10 really discovered not only with our work with
11 victims and survivors but also when we went out
12 listening to practitioners in the field, we
13 listened to prosecutors and advocates as well,
14 was that there needed to be a continuum of care,
15 the same level of attention that happens around a
16 crime and pretrial and through the trial needed
17 to continue into this post-conviction space,
18 particularly when there was a continuing claim of
19 innocence, and we were going to perhaps be
20 exonerating somebody on factual innocence.

21 And they needed information and
22 support regardless of the outcome. In other

1 words, it wasn't -- they didn't just need to know
2 about the exoneration. They needed to know what
3 was happening in the case, that they needed to
4 understand that this process was afoot and that
5 they could ask questions and get support and
6 information as they needed.

7 And the other thing that we I think
8 truly did discover with the help of Meg Garvin,
9 NCVLI, is that there are actually post-conviction
10 rights, right? That victims' rights extend to
11 the post-conviction space, and we tend to forget
12 that as well, that they have rights to
13 notification and rights to information and rights
14 to privacy and confidentiality, and all of these
15 things were important discoveries by us as we
16 were trying to figure out what had happened to
17 victims and survivors in these cases.

18 Next slide?

19 We ended up -- we're still working
20 with the Office for Victims of Crime, but we got
21 funding to put together a toolkit, and I hope
22 it's a toolkit that you all will be able to take

1 advantage of. It is at survivorservices.org. I
2 think the link has been sent around. And in
3 addition to there being a toolkit, there is
4 really compelling videos on the -- on that
5 website that I would encourage you to watch,
6 because they are victims and survivors of
7 exonerations and wrongful convictions telling
8 their stories from beginning to end.

9 Next slide, please.

10 But in this toolkit there are really
11 a plethora of practical tools. We have a set of
12 guiding principles, things that we -- there was a
13 multidisciplinary group that led the grant award
14 of course and the production of these tools and
15 resources, and we centered them on a set of
16 guiding principles relating to being victim
17 centered and trauma-informed.

18 But there is a checklist, an agency
19 checklist, that allows conviction integrity and
20 other units or groups to go through and make sure
21 that they are taking steps that are
22 trauma-informed and centering victims in this

1 process.

2 There is a sample policy. There are
3 materials that can be handed out to victims and
4 survivors as these cases are being reviewed, so I
5 hope you all will go to that and take advantage
6 of that.

7 I'm sorry. I have a super dry mouth
8 right now.

9 And the guiding principles -- next
10 slide, please.

11 The guiding principles, I want to
12 highlight just a few of these. Probably the
13 biggest founding principle from this project and
14 of these tools was the importance of early
15 notification. I'll talk in just a minute about
16 what it looks like to be victim-centered and
17 trauma-informed when we give notification.

18 But there was -- I think that this was
19 probably because most of this work had been
20 handled by innocence projects in the past, but
21 the way the conviction integrity units were doing
22 it is that they were doing all of the work and

1 then waiting until they had a resolution and were
2 ready to go to court and release would follow
3 really quickly after that.

4 They were waiting until that moment to
5 let victims and survivors know that this was
6 happening, and sometimes that left victims and
7 survivors with 48 hours in advance or maybe two
8 weeks in advance, but certainly not enough time.

9 And, really, the key kind of
10 underpinning guideline here was that we needed to
11 let victims and survivors know we were committed
12 -- when we were committing the resources to
13 investigating these cases and going out in the
14 field and investigating them, we needed to -- at
15 that point to let them know.

16 The other one was that in letting them
17 know -- and we can talk at any point about what
18 that looks like -- giving them some agency and
19 choice in terms of how much they wanted to
20 continue to know. There are survivors and family
21 members out there that want to know every step of
22 the way what's happening in the conviction review

1 process.

2 There are others who say, you know
3 what, this case is really old, and I don't want
4 to be deeply engaged, but, you know, please do
5 let me know what the outcome of the investigation
6 is.

7 But giving that autonomy to them or
8 that choice to them instead of making those
9 decisions ourselves, we heard a lot -- and I'm an
10 attorney, so I feel like I can say this with some
11 credibility -- you know, as attorneys we like to
12 think that we know the answers for everybody
13 else.

14 We're hearing from prosecutors, well,
15 they -- what they knew best when victims and
16 survivors should know, should have information in
17 these cases, and what we were hearing from the
18 victims and survivors was, don't make those
19 decisions for us. Those are our decisions to
20 make. Let us know what you're doing and then ask
21 us how much information do we want and how do we
22 want that information throughout the review.

1 So that was another key guideline, and
2 there's lots of details about this on the
3 website.

4 And then making sure that when
5 notification and information are being provided
6 that you have an attorney who can talk about the
7 process and a victim advocate who can actually do
8 a needs assessment and provide support. We call
9 that a multidisciplinary approach, but it didn't
10 seem to work when it was just a police officer or
11 just a prosecutor or just an advocate. There
12 really needed to be a group approach to providing
13 notification and support in these cases.

14 Next slide.

15 (Simultaneous speaking.)

16 MS. MONROE: We'll go to the slide at
17 the bottom of 14 where it says, when initial
18 notification tends to happen, and we like to
19 include this illustration because for -- truly,
20 since the beginning of conviction review work
21 until maybe about two years ago, this is when
22 notification was happening.

1 There would be a multi-year process
2 that involved investigation and reinterviewing
3 witnesses and conducting DNA testing or other
4 forensic testing, and it would only be at the
5 very end when victims and survivors were alerted
6 that there had been this change in the status of
7 the case.

8 And because of the nature of the
9 change -- of that change, it was too little
10 information too late. And if you go to the next
11 slide, we have illustrated when it should happen,
12 when your -- when that initial notification
13 should happen.

14 So if you all do end up doing the
15 conviction review work, there will be a lot of
16 cases that are screened maybe initially and then
17 screened out pretty readily, but then there will
18 be cases that actually move into an investigative
19 space where there is, you know, information
20 collection happening or new investigation, and
21 it's that -- at that moment when the case is
22 being officially undertaken for review that we --

1 that we recommend the best practice is that
2 victims and survivors be told then that the
3 process is beginning, and that that process be as
4 transparent as it can be.

5 I mean, obviously, there are going to
6 be case details and things that can't be shared,
7 but that notification moment, that initial one
8 happens when the resources are put towards
9 conducting the review.

10 Next slide?

11 And I will just -- I think I will end
12 here. I don't want to -- I don't want to take
13 time away from Mr. Wilkinson. But the reason
14 earlier is better is because the nature of these
15 cases just requires that victims and survivors
16 have more time to process what may happen.

17 And even if ultimately the conviction
18 review process ends with a determination that the
19 person is guilty, that is a good outcome for a
20 victim or survivor. And they have known all
21 along that that was happening, was important to
22 them, but certainly if the outcome is that the

1 person is factually innocent, and that the wrong
2 person was convicted, then that's an outcome they
3 need to have been able to prepare for.

4 And we also often found out, or
5 somewhat routinely found out, that if it wasn't
6 the conviction review unit providing that early
7 notification, they were going to learn about it
8 from someone else. They were going to learn
9 about it from an investigator or somebody in the
10 media showing up on their door and you don't want
11 that to happen.

12 We have found almost uniformly that
13 that initial conversation, you know, that we have
14 a conviction review unit, we're charged with
15 doing this work, this is what our process is,
16 we're here to let you know that we're available
17 to answer questions and provide support, that
18 that being the starting conversation builds trust
19 and relationship, and that allows victims and
20 survivors to have better outcomes to give
21 ultimately the case results and an exoneration as
22 opposed to waiting until the last minute.

1 We heard this from prosecutors a lot.
2 They didn't want to deliver bad news, and so we
3 said, don't deliver bad news. Let them know what
4 you're doing right up front. You know, be as
5 open and transparent as you -- and supportive as
6 you can be. And then, ultimately, if you have
7 bad news to give, then that conversation is much
8 easier and the outcomes are better for everyone.

9 And we have worked with conviction
10 review units who have said just that, right?
11 That that early notification and that
12 transparency and that continual provision of
13 support has made a real difference for the
14 victims and survivors and also for their staff.

15 There are -- will be continuing
16 moments, but those are in the slides -- that you
17 would continue to provide information,
18 notification, as the case is -- the conviction
19 review and the case is proceeding.

20 I would love to take questions, but I
21 don't know whether, John, you want to go ahead
22 and start with your presentation or --

1 MR. WILKINSON: It's up to the panel.

2 MS. GUPTA: We're having a small
3 technical problem. I think, we should be back
4 running openly in the next minute.

5 And then, Patty and John, if you would
6 like to go ahead with your presentation and then
7 we can open it up for questions for everyone.

8 MR. WILKINSON: Okay. So you want me
9 to go now?

10 MS. GUPTA: So, you need to wait for,
11 --

12 MR. WILKINSON: You have a long wait.
13 (Laughter.)

14 MS. GUPTA: Let's wait for Patty. I
15 think, she's reconnecting to the Zoom.

16 MR. WILKINSON: I don't need to wait
17 for her. If you prefer.

18 MS. GUPTA: Give me one moment. I'll
19 let you know.

20 MR. WILKINSON: Okay.

21 MS. MONROE: I'll just add that, you
22 know, herein we do provide training and technical

1 assistance for conviction review units around
2 developing what protocols and practices should be
3 for victim notification and support in these
4 cases.

5 We do provide that training and
6 technical assistance. And, having there's a --
7 for conviction review units that's almost
8 invariably have a lot of protocols relating to
9 how the case itself is going to be handled.

10 But, very few that relate to how
11 victim notification will happen. And, we think
12 that's an obstacle and a flaw.

13 So, making sure that that is part of
14 your protocols and processes is going to be
15 important as well.

16 MS. GUPTA: Okay, thank you. And, we
17 now have Patty Powers is back online. Apologies
18 for the disruption.

19 And so, John and Patty, I turn it over
20 to you please.

21 MR. WILKINSON: Patty, do you want to
22 go first? Or second?

1 MS. POWERS: I'm happy to. Hello
2 everyone. Hello everyone. And, first of all I'd
3 like to thank all of you for the opportunity to
4 be here today and to describe some information.

5 Let's see, is my audio coming through
6 okay? I'm not sure.

7 PARTICIPANT: Yes.

8 MS. POWERS: Okay. Thank you. And,
9 thanks for the chance to be here today. And, to
10 describe the work that I did in developing an
11 adjunct to the sexual assault that is known as
12 the Integrity Project.

13 I am at Patty Powers. I am a senior
14 attorney advisor for the Integrity Project.
15 Before I joined my colleagues there, I was a
16 Senior Deputy Prosecutor in Washington State for
17 27 years.

18 And, I had the opportunity of
19 prosecuting a high volume of sexual violence
20 cases as well as violence and related homicides.

21 While I was still a prosecutor, I was
22 appointed as an HQE for the United States Army.

1 I had the opportunity, I called on cases to
2 provide training at Fort Leonard Wood as well as
3 in Germany.

4 So, I bring that perspective to the
5 work that I'm doing at the CAS. And, as our lead
6 attorney advisor on the assault field.

7 I believe, that I was able to add to
8 the field in terms of developing the conviction
9 integrity program. At the beginning, I'd like to
10 share some of the metrics of the sexual assault
11 program.

12 I know many of you are already
13 familiar with it. It's funded by BJA, the Bureau
14 of Justice.

15 I want to explore the metrics with
16 you, really in an effort to help illuminate the
17 rest of this program as well, as all of the
18 information that we've been able to achieve
19 through the work of professionals around our
20 country.

21 First of all, this is data that is
22 provided by the grantee side to RTI and the

1 metrics are developed on a quarterly basis. I'm
2 advised that the data that I'm going to share
3 with you is current as of March of 2024, this
4 year.

5 There have been 100,001 sexual assault
6 kits sent for testing by crime labs around the
7 country. What's significant about this work is
8 that the victims of sexual violence in these
9 cases instead of too depressive in nature, who
10 have obtained evidence from their bodies, it's
11 not in a significant crime lab for analysis.

12 So, that work has been done and at
13 this point in time, at least as of March of 2024,
14 there were 9,035 cases that occurred when the DNA
15 obtained from the sexual assault kit met the
16 criterion for uploads into CODIS.

17 Of this number of CODIS hits, 2,830 of
18 them for CODIS hits led to serial sex offenders.
19 Going further, 10,170 hits of the CODIS hits were
20 hits to serial violent offenders of other violent
21 crimes, including crimes such as homicide,
22 kidnaping, and serious assaults.

1 The reason that we provide this
2 information for your consideration is to really
3 serve as the backdrop for the work that we were
4 able to do with the conviction integrity project
5 actually was adjunct to the sexual assault
6 initiative.

7 The goal behind this program was to
8 utilize all of the research and information that
9 we were gaining from work done by professionals
10 around the country on the sexual assault
11 initiative and apply this information for
12 prosecutors, investigators, systems-based
13 community-based advocates, crime laboratory
14 personnel, and educational personnel from around
15 the country.

16 We put together a program which
17 actually went for a fourth year that focused on
18 providing training that helped inform the field
19 with the objective of doing it right the first
20 time.

21 And also, ensuring to the extent
22 possible, conviction integrity of sexual violence

1 and also homicide. We focused our attention both
2 on conflict and real cases of sexual violence and
3 the like.

4 And, what I'd like to do is just very
5 briefly give you, in addition to the background
6 of this project, some of the work that we were
7 able to accomplish. The program was known as
8 Enhancing Conviction Integrity and we paid a lot
9 of attention to consulting and workplace
10 initiative.

11 We presented information and met with
12 prosecutors, working their blood stain pattern
13 analyst, crime scene analyst, DNA analyst, and
14 group analysis.

15 And, it was very exciting because we
16 had the chance to really provide an update as to
17 what this technology can really offer to
18 investigators across and around the country in
19 terms of the investigation and also the evidence.

20 We also focused on a victim-centered
21 and offender-focused approach. We took a further
22 step with forensic evidence, not only talking

1 about how to set expert testimony, also how to
2 explain across from this evidence what the
3 victim's experience of that crime may have been.

4 For example, stippling located on the
5 body of a victim who is shot in violent ends.
6 And help them to understanding of the terror of
7 the context.

8 This is only one small example of many
9 others used. We're really trying to use forensic
10 evidence for observation and certainly also we
11 provided a glimpse into the experience of crime.

12 In that regard also, we provided
13 training. And, this was with the assistance of
14 Dr. Rebecca Campbell, who presented a webinar on
15 direct examination of victims of violent crimes.

16 We were trying to report for
17 prosecutors, investigators, and other associated
18 professionals about the impact of trauma this
19 causes. This may not be able to provide a full
20 account of a sexual assault and there may be some
21 difficulty or impairment in providing the
22 narrative of events related to this assault.

1 So, in terms of the training provided
2 by the webinars, we did this for a three-year
3 period and in are in fact into our fourth year.

4 I want to focus just briefly on some
5 of the key components of the training. Bearing
6 in mind that the goal was to provide information
7 to investigators and prosecutors to put together
8 the strongest possible cases and to do it right
9 first.

10 And also, having the true goal on --
11 in the appellate system for convictions to be
12 questioned on appeal.

13 We talked at length about charging
14 decisions, which appropriately charge the
15 defendant. It would reflect on their work.

16 Since the work done on the sexual
17 assault kit initiative, we've learned much about
18 offenders.

19 And, just to share this with you in
20 summary form, we've learned that there is a
21 significant incident of serial offenders, both
22 with offenders who are known to the victim,

1 perhaps in a relationship or some in
2 acquaintance, and also offenders unknown to the
3 victims.

4 Both having significant numbers of
5 serial or repeat offenders. We learned in
6 addition to this, the reality of crossover
7 offense.

8 And, for those of you that may not
9 have heard the terminology previously, and those
10 who have and want to go through again, because it
11 really underscores the danger in sexual violence
12 for the victim and certainly for community.

13 We learned that offenders may commit
14 a crime of sexual violence against someone they
15 now have a relationship, or as an acquaintance
16 perhaps. Or, they had previous or in the future
17 go on to commit this crime against the victim
18 they do not know.

19 So, this one has limited reality of
20 sexual violence and it really has helped inform
21 the kind of training that is necessary for
22 investigators and prosecutors to do their best

1 possible work in addressing cases.

2 Regarding the charging, we provided
3 training about making appropriate charges based
4 upon the evidence that is obtained in an
5 investigation. At all times we stressed ethical
6 considerations during investigation, during the
7 charging process, throughout the entire file.

8 And, I think, that's really an
9 important consideration of this program. That
10 certainly is a critical consideration in training
11 those that deal with sexual assault cases.

12 In discussing the charging of cases,
13 another important focal point is to determine the
14 presence and appropriately charge any co-
15 occurring events that might be there.

16 One important reason to do that is
17 that this will reflect what the offender's
18 conduct was and what major accountability should
19 be sought in the evidence-based charging
20 decision.

21 And, along the standard of is there
22 sufficient evidence admissible. And, that's a

1 very important component analysis that a
2 reasonable jury can find that the elements of the
3 crime are established beyond a reasonable doubt.

4 The other thing that's so important
5 about making sure that co-occurring crimes are
6 reflected in charging documents, this may also be
7 a conduit to the use of Federal Rule of Evidence
8 404(b).

9 And, it's so important by highlighting
10 all of the crimes that may be committed by an
11 offender, we may be able to take a look at
12 similarities in patterns or conduct.

13 Now, as you know, some of this history
14 we've touched upon briefly. We know that there's
15 a significant amount of serial or repeat
16 offenders.

17 And, there's a lot of attention given
18 throughout the whole country and nearly every
19 jurisdiction to 404(b) on a state level or a
20 federal level. And, really attention can be
21 signified.

22 What we're learning and through the

1 work done by professionals in the sexual assault
2 initiative, is that there may not be the discrete
3 kind of patterns that we saw in the past, coming
4 from signature crimes.

5 And, Dr. Rachel LaBelle has done some
6 very important research in this area that really
7 has helped to inform the training that we've been
8 able to provide.

9 And, in fact, Dr. LaBelle has
10 indicated through her research that there may be
11 inter-serial variations. And, an offender may
12 commit an assault of a person of another gender,
13 of another age group, with dissimilar
14 characteristics.

15 And so, this information, I think, has
16 been extremely important to investigators and
17 prosecutors. And, help with regards to
18 investigating these crimes, addressing sexual
19 violence, and together helping to bring the
20 reality of the violence of these crimes for a
21 jury.

22 Again, with the focus being on doing

1 this with all of the ethical considerations that
2 must be respected throughout.

3 We focused on forensic evidence as
4 I've mentioned previously, blood stain patterns,
5 ballistics, crime forensics, all DNA. We spent a
6 lot of time on introductory webinars with DNA,
7 talked about the processing of this evidence.

8 Any of the SPR testing, Y-STR testing,
9 which has now given us more, it's certainly
10 leading to the latest technology, as well as
11 forensic technology. All of which have been
12 important components.

13 Turning to the trial of these cases,
14 we continued with the focus on ethical
15 considerations from jury selection throughout the
16 end of the trial. Focusing on an experience-
17 based approach in selecting a jury and ask each
18 that allowed jurors to access their own
19 experience in an effort to better understand the
20 victim's experience at the time when that
21 presented with the evidence.

22 Expert testimony was another important

1 aspect of this that we provided. And, we really
2 encouraged working with experts about the case to
3 better understand the evidence and to better be
4 able to explain this evidence ultimately to a
5 court and to the jury.

6 The truth of expert testimony, we
7 focused on not only forensic expert testimony,
8 but a potential of behavioral expert testimony.

9 We also talked about the importance of
10 direct examination of victims of violent crimes
11 because victims may be in a position where they
12 may be able to explain their responses on it, and
13 an expert may not be.

14 We talked about cases or testimony of
15 witness and how that expert can help with that
16 too. One important consideration is looking at
17 the heart of the completed integrity project and
18 that I'm very proud to be a part of, is really
19 the attention given to doing it right the first
20 time.

21 Giving investigators and prosecutors
22 the best current and cutting edge information.

1 And, we're deriving and working with the help of
2 the many efforts, we're able to work.

3 As an example of being proactive and
4 doing things right the first time, I was able as
5 the deputy, to work on the sexual assault kit
6 initiative to explore it with the multi-
7 disciplinary professionals who were present.

8 The potential impact is that the
9 Supreme Court based in Arizona that may impact
10 the presentation of expert testimony with an
11 original forensic analyst is no longer at the
12 company.

13 So, the work of this project continues
14 on. I believe, it's important. Again, our goal
15 was to enhance presentation, do it right the
16 first time, to give prosecutors and investigators
17 those necessary tools.

18 Case review with associated
19 professionals. It's another aspect of the work
20 that we did.

21 Gaining evidence from the expertise of
22 professionals when prosecutors are preparing the

1 charge cases, hearing about the significance of
2 that evidence, ask questions to better understand
3 the victim's experience of the crime, and the
4 offender's conduct are very important aspect of
5 multi-disciplinary communication.

6 And also, once a case has been
7 adjudicated, reviewing that case again and
8 carefully going over the witnesses that were
9 involved in that. But, they can do better, of
10 course, in the future, was important as well.

11 But, this is, I hope, a very brief
12 overview of the work that I was privileged to do,
13 putting together conviction integrity programs as
14 an adjunct assault case initiative. I appreciate
15 so much this chance to discuss the program.

16 MR. WILKINSON: Thank you. Thank you
17 all for having me. I'm John Wilkinson. I'm also
18 a senior attorney advisor with AEquitas.

19 And I think you guys are familiar with
20 AEquitas. We're a resource for state and local
21 prosecutors on violence against women crime.

22 I'm a former prosecutor from

1 Fredericksburg, Virginia. So, we were a small
2 jurisdiction about an hour south of here.

3 So, I tried every type of case from
4 traffic offenses to first degree murder. But, I
5 focused a lot on domestic violence, domestic
6 violence homicide, sexual violence, and I was on
7 our sexual assault response team.

8 Prior to becoming a prosecutor, I have
9 about 15 years of criminal litigation experience,
10 half of that was as a defense attorney and half
11 as a prosecutor. So, I kind of have a
12 perspective from both sides.

13 But, it was my experience on the
14 sexual assault response team that kind of opened
15 my eyes about these cases and how they're
16 different from regular cases.

17 When I first started, I was probably
18 trying my sexual assault cases like I would a
19 burglary or an auto theft case. And, I'm not
20 having great success because I'm not hitting the
21 things that juries in these cases get hung up on.

22 And, once I started working in that

1 sexual assault response team, working closely
2 with experienced investigators, experienced
3 medical professionals, experienced advocates,
4 they kind of educated me on the things that are
5 going to be important in these cases, the things
6 that the defense is going to hone in on, and then
7 the things that juries get hung up on.

8 And so, that was an invaluable
9 experience for me. And, that kind of opened my
10 eyes to how these cases are different and how we
11 approach them a little differently.

12 Sort of taking a different approach
13 from Ms. Monroe, focusing on the front end to
14 hopefully make sure that these convictions do
15 have integrity and won't be challenged later.

16 But, a lot of the things she talked
17 about, I think, our principles that we use in our
18 cases as well. Being victim-centered, thinking
19 about how everything we do impacts victims, helps
20 us as we go along in these cases.

21 Three things that I just thought in
22 dovetailing off of what Patty was saying that

1 help conviction integrity from the front end are
2 collaboration, education and training, and
3 evaluation of what we do.

4 And so, in that collaboration, my
5 experience in the sexual assault response team
6 was super helpful, having that expertise at my --
7 at the ready as we went over cases, we just did
8 it in our office. We were a small office, so we
9 just met once a month and went over the cases and
10 talked about them.

11 And, that really was invaluable. It
12 really helped me understand how victims respond
13 to the trauma of sexual violence.

14 How I shouldn't get hung up on certain
15 different individual things that can be explained
16 when you understand why they're responding the
17 way they do. How the medical aspects of the case
18 play into it.

19 And, what a medical expert can say and
20 what they cannot say, so that we don't go too far
21 in presenting expert testimony in these cases.

22 Working with experienced detectives

1 and understanding what they're going for and what
2 they're looking for.

3 And then, also the victim support
4 piece. Because it's such a difficult process for
5 these victims to go through that we have to make
6 sure that we're spending time supporting our
7 victims all along the way. It's a very difficult
8 process.

9 We know that it's one of the most
10 under-reported crimes out there and not for no
11 reason. It's very difficult for someone to have
12 the courage to come forward after something like
13 this happens.

14 So, having that collaboration, I
15 think, is key to doing a better job in these
16 cases and ensuring that our convictions have
17 integrity from the front end.

18 Education and training I think, is
19 also super important. All our allied
20 professionals need that training.

21 If we don't understand how these
22 crimes work and how the victims respond to the

1 trauma of sexual violence, we're going to make
2 bad decisions about victim credibility, about
3 charging, about all of the things that we need to
4 do to make sure we have a case that is triable,
5 that is winnable, one that I can go forward with
6 ethically and with confidence.

7 And, I would not go forward with the
8 case that I didn't believe that this didn't
9 happen, right? Nobody would do that.

10 But, when you have the expertise at
11 the ready to inform you about how these crimes
12 work, that helps you build that confidence and
13 figure out your path from charge to conviction.

14 Anybody who's had a case involving
15 say, an alcohol facilitated sexual assault, when
16 I would get those files, you kind of get a little
17 bit of a sick feeling in your stomach, how am I
18 going to convince a jury that this person who got
19 voluntarily intoxicated knew what they were doing
20 or is reporting the crime accurately?

21 And, there are ways to do that. And,
22 we train about that all the time. It's not just

1 about prosecutors knowing it, or individual
2 detectives, or our medical professionals,
3 everybody that works these cases has to know
4 about it.

5 So, we need to do that training for
6 all our allied professionals on the dynamics of
7 these crimes, how to thoroughly investigate them,
8 the evidence that we need to prove these cases.

9 And, there's almost never like a stop
10 point, right? There's always more that can be
11 done.

12 We should never really, we talked
13 about this before we came in, but there should
14 never really be a situation where we have a, he
15 said/she said type of case. We want to
16 thoroughly investigate the things that happen.

17 Often the actual, the ultimate sexual
18 assault happens when only those two individuals
19 are present. But, a lot of things happen leading
20 up to that, and a lot of things happen after
21 that.

22 And, those things can be independently

1 verified, including some aspects of the encounter
2 between the two. And so, we need to investigate
3 all of those things because they build the
4 credibility of that victim when it comes time to
5 say what happened when those two were alone.

6 So, getting that training for
7 investigators so that they can gather all the
8 evidence that we need to thoroughly prove these
9 cases.

10 Having a trauma-informed approach,
11 which Katie talked about quite a bit, I think, is
12 super important. You know, it's important that
13 we go forward in these cases ethically and with
14 confidence.

15 But, it's also important that we
16 recognize the impact of everything we're doing on
17 victims. And so, being trauma informed is going
18 to allow us to listen more and allow them to tell
19 their story more.

20 I never interviewed a victim probably
21 in any case, but particularly in sexual violence
22 cases, where I didn't learn something new about

1 the case when I was interviewing them.

2 I had a good police report, we were
3 going forward with the case, and I'm meeting with
4 the victim to prepare. And, I just would learn
5 something new by asking questions.

6 I wasn't great at the listening part
7 always. But, I learned over time working on our
8 SART that you have to let people tell their story
9 their way.

10 It may not make sense right from the
11 get go what they're saying or how they're telling
12 their story. But, if we give them time and we
13 follow up, investigate and corroborate what
14 they've told us, it ultimately makes sense.

15 And then, we have to train on ethical
16 considerations as well. We never want to be in a
17 situation where we're violating ethics or doing
18 trial by ambush, we're meeting our discovery
19 needs and obligations to the defense at all
20 times.

21 We also have to focus on educating the
22 fact finder, whether it's a judge or a jury.

1 Every sexual assault case I tried was a jury
2 trial. I never had one that was a bench trial.

3 And so, I had to strategize about how
4 I'm going to educate that panel of jurors so that
5 they understand things that the victim did and
6 that they don't make false credibility or bad
7 credibility judgements about that victim.

8 So, educating them is going to be a
9 strategy. Patty talked about using victim
10 behavior experts as part of that education.

11 That's one strategy that can be very
12 effective. So, we can call an expert witness
13 that can explain why do some victims delay in
14 reporting?

15 Why do some victims have continued
16 contact with an offender? Someone they're now
17 telling us they were terrified of, that this
18 individual raped them and that they couldn't
19 fight back.

20 Why do some victims not cry out? All
21 of those things are explainable. They happen.
22 We know they happen when you do this work.

1 And, we have to educate the jury about
2 it, or they're not going to be able to judge the
3 case clearly. It doesn't mean that they're going
4 to automatically find somebody guilty just
5 because you've explained how victims respond to
6 the trauma of sexual violence, but at least they
7 won't get hung up making bad decisions about that
8 credibility based on things we know happen
9 regularly with victims of sexual assault.

10 So, those types of things are super
11 important. Patty talked about the forensic
12 experts. There's all types of forensic evidence
13 that can be involved in these cases.

14 We don't always have it, or it's not
15 always dispositive. But, again, collecting that
16 evidence is important.

17 The most common defense in sexual
18 violence, there's only two really, it was
19 consensual or it wasn't me. And so, most of the
20 defense will argue it was consensual.

21 So, if they're admitting consent, does
22 that DNA evidence, is it important? Is it

1 dispositive?

2 Maybe not, but, it's important to
3 collect and analyze because it corroborates one
4 aspect of something that the victim has told us.

5 And, secondly, as Patty mentioned,
6 serial offenders. It may connect to another case
7 somewhere else if we identify a profile that we
8 can upload into CODIS. So, forensic evidence is
9 super important too.

10 Patty mentioned jury selection, voir
11 dire, that's one area that we can educate jurors
12 about what's happening. Invariably, we ask the
13 question, has anybody here been a victim of
14 sexual violence?

15 And, hands go up, and sometimes for
16 the first time. They're under oath and they take
17 it seriously. And, they're telling people for
18 the first time that they had been a victim of
19 sexual violence.

20 In fact, Patty has a very compelling
21 story. She didn't share about a juror who was, I
22 think, a former military member who revealed for

1 the first time he had been a victim of sexual
2 violence during one of her trials.

3 And so, those things are going to
4 happen. We can educate the panel about how these
5 crimes work through the experiences of panel
6 members or people who know somebody, a close
7 friend or a family member who was a victim of
8 sexual violence and how they responded.

9 And, through argument. When we make
10 our arguments, we also can educate the panel and
11 make them think about things differently.

12 A typical argument, may be in a sexual
13 alcohol facilitated sexual assault case, might
14 be, you know, there's lots of consequences of
15 getting drunk. You might fall down, you might
16 skin your knee, you might throw up.

17 But, getting raped is not a
18 consequence of getting drunk. That's the
19 consequence of a rapist being present when you
20 were vulnerable.

21 And, arguments like that can bring the
22 jury, educate them, and make them rethink what

1 they're thinking about these facts because we
2 know jurors are going to harshly judge an
3 individual who gets voluntarily intoxicated.

4 We also should think about community
5 education and outreach while doing these cases as
6 well, because those community members ultimately
7 are going to be in our victim population.
8 They're going to potentially be on our juries as
9 well.

10 And so, anytime we can educate the
11 community at large, whether it's in small chunks
12 on campuses, in schools, on bases, things like
13 that. It's helpful because people might
14 recognize, not everybody identifies as a victim
15 of rape who has gone through an experience we
16 might characterize as rape.

17 And so, once you start talking about
18 it, light bulbs go off and people report. So, it
19 is helpful to have that community education
20 aspect as well.

21 And then, the evaluation piece as well
22 is something that I think, is important. So,

1 collecting data to understand what are we doing
2 in our cases.

3 I felt like we really did a good job
4 in Fredericksburg. We had great detectives who
5 the cases they brought me were really well
6 thought, really well investigated, and I could go
7 forward.

8 I don't remember declining a case that
9 the detectives had brought to me. They were very
10 well done.

11 But, what I didn't know was what cases
12 were not being brought to me? What cases did the
13 investigators not charge?

14 In Fredericksburg, the police were the
15 main charging authority. We could also charge,
16 but they did the main charging authority and then
17 they would bring the case to us.

18 So, what was I not seeing? And so,
19 sort of collecting that data, what cases are we
20 charging?

21 What cases are not being charged?
22 What cases and how do we do our declination of

1 cases?

2 As you were talking, I was just
3 thinking about this. When we decline to charge a
4 case, how do we communicate that decision to the
5 victim and what is the process there and what's
6 the support that we give?

7 A lot of times we would just send
8 letters and I just now think that's terrible to
9 just send someone a letter who reported that they
10 were the victim of a rape.

11 There might be reasons we cannot go
12 forward in that case, but if we decline to
13 charge, we should have a better process in place
14 that is more trauma informed in those cases.

15 Are we tracking pleas, and trials,
16 convictions? All of this data can help us
17 understand how we're doing as an office, where we
18 might have issues going forward.

19 What are the complexity of the cases
20 that we're bringing charges on? Are these all
21 the cases that are sort of classic, what we might
22 call as rape cases?

1 And cases that have difficult elements
2 are not going forward, and can we figure out ways
3 to go forward in those cases?

4 We should also think about soliciting
5 feedback on how we're doing from our allied
6 professionals, investigators, courts, defense,
7 advocacy, all of those folks we work with, and
8 potentially from victims. It can be done in a
9 safe way that doesn't re-traumatize victims.

10 And, we should think about partnering
11 with researchers to help us collect data, analyze
12 it, and come up with good conclusions based on
13 the data that we're collecting.

14 So, I just, those three things
15 hopefully, if we do that from the front end going
16 forward, we won't wind up with a lot of cases
17 that are being challenged later or brought in
18 before a conviction integrity unit where we have
19 to start all over.

20 VICE CHAIR SCHWENK: Thank you very
21 much. Anybody have any questions they'd like to
22 ask? Cassia?

1 DR. SPOHN: So, I'm wondering if maybe
2 Katie, your organization has done any research on
3 the reasons why these cases result in wrongful
4 convictions?

5 I know at the national level, the
6 National Center on Wrongful Convictions or
7 Exonerations or whatever, I can't remember the
8 exact name of it, but you know, they've looked at
9 exonerations and it's shown that it's either DNA
10 evidence or misidentification of the perpetrator.

11 A lot of these are cross racial
12 misidentification. So, that issue is probably
13 not going to be an issue in military justice
14 cases because the perpetrator and the victim know
15 one another.

16 And so, it's more an issue of consent.
17 So, do you have any thoughts on first, you know,
18 what explains exonerations in sexual assault
19 cases, the ones that you've looked at?

20 And then, how would the military
21 justice system, how would it look different in
22 the military justice system?

1 MS. MONROE: I appreciate that
2 question. I have a lot of thoughts. So, here at
3 Healing Justice, we've been exclusively focused
4 on the recovery space.

5 But, prior to that, all my career has
6 been with Innocence Projects. And, the Innocence
7 Community obviously has spent a lot of time
8 identifying the causes of wrongful convictions.

9 And, I taught a course about that at
10 George Mason University now for about a decade.
11 And, misidentification is one.

12 But, there are many others. And,
13 having worked on truly thousands of cases
14 involving claims of innocence and spearheaded a
15 number of exonerations, no wrongful conviction
16 case, or very few are based on one thing only.

17 Misidentification is a, makes up a
18 significant percentage of the cause of wrongful
19 convictions.

20 But, there is misapplied forensics,
21 there's fraudulent forensics, there's, you know,
22 neglect and resource constraints by investigators

1 and prosecutors. There's poor defense work.

2 And, ironically, we talk a lot about
3 how much better the military system must, surely
4 must be, because at least there's information
5 sharing. And, attorneys are trained to do both
6 defense and prosecution, which takes some of the
7 gamesmanship out of the process.

8 And, a lot of that gamesmanship and
9 kind of hiding of evidence means that what goes
10 before a jury, you know, isn't always fact,
11 right?

12 We just, we discover so much is wrong
13 with a case when we discover a wrongful
14 conviction. And, almost every single one
15 involves a little bit of everything.

16 Just poor choices, neglect from the
17 beginning to the end on the part of everyone,
18 unfortunately. The vast majority of exonerations
19 don't involve DNA evidence or those that are on
20 the registry of exonerations.

21 You know, post-conviction DNA testing
22 tends to be at its most probative when it is a

1 single perpetrator rape case. And, the evidence
2 was really well collected and properly preserved.

3 But, most exonerations are the result
4 of people spending a lot of time going back and
5 looking at what went wrong in the case. And, you
6 know, doing the kinds of things that John and
7 Patty were talking about, looking at what went
8 wrong so that they can learn better.

9 I think, in the military system, we
10 talked, I talked with Nalini about this. A lot
11 of Innocence Projects, and this was true in my
12 work, we didn't take cases that only involved
13 witness testimony, the, you know, so-called he
14 said/she said cases, only because there wasn't
15 going to be the opportunity, most likely to
16 uncover something new.

17 And, if you couldn't uncover something
18 new, then there'd be no opportunity to go back
19 into court and prove innocence. But, in the
20 cases that you all may be looking at, so many
21 things could go wrong, right?

22 There could be mistakes. There could

1 be lying. There could be incentives to win that
2 skew the approach of the attorneys, you know, in
3 the cases.

4 I mean, haven't worked on any cases
5 that have come out of the military criminal legal
6 process. But, I can't imagine that they are
7 immune to wrongful accusation and wrongful
8 conviction.

9 And, I think, that conviction
10 integrity in the post-conviction space is an
11 opportunity to demonstrate leadership, right?

12 In the same way that we talk about a
13 continuum of care for victims and survivors from
14 beginning to end, you know, there should be a
15 continual search for the truth, right?

16 We want to make sure not only we're
17 doing everything right on the front end, but if
18 someone claims an injustice or factual innocence,
19 then we need to demonstrate the courage and the
20 leadership to take a good hard look at that.

21 And, I think, the same things that
22 have been outlined that make, that give a

1 conviction integrity, are the same things you
2 look for when you are on the back end in that
3 post-conviction space looking back with those
4 cases.

5 A he said -- I hate this, I hate that
6 term he said/she said. But, a case that doesn't,
7 that only involves the accounts of two people,
8 may be very, very, very difficult to review post-
9 conviction. But, that doesn't mean you shouldn't
10 do it.

11 And, I guess the only other thing I
12 would say is that in addition to remembering, and
13 I don't think this would be a problem in your
14 space, it's a problem in the Innocence Project
15 space, that we get so singularly focused on the
16 claim of innocence that we can't see past it.

17 But, in addition to being, to
18 providing information and care and seeing victims
19 and survivors as a party to the process, I don't
20 think it's a moment to set aside believing them
21 either, right?

22 I think, sexual assault is a terribly

1 under-reported crime. And so, you do want to
2 continue to believe survivors in that space.

3 But then, look objectively at what
4 might've gone wrong on the front end. And, in
5 any human system, there are opportunities for
6 things to go wrong.

7 I mean, the stuff that we see in these
8 cases, the vast majority of it's honestly just a
9 little bit of overzealousness and neglect and
10 resource limitations and poor incentives. Not
11 really anyone doing anything wrong.

12 Or, it's just we get caught up in
13 prosecuting these cases and we do it. And, we
14 can make mistakes.

15 I don't know if John may have a better
16 answer for that.

17 MR. WILKINSON: No. I don't have a
18 better answer. That was good. But, all of those
19 things are true.

20 But, when we do work collaboratively
21 and we do our jobs, investigate these cases
22 thoroughly, I just think we improve our ability

1 to hold offenders, actual offenders accountable
2 and avoid that.

3 MS. MONROE: Reduce the chance of
4 mistake.

5 MR. WILKINSON: Yes.

6 MS. MONROE: Absolutely. I mean, at
7 Innocence Project, it starts, what we always said
8 was, you know, we want to be put out of business.
9 Put us out of business, right?

10 I mean, no one wants the wrong person
11 to go, to be convicted and the actual perpetrator
12 not to be apprehended and held to justice.

13 So, I do think that the work that
14 AEquitas is doing to improve the integrity of
15 convictions in the front end is equally as
16 important.

17 But, I wouldn't discourage you from
18 doing a conviction review. And, I would just,
19 and I didn't have a chance to really emphasize
20 this before, but as, if you do go forward with
21 conviction review and you do look at all of the
22 models out there that developed you know, that

1 offer practices and protocols for reviewing the
2 cases, please make sure that victim notification,
3 the information for victims and victim support,
4 are part of those protocols from the beginning.

5 And, we're happy to help you with that
6 when you get to that point.

7 DR. SPOHN: Thank you.

8 VICE CHAIR SCHWENK: Any other
9 questions from anybody?

10 Well, thank you, all three of you.
11 Patty, you too. Thank you for being here today
12 and for your presentations and for your answers.

13 And, we are interested in the CIUs.
14 And, we are trying to figure out how best to
15 resolve in our minds whether we should make that
16 recommendation or not. Because, as you all said,
17 one innocent person is one too many.

18 So, thank you very much.

19 MS. MONROE: Thank you very much.

20 VICE CHAIR SCHWENK: Okay, tomorrow
21 morning -- we're here on the policy subcommittee,
22 at 8:30. You're supposed to be here.

1 And if you're not on the policy
2 subcommittee, you can sleep in.

3 (Whereupon, the above-entitled matter
4 went off the record at 4:57 p.m.)

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