

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

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PUBLIC MEETING

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WEDNESDAY
SEPTEMBER 21, 2022

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The Advisory Committee met in the Commonwealth Room at the DoubleTree Hotel, 300 Army Navy Drive, Arlington, Virginia, at 8:30 a.m., the Honorable Karla Smith, Chair, presiding.

PRESENT

Hon. Karla Smith, Chair
MG(R) Marcia Anderson
Ms. Martha Bashford
Ms. Meg Garvin
Hon. Suzanne Goldberg
Hon. Paul W. Grimm*
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
Dr. Jennifer Markowitz
Hon. Jennifer O'Connor
BGen(R) James Schwenk
Ms. Meghan Tokash*
Hon. Reggie Walton

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Officer

DAC-IPAD STAFF

**Colonel Jeff A. Bovarnick, JAGC, U.S. Army,
Executive Director**

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Stacy Boggess, Senior Paralegal

Ms. Audrey B. Critchley, Staff Attorney

Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney

Ms. Amanda Hagy, Senior Paralegal

Mr. R. Chuck Mason, Staff Attorney

**Ms. Marguerite McKinney, Management & Program
Analyst**

Ms. Meghan Peters, Staff Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Staff Attorney

Ms. Kate Tagert, Staff Attorney

Ms. Eleanor Magers Vuono, Staff Attorney

***Participating virtually**

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

2 8:40 a.m.

3 MR. SULLIVAN: Good morning. I'm
4 Dwight Sullivan, the Designated Federal Officer
5 for the Defense Advisory Committee on the
6 Investigation, Prosecution, and Defense of Sexual
7 Assault in the Armed Forces, known colloquially
8 as the DAC-IPAD.

9 This public meeting is now open.
10 Judge Smith, you have the baton.

11 CHAIR SMITH: Thank you, Mr. Sullivan.
12 And good morning, everyone. I want to welcome
13 the members and all attendees to the 24th public
14 meeting of the Defense Advisory Committee on the
15 Investigation, Prosecution, and Defense of Sexual
16 Assault in the Armed Forces, or DAC-IPAD.

17 Today's meeting will be in-person and
18 by videoconference via Zoom for members and
19 presenters. For members and presenters joining
20 by video, please mute when not speaking. If we
21 have technical difficulties, we will break for 10
22 minutes, move to a teleconference line, and send

1 the instructions by email.

2 The Secretary of Defense created the
3 DAC-IPAD in accordance with the fiscal year 2015
4 National Defense Authorization Act.

5 The DAC-IPAD statutory purpose is to
6 advise the Secretary of Defense on the
7 investigation, prosecution, and defense of
8 allegations of sexual assault, and other sexual
9 misconduct involving members of the armed forces.

10 Representatives from the military
11 services criminal law divisions, who serve as the
12 DAC-IPAD service specific experts and liaisons to
13 their services, have joined us today. Welcome.

14 Mr. James Markey has resigned his
15 position on the committee due to health concerns.
16 And, on behalf of the committee, I want to thank
17 Mr. Markey for his service on the committee, and
18 his contributions to the DAC-IPAD's work.

19 We will begin today with a
20 presentation from Ms. Martha Bashford, and Ms.
21 Terri Saunders, on their observations of the
22 court-martial they attended in Washington state.

1 They will be accompanied by Major
2 Steven Dray, Associate Professor, Criminal Law
3 Department, the Judge Advocate General's Legal
4 Center and School, Army, who will be our subject
5 matter expert on military court-martial
6 proceedings.

7 As a result of our last meeting, and
8 hearing about the establishment of the Offices of
9 Special Trial Counsel, the Air Force and the Army
10 invited committee members to attend litigation
11 training.

12 We will hear from Ms. Bashford and Ms.
13 Suzanne Goldberg, about their observation of the
14 Air Force's course in Alabama, and the Army's
15 course at Fort Belvoir, Virginia.

16 Finally, Ms. Gallagher will wrap up
17 this session with a discussion of upcoming
18 courts-martial and training observation
19 opportunities.

20 After a short break, we will hear from
21 Major Dray on the UCMJ appellate process, and for
22 the last session of the morning, the staff will

1 brief the fiscal year 2021 appellate case data,
2 being compiled for the Appellate Case Review
3 Project.

4 After lunch, representatives from the
5 services' Government Appellate Divisions,
6 followed by Defense Appellate Divisions, will
7 brief their current practices and perspectives.

8 Following that, the staff will brief
9 appellate practice issues and seek committee
10 guidance.

11 We will end the day with public
12 comment, a brief recap of today's events, an
13 update on our request for subcommittees, and a
14 preview of our December meeting.

15 This meeting is being recorded and
16 transcribed, and the complete written transcript
17 will be posted on the DAC-IPAD website at
18 www.dacipad.whs.mil.

19 If a meeting attendee wants to make a
20 public comment, please submit your name no later
21 than 2:00 p.m. to
22 whs.pentagon.em.mbx.dacipad@mail.mil.

1 Comments will be heard at my
2 discretion at the end of today's session.

3 To assist the court reporter and to
4 avoid multiple people speaking at the same time,
5 committee members should signal if they have a
6 question or wish to speak, by stating your name,
7 and waiting to be acknowledged before proceeding.

8 Thank you to everyone for attending
9 today. Over to you, Colonel Bovarnick, to start
10 the meeting.

11 Thank you.

12 COL BOVARNICK: I'd like to start
13 today with have our service representatives here
14 present in the room, and then we can go those who
15 are on, joining us by Zoom.

16 And we can start with the Army, and
17 then we have Army, Navy, and Marine Corps here in
18 the room. So if you all could please introduce
19 yourselves.

20 MS. MANSFIELD: Sure, I'm Janet
21 Mansfield, a former judge advocate. I'm the Army
22 representative. I've been a civilian attorney at

1 the Criminal Law Division, Office of the Judge
2 Advocate General, at the Pentagon since 2009.

3 MR. HIGGINS: Good morning, my name is
4 Dan Higgins, I'm the Navy representative. I'm a
5 retired Air Force Judge Advocate, and I've been
6 with the Navy since just May.

7 MAJ KLOSSNER: Good morning, ladies
8 and gentlemen. I'm Major Dylan Klossner, I'm
9 with the Marine Corps' Judge Advocate Division
10 Military Justice Branch, and I've been there
11 since January.

12 COL BOVARNICK: Thank you, and I know
13 we have online our Air Force representative, if
14 you could introduce yourself.

15 MAJ MOQUET: Yes, good morning. My
16 name is Major Doug Moquet. I'm the Chief of
17 Victim and Witness Policy in the Military Justice
18 Law and Policy Division, Air Force Headquarters.

19 MS. VAGHELA: Good morning everyone.
20 My name is Asha Vaghela, I am the Senior Civilian
21 Attorney in the Military Justice Policy Division.
22 And I've been with the Air Force for 10 years.

1 And, prior to that, I was a career prosecutor in
2 New York. It's great to see you all today.

3 Thank you.

4 COL BOVARNICK: And do we have our
5 Coast Guard representative online?

6 (No audible response.)

7 COL BOVARNICK: Okay. Thank you all
8 to the service representatives for introducing
9 yourselves, and also for joining us in your
10 expertise on these matters.

11 As you heard the Chair announce, Mr.
12 James Markey resigned from the committee
13 effective 7 September due to health concerns.

14 He served on the committee since his
15 initial appointment in January 2017, and his
16 reappointment earlier this year.

17 He was the committee subject matter
18 expert on investigations, and the committee as
19 the Chair already did publicly recognize him, and
20 the Chair has also signed a letter on behalf of
21 the committee, that I'll ensure is delivered to
22 Mr. Markey.

1 For the update on subcommittees, the
2 packet, the full packets with the DoD general
3 counsel now, shall do the formal establishment of
4 the subcommittees with terms of reference.

5 And then, following that, that packet
6 will go to the Secretary of Defense for
7 appointment of the subcommittee members. And we
8 can have a further discussion on kind of the
9 committee operations and tasks, pending final
10 approval during the deliberation session later
11 this afternoon.

12 At the last session, the committee had
13 certain requests for information when we had the
14 general counsel of the military departments here,
15 and the service judge advocates general and SJ to
16 the Commandant.

17 And there were two broad categories.
18 The Offices of Special Trial Counsel. There was
19 three specific requests, and then diversity
20 statistics.

21 So, we want to inform the committee
22 that we have received back from the services, and

1 you have in your folder, a list of approximately
2 85 documents, a summarized list of what we
3 received back and the categories that we
4 requested, and the Office of Special Trial
5 Counsel.

6 So you'll see in your list broken down
7 by service, but the precept language used for
8 promotion selection boards, that each of the
9 services use, and all the documents that are
10 produced by the human resources commands of
11 various departments, as well as the secretaries
12 of the departments. Their notices and things
13 like that.

14 So, we'll itemize all those documents
15 and compile for the past four years, how they
16 went about the Office of Special Trial Counsel
17 selection. Those documents, we've got them in
18 the formation.

19 So you see those documents there, so
20 in the interim period and again for further
21 discussion this afternoon, kind of how we'll
22 handle, the staff will handle those documents and

1 eventually get them distributed to the members
2 for review in anticipation of inviting the same
3 members, senior DoD officials that came before
4 the committee in June, if you recall invited back
5 to come back in December.

6 So, the bottom line for that is all
7 the documents have been compiled, and the staff's
8 going to go through them, organize them, to make
9 them, put them in a presentable manner for the
10 panel.

11 The second area of requested
12 information was diversity demographics. And what
13 you see is there's also another page in your
14 folder there, and sent to the members that are
15 online.

16 That's not the statistics, but you'll
17 see what we compiled. So the services sent back
18 as you can imagine, hundreds of lines of data on
19 spreadsheet. And so, again, in this interim
20 period, the staff will go through that, and be
21 able to provide the specific number, statistics,
22 and analysis at the next meeting.

1 So I just want the committee to know
2 that the requests went out and they've all been
3 complied with, and now the staff will go through
4 analyzing those documents and preparing them to
5 send to the members, and for presentation at the
6 next meeting.

7 Finally, I just wanted to mention
8 before we get into the briefings today, public
9 comments.

10 So three requests for public comments
11 and was also provided a separate binder there, of
12 the materials that each of the three gentlemen,
13 Mr. Anderson, Mr. Lopez, and Mr. Owens sent.

14 They'll each anticipated to be here in
15 public today, to make five minutes of comments at
16 the end of the day.

17 A question was asked about whether
18 they have active cases, and they're represented
19 by counsel. The answer is, no.

20 Mr. Anderson mentioned he may have a
21 federal appeal and he's representing himself.
22 But no issues with their representation or

1 counsel for any active, ongoing cases.

2 And you may also hear from Mr. Owens
3 that he invited LULAC, the League of United Latin
4 American Citizens. They may be joining us by
5 Zoom, as well, and maybe are interested in coming
6 before the committee in the future, as is
7 potential for Survivors United.

8 But that will be up for the committee
9 to determine if they want to hear from any of
10 those organizations, in a future meeting.

11 Okay with that said, we're going to
12 get into topic session 1, 2, and 3. So the next
13 few sessions that we have here this morning, are
14 result as you heard the Chair briefly mention.

15 Ms. Bashford, Ms. Goldberg, and staff
16 members attended first a court-martial in
17 Washington, and then two courses. The Air Force
18 litigation course in Alabama, and then a
19 litigation course here, well, here, but in Fort
20 Belvoir, Virginia.

21 And so now the staff members along
22 with the committee members, are going to talk

1 about their experiences at each of those things.
2 And, again, anticipation many members are
3 interested but couldn't make those particular,
4 the court-martial of these courses. Certainly,
5 there are going to be future opportunities and at
6 kind of the end of this session, Ms. Gallagher
7 from the staff, will come up.

8 You have an updated court-martial
9 docket in there. So I think these conversations
10 will spark your interest, or continued interest
11 in attending courses.

12 We don't have the specific list of
13 different courses in the future, but we're going
14 to get that.

15 And, as soon as we do, kind of like we
16 did for the last one we'll send it out to the
17 members. Who's interested in attending this
18 course.

19 So with that, we'll hand it off for
20 the first session. I should also introduce Major
21 Dray. His file is in your packet, and I think
22 it's tab two. So he's kind of our expert.

1 If you have any specific questions as
2 Ms. Saunders or Ms. Bashford are talking about
3 the court-martial, hey what about this, or the
4 selection of members and stuff, we'll defer to
5 Major Dray, who is a professor of criminal law at
6 the Army's Judge Advocate School, and kind of
7 handle that stuff.

8 So with that, I'll hand it off to Ms.
9 Saunders, Ms. Bashford, and Major Dray with a big
10 assist.

11 MS. SAUNDERS: Thank you.

12 Good morning everyone. As Colonel
13 Bovarnick mentioned, Major Dray is here to answer
14 any military justice process, or other types of
15 questions that you may have as we go through
16 this.

17 The other reason he's here is to, you
18 know, correct me if I say anything incorrect. So
19 he's going to jump in and save the day that way.

20 So we're here to talk about a court-
21 martial that Martha Bashford and I attended at
22 Fort -- or, excuse me, Naval Base Kitsap

1 Bremerton, in Washington state. And that was the
2 27th of June through the first of July.

3 This was the U.S. Dominguez court-
4 martial, and if any of you recall back in the
5 April public meeting, Lieutenant Commander
6 Dominguez came and he made a public comment at
7 that meeting. And then he also invited anyone
8 who wanted to, to come see his trial, which was
9 in June.

10 So, Ms. Bashford and I went to the
11 trial. This was actually, interestingly, a re-
12 trial. He had originally been court-martialed in
13 let's see, February of 2020, on some child sex
14 offenses. And he was -- his conviction was
15 overturned on appeal. And so -- and a re-hearing
16 was authorized. So, this was the re-trial that
17 was happening again, on the same child sex
18 offenses as he was originally tried for.

19 So, prior to our going to the court-
20 martial, we coordinated with some of the local
21 Navy headquarters staff, and they put us in touch
22 with the local base officials. And they helped

1 with our access to the base, access to the
2 building, all of that. And I will say, you know,
3 everyone was absolutely outstanding and
4 incredibly helpful in getting us where we needed
5 to be. So that was fantastic.

6 So, the re-trial that we observed, he
7 pled not guilty. There was a panel of members.
8 And at the end of the day, we were there the
9 entire week. At the end of the day, he was
10 ultimately acquitted of all offenses on that
11 Friday. So, no sentencing.

12 So, what I'd like to do is just talk
13 a little bit about some of the stages of the
14 trial, and then ask Ms. Bashford to give her
15 observations, and her takeaways from some of the
16 things that she saw at the court-martial, as
17 compared to what she's used to in civilian court.

18 So we started that Monday morning out
19 in, with voir dire. Due to some recent statutory
20 changes that took effect in January of 2019, for
21 a general court-martial where the member chooses
22 a panel of members, or a jury, the number is now

1 eight. There will be eight panel members.

2 It used to be a minimum of five, and
3 then it could go up from there. But they have
4 said it will be eight now.

5 So, we observed the voir dire process
6 that Monday morning. Ms. Bashford, do you, can
7 you share your observations about that?

8 MEMBER BASHFORD: Yes, it was in my
9 opinion, ineffective. A typical question would
10 be, would all of you agree with me that X. Would
11 all of you agree with me that Y.

12 And then the next statement would be,
13 all members, you know, nodded in the affirmative.
14 And on you would go.

15 There were a few, a few questions
16 where there was individual questioning of members
17 afterwards.

18 But as a general process, and most
19 people don't like voir dire, that's why you never
20 see it on TV, it's boring, but it was really I
21 thought, ineffective.

22 MS. SAUNDERS: One thing I should have

1 mentioned about that, too, is that there are
2 unlimited challenges for cause, of course. And
3 so this panel in this particular court-martial,
4 they started out with 15 members.

5 After the various challenges for
6 cause, they were left with nine. So needing to
7 get down to eight, they used what they called a
8 random number generator, to determine which of
9 the nine would be excused.

10 After seeing who that was, the defense
11 and the prosecution, the defense elected to use
12 their peremptory challenge to excuse another
13 member, bringing them down to the required number
14 of eight. And that's what they carried on the
15 trial with.

16 MEMBER BASHFORD: The one thing I
17 observed in voir dire that completely changed my
18 mind about one thing is, that I understand that
19 there's a case on appeal now about the lack of
20 unanimous verdicts in, in the military.

21 This was a panel of not enlisted, it
22 was -- blanking.

1 MS. SAUNDERS: Officers.

2 MEMBER BASHFORD: Officers, thank you.

3 And at least two, and maybe three, had expressed
4 some concern to the judge that their verdict
5 would be known, and that, that they had concerns
6 about continuing to operate if they sat on the
7 jury.

8 And they were all reassured when the
9 judge said it's six out of eight, it's not, it
10 could be unanimous but doesn't have to be, and
11 nobody will ever know your verdict. So, nobody
12 will ever know if you voted to convict or not.
13 Obviously, if it's a unanimous, they simply would
14 never know because you don't say how many people
15 voted.

16 I also did not realize that you don't
17 have hung juries. So, if you don't get the six
18 out of eight, it's a not guilty. There's no do-
19 overs, which I think if they moved to unanimous
20 verdicts, that's going to be an issue because
21 then you'd need eight out of eight.

22 But I was actually surprised that as

1 I said, two or three officers felt there could be
2 repercussions if their verdict was known. And,
3 to me, that would be a good reason to keep the
4 non-unanimous verdict.

5 MS. SAUNDERS: So they were able to
6 seat the panel by about mid-day, I think on
7 Monday, and they began with some of the
8 prosecution witnesses at that point.

9 The child who was the purported victim
10 in the case, testified. And then each side also
11 had an expert witness in the child, you know,
12 child interview techniques that each side called.

13 So, Ms. Bashford, do you have any, do
14 you want to share your observations about the
15 trial process, or things that occurred during
16 cross or?

17 MEMBER BASHFORD: It was incredibly
18 well staffed. Each both trial counsel and
19 defense had three lawyers at their tables.

20 Each had a full-time paralegal in the
21 courtroom; and each had an expert witness
22 observing the entire trial.

1 I see this through, in the trainings
2 as well. There's a certain lack of detail I
3 think elicited, both in direct and cross.

4 And it's a little more complicated on
5 this particular case, because the complainant was
6 11, and was talking about things that happened
7 when she was 4 and 5.

8 So, that very much can limit the
9 amount of detail you're able, able to bring out.

10 But I also saw that throughout the
11 trainings, that there was a tendency to I don't
12 mean like a checklist, but get the element of the
13 crime elicited, and then move on to the next
14 element.

15 MS. SAUNDERS: One thing I think, and
16 you did comment on this as I recall, is during
17 the course of the, some of the directs and
18 crosses, any time the, perhaps there was an
19 objection, and the defense or prosecution wanted
20 to have that heard outside the hearing of the
21 members, there are no sidebars in military
22 courts.

1 There is something called a 39(a)
2 session that's under, that's a reference to
3 Article 39(a) of the UCMJ. And it's basically a
4 hearing outside of the -- it's a hearing outside
5 of the hearing of the members. So they would
6 excuse the court-martial panel members back to
7 the jury room, and then they would argue whatever
8 they were going to argue, and then bring them
9 back.

10 And I think is it safe to say that was
11 a little frustrating?

12 MEMBER BASHFORD: Yes. And it also
13 was odd because many times the witness about
14 whose testimony they are arguing, remained on the
15 witness stand.

16 So, when somebody was trying, saying
17 this is a prior inconsistent statement, no it
18 wasn't, the witness is sitting right there
19 listening to all of it until somebody would
20 finally say maybe we should have the witness step
21 out, step out in the hallway.

22 And a lot of this came, would start to

1 be re-litigating pre-trial motions. So, the
2 objection would come and then they'd say, you
3 know, we dealt with this already. And they'd say
4 well, but here's another aspect.

5 And it just seemed a little bit
6 laborious to me.

7 MS. SAUNDERS: So, yes. And for any
8 of you who have seen a military court-martial
9 before, you will know that's a pretty common
10 practice to excuse the jury members. And
11 sometimes that can be frequent. You know, they
12 come back in, two minutes later there's another
13 objection, they go back out. And back and forth.

14 So, that was -- you know, I found that
15 interesting. I had not occurred to me that
16 you're right, in civilian practice they typically
17 would, might do a lot of that through sidebars.

18 So, finally, you know, we ended up
19 that Friday both sides had rested. They had
20 given their closing arguments.

21 The judge gave her instructions to the
22 panel, and then they went back to deliberate I

1 think most of the day Friday, before finally
2 coming back to, coming back with a full acquittal
3 on all charges.

4 And, as Ms. Bashford mentioned, in a
5 military courts-martial, again it is not
6 unanimous. It requires three-quarters for all
7 except capital cases. For a capital case, it
8 would be unanimous. Am I correct, Major Dray?

9 But for this case, it was three-
10 quarters of the members had to come with, come up
11 with a finding of guilt. So, six out of the
12 eight would have had to have found the member
13 guilty.

14 If five of the members found him
15 guilty, it would have been an acquittal on that
16 specification. And they vote on each
17 specification.

18 So, if there were, in this case there
19 were three, so they would vote on each one. And,
20 in this case, they found him not guilty on, on
21 all specifications for the charge.

22 Were there any other observations that

1 you wanted to make?

2 MEMBER BASHFORD: With respect to the
3 verdict, there was a motion to reconsider. So,
4 I'm trying to remember the specifics.

5 If the person who wanted to reconsider
6 had previously voted guilty and wanted to change
7 that, you needed the concurrence of five perhaps,
8 people to allow that motion to be granted.

9 If it had been a not guilty, that's
10 the other way around. If it had been not guilty
11 and now I wanted to change it to guilty, you
12 needed five. If it was guilty and you wanted to
13 change it to not guilty, you needed three.

14 However it was, they didn't get the
15 concurrence of the other panel members, and so
16 there was no motion to reconsider.

17 At least in my jurisdiction, a verdict
18 isn't final until the jurors are polled. If they
19 announce it in court, then they're polled.

20 And sometimes you'll have juror number
21 seven, is that your verdict, no. And then they
22 just go back into the jury room to deliberate

1 more.

2 So, this seems to have a lot more
3 finality, that you can't change your mind without
4 the concurrence of other people.

5 I was amazed at how punctual. I guess
6 I shouldn't have been, but if court starts at
7 8:00 o'clock, it does not start at 8:01. It
8 starts at 8:00 o'clock.

9 The quality of the jurors was amazing.
10 In terms of education, there were three medical
11 doctors on this particular panel, including a
12 pediatrician.

13 One thing that I was confused about
14 for a long time, is the way the judge pronounced
15 MRE rules. She kept saying Emery, the Emery
16 whatever.

17 And I thought it was like Richardson's
18 on Evidence. That there's some big book called
19 Emery on criminal, on military procedure.

20 I did not also realize that there are
21 standing panels of, of members. Because it was
22 clear, at least in the trainings, where they see

1 the same person over and over again.

2 So, they know, yes, we know you have
3 a daughter who is an investigator. Yes, we know
4 your sister was the victim of a sexual assault.

5 I did not realize that the panel can
6 see multiple cases over the period in which
7 they're stood up.

8 Both the complainant and her mother
9 had victim legal counsel. A prior victim legal
10 counsel for the complainant, who had since
11 retired from the Navy, was also present
12 throughout the court.

13 Both sides had a mix of experience in
14 their counsels. There was a very junior member
15 of the trial counsel team, who was really I think
16 brought in more to observe. But the lead trial
17 counsel had 12 years litigation experience.

18 I thought the openings from both
19 sides, and the summations from both sides, were
20 excellent. Well done, well thought out.

21 There was a, an overuse of laptops and
22 screens. There's six people, right. There's

1 three on the defense; three on the trial counsel.
2 Everybody's got a laptop screen up.

3 And, if they go to the podium, there's
4 another laptop screen up. And it's like you can
5 barely see the panel members because of all the,
6 all the screens.

7 I thought that was you lost a lot in
8 terms of interpersonal interaction with the
9 members. And the complainant had been
10 interviewed twice in forensic interviews. And
11 that was the reason the original conviction was
12 overturned.

13 And they were sliced and diced into
14 prior inconsistent clips, and then prior
15 consistent clips to the point there was
16 absolutely no coherence to this.

17 And that was the only thing the
18 members wanted to see during deliberations.
19 Never asked for any read back of testimony. It
20 was just like this slip, this snip, this snip,
21 this snip. So, that was a little -- I'm not
22 saying it was wrong, it was just hard to follow.

1 On the whole, it was an amazing
2 experience, and it's good to be retired. I had a
3 week that I could take off and see the whole
4 thing.

5 But particularly, if you haven't seen
6 a court-martial recently, or if you've never seen
7 one, I really strongly encourage it. Because it
8 was invaluable to me.

9 MS. SAUNDERS: Major Dray, was there
10 anything that jumped out of anything you heard,
11 that you wanted to talk about, or clarify in
12 terms of military procedures?

13 MAJ DRAY: Your perception of Article
14 39(a) sessions where the members went out, did
15 the members seem, did they seem aggravated?

16 Because I know that can be a, a
17 sensitive issue when you're offering repeated
18 objections, and you know the panel is going to be
19 removed, and it seems disruptive to them.

20 MEMBER BASHFORD: Aggravated would be
21 too strong. They weren't pleased.

22 MAJ DRAY: Did the lawyers do the voir

1 dire?

2 MEMBER BASHFORD: Yes. Well, there's
3 a questionnaire that they have beforehand. And
4 then the lawyers each did it.

5 MAJ DRAY: Not the judge?

6 MEMBER BASHFORD: Did she do some at
7 the beginning, or was that the questionnaire? I
8 don't recall.

9 MS. SAUNDERS: I believe she did do
10 some at the beginning. So, kind of some of the
11 basic questions and then turned it over to the,
12 the counsel.

13 MAJ DRAY: Another question, ma'am.
14 You mentioned a lack of detail in questions. Is
15 that, did you notice that from both sides, both
16 the government and the defense?

17 MEMBER BASHFORD: Yes. And, again,
18 given the scenario of what I watched, it can be
19 understandable because you have a child on the
20 stand.

21 For both sides, you know. You don't
22 want to look like a thug cross-examining an 11-

1 year-old.

2 And there could very well have been
3 gaps in her memory, and that might have been all
4 that the trial counsel could elicit.

5 But it just seemed, and I know again,
6 I noticed it in the trainings too. That's why I
7 bring it up here. Because it really doesn't seem
8 that the type of detail that you, that I would
9 expect to see.

10 MAJ DRAY: Perhaps useful to the
11 committee is that the panel also could have asked
12 questions, which is not --

13 (Simultaneous speaking.)

14 MEMBER BASHFORD: Oh, the panel asked
15 lots of questions.

16 MAJ DRAY: Okay.

17 MEMBER BASHFORD: And that became an
18 issue because in the response to one of the
19 questions asked by a panel member, put forth by a
20 panel member, and asked by the court then, the
21 defense then argued that the mother had waived
22 attorney-client privilege in her answer to this

1 question.

2 Which resulted in hours of litigation
3 outside the presence of the panel, that went late
4 into the night.

5 We decided around 6:00 o'clock to
6 leave. We could leave that discussion. I
7 believe they went on till past 8:00 o'clock at
8 night.

9 MS. SAUNDERS: I think that's right.

10 MEMBER WALTON: What was the process
11 used for the questions from, what the panel was
12 using for questions they asked?

13 MEMBER BASHFORD: What I saw is they
14 write down a question, it's shown to trial
15 counsel and defense counsel, and given to the
16 judge.

17 They can object to the question. But
18 then if it, if there's no objection or if the
19 objection is overruled, the judge, the judge then
20 asks the question.

21 MEMBER WALTON: Is there any rationale
22 for why there aren't sidebars as far as

1 conducted?

2 MAJ DRAY: Honestly, I'm not aware of
3 the history behind why there is no sidebar, but
4 my guess is it has something to do, sir, with
5 the, with the court reporter hearing everything.

6 But I know that there's a court
7 reporter in civilian cases, as well.

8 I don't understand why we have to send
9 everybody out. As Ms. Bashford mentioned, it
10 does become sometimes a re-litigation of an
11 issue.

12 It's more animated I would say maybe,
13 than a brief conversation about a particular rule
14 of admissibility.

15 And perhaps that's why it can be
16 pretty adverse at times. And so perhaps that's
17 why.

18 CHAIR SMITH: Ms. Bashford, you said
19 that you thought the voir dire was largely
20 ineffective. So, I'm curious if you could give
21 an estimate.

22 You know, how many questions were

1 asked? I think you said there was an initial
2 questionnaire that was filled out.

3 What about that process, made you
4 think it was ineffective?

5 MEMBER BASHFORD: I think whenever you
6 ask a group of people, would you agree with me
7 that the burden of proofs always rests on the
8 government?

9 Or, would you agree with me that
10 there's no adverse inference if my client
11 doesn't, doesn't testify and everybody, everybody
12 says yes, raises their hand in the affirmative.

13 It doesn't really get to what they
14 really think. I mean I think there is a lot of
15 group answers where people want to be part of
16 the, the group.

17 And, if you can do more individual
18 questions, I think you can get some of these
19 biases out, as opposed to just waiting for
20 somebody to raise their hand that they disagree,
21 or not raise their hand that they agree.

22 CHAIR SMITH: So there was no

1 opportunity for folks to approach the bench, or,
2 you know, where you take people separately and
3 inquire a little bit more --

4 (Simultaneous speaking.)

5 MEMBER BASHFORD: If there was
6 something on their questionnaire, or if they did
7 not agree with all the broad questions, they
8 actually got a time to come back and be
9 questioned individually.

10 MEMBER MARKOWITZ: So, as someone who
11 spends a pretty decent amount of time behind the
12 bar, I would just say there's a couple of things.

13 One, I do hope that folks on this
14 committee will attend a courts-martial. And I
15 hope Ms. Bashford, that you'll actually get to go
16 to at least one more.

17 I agree that there are definitely
18 times when voir dire is not particularly
19 effective.

20 That being said, there is a pretty
21 broad variety of approaches, I would say, in
22 terms of, or at last leeway in terms of what

1 judges I've found, will let in.

2 And so while some judges are very
3 narrow in terms of what voir dire questions
4 they'll allow, I've found that there are some
5 judges, not a lot but there are some judges, who
6 definitely will allow a lot more flexibility in
7 terms of the types of questions that are asked.

8 And so there are some judges who are
9 allowing I think, more creativity in terms of
10 their voir dire questions. And you do see more
11 than just the types of standard questions that
12 you're talking about.

13 So, hopefully people on the committee
14 will get a broader flavor of the types of
15 approaches to voir dire that are happening across
16 the services.

17 But I agree that oftentimes, voir dire
18 is not super effective. So, I do hope folks will
19 get the opportunity to see that for themselves.

20 I want to point out, too, that in
21 terms of getting to see some of the differences
22 that occur in courts-martial, the 39(a) process

1 is obviously very different. And then the team
2 approach that I think occurs at trial is an
3 incredibly different approach, as well.

4 And so I'm glad that you had the
5 opportunity to see how well-staffed these trials
6 are. As an expert in these cases, sitting behind
7 the bar, we are a part of the trial team and end
8 up being there for the entirety of that process.
9 Which does end up being very different than it is
10 in federal court or state court. So, the
11 opportunity to sort of see that interplay is also
12 very different.

13 For me personally, I relish panel
14 questions. I think they're one of the best part
15 of trial. I think they provide an incredible
16 amount of insight, and so I love having panel
17 questions. So, anytime we're able to have those
18 as someone who's actually testifying, it's one of
19 my favorite parts of trial.

20 So, I'm glad you had the opportunity
21 to watch that process happen, and sort of see
22 what that looked like. So.

1 MEMBER WALTON: Just to ask, a
2 potential panel member who has concern about it
3 being known what their verdict was, were they
4 excluded from participation in the trial?

5 MEMBER BASHFORD: I don't believe they
6 were, because after the judge explained to them
7 that nobody would ever know their verdict, they
8 said they had no more concerns.

9 If they were excluded, they were
10 excluded for some other reason. But not, not for
11 that. And, as to what I found out in some of the
12 training courses about the voir dire, it tends to
13 be the younger judges that allow more flexibility
14 in the questioning, as opposed to the older
15 judges.

16 But apparently that can come, can be
17 a two-edged sword because at least in one of the
18 training courses, they alerted the students that
19 there have been some cases overturned based on
20 voir dire usually where trial counsel has
21 successfully fought to keep somebody on, that the
22 defense wanted, wanted excluded for cause.

1 So, they were told to be careful about
2 that.

3 MEMBER MARKOWITZ: I would agree that
4 it is the younger judges who do seem to allow a
5 little bit more leeway.

6 I can't speak to cases being
7 overturned, but I'd agree with the other part.

8 CHAIR SMITH: Major Dray, are the
9 panels always made up of officers?

10 MAJ DRAY: Great question, ma'am. For
11 an officer, a panel will always be a panel of
12 officers. An enlisted accused can make an
13 election to -- they can ask for all officers,
14 they can also ask for at least one-third enlisted
15 members.

16 CHAIR SMITH: What was the demographic
17 makeup of this panel? I'm curious since it was
18 all officers in terms of male-female, race, et
19 cetera?

20 MEMBER BASHFORD: There were at least
21 two women on the jury. There were several on the
22 larger panel that were excluded by the defense.

1 There was one Hispanic doctor, and
2 honestly, I don't remember anything beyond that.

3 MS. SAUNDERS: No, I think your memory
4 is correct on that.

5 MAJ DRAY: I have a comment on that
6 but I can.

7 MEMBER GARVIN: Mine's a new question,
8 so please go ahead.

9 MAJ DRAY: Yes, that's an interesting
10 question, and our panels are selected by
11 convening authorities under the authority of
12 Article 25 of the UCMJ. And considerations of
13 demographics are not part of that explicitly.

14 There is actually a case though, that
15 will be heard at the Court of Appeals for the
16 Armed Forces, that addresses some of this, where
17 the convening authority gave no justification on
18 the record for why there was an all-White panel
19 essentially.

20 I think rules like that apply to
21 court-martials, but there's no explicit mechanism
22 to force, I'll call it equal representation, to -

1 -

2 FEMALE SPEAKER: A jury of their
3 peers?

4 MAJ DRAY: Yes, ma'am.

5 COL BOVARNICK: Major Dray, before the
6 next question, could you cover a little bit more
7 like some of the Article 25 criteria, age,
8 experience, and then a little bit more about that
9 panel selection process?

10 And also clarify Ms. Bashford
11 mentioned standing panels versus, as we all know,
12 there's no standing courts-martial. So I think
13 that's an important distinction to make. So if
14 you could just cover that a little bit, and then
15 obviously hit the different questions from the
16 members.

17 MAJ DRAY: Yes, sir. So, Article 25
18 is the authority that a convening authority uses
19 to select members. And it's different
20 jurisdictions probably do the finding folks who
21 would qualify for their age, experience,
22 education, temperament, perhaps, perhaps there's

1 one more in Article 25 that are explicitly
2 written in that law.

3 The convening authority then
4 identifies people who meet that criteria, and
5 will then create a standing panel of people who
6 then he would identify to go show up at least to
7 a panel before, for a court-martial that that
8 convening authority convenes.

9 So, there is a list of people that
10 perhaps that convening authority uses routinely,
11 to send to different courts-martial. But it is
12 not like one court-martial exists in perpetuity
13 for every charge, or even a significant length of
14 time.

15 COL BOVARNICK: And so, then he's
16 referencing the convening order. So, the
17 commanding general also called the convening
18 authority, solicits input from the installation
19 or wherever they're at. They compile a convening
20 -- a list of members. The Staff Judge Advocate
21 will go and advise the convening authority, but
22 the convening authority will select members. And

1 they go on this piece of paper called the
2 convening order. That's sitting there.

3 Once charges are referred, then
4 there's a standing -- then there's the court-
5 martial. And the court-martial will be referred
6 to that convening order, and then a number of
7 members will show up. And then, as was explained
8 a little bit earlier, they'll go through the voir
9 dire and get it down to eight for a general
10 court-martial.

11 So, there's this convening order
12 that's out there after a case is referred. On
13 the back of a charge sheet it literally says,
14 it's referred to court-martial convening order
15 number one, headquarters, 101st Airborne
16 Division, that has these like 15 members on it.

17 If it's an officer, the other point
18 that should be made is the person has to be
19 senior in rank, and not in the chain-of-command
20 of the officer.

21 In enlisted, this convening order has
22 officers and enlisted on it. If it's an enlisted

1 soldier, they select their forum election. The
2 judge will ask them.

3 The default is an officer panel unless
4 the accused if it's an enlisted person, requests
5 an enlisted panel.

6 Then one-third of the members all
7 senior in rank and not in the chain-of-command,
8 will be on that, will show up for that panel.

9 So for example, for Lieutenant
10 Commander Dominguez, they wouldn't have had like
11 a lieutenant or a lieutenant junior grade.

12 There could have been on the convening
13 order actually show up and sit there in the pool
14 of panel members, when you already know the
15 person can't sit on that court. They're junior
16 in grade.

17 Just like none of the enlisted folks
18 that were on the convening order would even show
19 up at the court-martial, for Lieutenant Commander
20 Dominguez.

21 So, anyway, if that helps a little
22 bit.

1 MAJ DRAY: Yes, and so then like
2 that's the venire, right, that shows up. And
3 maybe it's 15 people who are on this.

4 Okay, they'll show up and then that's
5 who is, oh, sorry, that's who the counsel are
6 conducting voir dire with.

7 Another thing too, that is unique to
8 the military, is a accused, any accused, can
9 elect to be tried by a military judge alone on
10 findings. So.

11 MEMBER WALTON: The members of this
12 standing panel, whatever you call it, is there a
13 period of time in which they can only be on that
14 panel? Or is it in perpetuity?

15 MAJ DRAY: Just the nature of the
16 military is people are in and out of training, or
17 they're PCSing. And so, or doing any number of
18 other duties. And so, more than would ever be
19 required to sit on a court-martial are on this
20 standing panel, we'll call it.

21 And, just be cut for convenience and
22 necessity, they're on it for a while until they

1 say, PCS, or take on a new duty assignment that
2 perhaps would make it almost impossible for them
3 to reasonably ever sit on a court-martial.

4 COL BOVARNICK: Okay, I ended at one
5 other point. So, sir, so basically let's say for
6 example, summer is a big PCS season in the
7 military.

8 So a convening authority, I'm just
9 using an Army example experience, and I'm not
10 sure if it's different for the other services.

11 So, for example when you take an
12 installation, 101st Airborne Division, there's
13 the general selects whatever it's going to be,
14 like 20 people that are on this piece of paper, a
15 convening order.

16 Court-martial convening order number
17 one. Twenty people on there. Officers and
18 enlisted. There's a particular case. The case
19 is referred to that.

20 Let's say for example, let's pick this
21 officer example and I'll get to your question.
22 The people on the panel are junior. They'll be

1 excused from that exact case.

2 So it's amending. So court-martial
3 convening order number two, it's the first one,
4 amended by number two, which is for that exact
5 case.

6 So anyone that shouldn't even show up
7 because they're not an officer, they're junior in
8 grade or enlisted, they're gone.

9 What will happen each year, when you
10 start to get towards the PCS season, or whatever
11 reason, you had a lot of those members on that
12 panel, on the convening order, excuse me, are
13 leaving --

14 MEMBER BASHFORD: Colonel, I think
15 you're not speaking into your mic. I'm getting
16 some --

17 COL BOVARNICK: Hopefully I'm loud
18 enough, but yes. So, sorry. So, what will
19 happen is when members are starting to PCS and
20 this list of 20, a lot of folks are gone, each
21 year perhaps, or whatever the, the convening
22 order, excuse me, the convening authority thinks,

1 they'll do a new court-martial order with all new
2 people.

3 So they'll go through a whole new
4 selection process with the Staff Judge Advocate.
5 Then you have a whole new convening order. All
6 the other people are excused, and you're starting
7 fresh with new people.

8 So they'll go through this process, so
9 you can say generally a year, some are less.
10 Some convening authorities may do it because it's
11 a critical, important process but as you can
12 imagine, it's laborious.

13 You have to solicit nominations from
14 all the commands. It's this long, detailed
15 process.

16 So you hope you'd have it for about a
17 year. Certainly I can't imagine any installation
18 does it like less than six months, and if anyone
19 has any other experience with that.

20 So generally everyone's on it for a
21 year, and then you just pick the new panel.

22 MEMBER GARVIN: So changing the

1 subject just a little, hopefully no one, and we
2 can come back to that, I think.

3 So, I think you mentioned that both
4 the child and the child's mother had SVCs, or had
5 counsel.

6 So in any of the 39(a) hearings,
7 hearings outside the hearing of the panel, did
8 any of those issues raise victim issues 412-513,
9 and was the SVC, was the victim's counsel in part
10 of those hearings?

11 MS. SAUNDERS: There were no, none of
12 those types of issues. Ms. Bashford had
13 mentioned the attorney-client issue with the mom.

14 And I think the SVC for the mom did
15 get involved with that. And the attorney in
16 question there, was the, her divorce attorney.
17 And he was trying to pierce that, that privilege
18 there.

19 And so the SVC did get involved there.
20 But the other SVCs, I don't think there was
21 another issue where they had to, to get involved.

22 MEMBER GARVIN: And so just a quick

1 follow up. I believe, Ms. Bashford, you had
2 mentioned that some of them were re-litigating
3 pre-trial motions basically, or trying to re-
4 litigate.

5 And so were any of those issues things
6 that, that you thought victim counsel might have
7 wanted to have been involved in, or should have
8 been involved in, and they didn't join? Or were
9 they just not issues that implicated the victim's
10 rights?

11 MEMBER BASHFORD: I don't think
12 anything that came up was, was really implicating
13 victims' rights.

14 It was more we decided this would be
15 the parameter of something, and then one side or
16 the other wanted to change the parameters of what
17 was going to be allowed.

18 It was hard to know because I wasn't
19 there for any of the pre-trial motions, so I'd
20 only hear, hear them like sort of in reference.

21 MEMBER KRAMER: Can I -- I'm sorry,
22 I'm stuck in a no-man's land here.

1 (Laughter.)

2 MEMBER KRAMER: They didn't want me to
3 ask anything, I guess.

4 Can I ask you two questions that were
5 -- one, how many others? And are there
6 statistics or do you have a sense for how often a
7 member chooses to have a judge trial? And --

8 MAJ DRAY: That's an interesting
9 question. I don't, I'm sure there are
10 statistics. I'll offer my, I've certainly seen a
11 lot, many cases. My gut would be about 50
12 percent.

13 It depends on the nature of the
14 charges. Because we have standing -- because we
15 have panel, like, perhaps you get a feel for how
16 a panel decides certain types of issues. Or a
17 judge, because the judge, a military judge, will
18 be located at one installation doing many courts-
19 martial. And so, knowing how that judge rules on
20 things, makes findings on particular facts, and
21 sentences, as well. Perhaps --

22 (Simultaneous speaking.)

1 MEMBER KRAMER: Do you have a sense
2 that -- oh, I'm sorry.

3 MS. SAUNDERS: Oh, no, I was just
4 going to say: in any case involving a pre-trial
5 agreement, a standard clause of that would be
6 that they would be heard by a judge alone.

7 MEMBER KRAMER: And do you have a
8 sense, does that occur more or less often in
9 sexual offenses, or sexual assault cases? Do you
10 have any sense of that?

11 MEMBER BASHFORD: I just want to,
12 partly in answer to your question. On the case
13 review if you recall, that on the penetrative
14 sexual assaults, you were more likely to be
15 convicted of that charge by a member panel.

16 You were less likely to be convicted
17 of that by a judge, but the Judge was going to
18 get you for something. It's all sort of the
19 associated crimes around it. The member's use
20 was either up or down, and they didn't care about
21 the adultery or whatever.

22 MEMBER KRAMER: Then I just had one

1 last question.

2 MR. SULLIVAN: If I could just
3 intercede for just one second. Some of the
4 service representatives may have some greater
5 fidelity on those numbers. It may be worthwhile
6 to ask them.

7 MAJ DRAY: And I offer this, too:
8 there is not -- there is an option if an accused
9 is tried by a panel of members, that they can
10 choose to be sentenced by just a military judge
11 after that.

12 MEMBER KRAMER: Then I just have one
13 more quick question. Do you have a sense in
14 whether this statistics, and do you have an
15 anecdotal sense of, you said an enlisted member
16 can choose to have up to three enlisted members
17 on the panel, I think?

18 MAJ DRAY: A third.

19 MEMBER KRAMER: A third.

20 MAJ DRAY: A minimum of a third.

21 MEMBER KRAMER: Do you have a sense
22 how often they choose to have some enlisted

1 members, as opposed to all officers?

2 MAJ DRAY: I'll offer my experience on
3 that. Certainly, the service representatives
4 would have -- very often. I found that enlisted
5 accused almost always were selecting enlisted
6 representation on a panel case.

7 MEMBER KRAMER: Thank you very much.

8 MEMBER MARKOWITZ: I will second that.
9 This year, I have not had an accused who was an
10 enlisted soldier who did not go with an enlisted
11 panel this year.

12 MEMBER O'CONNOR: Totally different
13 topic. I'm curious if you can talk just a little
14 more about the make-up of the panels. I think
15 you've made reference to the fact that commands
16 nominate people, a judge puts together the panel,
17 I guess, or the convening authority does.

18 Could you just talk a little bit more
19 about is there -- is everybody, you know, put on
20 a list and it's randomly selected based on who's
21 available? I'm curious more about how the panels
22 are composed.

1 MAJ DRAY: So, it is -- I'm in the
2 Army, and so I'll offer an Army perspective.
3 Perhaps a general -- a two-star general who is a
4 division commander, let's say he's got 10- to 15-
5 to 20,000 people under his or her command,
6 solicits from his subordinate commanders to
7 identify people who could serve on a panel, who
8 could be on this, right, standing convening
9 order, standing list of people who I could then
10 appoint to specific courts-martial.

11 And that's where that commander is
12 consulting with his senior legal advisor, the
13 Staff Judge Advocate, and their subordinate
14 attorneys who work with those commanders to
15 identify people who would be available, and also
16 meet these criteria within Article 25 of the
17 UCMJ, right, for experience, education,
18 temperament. Those people who are identified are
19 on, like, a list, right, a big Excel list,
20 perhaps.

21 And then the convening authority
22 identifies a number, say 20, 25, 30, depending on

1 the size of the installation, who are on this
2 list, based on those factors.

3 Now that's like the -- I'm air-quoting
4 here for the transcript -- that's where the
5 selection happens, right? And it's meant to be
6 unbiased. We're not -- the convening authority
7 should not be choosing people because they
8 convict, right, more often than not, or because
9 they perceive that person to be tough on crime.
10 It should be for other factors identified in
11 Article 25.

12 COL BOVARNICK: If I could jump in,
13 just because I've gotten this probably about 30
14 times, literally.

15 So, a tasking goes out in the command
16 to all of the units. And, as Major Dray
17 explained, and I won't reiterate any of that, but
18 the other factors like rank, as well. So, it
19 goes out to your unit, the 1st Brigade, you owe
20 us. Brigade commander, with their lawyer, give
21 us the names of X number of colonels, which is
22 usually one that's the colonel, X number of

1 lieutenant colonels, X number of majors,
2 captains, and so on down the road. And the same
3 thing for enlisted.

4 That unit will then send a list to the
5 Staff Judge Advocate from that unit, of those
6 just categories of basically by rank. You know,
7 obviously they don't have all of their
8 demographics, or whatever.

9 Each of the units do that. The Staff
10 Judge Advocate compiles it. You walk into the
11 general one day with a binder with like hundreds
12 of names. And the general, the convening
13 authority, on their own is looking that you have,
14 you have officer record briefs, ORBs and enlisted
15 record briefs, that show all the person's former.

16 Because it's age, experience, do you
17 want your 18-year-old private that just came in?
18 No, and by the way, they're probably not going to
19 be senior in rank to an accused.

20 So bottom line, so they're going to go
21 down this list, and they're just going to sit
22 there on their own and they're going to check

1 names.

2 And what I would say to the general,
3 sir, you should pick three or four colonels.
4 Three or four, you kind of have these numbers to
5 make up your convening order, or whatever it's
6 going to be, 20 people.

7 And the general sits there for an hour
8 and you just sit there as a Staff Judge Advocate,
9 check all these names.

10 You take all the names they checked,
11 you go back to the office and you produce an
12 convening order.

13 The general picked these people, it's
14 called court-martial convening order number one.,
15 headquarters, 101st Airborne Division.

16 And it says a little blurb at the top,
17 for an officer panel, these are the 10 officers
18 that you'll start with.

19 If the, then there's another little so
20 it's just a list of officers, their rank, name,
21 and their MO, their military occupational
22 specialty, or branch.

1 Then there's a little line under that
2 that says, if the accused elects an enlisted
3 panel, you'll add in these enlisted members, and
4 you'll excuse certain officers. So they're
5 automatically excused.

6 There's also a provision that says, if
7 the person's in the chain-of-command or senior to
8 the accused, they're automatically excused.

9 And what that means is for a specific
10 case that comes up, the court-martial of
11 Lieutenant Commander Dominguez, it's
12 automatically an officer panel because he's an
13 officer. He can't choose an enlisted panel.

14 If it's an enlisted person, then
15 they'd say I want an enlisted. So the Staff
16 Judge Advocate knows that the convening order for
17 a specific case, if it has to be amended and you
18 have to excuse people, then you'd excuse them
19 from this standing list. So that's kind of how
20 it works.

21 So that list, and so every particular
22 case is automatically going to have a number of

1 automatic excusals based on the document that
2 accompanies the convening order, that says if
3 they're senior to the, if they're junior to the
4 accused, automatically excuse them. They're not
5 to show up at the court.

6 If they're not available because
7 they're TDY or they're deployed, automatically
8 excused. If they've PCS'd, automatically
9 excused.

10 That's why at the end of the year, you
11 start to get a lot of that, and you have to do a
12 new one.

13 So hopefully that explains it. That
14 court-martial convening order is good for as long
15 as the convening authority wants.

16 And then every individual case, the
17 Staff Judge Advocate looks at it. What's the
18 rank of the accused? Was it enlisted? Did they
19 request enlisted? And then they publish a
20 convening order, an amending order for that exact
21 case.

22 So the very first words out of the

1 judge's mouth at every court-martial is, actually
2 it's the trial counsel doing it, this court-
3 martial is convened by court-martial convening
4 order number one, headquarters, 101st Airborne
5 Division, as amended by court-martial convening
6 order number three, headquarters, 101st Airborne
7 Division.

8 And, blah, blah, blah. Like I said,
9 it's literally the first quote of every court-
10 martial.

11 MEMBER WALTON: We used to have in the
12 District of Columbia, something equivalent to a
13 standing jury pool.

14 And what the statistics showed is that
15 the longer the jurors were on that pool, and the
16 more cases they heard, the more likely it would
17 be that they were going to convict.

18 Have you seen that same phenomenon in
19 the military?

20 COL BOVARNICK: Yes, I don't have any
21 specific statistics on that.

22 What I will say is one thing, is that

1 the panel when they continue to hear more and
2 more cases, the, let me give you an example
3 again, anecdotal, but just in general.

4 So this standing convening order I
5 mentioned, so for example sorry to go about the
6 101st but that's where I was for three years.

7 But so when there's a lot of trials,
8 right, as opposed to an installation that just
9 has a few like you got like Fort Belvoir, or
10 something like that.

11 So, there's like 50 trials a year.
12 And maybe like 30 of them are contested. Any
13 individual member, like the most I've ever seen,
14 and this is like hundreds of courts-martial over
15 the years, I mean, if you ever find a panel
16 member that says like I sat on like five or six
17 cases, that's a lot.

18 So, any individual person is not going
19 to sit on all 20 or 30 cases that are panel cases
20 at an installation.

21 Just, I mean it could happen, but in
22 my experience, you just don't see it. They're

1 going to get excused.

2 They're going to come in, they're
3 tired. It's like their, you know, tenth case and
4 they're going to say something in voir dire that
5 gets them excused.

6 Whether it's for cause, or the judge
7 is just like okay, they're gone. So, you're not
8 going to see an individual person hear that many
9 cases.

10 So it's a great point though, so I
11 don't really know anecdotally even like, so
12 you're not going to have the same panel hearing
13 10, 15, cases. That's not going to happen in my
14 experience.

15 CHAIR SMITH: So I have a question.
16 Can an accused challenge the panel? And I'm
17 asking this, I'm curious as to one, what are the
18 factors in Article 25, right? So if you are a
19 Hispanic enlisted person, and your panel is all-
20 White, are you able to say hey, you know, this is
21 not a jury of my peers? Is there a requirement
22 that it's a jury of your peers?

1 And so, if it's just scenario an all-
2 White jury or panel, all-White panel, can an
3 accused challenge that panel? And when the
4 general is looking at the list, is there any
5 consideration to having women, having minorities,
6 et cetera?

7 MAJ. DRAY: Yes, ma'am. So, an
8 accused can challenge a panel in the sense that
9 if there is a purposeful exclusion of people
10 because of potential panel members, because of
11 their race, that would be improper.

12 But as far as an affirmative
13 requirement to establish a certain demographic,
14 there's not, and there would be at least two
15 mechanisms by which an accused could do that
16 because I'll chat about a bit when I discuss
17 appeals.

18 But unlawful command influence is
19 perhaps the most significant underlying aspect to
20 everything that happens in military justice,
21 command influence. By that, I mean a convening
22 authority or other person who is attempting to

1 dictate unlawfully the results of a court-
2 martial.

3 An example would be I am a minority
4 person and you purposefully excluded from your
5 preselection criteria or from your deliberative
6 process with you SJA this type of person, and so
7 that is unfair and then could make some -- could
8 certainly show it, but you would have to show
9 some if not purpose, at least an intentional
10 disregard of those factors in that selection
11 process, so there is a way to challenge it.

12 MEMBER KRAMER: How would somebody
13 ever show that?

14 MAJ. DRAY: Yeah, great question, some
15 kind of, yeah, I mean, not to be flippant, but I
16 mean, you'd have to be privy to probably some
17 kind of, some of the conversations between the
18 SJA and the commander if you could get that, if
19 anybody would admit to it or subordinate
20 commanders, very difficult.

21 MS. SAUNDERS: So, our next session,
22 we have Meghan Peters and Terry Gallagher who are

1 going to come up, so there will be more
2 opportunities during this next session which
3 covers some of the training courses that some of
4 our committee members have attended recently.

5 So, there will be more opportunities
6 for you all to ask some of these similar types of
7 questions during that session. So, I'll have
8 them come up and I think Major Dray is going to
9 stay here to continue to answer any questions you
10 may have. Thanks.

11 COL. BOVARNICK: Judge Smith, do you
12 want to proceed with the next session before we
13 take our first break or do we prefer a break?

14 CHAIR SMITH: I think we can proceed.

15 COL. BOVARNICK: Okay, and just as a
16 reminder, so, yeah, these are the two litigation
17 courses as our staff members are coming up, the
18 Air Force litigation course you'll hear about and
19 then the Army litigation course.

20 MS. PETERS: Good morning. I'm here
21 to give you an overview of one of the courses
22 attended since our last meeting.

1 PARTICIPANT: Turn on your mic.

2 MS. PETERS: I'm here to give you an
3 overview of the courses that the staff and
4 members have attended since our last meeting and
5 the first one is the advanced sexual assault
6 litigation course hosted at the Air Force Judge
7 Advocate General School in Maxwell Air Force Base
8 in Montgomery, Alabama.

9 And if you recall at the last meeting,
10 Air Force presenters had invited the members down
11 to attend this specific course and the JAG school
12 staff there are just, as a first note, they were
13 incredibly gracious to host myself and three of
14 our members. That's Ms. Bashford, Ms. Goldberg,
15 and Dr. Spohn.

16 The litigation course was really
17 geared towards experienced litigators and it
18 emphasized the preparation and presentation of
19 expert testimony, witness testimony, and argument
20 in sex assault and special victim cases.

21 This was a joint training event, so it
22 was attended by prosecutors, defense counsel, and

1 victims counsel.

2 The prosecutors had all been selected
3 already as members of the upcoming Office of
4 Special Trial Counsel, so that was, I think, what
5 brought this course to be of particular interest
6 to the committee -- its role in developing skills
7 and training for members of the Office of the
8 Special Trial Counsel in the Air Force.

9 And to be clear, this was a
10 preexisting course, but it is now bringing in
11 those particular folks for additional training
12 and sharing of experiences with other counsel.

13 The structure of the course was a
14 mixture of plenary sessions, then they'd have
15 small group breakouts where just the prosecutors,
16 just the defense counsel, and victims counsel
17 would meet to discuss particular aspects of their
18 advocacy, and then they would reconvene again for
19 practical exercises to walk through mock voir
20 dire, direct and cross examination of a witness
21 or argument, and then immediately following that,
22 the instructors would provide their feedback.

1 And I think it's important to note who
2 these instructors were. There were some Air
3 Force JAG school staff who are field grade,
4 seasoned judge advocates, and they're
5 supplemented heavily by experienced counsel in
6 the field.

7 So, the prosecutor who is teaching
8 about how to cross examine an accused was in a
9 court-martial last week at some other base and
10 flew in just to teach this course, and in these
11 breakout sessions, they could share their
12 practical tips and experiences on top of giving
13 good instruction.

14 And one point of note, that they often
15 incorporated those cases decided recently in
16 appellate courts that might highlight an issue
17 that counsel had created at trial and said hey,
18 this is what the appellate court just said.
19 Avoid this or here is what to watch out for.
20 Here is what we just learned, and so they were
21 melding their experience with their knowledge of
22 the law for these mid-grade and more experienced

1 practitioners.

2 By being at the schoolhouse for four
3 days, we were able to take advantage of some time
4 with the Air Force JAG school staff and the
5 acting lead special trial counsel for the Air
6 Force and people like that.

7 So, we had two working lunches where
8 we just were able to sit down and members could
9 engage with the staff and say here is our
10 questions, here is our observations, and it was a
11 good dialogue.

12 And I'm going to turn it over to Ms.
13 Gallagher to talk about the other course and then
14 open it up for observations and questions.

15 MS. GALLAGHER: So, just last week,
16 Ms. Bashford and I attended the four-and-a-half-
17 day sexual assault trial advocacy course training
18 conducted by the Army Trial Counsel Assistance
19 Program, and that was at their new Army Advocacy
20 Center on Fort Belvoir, Virginia.

21 In the future, that course will no
22 longer be taught. It is going to become part of

1 the special trial counsel certification course
2 and they are in the process of developing that
3 course right now. They anticipate it's going to
4 be a three-week-long course and the first course
5 is scheduled for June of 2023.

6 Nineteen Army prosecutors attended the
7 course. Most of them were judge advocates
8 already serving as special victim prosecutors,
9 with about half of those projected to fill
10 special trial counsel positions.

11 The format was both lecture and
12 practical exercises. The lectures were almost
13 all presented by civilian experts. The topics
14 covered were the cross examination of experts and
15 the accused, forensic psychology and biology
16 consultants and witnesses, corroborating
17 evidence, and closing and rebuttal arguments.

18 The small group workshops were
19 practical exercises conducted on motions, both
20 military rule of evidence 412, which is the rape
21 shield, and military rules of evidence 513, which
22 is the psychotherapist-patient.

1 They did practical exercises on voir
2 dire, opening statements, and direct and cross
3 examinations, and those were of the accused, the
4 victim, and two experts.

5 They had, for evaluators, well, they
6 had -- they were broken out into four different
7 rooms with about five practitioners in each room,
8 and they had a team of evaluators.

9 The team consisted of an Army civilian
10 who is one of their highly qualified experts that
11 have years of prosecution experience in the
12 sexual assault field and they serve with TCAP.

13 And so, there were three of them in
14 the breakout rooms and they were paired up with
15 an experienced judge advocate in the rank of
16 either O-4 or in the grade of O-4 or O-5, and so
17 those two, that team served as the evaluators.

18 In one of the rooms, they had two
19 experienced judge advocates in the rank or the
20 grade of O-4 and O-5 serving as the evaluators.

21 And both the students, the attendees,
22 and the evaluators stayed in the same mock

1 courtroom for all of the practical exercises, so
2 they stayed together.

3 Interestingly, for the experts, for
4 the practical exercises, they did cross
5 examinations and direct examinations of the
6 forensic psychologists and the forensic
7 biologists, and they had the experts graciously
8 sat there in a room with, you know, the five
9 practitioners.

10 And they patiently went through the
11 prepared cross or direct examination and then
12 they were also available to just answer every
13 question that the practitioners had of them about
14 their science, about how to elicit the
15 information.

16 And the enthusiasm of the
17 participants, I mean, they just, they used, I
18 mean, they were on those experts during the
19 breaks and everywhere else, and so it was a very
20 open forum for them to learn the science and how
21 to elicit the information.

22 Well, all in all, I mean, of course it

1 was -- the facilities, the host were incredible
2 and provided everything we could possibly need.
3 It was an excellent informal site visit. I know
4 Ms. Bashford and I both had an opportunity to
5 engage with the students and learn a little about
6 them and what they were doing, and kind of their
7 background and experience.

8 And with that, I think we'll turn it
9 over to Ms. Bashford to provide some specific
10 observations on the training.

11 MEMBER BASHFORD: Both of the fact
12 patterns involved an intoxicated victim, but
13 neither of them charged incapacity. They charged
14 without consent.

15 And in each, both the Army and the Air
16 Force, a number of the attorneys were conflating
17 that and arguing incapacity even though that
18 wasn't charged in either of the fact patterns,
19 which certainly, considering the level of the Air
20 Force, was a little troubling.

21 The Army training, about half of them
22 were going to be probably going to OSTC, the

1 other half not just depending on their experience
2 level.

3 I also saw the same lack of attention
4 to detail. A couple of the Army trainers pointed
5 that out. One example in the fact pattern, I
6 woke up and he was on top of me penetrating me.
7 There would be one follow-up question about what
8 was penetrating what and then move onto something
9 else.

10 What does on top of you mean? Not a
11 single person in anything I saw talked about
12 clothing, you know, who is dressed how and what
13 does on top of you mean? So, that kind of lack
14 of attention to detail I saw in both courses.

15 There was -- the Air Force started
16 with talking about the changes with OSTC and the
17 Army on Wednesday had a town hall telling them
18 about changes that were going to come into effect
19 on Friday.

20 For the Army, they were going to fall
21 in line with everybody else. PC is going to be
22 done by investigators.

1 And then there was a reference, which
2 I think we need, the committee needs more
3 clarification on, that the counsel will be making
4 an opine based on preponderance of the evidence,
5 which to me seemed to come out of nowhere.

6 For the Army training, we suggested a
7 six-month to one-year follow-up where you go back
8 to the people who took your course and said what
9 three things did you find most useful that you
10 learned here and what three things did you never
11 use at all, which they seemed to think was a good
12 idea.

13 I want to loop Jen Markowitz into this
14 because certainly the Air Force seemed very
15 reluctant to ever use the SAFE exam or call a
16 SAFE examiner, and they went back and looked and
17 they had not done a training on this in either
18 their basic, intermediate, or advanced training.
19 It was unclear for how long.

20 One practitioner said in the
21 preliminary motions that physical injury is
22 irrelevant, which astonished me. It seemed that

1 they were very concerned about prior sexual
2 conduct of the victim being elicited if you
3 brought in the SAFE examiner's report.

4 It was a little bit more mixed with
5 the Army. Some people thought it was not useful
6 because injury could have come from other ways.
7 It was a very detailed SAFE report. I would have
8 like given my right arm to have had such a report
9 and about half of them weren't going to use it,
10 so that was, you know --

11 MEMBER MARKOWITZ: You're breaking my
12 heart, so I will say that. Also, I think I wrote
13 that SAFE report, so thank you. So, I guess a
14 couple of things I will say.

15 As I think everybody at this table
16 understands, medical evidence in most sexual
17 assault cases in adult cases is nonspecific, but
18 that doesn't mean it's unimportant, and I think
19 one of the things that I probably spend most of
20 my time talking about is how to best use medical
21 evidence and medical experts in these cases.

22 I teach five or six courses a year for

1 the Trial Counsel Assistance Program for the Army
2 and a couple of courses for the Navy and Marine
3 Corps. I do not teach for the Air Force.

4 So, that being said, we do spend a lot
5 of time having that conversation and I'd be
6 interested in Ms. Garvin's feedback about
7 balancing the issue of victim privacy and how we
8 approach the issue of prior sexual conduct and
9 things like that with the realities of source of
10 injury and that issue coming up at trial.

11 But we do teach, at least at the
12 courses that I'm teaching at, how to use the
13 medical exam, how to use medical evidence in
14 these cases and provide some context, right, what
15 the left and right limits are for that evidence
16 because, of course, just because something isn't
17 specific doesn't mean it's not important.

18 So, it is a little bit heartbreaking
19 to hear that they're just not using it at all and
20 my hope is that that will change in the future
21 because we did used to teach it at the Air Force
22 when I taught for them a while ago, so that's

1 unfortunate.

2 CHAIR SMITH: Can I ask a question?
3 When you're referring to prior sexual conduct of
4 the victim, are you referring to what might be
5 additional reasons for findings in the Sexual
6 Assault Forensic Examination or are you referring
7 to prior sexual conduct of the victim as in, you
8 know, a year ago, she had a relationship?

9 MEMBER MARKOWITZ: Sure, so I'm
10 talking about other sources of injury --

11 CHAIR SMITH: Okay.

12 MEMBER MARKOWITZ: -- in a particular
13 case, things that may come in --

14 CHAIR SMITH: Okay.

15 MEMBER MARKOWITZ: -- as an
16 explanation for what we're seeing on the
17 examination.

18 CHAIR SMITH: So, prior sexual conduct
19 isn't admissible unless it's in that --

20 MEMBER MARKOWITZ: That's right.

21 MEMBER GARVIN: And if I may -- oh,
22 I'm sorry. If I may, just because Jen brought it

1 up, you know, the prior sexual activity that
2 could show the cause for the injury is
3 problematic because we then have the 412.

4 And, right, as a victim lawyer, my
5 loyalty is to, would be to how does the victim
6 want that to proceed. Trial counsel may want
7 something else to proceed, right, so trial
8 counsel may want more of the injury evidence in
9 regardless of what it reveals and then we have to
10 argue the 412 too.

11 So, right, we have a privacy
12 litigation moment where there could be different
13 interests at play, and so it's a complex issue.
14 So, if you're going after conviction, you might
15 want injury evidence in more than if your
16 priority is privacy.

17 MEMBER MARKOWITZ: Yeah, I agree with
18 that, and I think one of the things we recognize
19 is that medical evidence is rarely the smoking
20 gun in an adult or adolescent case, and so there
21 definitely is, as part of the calculus, this
22 conversation that does need to take place.

1 The idea though that it's just never
2 relevant because it's impossible to ever prove
3 that that could, was only from a sexual assault
4 is, I think, hugely problematic and that's the
5 conversation that probably needs to be taking
6 place from a training perspective. My hope is
7 that we're going to do a better job moving
8 forward.

9 We certainly have that conversation,
10 like I said, in the courses where I'm teaching,
11 but even still, having those conversations,
12 obviously that message is not always being
13 conveyed consistently, so again, still somewhat
14 heartbreaking from the clinician side of things.

15 CHAIR SMITH: What's a 412, and when
16 there is a dispute between victim's counsel and
17 the prosecutor, who ultimately makes the call on
18 how to proceed?

19 MEMBER GARVIN: I'm wondering if we
20 should have military practitioners answer the
21 question, but I'm happy to also.

22 MAJ. DRAY: So, I'm at least -- so

1 MRE, Military Rule of Evidence 412 generally
2 prohibits the admission of previous sexual
3 history or conduct of a victim, but there are
4 exceptions to it.

5 And the concern of folks there that
6 we're discussing is that well, if I enter or
7 start talking about this examination, perhaps it
8 shows conduct from a day or two ago that's going
9 to make my victim look promiscuous. I don't want
10 that, so that would be their hesitation.

11 The conflict at times that can happen
12 between an SVC and a trial counsel is just that,
13 is exactly that, is that the privacy interests of
14 a victim perhaps are more important to that
15 victim than the admission of a particular bit of
16 evidence or something, and so that is a
17 conversation with the SVC and their client, and
18 then the SVC and the trial counsel.

19 And the reason that we now have a, I
20 would say, quite robust program in the military
21 involving SVCs and VLCs, VLC, I think, is just
22 the Marine term for it, but this legal

1 representative for a victim of a covered offense,
2 they can fight that fight.

3 They would have standing to go and
4 litigate at a motion regarding MRE 412 at a trial
5 that may be adverse or at least not perfectly in
6 line with the government's position, and so that
7 is an aspect to the SVC-VLC program.

8 MEMBER GOLDBERG: I'm going to jump in
9 and offer some additional observations. I
10 thought I would share first some observations
11 about the course and the experience there, and
12 then a few that relate to sort of bigger picture
13 questions that came up for me.

14 And I do want to start by thanking the
15 very hospitable hosts for us. I was only in
16 Montgomery for two days at Maxwell Air Force
17 Base, but both were, you know, full of training
18 sessions.

19 Leadership at the base or at the JAG
20 training center, and staff from the program and
21 students were all very willing to talk and answer
22 questions. I had a lot of questions and I found

1 it really useful, and I also encourage my
2 colleagues, if you have a moment, to go and
3 observe even for a day probably would be
4 worthwhile.

5 A couple of general observations about
6 that teaching, you know, and it reflects what Ms.
7 Gallagher, Ms. Peters, and Ms. Bashford said, I
8 mean, you know, it was a mix of interactive and
9 sort of participation by students.

10 I thought the teaching was generally
11 excellent. I have spent a lot of years as a
12 professor and have observed a lot of teaching and
13 training sessions, and thought that really almost
14 all of them were at the very highest level in
15 terms of engaging the students and having the
16 students sort of being clear that the students
17 could challenge those who were teaching.

18 And there was one faculty member who
19 was particularly good at that, and I can imagine
20 in a situation where the students are all junior
21 ranked to that teacher, they might be reluctant
22 to push back on something that's being said, and

1 the teachers really were creating an environment
2 to enable that.

3 I also thought that there was a real,
4 an interesting benefit of prosecution, defense,
5 and victims counsel sharing space. Even though
6 they had a lot of separate sessions, I think the
7 idea that they do interact even though each of
8 them is sort of working in a different location,
9 but the idea that they could interact and learn
10 from each other seemed worthwhile. This relates
11 to something I'll say more generally.

12 When we were in some of those working
13 lunches, I offered a couple of my suggestions for
14 future courses. One was that there be sort of
15 consistency in providing detailed feedback to the
16 students.

17 Some of the teachers, whether they
18 were acting in a role or otherwise, but
19 particularly when they were acting as judge and
20 then they would debrief after an exercise in voir
21 dire or anything else, would provide very
22 specific feedback, not only about presentation

1 style, but about the types of questions that were
2 asked or missed.

3 Others would provide the more generic
4 don't use your laptop so much, to go back to Ms.
5 Bashford's point from before, or, you know, make
6 sure that your laptop doesn't impede your
7 engagement with the panel.

8 You know, that kind of feedback is
9 fine, but I think what the students probably
10 absorbed more was when something was mentioned to
11 them that they hadn't thought to ask about X, or
12 why didn't they follow up about Y, or what about
13 this whole other set of questions and some of
14 that came up in the voir dire training.

15 The second suggestion I offered was to
16 have a little bit more modeling. Since there are
17 so many experts about the teachers, having the
18 students not only try for themselves, but watch
19 somebody who is really good at this do it, not
20 just by way of offering a momentary example in
21 the course of teaching, but instead wow, look at
22 that person do their voir dire, and then even

1 have that person reflect on how they did and what
2 they might have improved themselves. I think
3 that is just another good teaching modality.

4 The two broader points I wanted to
5 mention, one is about voir dire and one is about
6 that composition of that panel, or one is about
7 voir dire and the composition of panels, which
8 relates to the conversation we were having
9 before, and the other is about clarity about the
10 role of victims counsel.

11 Around voir dire, I sat in a couple of
12 sessions that were special for victims counsel
13 and I talked with those folks a lot, as well as
14 sitting at a table and chatting informally with
15 defense counsel and trial counsel.

16 But I want to acknowledge up front my
17 knowledge base is limited. I've just joined this
18 committee. I know that this committee has people
19 who are, probably everybody in it is far more
20 expert than me, so I'm offering my comments with
21 those grains of salt.

22 But I did become aware of something

1 that I know is familiar to others, which is a
2 structural challenge with panel composition as it
3 relates to the inclusion of women, and there were
4 two reason for this, at least as I saw.

5 One is that people who have
6 experienced sexual assault -- again, this is what
7 people told me. It's based on my very limited
8 observation and listening to folks. People who
9 have experienced sexual assault are consistently
10 dismissed for cause from panels.

11 And since we know that the
12 overwhelming majority of people who acknowledge
13 that they've experienced sexual assault are
14 women, that results in disproportionately more
15 women being excluded from panels.

16 The second is that people who had had
17 training at any point in their career as victims
18 counsel were being dismissed for cause. And it
19 wasn't suggested to me that this was a rule
20 necessarily, but the victims counsel around the
21 table in the session, one of the sessions were
22 all nodding when one person talked about this

1 being a challenge for them, and then several
2 other people raised that issue and I followed up
3 in conversation with a few of them.

4 The issue there is that more women, I
5 mean, again, as I have been told in my limited
6 session, more women volunteer for those roles and
7 more women are voluntold to be in those roles, or
8 have been at some point in their careers are told
9 you really, you know, should do this.

10 And so, to the extent it's a common
11 practice that it is assumed that someone who has
12 been trained as victims counsel cannot deliberate
13 fairly as a panel member, that sort of amplifies
14 or exacerbates the other issue, which is that
15 more women will be excluded from panels because
16 more women will report having experienced sexual
17 assault.

18 You know, it's a structural challenge.
19 There are obviously concerns on the defense side
20 that are reasonable to take into account, but it
21 strikes me as a significant challenge for
22 legitimacy, for fairness, for a jury of one's

1 peers.

2 And so, maybe this committee has
3 already done a lot of thinking about that issue
4 and how to address it, but it's quite a live
5 issue, at least among, you know, in the segment
6 of people I talked with.

7 The second related to clarity around
8 the role of victims counsel, and I know that that
9 is something that this committee has taken up.
10 In the sessions, again sitting with victims
11 counsel, I heard multiple times people say I'm
12 not able to get the documents I'm entitled to get
13 from trial counsel.

14 You know, and that gets to the
15 colloquy that both of you were having before
16 about a victims counsel may want to not include
17 certain sorts of evidence and a trial counsel may
18 want to, and those are all fair considerations,
19 but a number of the victims counsel talked about
20 not getting access to documentation or evidence
21 that they thought they should have.

22 I don't have a view about what they

1 should or shouldn't have. I don't know, but it
2 was a consistent issue and it was a variable
3 issue, because others said that they had trained
4 their people who they were working with, their
5 counterparts in trial counsel, and were able to
6 get that documentation because those trial
7 counsel understood the limitations on victims
8 counsel in terms of the use of those documents.

9 What it left me with was a sense that
10 this would all benefit from a lot more clarity,
11 and that in particular because the -- sorry, I'm
12 not going to get either the acronym or the actual
13 name correct here, but that person in charge of
14 the trial counsel, not the SJA. That may be way
15 off. I don't have those notes in front of me.

16 The person in charge of, the ultimate
17 person in charge of the trial counsel on a
18 particular base or in a particular area, some of
19 them have a lot of experience, some of them have
20 just moved in, and same is true for their
21 deputies.

22 And so, if they haven't had a lot of

1 experience with victims counsel or haven't been
2 briefed recently or accurately on the role of
3 victims counsel, they're not -- you know, every
4 effort to get a document is a fight and that
5 becomes challenging.

6 Different victims counsel had come up
7 with individual ways to improve their situation,
8 and someone said she always goes and briefs the
9 new person and tries to help them, but that
10 doesn't always work everywhere, particularly when
11 people are then in a new situation, or with a new
12 base, or with a different service, so that's, you
13 know, not a cure-all solution.

14 So, I note that. I think there are
15 probably a lot of efforts and progress to improve
16 that situation, but enough people said it in this
17 room that it made me think this is a systemic
18 issue rather than a one-off problem for one or
19 two people.

20 And let me just give one other quick
21 example which was that some victims counsel are
22 allowed in front of the bar and some have to

1 speak from their seat behind the bar, and it
2 seemed like that either --

3 I imagine there's a rule one way or
4 another that is just not well known. If there's
5 not a rule one way or another, that struck me as
6 something that would be important to clarify.

7 One of the victims counsel observed to
8 the nods of others in the room that their client
9 saw them struggling, not that they saw, you know,
10 I mean, I think they're professionals, but, you
11 know, they would explain that I tried to get this
12 or that document and I couldn't get it, and the
13 clients felt further sort of, well, if you're my
14 advocate and you can't get this, what chance do I
15 have?

16 And the last point I would note is
17 that somebody was doing a small training on
18 appeals for the victims counsel and, you know,
19 reinforced that as is appropriate, right, any
20 victims counsel should tell the victim that even,
21 whatever happens in the trial, you know, many
22 cases are appealed.

1 It can take a lot of time and this may
2 all -- at the point of appeal, you know, many
3 convictions are reversed, and that gets at some
4 of the voir dire issues and otherwise.

5 And I think it created a sense that
6 there are a lot of challenges out there. Again,
7 to be clear, not to diminish the due process
8 rights of the accused, but there are many
9 structural challenges that make proceeding in one
10 of these cases for a victim a real challenge, and
11 that in turn, of course, has consequences for the
12 services.

13 I'll end again with thanks because it
14 was really, it was overall terrific education, I
15 thought, and the colleagues there could not have
16 been more hospitable, and I also want to credit
17 Ms. Peters with being a terrific guide for us
18 through the process, so thank you for that.

19 **MEMBER BASHFORD:** Madam Chair, I know
20 we're over our time. I can do this after the
21 break, but I've got about three minutes about the
22 Office of Special Trial Counsel. I'm happy to do

1 it after or now.

2 CHAIR SMITH: I think we should do it
3 now.

4 MEMBER BASHFORD: Okay.

5 CHAIR SMITH: Thank you.

6 MEMBER BASHFORD: The Office of
7 Special Trial Counsel will be triaging cases.
8 And it's not like they're the A Team, and the
9 cases they don't want then go to the B Team. If
10 they don't keep it, it's gone. What does gone
11 mean seems to be a little confusing.

12 Twice, both the Air Force and the
13 Army, said it's just gone, but then on
14 reconsideration, they said well, it could be used
15 for purposes of separation from the service.

16 It's unclear how the triage will work.
17 It's unclear when it will happen. The Air Force
18 said it would happen only after a full
19 investigation by the military investigators.

20 I don't know for other services when
21 that will happen and what the criteria will be.
22 I know they're doing a proof of concept in Fort

1 Hood and Fort Bragg which might give us more
2 clarity.

3 I'm also concerned with the volume
4 because they're also going to be taking every
5 domestic violence case with injury, and my
6 impression would be that that would be way more
7 than the Article 120 [sic] cases.

8 And I just, since we're going to be
9 focusing on this, I believe, in January, it would
10 be great to get a lot more information as to how
11 this will happen. Thank you.

12 COL. BOVARNICK: We're going to break
13 now, and then when we come back, we can obviously
14 kind of give a little wrap-up of what we just
15 heard here and any kind of due outs that came
16 from this session. So, with your approval,
17 ma'am, we can break until 10:35.

18 CHAIR SMITH: All right, thank you.

19 (Whereupon, the above-entitled matter
20 went off the record at 10:15 a.m. and resumed at
21 10:40 a.m.)

22 COL. BOVARNICK: This afternoon when

1 it comes up, I want to remind everyone that you
2 have the docket. We'll just call it the docket,
3 the list of cases if we can get to one, you know,
4 prior to the new year. We'll have more cases as
5 they become available after the new year.

6 But take a look and just basically you
7 have to let myself and Terry Gallagher on the
8 staff know today if you see one that you're
9 interested in and we'll take care of everything
10 from there.

11 As far as courses, there's going to be
12 more to follow on that, but one recommendation,
13 and the panel can certainly discuss, and
14 deliberate, and give us guidance this afternoon,
15 is whether at the December meeting, when we bring
16 folks back to talk about the Office of Special
17 Trial Counsel, it may be beneficial to the panel
18 to hear from those senior judge advocates that
19 run the different training programs and these
20 courses so that members could give feedback and
21 input prior to them as they develop the courses.

22 But again, we'll leave that for

1 discussion this afternoon, and so for now, I'm
2 going to hand it over to our Major Dray who will
3 talk about, we'll kind of focus now and
4 transition into the appellate process.

5 MAJ. DRAY: Great, thank you, sir.
6 So, I'm Major Steve Dray. I currently teach at
7 the Judge Advocate General's Legal Center and
8 School, and there, my portfolio is everything
9 post-verdict basically. So, I teach sentencing,
10 post-trial processing, which is a term of art of
11 import in the military, and then appeals.

12 Today, on my agenda, I will go over
13 military justice appeals big picture style
14 initially. I'm going to move into the
15 jurisdiction of the service Courts of Criminal
16 Appeals, the CCAs, so if I use that acronym CCA,
17 I'm talking about those first-level of
18 intermediate appeal within the military.

19 I'm going to talk about their
20 statutory responsibilities and authorities. I
21 will then shift into the court of appeals for the
22 armed forces and their jurisdiction, and then

1 their responsibilities. I'll end with a brief
2 comment about Supreme Court jurisdiction.

3 I am prepared to take any question at
4 any time, so please, if I say something that
5 doesn't make sense or you want more information,
6 I'm happy. Just please interrupt me. I would
7 prefer it than saving it until the end.

8 So, first, so the military justice
9 system, we are Article I courts established under
10 Article I, Section 8 of the Constitution. Our
11 trial courts are Article I courts. Our CCAs are
12 Article I. The Court of Appeals for the Armed
13 Forces is an Article I court.

14 This is the structure. So, every
15 service has its own trial courts, right. Coast
16 Guard does its own trials. Army does its own
17 trials. Air Force does its own trials. The Navy
18 does its own trials. The Marine Corps does its
19 own trials.

20 At times, I believe there may be
21 parties, like perhaps a military judge from the
22 Navy in a Marine Corps trial. They have a little

1 bit of mixing, but generally at the trial level,
2 it's service specific.

3 COL. BOVARNICK: For the members, this
4 slide should be in your red folder, I believe,
5 sorry, and for the folks that are viewing online,
6 I believe the slides would be up on your screen.
7 Sorry about that. I just wanted to orient
8 everyone there. Sorry, Major Dray.

9 MAJ. DRAY: No problem whatsoever.
10 Okay, and then these appellate courts align with
11 articles in the UCMJ. So, Article 66 is those
12 CCA courts, Article 67 is the CAAF, the Court of
13 Appeals for the Armed Forces, and then Article
14 67(a) pertains to the Supreme Court review.

15 This first level of review is an
16 appeal of right. There is no convincing the
17 court to take it outside of a few exceptions that
18 I'll discuss in a moment, and jurisdiction is
19 tied direct, it's tied directly to the sentence
20 adjudged at the court-martial.

21 I'll say there's one small exception.
22 If there's an interlocutory appeal that the

1 government files during the case, then that would
2 get an automatic appeal of right at the CCA with
3 nothing further.

4 That doesn't happen that often just
5 because typically I would say the sentence is
6 going to meet a threshold if the government wins
7 that appeal, and if they lose that appeal,
8 perhaps there would be an acquittal, so it's
9 just, it's a nuance. Generally, it's tied though
10 to the sentence of the judge at the court-
11 martial.

12 So, this is important because then
13 forum is irrelevant, right? If the accused
14 elects to go before a panel or a judge, then it's
15 irrelevant for this purpose. It's just what the
16 sentence, that forum sentences the accused to,
17 and whether or not an accused pleas is
18 irrelevant.

19 So, if an accused pleas to, say, 20
20 years of confinement and a discharge or whatever
21 and pleas to the findings, that still gets this
22 appeal.

1 And also rank is irrelevant. So, a
2 general officer who is sentenced to two years in
3 confinement would get the same appeal that a
4 private first class who is sentenced to two years
5 in confinement, or an E3.

6 So, I'll go through these relatively
7 quickly. These are just the different, sort of
8 the different jurisdictional wickets, I suppose,
9 that an accused must meet to get this 66 review,
10 and I'm going to emphasize 66 just because it's
11 the most robust review that servicemembers have.

12 So, if an accused is sentenced to more
13 than six months in confinement, but less than two
14 years in confinement, and there is no discharge
15 adjudged -- and by discharge, I mean a punitive
16 discharge adjudged by a court-martial which would
17 be a bad conduct discharge, a dishonorable
18 discharge, which are the only discharges an
19 enlisted person can get, or a dismissal, which is
20 the only discharge an officer can be sentenced
21 to.

22 So, if there's no discharge in a case

1 and the sentence is between six months and two
2 years, all the accused needs to do is elect to
3 have the case reviewed by the CCA. I would say
4 it's a mere formality and they would get a full
5 66 review.

6 Again, I mentioned this. If there is
7 an interlocutory appeal by the government during
8 any case, that will entitle an accused to this
9 robust 66 review.

10 I'm going to skip C here because this
11 applies to sentencing appeals by the government,
12 which we really haven't had any. I'm not aware
13 of any so far because we don't have sentence
14 guidelines yet.

15 And then here, if an accused is
16 sentenced to less than six months in confinement
17 and no kick, and they convince the Court of
18 Criminal Appeals to take their case, then they
19 can get this review. So, there is an appellate
20 option for somebody who gets that, I'll call it a
21 sub-jurisdictional sentence. They happen
22 relatively I would say rare enough that I won't

1 discuss them much today.

2 The vast majority of appeals that the
3 CCAs handle are these automatic reviews where the
4 appellant does not need to really do anything
5 affirmatively to get this 66 review.

6 If there's a sentence to any discharge
7 or confinement for two years, then the CCA
8 conducts -- it's a presumption that the CCA will
9 review the case and an appellant really needs to
10 waive or withdraw that appeal. They need to take
11 a step.

12 And I'll emphasize that because it's
13 my understanding -- I don't have a ton of
14 experience in other jurisdictions' appellate
15 systems, but typically an accused, after a
16 conviction, is filing a notice of appeal.
17 They're putting the court system on alert that
18 they will appeal some issue.

19 And then there is a compilation of the
20 record. Perhaps there is a burden on an accused
21 and perhaps the court is doing it, but in the
22 military, all of this burden -- and I began post-

1 trial processing is a term of import.

2 The government is putting together a
3 record automatically in every single conviction
4 at a GCM, and when I say GCM, I mean general
5 court-martial or a special court-martial. They
6 are compiling a record and sending it up.

7 And so, then, and again, the
8 presumption is that this appeal will take place
9 and the accused would need to withdraw the court
10 from considering this, or I suppose not filing
11 any brief, which could happen, but I haven't seen
12 it.

13 Another important point here is that
14 for each of these, an appellate defense counsel,
15 an active duty, well, a military appellate
16 counsel is detailed for each one of these for
17 free regardless of rank, regardless of nature of
18 the offense, regardless of complication of the
19 case. One is assigned in each case.

20 And Ms. Bashford made the comment
21 earlier about her observation of a court-martial.
22 It's not different at the trial level. I think

1 it's note -- the military details free defense
2 counsel at the trial level as well regardless of
3 rank, regardless of offense.

4 So, that's the jurisdiction of these
5 service Courts of Criminal Appeals. Any
6 questions so far or I can talk about what they
7 do?

8 I'll also talk -- so when these cases
9 come in, they are transmitted up to the CCAs, the
10 Courts of Criminal Appeals, and then the
11 appellate branch assigns, details an attorney to
12 a case. That attorney then reads the whole
13 record.

14 And our records include a verbatim
15 transcript of all of the proceedings. It's going
16 to include all of the evidence that was admitted
17 at trial, various other court documents,
18 including appellate attachments, which would be
19 motions, things, evidence that was identified but
20 not admitted.

21 These are also sent up and reviewed by
22 the appellate defense attorney to help them spot

1 issues. If the appellate defense attorney spots
2 an issue, they can file a substantive brief.

3 An assignment of error is what we call
4 it in the Army, but perhaps other services call
5 it something else, if we identify a specific
6 issue that we want to brief that we think has
7 merit.

8 If we don't, but our client has an
9 issue that we want to raise, there is a mechanism
10 by which we can do that. We call it colloquial
11 Grostefon based after a case, Grostefon. It was
12 a CAAF case that said an appellant has the right
13 to raise issues during their appeal even if the
14 attorney thinks they are frivolous. That would
15 be when you would use that, I'll call it a tool.

16 Then, if the defense appellate counsel
17 doesn't see any, doesn't identify personally any
18 issue that is meritorious to raise specifically,
19 then they file what's called a merits brief or a
20 pro forma brief, which essentially says CCA, I
21 haven't identified anything specific. I'm not
22 saying that the judgment below is correct, but

1 I'm filing this not identifying anything
2 specific.

3 And it's important, as I'll discuss
4 the responsibilities of CCAs, to keep that in the
5 back of your head that there still is the
6 responsibility of the CCA to review that case
7 even though a defense appellate counsel has not
8 identified any specific issue.

9 MEMBER KRAMER: Does that happen very
10 often that such a brief is filed?

11 MAJ. DRAY: All the time and here's
12 why, because, as I mentioned, because this
13 jurisdiction is not based on, say, a requirement
14 that there be a contested case, a lot of guilty
15 pleas are going to result in a pro forma merits
16 brief.

17 Perhaps the client doesn't want
18 anything, right? Perhaps there just is nothing
19 because guilty pleas, by their nature, are clean,
20 right? So, yes, all of the time.

21 It happens sometimes in a contested
22 case. Sometimes a contested case is clean enough

1 that you don't have anything non-frivolous, non-
2 meritless, I'll say, to raise, and that happens,
3 but more rare. There's often something you can
4 say. Great question.

5 After a defense appellate briefs a
6 case and files it with the court, then the
7 government -- and the time on this is, I'll call
8 it two to, say, five to six months probably.

9 From the time the case is assigned to
10 an appellate counsel, I'd say almost always
11 within six months, perhaps shorter, there's going
12 to be that brief filed.

13 When that brief is filed, then the
14 government appellate division will also have an
15 attorney assigned to it. They will research the
16 issues, read what part of the record, perhaps all
17 of the record or what part of the record they
18 think is relevant, and respond to that.

19 Defense gets an opportunity to file a
20 reply brief if they want, and then the Court of
21 Criminal Appeals will review the case and decide
22 the merits of the issues. The CCA -- yes?

1 MEMBER GARVIN: If any of the issues
2 on the appeal implicate what would have been a
3 victim's rights down below, does the SVC or VLC
4 have any explicit standing to participate or
5 would they be relegated to amicus status?

6 MAJ. DRAY: That's a great question.
7 I can't imagine there would be any standing at
8 this level. I've never seen it. Part of it
9 would be what is the responsibility of the CCAs,
10 which I'll get to, is --

11 I can't see how a victim's stance on
12 an appellate issue would necessarily affect its
13 66 review. Perhaps that will make more sense in
14 time. That's a great question though.

15 I believe that the Air Force, and
16 maybe the Air Force can help me later, has an
17 appellate attorney at their, I believe, as part
18 of their government appellate division who does
19 manage these, but I think it's mostly for
20 interlocutory appeals, not 66s. I think there
21 would be another mechanism then. That's a good
22 question.

1 Okay, the CCAs also, they are --
2 there's a lot of appellate judges. I say a lot.
3 There is, I think in the Army, perhaps there's
4 ten appellate judges and they're in panels, so
5 panels are randomly assigned cases. It's panels
6 of three unless for whatever reason the CCA
7 itself decides to take a case en banc.

8 I'll say this just because I know it
9 comes up in a lot of cases, post-trial delay.
10 This I took from Army Regulation 27-10, which is
11 our military justice regulation. These are the
12 post-trial performance standards for court
13 reporters.

14 I mentioned that every case includes
15 a verbatim transcript. That transcript is
16 prepared by a court reporter who is an E-5 to E-8
17 usually and these are their metrics. So, right,
18 after being a court reporter for 18 months, a
19 court reporter might be, is expected to prepare
20 ten straight verbatim pages per hour.

21 By way of example, one of my first
22 cases at the defense appellate division was 2,200

1 pages long. These people are all -- that's seven
2 pages per hour. I don't think it's reasonable to
3 assume eight hours a day of this type of work.

4 And so, this is why some cases, the
5 busier jurisdictions who do a lot of court-
6 martials, completed courts-martial, then, you
7 know, the preparation of the transcript can take
8 quite a while. That's not everything, but it's
9 something I will just offer. Okay, so, yes,
10 ma'am?

11 MEMBER GOLDBERG: Sorry if you went
12 over this, but how many judges are sitting on a
13 panel and what does the en banc look like?

14 MAJ. DRAY: Yes, so three judges sit
15 on each panel in the service. So, it goes to a
16 panel within the service and there's going to be
17 three, and it's majority vote on the decision.

18 En banc, the CCAs can sua sponte
19 decide to take a case en banc. An appellant --
20 typically it would be a request for
21 reconsideration would the time that an appellant
22 would request the whole CCA to review a case, and

1 that again would be majority rule, but then the
2 whole CCA is reviewing it.

3 And I don't know exactly how many
4 judges are on each. When I was at the Army, I
5 think it was ten, including the chief trial
6 judge, who was the general officer in charge of
7 our command there. I'm not sure what the other
8 services have.

9 COL. BOVARNICK: Again, we have folks
10 in this afternoon's panels. Sorry, folks from
11 this afternoon's panels will be able to know all
12 of the details of that.

13 MAJ. DRAY: Thank you, sir. So, and
14 this -- any question? If there are no questions
15 on the sort of procedure, I'll get into what
16 they're looking at. Yes, sir?

17 MEMBER WALTON: I have a question
18 about compiling the record. Are you experiencing
19 the same problem that civilian courts are
20 experiencing with the limited number of available
21 court reporters?

22 A lot of people, I understand, are not

1 going into that profession, and therefore,
2 there's just a lack of available court reporters.

3 MAJ. DRAY: Perhaps, sir. I don't
4 know enough about the resourcing and manning
5 decisions of, say, an SJA, a Staff Judge
6 Advocate, the senior lawyer at an installation.
7 I don't know enough about the manning decisions
8 there.

9 I do know, within our office at the
10 school, we train all of the court reporters who
11 come through, and I know that it's a tough job.
12 I'll say that. I mean, it is a tough job and it
13 takes a particular kind of person to do it. I
14 don't know if they have a shortage of hopeful
15 applicants or not. I just don't have that
16 information. There --

17 COL. BOVARNICK: Sorry, I was going to
18 offer one anecdote. So, in a busy jurisdiction
19 where stuff is backed up, the first thought would
20 be why not contract for civilian court reporters
21 who can whip this stuff out quickly?

22 And that sounds great until you start

1 throwing in the military acronyms in a verbatim
2 transcript, and what we found was, again, this is
3 anecdotal and maybe all of this has been fixed,
4 but it still took a court reporter because
5 whoever has to certify that record with the
6 judge, to essentially go through what the
7 civilian incredible court reporters whipped out
8 with acronyms.

9 You know, you just think of one and it
10 looks like it's a word. It's like gibberish
11 because they didn't really understand the
12 acronym.

13 Anyway, so that anecdotally doesn't
14 work, so you do need the trained court reporters,
15 and again, I don't again the answer that Major
16 Dray gave, I don't know the specifics of that.

17 MAJ. DRAY: Okay, so here, this is
18 the, I'll call it the responsibility of the CCAs
19 and what they are required to do under the law.
20 The court may affirm only such findings of guilty
21 as the court finds correct in law, so that's the
22 clause I'll briefly discuss.

1 What that means is -- I know that
2 you'll hear from those who have studied appellate
3 cases later today. Say there's an evidentiary
4 issue. The claim is that the military judge made
5 the wrong call, used the wrong law, applied the
6 law in the wrong way.

7 Then obviously an appellant can raise
8 that issue provided it was preserved in some way,
9 which, I mean, evidence usually is. Then they
10 can raise that on appeal and then the court
11 decides that issue.

12 And without getting into the
13 complications of proper preservation, they are
14 generally conducting a de novo look at that
15 application of the correct law, whether it was
16 the right law or not, how the judge applies it.
17 Perhaps we're like skewing into an abuse of
18 discretion, but we're still making a
19 determination on that judge's decision in law.

20 But this doesn't mean though that
21 every single mistake or punt that the judge did
22 results in some kind of reversal or other form of

1 relief because we are always limited by Article
2 59 on matters of law, that they're not going to
3 find the court-martial itself to be incorrect on
4 the ground of an error of law unless the error
5 materially prejudices the substantial rights of
6 the accused.

7 And so, let's say they find an error
8 that was properly preserved. They will conduct a
9 prejudice analysis, which is, depending on the
10 issue, a factor analysis to decide whether the
11 findings were improperly influenced by this
12 mistake.

13 So, this is the -- very specific to
14 this court power that was recently changed and
15 I'll discuss the factual sufficiency power,
16 right. So, the court may only affirm such
17 findings of guilty as it finds correct in fact in
18 accordance with subparagraph B.

19 This is subparagraph B. So, now this
20 was a recent change. I think it was January 1,
21 2021 was when this went into effect, so there's
22 not a ton of litigation that is out there

1 interpreting this change, but this is the status
2 of it now.

3 The accused must first make a showing
4 of a deficiency in proof, so that's not -- it
5 used to be just a de novo look by the CCA in
6 every single case, in every single case where
7 then the CCA was deciding if it, as a panel, was
8 convinced personally of the guilt of the accused.

9 Okay, so there's not really any -- we
10 sometimes talk about similar powers in, I think,
11 New York and Texas, but really it wasn't anything
12 close.

13 This was each panel looking at,
14 reading a record and then determining whether
15 they were convinced personally beyond a
16 reasonable doubt of the accused's guilt. It was
17 a de novo look. There was no presumption here.
18 There was no presumption of guilt, no presumption
19 of innocence.

20 Now the accused must make a specific
21 showing, which just, practically speaking, means,
22 I think, most accused will raise this as an

1 assignment of error in a brief and just highlight
2 the facts that they think makes their most
3 compelling case.

4 After the accused has made such a
5 showing, the CCAs are giving appropriate
6 deference to the fact that the trial court saw
7 and heard the witnesses and other evidence, and
8 appropriate deference to findings of fact entered
9 into the record by the military judge.

10 So, this is a change as well. The
11 language -- I'll get to the language in a bit,
12 but it was generally just an admonishment in the
13 old days, an admonishment that the trial court
14 saw and heard the witnesses, right, as far as
15 credibility determinations go.

16 Another new standard here is that the
17 court must, after conducting this review, the
18 court must be clearly convinced that the finding
19 of guilty was against the weight of the evidence.

20 Again, I haven't seen any cases that
21 have come out analyzing exactly what that means,
22 whether this will result in more or fewer --

1 whether it would result in fewer reversals based
2 on factual insufficiency, I don't know.

3 That, to me, reads like a much higher
4 standard, but others I've talked to seem to think
5 that a court that isn't convinced will work its
6 way to getting there, but I don't have a ton of
7 insight into what this will look like in the
8 future aside from it does at least seem on paper
9 to be a much more significant review. Yes,
10 ma'am?

11 MEMBER BASHFORD: What kind of
12 findings of fact would a judge make that would be
13 entered into a record?

14 MAJ. DRAY: Like a ruling in a motion
15 perhaps, like a ruling, like I find that this,
16 that based on this, you know, witness testimony,
17 that they are credible and that this happened,
18 without having a better example, yeah.

19 Yes, ma'am?

20 MEMBER GOLDBERG: Is "appropriate" a
21 typical standard in other areas of military law?
22 It, you know, strikes me, as someone who's taught

1 civil procedure in the federal system, that
2 appropriate has a lot of room, it's a capacious
3 word, as we might say, and, you know, which could
4 lead to a lot of variation in how courts apply
5 it. And, I appreciate your saying that this is
6 in development, but does that appear elsewhere so
7 that judges might draw on understanding
8 appropriate in some other context?

9 (Simultaneous speaking.)

10 MAJ DRAY: Yeah. Great question. I
11 know what you're saying, ma'am. Yeah, some canon
12 of construction, like, oh, I'm looking for this -
13 - Great question. I'm not prepared to say that
14 there's no other reference to appropriate, but I
15 can't think of one off the top of my head.

16 I'll say that, this word now,
17 appropriate, I'll get -- here, this is the old
18 one. It used to be -- I'm sorry, let me find it
19 -- recognizing. So, it used to be recognizing,
20 now it's appropriate. Two words that, what does
21 that mean, except, like, I called it an
22 admonishment, it's a reminder -- hey, just so you

1 -- don't forget, perhaps the trial court would be
2 in a better position to determine credibility,
3 right?

4 That's, like, what our appellate
5 system in our country, all of them, are based on,
6 is the trial court is better at making
7 credibility determinations than an appellate
8 court that's reading a record based on, I suppose
9 our belief that we're better lie-detectors in
10 person. I mean, there's science on that we don't
11 need to get into.

12 But, I think this is a significant
13 shift from this old standard which required the
14 CCAs to weigh the evidence, judge the credibility
15 of witnesses, determine controverted questions of
16 fact, and then -- while recognizing that trial
17 courts saw and heard the witnesses. This is just
18 a side-by-side comparison of those.

19 So, at least it requires an
20 affirmative step by the accused -- or by the
21 appellant -- to raise this specific issue and
22 point to specific facts that indicate a

1 deficiency in proof, and a higher standard for it
2 to find. Also, on this, I'll get to it in a bit
3 when I'm talking about the Court of Appeals for
4 the Armed Forces, but it used to be that that was
5 a decision that was unreviewable. If a CCA found
6 a case to be factually insufficient then that
7 case was -- then that charge, at least -- was
8 dismissed.

9 Now, there is a review of that within
10 Article 67, the Court of Appeals for the Armed
11 Forces can review that. And, again, I'm not
12 familiar -- there is no case that the Court of
13 Appeals for the Armed Forces has done that, so I
14 don't know what that could look like. That would
15 be quite the war of words.

16 Okay. So, I'll call that, that's what
17 the CCAs are doing as it pertains to findings,
18 but the CCAs also have a pretty tremendous power
19 to review the sentence. The court may affirm
20 only the sentence, or such parts of the amounts
21 of the sentence as the court finds correct in law
22 and fact, which generally means, is it within the

1 sentence maximums that have been prescribed by
2 the president, or the sentence minimums
3 prescribed by Congress. It doesn't really mean
4 much more than that, effectively.

5 This clause here, basing it on the
6 entire record is important because record, again,
7 it's a term that means something, as when I was
8 with the Defense Appellate Division, appellants
9 are often excited to submit matters about things
10 that they think demand a finding of innocence,
11 right, like, useful documents that they want to
12 attach to the record. But, really, it's not
13 something that, outside of a few small
14 exceptions, the record is what was created at
15 trial, and then what was submitted to the
16 convening authority.

17 At times, a small exception to that
18 would be somebody who's in confinement who wants
19 to raise a cruel and unusual punishment type
20 offense, justifying it as sentencing
21 appropriateness, essentially saying, my sentence
22 is being unlawfully aggravated by my prison

1 conditions. And the courts will entertain that
2 to a degree but the difficult part is amending
3 the record, or supplementing the record, to allow
4 the CCAs to do that.

5 And then, this, should be approved
6 language, is where the CCAs get much of their
7 sentence modification authority. It generally
8 means these things, assure that justice is done
9 and the accused receives the sentence or
10 punishment that they deserve. The CCAs have a
11 great deal of discretion, but they are
12 specifically prohibited from just granting
13 clemency.

14 The best example of that, what is not
15 clemency, is, there's a case from 2010 called
16 Nerad, where the CCA thought it was unjust that
17 the accused was convicted of having nude pictures
18 of his girlfriend, who was 17, so he was charged
19 and convicted of child pornography. But they
20 were in, like, a dating relationship, there was
21 nothing unlawful about their physical
22 relationship, and the court said this seems

1 unjust.

2 So, it's almost like an appellate
3 nullification, that's when the CCAs would go too
4 far, in the minds of the CAAF. But, generally,
5 they have a great deal of discretion authorized
6 by Article 66 to reduce the severity -- not
7 increase, but to reduce the severity of a
8 sentence. And, in my experience, they do it very
9 rarely, it's a power rarely used.

10 There was an article that was
11 published in 2010 where the author studied, like,
12 2000-some appeals between 2005-2009, and found,
13 in the Army it was something like, four instances
14 where the Army CCA reduced a sentence based on
15 being unduly harsh or severe. So, the power is
16 there, it's not really limited by the CAAF, but
17 they don't use it that often, at least in the
18 Army.

19 It also allows the CCAs to grant
20 relief for excessive post-trial delay, where say,
21 there is no prejudice that's clearly identified
22 to the accused, but that the CCA identifies a

1 problem with the post-trial processing. They use
2 that power at times to -- I don't think it's
3 necessarily punitive for the government that took
4 a long time to do that post-trial processing, but
5 it is a relief granted to an accused for putting
6 up with, say, a lengthy time between announcement
7 of sentence and their appeal.

8 And then, importantly, this should be
9 approved, gives the CCAs the power to reassess
10 sentences. Because, as we've discussed, because
11 courts-martial are ephemeral and they exist once,
12 and then there may be similar members on another
13 court-martial, that same court-martial will
14 probably never exist, of the same people.

15 And so, it's not like sending a case
16 back where there's been legal error accomplishes
17 much, it's not like it's going back to the same
18 people. Well, hey, same people, now that you
19 know this error, how would change your initially
20 adjudged sentence? Because that doesn't happen,
21 the idea is that the CCAs and those judges have
22 the experience and the wherewithal to find error

1 and then grant relief at the spot without, say,
2 ordering a re-hearing on sentence, if there was
3 an issue on sentence -- or if there was an issue
4 on finding, typically it would be an issue on
5 sentence, okay?

6 So just off of this briefly, the CCAs
7 -- so this is the Army CCA website, they issue
8 four kinds of opinions. A opinion of the court
9 is the only one that is binding precedent within
10 the Army, these other opinions have various
11 amounts of persuasive authority.

12 But, a note that, again, I'm not so
13 familiar with federal circuits of appeals and how
14 they do things, but my understanding is,
15 generally there would be a reason why an assigned
16 error is wrong, or doesn't warrant relief that
17 there'd be -- not published but perhaps a brief
18 opinion where they're identifying the
19 deficiencies in the assigned error.

20 At the CCA level, they do sometimes
21 just summarily affirm. So, I was at Defense
22 Appellate -- and I'm sure that the folks who you

1 speak to this afternoon will have some experience
2 with this -- where I would assign, say, three or
3 four errors in a case. And the CCA might say, we
4 think errors one, two, three are meritless -- or
5 without merit -- and then, we're going to talk
6 about issue four. And, that's it, there's no
7 discussion of why one, two, three are wrong -- or
8 without merit, I suppose is the best way to
9 phrase it.

10 And, at times, they'll issue an entire
11 opinion that I've -- I've had cases where I filed
12 with a 30-page brief and it's summarily affirmed,
13 with no question. And, an example is, one of
14 those got a grant at the Court of Appeals for the
15 Armed Forces that had no comment from the CCAs,
16 and I don't think that this is entirely a -- I
17 think that's atypical, but this affirmance of the
18 judgement below, without comment, is something
19 that does happen -- I'll just make that comment
20 there.

21 All right. Any questions before I
22 move on to the next higher court?

1 (No audible response.)

2 MAJ DRAY: Okay. So, that's the CCA
3 level review, the Court of Appeals for the Armed
4 Forces is, from an appellant's perspective,
5 discretionary in almost all cases. The exception
6 is, they do automatically review an appellant's
7 petition if there was a sentence to death. The
8 CAAF must grant the accused petition prior to
9 reviewing the merit, so you're essentially
10 convincing your way in, why the CAAF should hear
11 your case.

12 And, they use criteria that, I
13 believe, that are quite similar to Supreme Court
14 criteria, right? Is there, like, a split among
15 the CCAs, is it a critically important issue,
16 things of that nature. I'll get to it in a bit,
17 but the CAAF does not hear very many cases, they
18 get a lot of -- you can petition them if there's
19 a guilty plea and you filed that pro forma brief
20 below.

21 So, they get more cases than -- they
22 get a lot of cases, but they don't grant many,

1 and they don't need to offer any opinion as to
2 why they denied that grant. So, you may think
3 you have the best issue, you file it, and it's
4 just, review denied. So, it's entirely
5 discretionary, but the government, if the
6 government loses at the CCA below, the government
7 can essentially force its way into a Court of
8 Appeals for the Armed Forces review.

9 That process is called certification
10 where the TJAGs, I think they're required to talk
11 amongst each other, just consult with the other
12 service TJAGs or the equivalent, but then they
13 can certify the case and the CAAF must hear it.

14 That happens pretty often -- I'm not
15 talking about interlocutory appeals or writs
16 really, unless people have specific questions
17 about them, but that happens most often in a case
18 where the government loses at trial -- where the
19 military judge at trial, say, excludes an
20 important bit of evidence or dismisses a charge,
21 then the government can file an Article 62, an
22 interlocutory appeal, and if the CCA rules

1 against the government, I've found that they
2 often certify cases to the CAAF to hear.

3 Okay, this is just their jurisdiction
4 again. This is the CAAF's issued opinions over
5 the October 2021 to 2022 case, and this is the
6 military's highest court last, this past year.
7 And, these are cases that were argued within that
8 term -- so we're just starting a new term now,
9 somebody mentioned there's a unanimous verdict
10 case, the case, Anderson, is going to be argued,
11 I think, within the next month, up at the Court
12 of Appeals for the Armed Forces.

13 So, that'll be next term's -- that'll
14 be a decision that comes out next term but here,
15 it's -- this is 25 issued opinions from the Court
16 of Appeals for the Armed Forces, from all of the
17 services, right, they're the top in the military,
18 the top of that triangle. They do issue some
19 summary disposition, sometimes they'll grant and
20 affirm the lower court's decision sometimes, at
21 times, but they wouldn't be posted there, and so,
22 you know, interpret that as you will.

1 This is the statutory responsibility
2 of the CAAF, is to review the findings and
3 sentence incorrect in law. And, again --
4 incorrect in law, order, or judgement by the
5 military judge, again, constrained by Article 59.
6 So, they're only granting and reversing if there
7 was -- well, I should say, they're only reversing
8 cases where an error below has materially
9 prejudiced the substantial rights of the accused.

10 And, now -- I mentioned this earlier,
11 but this is that new review of factual
12 sufficiency determinations by CCAs that have
13 favored the appellant. I believe that's just a
14 wrap up.

15 So, the Supreme Court. There's a
16 limited jurisdiction for the Supreme Court to
17 hear military cases, they hear very few, like,
18 very few, the most recent was a bit of nuance
19 about statute of limitations. They don't grant
20 often, and also, the Supreme Court's jurisdiction
21 to grant cases in the military requires the Court
22 of Appeals for the Armed Forces to hear a case,

1 basically -- they must have reviewed a case.

2 So, if the government certified it,
3 then it would have that jurisdiction and an
4 appellant would have to -- have to grant an
5 appellant's petition. And so, there's some, you
6 know, discussion about that limiting the due
7 process rights of an appellant who's end of the
8 road, effectively, would be the CAAF denying
9 review.

10 And, that's my last slide here --
11 that's just a summary. So, I'm happy to answer
12 any questions on any of that, if you have them.

13 MEMBER SCHWENK: Could you say a word
14 about cases that don't make the CCA cut, what
15 happens to those cases?

16 MAJ DRAY: So, they get a review --
17 every case gets a review, at least, by a attorney
18 at the Office of the Judge Advocate General.
19 And, they're looking to make -- I think it's
20 correct in law, and maybe the sentence is correct
21 -- and an appellant can submit matters that would
22 indicate that their material rights were

1 prejudice at trial.

2 Then, I believe, if that attorney
3 identifies there could be some issue there, they
4 forward it to the TJAG, the TJAG makes a
5 determination about whether those issues have
6 merit, and then that appellant can file, it's
7 essentially a petition at the CCA, to request
8 that the CCA hear the merits of the case.

9 And, so there is -- I saw one in my
10 time -- I wasn't on it -- I saw one that happened
11 in my three years at the Defense Appellate
12 Department [sic] -- and, again, perhaps the folks
13 in the trenches now would have a better
14 perspective on that. But, there's the
15 availability for some form of the appellate
16 review, and they certainly get a review by an
17 attorney in that office for those sub-
18 jurisdictional sentences.

19 MR. SULLIVAN: If I can jump in there
20 for just one second, so General, in this year's -
21 - obviously we're in NDAA season right now, so in
22 the version of the NDAA for FY2023 that SASC

1 reported out, at DOD's request they included a
2 provision that would eliminate sub-jurisdictional
3 cases. It would say, if you're convicted by a
4 special or general court-martial, you can go to
5 the CCA.

6 And so, it's not in the HASC, it's not
7 in the House passed bill, it's in the SASC
8 reported bill, so obviously that'll go to
9 conference, but if that were enacted that would
10 greatly simplify the current byzantine appellate
11 review system.

12 MAJ DRAY: If I could offer a personal
13 thought on that -- I mean, to keep this in mind,
14 a conviction at a special -- if you're convicted
15 at a special court-martial, you get a three-month
16 sentence with no discharge. That's a federal
17 conviction on your record, it's a non -- I mean,
18 short of the president expunging that, that is a
19 conviction on your record that stays with you.

20 In our world of data collection and
21 management on everybody, that is prejudicial to
22 the rest of your life. So, to draw a line at,

1 well, six months of sentence matters, but four
2 months, you don't get this robust review, in my
3 personal opinion, is a significant distinction
4 with no common sense justification.

5 Ma'am, you had a question?

6 MEMBER GENTILE LONG: I just had a
7 question about the, when the CCA grants relief on
8 a sentence for defendants -- I'm sorry if I
9 missed it -- does the prosecution get to appeal
10 that or is just done, if the CCA grants sentence
11 relief?

12 MAJ DRAY: Ma'am, I suppose it would
13 depend on how the -- on why the CCA did, if it
14 was based on -- honestly, I don't know, and I
15 don't want to guess. It's a great question.
16 I've never seen it, so they -- I would guess -- I
17 don't want to guess. I'll stop there. It's a
18 good question.

19 Yeah, I trust that, yeah, completely.

20 MEMBER GARVIN: I know you already
21 said you're not going to talk about interlocutory
22 appeals, but if we have time, can I ask questions

1 about that, Madam Chair?

2 (No audible response.)

3 MEMBER GARVIN: Okay. So -- and maybe
4 it's an entire other briefing, because I know it
5 can be complex where it's interlocutory appeals,
6 but just looking back, I don't remember what year
7 the NDAA was revised to ensure that Article 6(b)
8 rights of the victims could go up to the CCAs on
9 review, but CAAF has not been taking further
10 reviews of victim's rights issues that have gone
11 to CCA, as the CAAF has generally said no
12 jurisdiction. I'm just curious if you could
13 unpack that a little bit, for all of us?

14 MAJ DRAY: Well, they should. My
15 understand is that 6(b), like, it started out
16 having an authority to file a writ with the CCAs,
17 but 6(b) was amended after that to authorize the
18 Court of Appeals for the Armed Forces to review
19 that. If they're not taking cases, I suppose
20 that's their prerogative.

21 MEMBER GARVIN: Have you seen cases
22 that the CAAF has taken on a victim's rights

1 issue brought by an SVC or a VLC?

2 MAJ DRAY: Brought by an SV -- I mean,
3 a K -- no. Except KL, no?

4 MEMBER GARVIN: LRM.

5 MAJ DRAY: LR -- right. CAAF right.

6 (Simultaneous speaking.)

7 MEMBER GARVIN: That was a certified
8 case.

9 MAJ DRAY: Right. So, no.

10 MEMBER GARVIN: Okay. Thank you.

11 MAJ DRAY: Yes, ma'am?

12 MEMBER GOLDBERG: I'm sorry. I'm
13 going back to the rudimentary questions, and I'm
14 sorry if you said this, but CAAF has how many
15 judges and what are, what is the selection
16 process --

17 MAJ DRAY: Excellent question, ma'am.
18 And, actually, I'll just give some background on,
19 I suppose, the -- so, the CCA judges are
20 generally military uniformed service people, I
21 believe the Coast Guard has civilians but, again,
22 I'll defer to them with that knowledge.

1 The Court of Appeals for the Armed
2 Forces, though, is five civilian judges, and
3 they're appointed for 15-year terms by the
4 president. Right now, there are four permanent
5 judges serving out their 15-year terms, and the
6 fifth judge has been nominated but not confirmed
7 -- and, I think it's been held up for a while.
8 So, they pull in retired CAAF judges who serve as
9 senior judges to hear cases.

10 And another perspective is, the vast
11 majority of appeals that the CCAs are briefed,
12 they are decided on the briefs, and an appellate
13 can request oral argument, the CCAs aren't
14 obligated to grant it. Sometimes the CCAs will
15 order oral argument in a case, if they want to
16 see it. Almost every CAAF-granted case is
17 briefed and argued before them.

18 COL BOVARNICK: If we have no further
19 questions on this topic for Major Dray, we'll
20 transition and we'll bring the staff up. And
21 they're going to close out the morning before the
22 lunch break, with update on the appellate -- FY21

1 appellate case review that will ultimately go to
2 a subcommittee, once formed properly, but they're
3 prepared to discuss it.

4 Again, slides are in your packet, and
5 I'll note for the people online viewing, if you
6 could -- we don't have the capability, I just
7 learned, of showing -- the slides that are
8 showing up in the room are just for the room, so
9 those that are online, if you could please just
10 look at the slides that were sent to you.

11 Okay. I'll hand it off to, I think,
12 Ms. Tagert, you're going to start?

13 MS. TAGERT: Okay. Good morning.
14 Good afternoon, and Audrey Critchley, Meghan
15 Peters, and Stacy Boggess and I are the appellate
16 team. And we are going to be focusing this
17 morning on our review of all of the appellate
18 cases from fiscal year '21, that we had an
19 opportunity to review since June. The review was
20 of the military appellate cases from the
21 intermediate service courts that Major Dray just
22 discussed, as well as the U.S. Court of Appeals

1 for the Armed Forces.

2 The first part of this presentation is
3 going to just focus on some of the descriptive
4 information that we found from the cases
5 involving guilty pleas, and then the appellate
6 dispositions, as well as the recurring issues
7 that we identified in these cases.

8 This afternoon, during your strategic
9 and deliberative session we're going to ask you
10 to provide us some recommendations as far as the
11 next steps in this project, based on the
12 information that you hear today as well as the
13 information that you may hear from the other
14 service representatives that are going to be
15 speaking to you this afternoon.

16 So, when we first met in June, The
17 Office of General Counsel had assigned the DAC-
18 IPAD in the terms of reference, a study for a
19 comprehensive review of the military appellate
20 system. So, if you look at the first bullet, the
21 tasker asked to analyze the most recurring issues
22 and any recommendations on those recurring

1 issues. So, that's what this particular
2 presentation is going to be about.

3 But, if you look at the second prong,
4 is really the next step, which is what we want to
5 discuss this afternoon, which is an analysis of
6 these cases and recommendations for recurring
7 issues, as well as how to measure and how to
8 study the efficacy of the system.

9 All right. So, back in June, when we
10 first discussed this particular tasking by OGC,
11 the members decided to look at cases that had a
12 conviction of a military sexual offense in cases
13 from fiscal year '21. And, the way that the
14 staff went about doing that is, we just looked at
15 the services' websites and basically identified
16 775 appellate cases from those websites, and then
17 went ahead and started reading them. This also
18 includes cases from CAAF, and, again, all of
19 these cases are from fiscal year '21.

20 Also, going back to some decisions
21 that were made in June, these cases consist of
22 any non-consensual penetrative or sexual contact

1 offense under the UCMJ, but that goes broader
2 than Article 120 and includes Articles 92, 93, as
3 well as Article 133 and 134, which are not your
4 typical Article for sex assault, but it involves
5 some wrongful touching, wrongful penetration,
6 which may include different ranks in the crime
7 itself. So, you'll see recruiters, and those
8 types of crimes in the military.

9 And, as we're going over the
10 particular information today, I want to keep in
11 mind -- because, in the past we've looked at
12 information from investigations onward -- today
13 we're only looking at cases that have appellate
14 decisions and also a conviction on a military
15 sexual assault. So, the cases that we're going
16 to look at today, and the information with them,
17 do not include cases that were charged as sexual
18 assaults and then pled down to an assault, or a
19 lesser offense.

20 So, out of the 775 cases we reviewed,
21 approximately 30 percent were identified as those
22 cases that did have that criteria, an appellate

1 case and a military sexual assault offense
2 conviction.

3 And, if you remember, back in June the
4 committee had some discussion but ultimately
5 decided to include cases that had child victim
6 cases, and here is the breakdown of the
7 percentages. For DOD, adult victims included 63
8 percent of all the cases we reviewed, followed by
9 the child victim cases at 35 percent, and then
10 there were a couple of cases that had both, child
11 and adult victims in them, which you can see is a
12 low number. So, this is just general information
13 that the DAC-IPAD requested in June.

14 Going back to some questions that were
15 asked earlier, we also broke down these
16 particular cases by how many of them were guilty
17 pleas versus contested. As you can see here,
18 approximately 30 percent resulted -- they were
19 guilty pleas and then went up on appeal, and then
20 the remaining were 60 percent contested, and then
21 of course there were some mixed pleas where the
22 accused would've -- or the appellant here -- pled

1 guilty to some of the offenses but not all.

2 And, Mr. Kramer, I think you asked
3 earlier, the breakdown of military judge versus
4 panel cases, we don't have that data -- I don't
5 have access to that data exactly today, but just
6 to let you know, for this group of cases it was
7 approximately half-and-half. So, half are
8 contested -- or half are military judge alone and
9 half of them are panel cases.

10 All right. And just to -- again, I
11 think in June there was some discussion about,
12 potentially there would be differences in
13 appeals, and potentially pleadings, when we're
14 talking about child versus adult cases. So, we
15 did a breakdown of guilty pleas involving adult,
16 and then separated them out from child. And, as
17 you can see, there's a much greater rate of
18 guilty pleas in child sexual assault cases than
19 there are in adult, so we found that that was an
20 interesting fact when we were looking at the
21 observations of the information we reviewed.

22 Having said that, I'm going to pass it

1 on to Audrey Critchley to talk about the
2 appellate information.

3 MS. CRITCHLEY: Thank you, Kate. The
4 212 cases that Kate has been talking about in the
5 previous slides resulted in 262 decisions from
6 the service courts. There were multiple
7 decisions in some cases if, for example, there
8 was a remand followed by a re-hearing, or an
9 interlocutory appeal followed by a regular
10 Article 66 review.

11 So I'm going to be talking about 262
12 decisions. Please note that not all of these 262
13 decisions were issued in Fiscal Year '21. The
14 staff looked at the entire history of any case
15 where an appellate decision was issued in Fiscal
16 Year '21.

17 So, for example, a case could have
18 been tried in 2016, come up to the service Court
19 in 2018, been reviewed by CAAF, the Court of
20 Appeals for the Armed Forces, in 2020, and then
21 come back to the Service court in 2021. And in
22 that scenario all three of those appellate

1 decisions were included in our study.

2 The vast majority of these 262
3 decisions as -- sorry, I can't see it, as this
4 table shows, arose in the normal course of
5 appellate review where a case was tried, went
6 through post-trial processing, and was reviewed
7 by the service court under its Article 66
8 authority.

9 These included a few decisions that
10 were the -- there were a few decisions that were
11 the result of a Government appeal under Article
12 62. And that included appeals from military
13 judges' rulings dismissing cases for speedy trial
14 violation or granting a mistrial, as well as two
15 interlocutory appeals that were challenging
16 evidentiary rulings.

17 And the third category on this table
18 includes decisions on writ petitions, one
19 petition for a new trial, and two petitions for
20 certificates of innocence.

21 Okay, this table, there we go, thanks
22 this table breaks down the service court

1 decisions according to whether they were
2 precedential value or unpublished opinions that
3 may be cited as persuasive but not controlling
4 authority.

5 Of particular note, 25 percent of the
6 decisions were summary affirmances which Major
7 Dray referenced. It's a subset of unpublished
8 opinions in which the Court writes that the
9 findings and sentence are correct in law and
10 fact, and there was no error materially
11 prejudicial to the rights of the accused, but
12 does not articulate any of the issues that were
13 either raised in the briefing, or the record, or
14 disclose its analysis.

15 You'll see that there are significant
16 service differences in the use of summary
17 affirmances. Only one of 76 Air Force decisions
18 took this form while 40 percent of the Army
19 decisions were summary affirmances.

20 Okay, Table H shows what happened to
21 these cases once they reached the service courts.
22 Two-thirds of service court decisions affirmed

1 the findings and sentence. Findings and/or
2 sentence were set aside, in whole or in part, in
3 nearly a quarter of the decisions. In the
4 remaining ten percent, there was no action on the
5 findings or sentence.

6 And that last category included
7 dismissals for lack of jurisdiction,
8 interlocutory appeals, and cases where the record
9 of trial of returned to the military judge or
10 convening authority for additional or corrected
11 or post-trial processing.

12 This table is snapshot of what rose
13 from the service courts to CAAF. In the vast
14 majority of cases, the appellant was not
15 satisfied with the results of the service court's
16 review and petitioned CAAF for review.

17 CAAF granted review of 54 decisions,
18 less than a third of the petitions. A grant on
19 this slide does not mean the appellant won
20 relief. It means only that CAAF agreed to
21 consider one or more of the issues raised. And
22 in addition to the 54 petitions, the Government

1 certified questions for review in another five
2 cases.

3 The other column on this table
4 reflects cases where a petition for review was
5 withdrawn or dismissed as unripe, or the time to
6 petition is not yet expired, or a decision on the
7 petition is not yet issued.

8 Turning to Table J, here we see the
9 outcome of the 59 cases reviewed by CAAF,
10 including the 54 petitions and five certificates.
11 CAAF affirmed the findings and sentence in 56
12 percent of the cases it reviewed, with Air Force
13 decisions being affirmed at the highest rate and
14 Navy and Marine Corps at the lowest.

15 A reversal in this table includes any
16 decision reversing or setting aside, in whole or
17 in part, any portion of the findings, sentence,
18 or decision of the service court. It does not
19 necessarily mean the appellant won or lost. It
20 may mean the case was remanded for clarification,
21 fact-finding, or for new post-trial processing.

22 In addition, the reversal may be

1 unrelated to the military sexual assault offense.
2 And finally, other includes pending decisions,
3 one answer to a certified question, and one case
4 that was remanded without decision.

5 So onto Slide 14, the staff identified
6 the top five recurring issues that were discussed
7 by the service courts in the decisions included
8 in this study. These issues were not necessarily
9 the basis for a reversal. We will cover those
10 issues in a minute.

11 Instead, this list includes the issues
12 that the service courts analyzed in their
13 decisions with the greatest frequency, regardless
14 whether they granted any relief. And the leading
15 one was factual and legal sufficiency.

16 And the other most significant ones
17 were post-trial processing errors, post-trial
18 delay, ineffective assistance of counsel, and
19 Military Rules of Evidence which included the
20 most frequent rules, those relating to hearsay,
21 to propensity evidence, the rape shield law, MRE
22 412 that you heard about earlier, search and

1 seizure, the psychotherapist patient privilege,
2 and decisions weighing the probative value versus
3 prejudice.

4 Additional recurring issues included
5 instructional error, member selection,
6 prosecutorial misconduct, and sentence
7 appropriateness.

8 Because we'll talk about the
9 propensity issue again, which accounted for about
10 half of the instructional error cases as well,
11 it's worth taking a minute to highlight what's
12 going on in the recent decisions discussing
13 propensity evidence. And my colleague, Meghan,
14 will talk about that briefly.

15 MS. PETERS: Thank you, Audrey. I
16 note on the cases discussing propensity evidence,
17 we don't anticipate that this will be a recurring
18 issue far into the future. But I suggest you
19 consult our panelists today on that issue.

20 But the reason is, in 2016 the Court
21 of Appeals for the Armed Forces decided U.S. v
22 Hills at 75 M.J. 350. And that decision

1 clarified the rules on the admission of evidence
2 of a charged sex offense for its tendency to show
3 a propensity to commit a charged sex offense.

4 In Hills, the CAAF decided that
5 evidence of one charged sex offense could not be
6 used to establish the accused's propensity to
7 commit another charged sex offense.

8 So as you might imagine, the nature of
9 this clarification, a number of trials were
10 percolating in the system at the time of this
11 decision. And so there are a number of cases
12 trailing Hills. They're in the Appellate
13 pipeline, and they made their way into our
14 review, because they caught a decision of some
15 sort in 2021.

16 And the nature of those cases after
17 Hill's, again, were a clarification on
18 identifying the Hills error, not that Counsel
19 were necessarily continuing to commit this error
20 but that they were additional adjustments and
21 pronouncements on the fact that this had to apply
22 in judge alone cases, as Hills was a panel case.

1 There may be, in our review, an
2 extraordinary writ so that an accused who had
3 already received review can say this is a change
4 in the law. I want you to look at this issue
5 again.

6 And the other reason that cases might
7 still be in the appellate pipeline in our review
8 is that sometimes the CAAF or the CCA needs to
9 clarify the prejudice analysis and do the
10 analysis again of the harm caused by the error in
11 their opinion. So again, it's how they -- the
12 error is clear now, and maybe there are some
13 clarifications on how you analyze its prejudicial
14 effect.

15 So that is, again, sort of creating a
16 bubble in the trend line. And it's worth
17 thinking about whether that will continue to
18 occur, because the law is now clear.

19 MS. CRITCHLEY: Thank you. So the
20 slide we were just looking at described the
21 recurring issues of the service courts. This
22 table, this slide, it's not a table, describes

1 recurring issues at CAAF.

2 The staff reviewed all of the CAAF
3 decisions from Fiscal Year '21 and '22, including
4 those that did not contain a military sexual
5 assault offense, to get a picture of the issues
6 most often discussed by the high court in the
7 last two years.

8 The following issues recurred in CAAF
9 with the greatest frequency, waiver, guilty pleas
10 and pre-trial agreements, ineffective assistance
11 of counsel, prosecutorial misconduct,
12 jurisdiction and, again, Military Rules of
13 Evidence, including some overlap with the service
14 courts, search and seizure, hearsay,
15 psychotherapist patient privilege, and also
16 confessions and admissions.

17 So we've just talked through and
18 looked at the issues that were most often
19 discussed by the appellate courts. And now we'd
20 like to turn to the issues on which the courts
21 were most likely to overturn military sexual
22 assault convictions.

1 The most frequent basis for a service
2 court to reverse the findings on a military
3 sexual assault offense in the relevant time
4 period was factual insufficiency. The second
5 most frequent recurring basis for reversals at
6 the Service courts, and also the top contender at
7 CAAF, was propensity evidence under Military
8 Rules of Evidence 413 and 414. That's follow-up
9 from the Hill's case that Meghan just talked
10 about.

11 So having now heard from -- you've
12 heard from the staff about the most commonly
13 recurring issues both discussed in appellate
14 decisions and those that were the grounds for
15 reversals by the appellate courts.

16 The staff proposes to conduct an in-
17 depth analysis of decisions on appellate issues
18 the committee wants to pursue and to develop
19 metrics to assess the efficacy of the handling of
20 those cases by the military justice system.

21 After lunch, we'll hear from
22 Government and defense appellate practitioners

1 about appellate practice and their perspectives
2 on recurring appellate issues.

3 At the end of the day, we'll come back
4 to facilitate a discussion and deliberation on
5 the direction the committee would like to see the
6 study take in light of the data and the panel
7 discussions to follow.

8 And decision points that we hope to
9 talk about at the end of the day would be
10 selection of the particular issues the committee
11 would like to focus on going forward,
12 identification of your specific interests and
13 concerns, and questions with respect to those
14 issues to guide the staff's future research and
15 analysis, and then a determination whether
16 committee members would like to review appellate
17 decisions dealing with these issues in
18 conjunction with the staff analysis.

19 (Simultaneous speaking.)

20 MR. SULLIVAN: If I can make could
21 make one quick supplemental point, so the staff
22 highlighted the nine cases that were reviewed on

1 factual sufficiency.

2 So you'll recall that Major Dray
3 discussed the 2021 change to the factual
4 sufficiency standard. All of those cases would
5 have been under the old factual sufficiency
6 standard, not under the current factual
7 sufficiency standard.

8 MS. CRITCHLEY: That's correct, thank
9 you. And in fact, one of the reasons that -- for
10 looking at the factual sufficiency issues now
11 would be to set a baseline for analyzing those
12 cases coming down the road when the new standard
13 starts to trickle to the Appellate courts, when
14 we start seeing cases under the new standard. So
15 we will have one and possibly two years of case
16 review to compare the impact of the new standard.

17 CHAIR SMITH: Dr. Markowitz?

18 MEMBER MARKOWITZ: So just a,
19 hopefully, a brief question. Hearsay is fairly
20 broad. Are you able to expand a little bit on
21 what the hearsay issues were, or is that
22 something that we can get more fidelity on?

1 MS. CRITCHLEY: Frankly, no, I mean,
2 it included, you know, looking -- some cases were
3 exceptions and exclusions. And just generally,
4 in order to come up with recurring issues, we
5 realized we have to think about it and sort of
6 group things, you know, that were logically
7 connected.

8 But I can't tell you the breakdown of
9 what specifically they were. I believe there
10 was, I remember seeing prior inconsistent
11 statements. Can you remember any other examples?

12 MS. TAGERT: Yeah, lot of prior
13 inconsistent statements and prior --

14 MS. CRITCHLEY: That's right --

15 MS. TAGERT: That was the bulk of
16 them.

17 MS. CRITCHLEY: Right, thanks.

18 MEMBER MARKOWITZ: Thanks.

19 MEMBER GENTILE LONG: I just have a
20 clarification. I was surprised not to see 404 B
21 on those. And is it because, and maybe this is a
22 practice question, is it because in these cases

1 the prosecutors are just moving under 413 and
2 414? Or did you subsume 404 in there and just
3 not write it down with the other acts evidence?

4 MS. TAGERT: So we did not subsume
5 those when we did the data. But if it didn't --
6 if it wasn't recurring at the rates that we
7 described today, but we can certainly look at the
8 numbers and send them out.

9 MS. PETERS: I'll add that I think it
10 just may not have made it into the top five. But
11 we saw it.

12 MEMBER GARVIN: So just -- I want to
13 make sure I'm understanding Page 14 where you
14 talked about the recurring issues most often
15 discussed in the service court opinions. So all
16 the summary decisions, no analysis of the
17 recurring issues that might have been briefed is
18 included in this at all. So we don't know if
19 there's recurring issues that keep not making
20 their way to appellate courts.

21 MS. CRITCHLEY: That's correct. And
22 that actually also brings up the fact that the --

1 so Air Force decisions are maybe over-
2 represented, because they only had one of those
3 summary affirmances.

4 And it also points to, you know, we
5 deliberated about whether to look at the briefs.
6 And in some cases briefs are available online,
7 and we can access them but not generally, at
8 least not for that time frame. I think, going
9 forward, more and more is going to be available.

10 So, you know, it's a question to think
11 about, if people are interested in looking at,
12 well, what's getting briefed and not written
13 about or, then at CAAF, was getting briefed and
14 not granted. And that's an analysis we could do.
15 We just have to get the briefs.

16 MS. TAGERT: And the DAD or GAD
17 practitioners, they're ready to discuss that
18 question in their presentation as well.

19 MS. CRITCHLEY: Yes?

20 MEMBER BASHFORD: What was the nature
21 of the prosecutorial misconduct in the four cases
22 that were reversed?

1 MS. TAGERT: The ones that I reviewed
2 were improper argument. I don't remember another
3 topic.

4 MS. CRITCHLEY: That's what I recall
5 as well.

6 MEMBER BASHFORD: And maybe this is
7 for the servicemembers; if a trial counsel's
8 conviction is reversed for improper prosecutorial
9 conduct, is there a consequence to that trial
10 counsel?

11 MS. TAGERT: I would not know. That
12 would be a question potentially for GAD or DAD to
13 answer as to what their -- it would probably be
14 based on their state bar, but I can't speak to
15 what happens to them within the DOD.

16 CHAIR SMITH: What were the types of
17 things that you were seeing with respect to the
18 ineffective assistance of counsel?

19 MS. PETERS: That is a -- first of
20 all, I think a great question for the next
21 panelists who are briefing and arguing. But we
22 saw all manner of issues crop up in there. It

1 could be failure to challenge a member, failure
2 to object to instructions and not seek a tailored
3 instruction, failure to pursue a case lead.

4 And there are procedural and
5 structural aspects to the appellate system that I
6 think bear upon the frequency with which IAC is
7 claimed, and briefed, and discussed, and again,
8 a great question for our next panel.

9 MEMBER WALTON: Regarding the factual
10 sufficiency reversals, do you have an opinion as
11 to what impact the new rule would have had on the
12 outcome in those cases?

13 MS. TAGERT: Judge Walton, I don't
14 think we can analyze that right now. Dr. Wells,
15 our criminologist, thinks that there may be ways
16 that we can look at the different decisions side
17 by side when we accumulate more cases.

18 But there have been theories that I've
19 heard from certain practitioners that believe
20 that it will just increase the amount of times
21 appellants want to raise this issue. Because
22 it's not going to be automatic. So there may

1 even be more decisions. But I don't know, other
2 than that other repercussion.

3 MEMBER ANDERSON: I have a question
4 regarding guilty pleas. In the federal courts,
5 and I'm going to defer to Judge Walton on this,
6 there is, at sentencing there is a series of
7 questions that the court will ask the defendant
8 regarding their understanding in their agreement.
9 So what were the issues you discovered in your
10 review?

11 MS. PETERS: First of all, there's a
12 sentencing that follows the guilty plea. So
13 sometimes it could connect to that in how
14 information from the guilty plea filtered into
15 the sentencing.

16 There is a colloquy with the --
17 between the Judge and the accused where they are
18 called upon to establish the facts upon which
19 their plea is based. And so some of that is,
20 were the elements sufficiently established there
21 in that discussion?

22 And the other is, alongside that, is

1 a stipulation of fact presented to the court that
2 both the Government and the accused has signed.
3 And when you line that up with what the accused
4 said to the judge in that active discussion on
5 the record, there could be inconsistencies there.

6 And then those have to be revisited to
7 see if the plea was knowing, and voluntary, et
8 cetera. And again, our experts to come may have
9 more color to add to that issue.

10 MR. SULLIVAN: And if I could add just
11 one concept, so the military doesn't have Alford
12 pleas. And obviously there is a concern in a
13 military context that an accused might be
14 pressured into pleading guilty.

15 So to preserve against that, we have
16 what's called the providence inquiry, also known
17 as the Care inquiry after a case named United
18 States versus Care, where the military judge has
19 to ask questions of the accused. The accused is
20 put under oath. And the military judge very
21 carefully, and at great length, questions the
22 accused.

1 And the military judge may not accept
2 that guilty plea unless the military judge finds
3 that the plea was voluntary and finds that the
4 accused has, under oath, admitted facts that
5 establish each and every element of the offense.

6 So on appeal, and I was an appellate
7 defense counsel for a large of my military
8 career, a large part of what appellate defense
9 counsels do in guilty plea cases is try to say,
10 hey, this providence inquiry didn't actually
11 establish this particular element of this
12 offense. So it's a quite often raised issue in
13 appellate review.

14 MEMBER GOLDBERG: First off all, thank
15 you very much. It's really tremendously helpful
16 to see this work. And it seems like a lot of
17 time and effort went into putting this all
18 together for us, so thank you.

19 Just a few quick observations, one, I
20 think I noted this in our last meeting, but I
21 continue to be struck by the very small numbers.
22 And these are numbers of appeals. So as I

1 understand from the appellate presentation, you
2 know, lots of appeals -- there are many appeals
3 relative to the, you know, many trial level sort
4 of determinations are appealed. And these are
5 small numbers.

6 I was also struck on Page 7 by the
7 variation in services. It was between guilty and
8 contested, guilty pleas and contested, where Army
9 and Navy, yes -- am I looking at this -- yeah,
10 Army and Navy had roughly similar percentages,
11 but the Marine Corps had a much higher
12 percentage, more than half were guilty pleas.
13 And Air Force had a very, you know, fewer than
14 two in ten were guilty pleas.

15 So it's just an observation, if you
16 have thoughts on it, I would be curious to know
17 the sort of --- were substantive observation, I
18 guess, as around Page 14, and the number of --
19 the 44 post-trial processing errors.

20 And it got me thinking about, you know, how
21 many of the issues that you're running into are
22 issues that are really unrelated to that these

1 are sexual assault cases and that this is just
2 generic challenges with cases?

3 And related to that, sort of, how many
4 convictions may be being dismissed because of
5 errors in processing that -- and what are the,
6 you know, that obviously has potentially very
7 serious consequences.

8 And then my fourth and last
9 point/question is you've all spent a lot of time
10 with these cases, a lot more than we have. And
11 so you've asked us for our views on what should
12 be next, and it would be helpful also to hear
13 your views.

14 MS. CRITCHLEY: If I can start by
15 responding to your comment about the post-trial
16 processing, one thing that I would point out, in
17 a lot of those cases it was one issue that kept
18 recurring and, sort of like the Hills issue, may
19 be resolved by this point. And I think our
20 experts can speak to that as well. It had to do
21 with the change in law in the beginning of 2019.

22 So they're all raising this issue of

1 whether the service court had jurisdiction over a
2 case if the convening authority failed to take
3 action on the sentence.

4 And that has been answered by now by
5 CAAF which said that it's an error, but it's not
6 jurisdictional. And so it's a pretty straight
7 forward correct the error and the case rolls on.
8 So a significant number of the post-trial
9 processing cases were that issue.

10 MEMBER GOLDBERG: Before you switch
11 topics, is that true for the post-trial delay
12 issue as well, which also sounds like a
13 process/resource issue rather than an issue
14 particular to -- that may come up in a variety of
15 cases?

16 MS. CRITCHLEY: Right. Well, I think
17 that's not particular to the sexual assault
18 cases. But that one, there were significant
19 service differences. And it appears to be, and
20 what our conversations with our experts have
21 suggested, that it's particular to -- more
22 frequently occurring in the Army and may be

1 limited to particular installations and so, not
2 necessarily a systemic issue, I mean, one that is
3 recurring frequently.

4 But that would be a great question to
5 ask them about further as well, so not
6 necessarily service-wide.

7 MS. TAGERT: And to go back to the
8 question regarding the low rate, not low rate but
9 lower rate for the Air Force guilty pleas, the
10 DAC-IPAD 1.0, I recall you guys as 2.0, did a lot
11 of study of charging decisions.

12 And the Air Force testified that they
13 charge cases at a probable cause standard without
14 further review. So potentially that is why the
15 guilty plea is different than the other services.
16 But the Air Force can testify to that as well.

17 MEMBER GOLDBERG: Do you have a
18 thought on that, Marine Corps being on other end?

19 MS. TAGERT: The testimony of the
20 Marine Corps two years ago, or three years ago,
21 was that they do charge cases based on whether or
22 not they believe that they can prove the case at

1 trial. So that is their charging standard.
2 Potentially they take cases at a higher standard
3 than the Air Force.

4 MEMBER GENTILE LONG: I just -- to
5 follow up on that, I guess then, and what I would
6 ask is that these charts have the prosecution
7 rate. I don't really think however the people
8 testify to what they do is that instructive
9 unless you know how many cases have come in.

10 Because the plea rate looks different
11 if you're only talking two cases than if you're
12 taking 100. And I think you have that data, so
13 maybe you can just attach it, if you can, attach
14 it to these tables for each service.

15 MS. CRITCHLEY: Yeah. I mean, we
16 started from the appellate decision. So this
17 represents, right, it's not a representation of
18 all cases as they come up from, you know, through
19 the trial courts.

20 It's starting from what made it to the
21 appellate courts and looking backwards, and
22 looking only at the military sexual assault as

1 we've defined. So we don't have that in this
2 context. But I'm not sure whether --

3 MEMBER GENTILE LONG: Well, I mean,
4 when you take it on its own, it suggests
5 something, perhaps, that may or may not be true.
6 So I think if you're going to have a slide that
7 talks about a percentage of convictions resulting
8 from a guilty plea, you need to tell the whole
9 story, how many cases are coming in to that
10 service. And then --

11 MS. TAGERT: From the investigative --
12 investigation.

13 MEMBER GENTILE LONG: Yeah, that
14 coming in, and you have to show the whole funnel
15 for that to make any sense, to be relevant at all
16 or useful.

17 MS. CRITCHLEY: Thank you for that
18 comment.

19 COL BOVARNICK: Any more questions?
20 And just to remind you, this will be a backup for
21 discussion for all these points and what's going
22 to be included in the next steps.

1 So with that, Chair, we can break for
2 lunch until, we could do until, I think, 1300,
3 like a full hour. And then we'll come back. And
4 we'll have the panels for Government and Defense
5 to come up. And they'll have plenty of time
6 built in for Q & A from the members.

7 Okay, we're on break until one
8 o'clock.

9 (Whereupon, the above-entitled matter
10 went off the record at 12:02 p.m. and resumed at
11 1:02 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 1:02 p.m.

3 COL BOVARNICK: I'm just going to do
4 introductions so we don't take any time away from
5 our presenters, and then the panel's chance to do
6 some Q&A.

7 So, we've got Major Dustin Morgan for
8 Government Appellate Division; Major Brittany
9 Speirs -- for the Army for Major Morgan -- Major
10 Brittany Speirs for the Air Force; Mr. Brian
11 Keller for Navy; and Captain Anita Scott for
12 Coast Guard.

13 So, I will turn it over to the panel
14 members, and you can introduce yourselves as well
15 and then get right into your presentations.

16 Thank you.

17 MAJ MORGAN: Good morning, ma'am. My
18 name is Major Dustin Morgan. I was formerly at
19 Government Appellate Division for the United
20 States Army. I am now currently a student at the
21 U.S. Army, Judge Advocate General's Legal Center
22 & School, where I'm getting an LLM in military

1 law.

2 MAJ SPEIRS: Hi. Good afternoon, I'm
3 Major Brittany Speirs. I am at Government
4 Appellate right now for the United States Air
5 Force, and before coming into this position, I
6 was a circuit defense counsel, and then just a
7 regular defense counsel.

8 MR. KELLER: Good morning, ladies and
9 gentlemen. My name is Brian Keller. I'm the
10 supervisor appellate counsel for the Navy and
11 Marine Corps, Appellate Government Division.
12 I've been doing that for about fifteen years.

13 MS. SCOTT: Good afternoon, ladies and
14 gentlemen. I'm Anita Scott with the Coast Guard.
15 I currently oversee the criminal law portion of
16 the Coast Guard's practice and I arrived there in
17 August. So, still getting my sea legs under me.

18 Prior to this tour, I have served in
19 a trial counsel role for a number of years,
20 defense counsel role. I was a military trial
21 judge, as well as a military appellate judge.

22 CHAIR SMITH: All right, let's start

1 with Major Morgan, if you would.

2 MAJ MORGAN: Yes, ma'am. So,
3 currently I'm Army, Government Appellate
4 Division. We have twelve or thirteen action
5 officers. They are the ones that take the cases.
6 We're assigned issues on a rotating basis.

7 An issue comes in from Defense
8 Appellate Division, we take the case and brief it
9 either to ACCA, to the Army Court of Criminal
10 Appeals, or to CAAF, depending on where the case
11 is in this situation.

12 Our training when we come into the
13 position, is you have a one-week intensive
14 training course when you come in, where you're
15 introduced to all the ins-and-outs of appellate
16 case law and how it differs amongst the Army
17 Court of Criminal Appeals and the Court of
18 Appeals for the Armed Forces.

19 That's typically not all that you come
20 into with. My experience is more typical than
21 atypical, where I served in both a trial counsel
22 and defense counsel role before coming into the

1 appellate world.

2 So, I did have, I don't want to say an
3 extensive knowledge of the court-martial
4 systems -- it's hard to get anything extensive
5 over four-to-five years I think, especially in
6 the legal field -- but more than your average
7 practitioner in the Army, and it's kind of a
8 self-selecting job where that happens.

9 Our case law depends, based on long
10 you've been doing it, but typically in my
11 practice I carry twelve to fifteen appellate
12 cases over the course of a year, and they were
13 all courses of the appellate process.

14 A majority of my cases were at ACCA,
15 obviously, because they handle a majority of the
16 cases. But I did brief and argue for cases in
17 front of CAAF this last year.

18 MAJ SPEIRS: Hi. Yes, ma'am. So, for
19 the Air Force Government Appellate Office there
20 are currently five of us that are doing active
21 appellate cases.

22 We come from all different experience.

1 Last year we had a majority of the circuit
2 litigators who came on, so I'm the only one that
3 came from defense. Everyone else came from the
4 senior trial counsel position.

5 We've had special victims counsels
6 that come into the role, so there's not a
7 specific track. It's usually justice. They'll
8 move people justice to appellate. But it can be
9 from the victim's counsel defense and from
10 government.

11 Ms. Mary Ellen Payne is a civilian in
12 our office who has review and authority over
13 pretty much everything that we do. She touches
14 every single case.

15 Like the Army, our caseload just
16 varies on what comes in, what's been filed from
17 appellate defense.

18 And for our training, when you first
19 come into the role you have a newcomers training
20 with Ms. Payne initially, and then after that the
21 veteran appellate counsel will train. So, we
22 have that coming up next week for our new

1 counsel.

2 CHAIR SMITH: Would you like to say
3 anything for the structure of the office?

4 MR. KELLER: Yeah, so we have about ten
5 appellate attorneys in our office, Navy and
6 Marine.

7 I think the average time in the court
8 before they come to our office is about three
9 years of trial time, either trial or defense
10 side.

11 The majority of people in my office,
12 within a few months, I think will be new to my
13 office. But I'd say that it ranges anywhere from
14 three to about like eight years of trial
15 experience in my office, the majority of them
16 being about three years.

17 For training, we have -- I'm Mary
18 Ellen Payne's counterpart. She and I were active
19 duty at the same time several years ago, and then
20 we both became civilians in role.

21 So, I'm the supervisor for the
22 Appellate Government Division. I'm the Chair of

1 the training next week, the joint appellate
2 training.

3 We do that every year. It's been
4 going on for nine years now. But we've brought
5 together the government, the defense and the
6 victim counsel community, both the trial and the
7 appellate side, so that they see the cross-
8 equities between trial and appeal, because that's
9 very important to succeeding on appeal.

10 And we bring in judges, appellate
11 litigators with a lot of experience, from the
12 private sector and from the government sector,
13 public sector, and they come teach appellate
14 writing, they teach appellate oral argument, they
15 teach appellate ethics.

16 And then, we bring people in
17 subsequently to discuss these issues to like
18 Fourth Amendment, like religion and courts-
19 martial, etc.

20 So, that's the kind of training. We
21 also do training inside the office. We kind of
22 ratchet up people slowly from simpler cases to

1 more complex cases.

2 We help with Article 62s in the field.
3 We have an advisory capacity. We have a duty
4 appellate counsel, phone and email dedicated to
5 helping trial counsel in the field, we try to do
6 presentations -- kind of a road show -- to get
7 out to the Marine Corps and Navy prosecutors in
8 the field to teach them the intersections between
9 appellate and trial.

10 MS. SCOTT: For the Coast Guard, the
11 billet structure within my office, there's two
12 billets that do appellate government work, an 03
13 and an 04.

14 They tend to be newer attorneys with
15 zero to three years of experience appellate
16 caseload-wise, obviously continuing on defense
17 filings.

18 Our average tends to be around ten
19 cases, maybe twelve, a year. Understanding the
20 slides you looked at earlier, that was an
21 anomalous year as well.

22 My two appellate government counsel

1 will be attending next week's training. So, to
2 that end we have no service-specific training.
3 However, we go to the other services and train
4 our folks that way.

5 The direct oversight of those two
6 appellate government attorneys is a GS-15 billet,
7 which has been capped for about two weeks now.
8 Just left to go to another service.

9 Those two billets, however, with the
10 standup of our Office of the Chief Prosecutor,
11 which is the equivalent of the OSTC, those two
12 billets will head over to fall under the chief
13 prosecutor. Anticipated timeline is next year.
14 So, they remain with me for the next several
15 months. Thank you.

16 CHAIR SMITH: Obviously, if anyone on
17 the committee has questions, go ahead and jump
18 in.

19 But if you were asked what issues your
20 division is facing, what are the largest issues,
21 in terms of being able to effectively represent
22 the government or your side in appellate cases,

1 what would you say?

2 And it doesn't have to be one issue.

3 If there's a few issues, what are those issues?

4 MAJ MORGAN: I think the biggest
5 issue facing at least the Army's practice of
6 appellate law, it's just a vacuum of information.

7 I don't know if that there's enough
8 sharing between the branches, because there's no
9 real sunshine between the four distinct appellate
10 courts.

11 There's no real way to get the briefs
12 of the other appellate attorneys or filing,
13 there's no real way to be able to articulate what
14 the other branches are doing in a similar
15 fashion.

16 A good example of this this past year
17 was our appellate courts are struggling with
18 whether or not our verdict should be unanimous,
19 and each of the services are struggling with that
20 issue and as it's going up through.

21 And being able to mesh together how we
22 are arguing with that because it is a rather

1 complex and big issue, did pose a bit of a
2 challenge. Not a great challenge, but it's one
3 thing that could help us in our practice.

4 MAJ SPEIRS: And just to piggyback off
5 of Major Morgan, when we are able to work
6 together, it does wonders for our office. It
7 really does. In addition to the unanimous
8 verdict issue, there was also whether or not plea
9 agreements could have mandatory discharges in
10 them.

11 Once you reach out to the other
12 services -- and you can see that we're all facing
13 similar issues -- we can use that information,
14 that knowledge, that experience, to help us with
15 our briefs.

16 And so, for the plea agreement issue,
17 that was one that we won because we had
18 information from the Navy that helped us put
19 forth our briefs.

20 I would say that another issue that
21 makes it difficult sometimes can be manning. I
22 know the Air Force, we were struggling with that

1 over this past PCS season.

2 We were short a couple and there
3 wasn't much turnover with the defense. And so,
4 typically, the government in the time that I have
5 been there, we do not usually take enlargement of
6 times or request enlargement of times, but just
7 over this past PCS season we had to, just due to
8 the number of people that we had.

9 MR. KELLER: Yeah, I'd say there's
10 four issues that challenge us. The first one is,
11 I think, the comment that both of my friends here
12 mentioned, which is we lack visibility into what
13 the trial attorney, the government-side
14 attorneys, the defense attorneys, victims
15 counsel, we have no idea what the United States,
16 specifically -- and that's who we represent -- we
17 have no idea what they're filing at the trial
18 level, all the way until a CCA opinion or CAAF
19 opinion comes out.

20 And then, we can read the breadcrumbs
21 by reading the opinions on Lexis or on the
22 website, so the other services.

1 It might happen that Mary Ellen Payne,
2 or Colonel Burgess from the Army, calls, or the
3 Coast Guard calls, and asks us for advice on an
4 issue. But otherwise, we have no visibility.

5 Contrast that to what U.S. attorneys
6 or federal public defenders would have with
7 CM/ECF. They can go type in something and they
8 can find it almost immediately. Lexis can find
9 it immediately.

10 So, I know that the services are now
11 executing on the 140 Alpha statute, but I am
12 unaware that there's any cross-service
13 visibility.

14 The most consequential thing that my
15 attorneys could have -- because we do this all
16 the time on Lexis looking at what the feds do so
17 we can take their position, because it governs
18 us -- the most consequential thing we could get
19 would be to have visibility in what's actually
20 happening at the trial level and transcripts,
21 pleadings, etc. A modern system like the feds
22 got 20 years ago.

1 Second -- and I'll try to make the
2 rest of these pretty quick -- I think we need to
3 find structures to encourage better coordination
4 between the services.

5 We have personalities that do that.
6 Like, personalities who pick up the phone. I
7 know Colonel Burgess, I've known Mary Ellen Payne
8 for a long time.

9 But what I'm going, what's the
10 structure that makes that happen? Or what
11 happens if the people don't like each other and
12 they don't want to pick up the phone and talk to
13 each other?

14 So, what's the structure that will
15 encourage coordination between the United States
16 and the United States, to make sure they're
17 taking the same position? So, find some way to
18 do that.

19 Third, I think that -- and these are
20 very appellate kind of difficult issues -- third,
21 I know you heard the Army Major talk earlier
22 about certification.

1 Well, the CAAF and the CMA see the
2 certification process, and that's the process
3 where the government seeks an appeal.

4 It's not really the government seeking
5 an appeal. It's the JAG certifying a case to
6 CAAF. So, I think the second consequential thing
7 that could happen would be to give power to the
8 appellate government divisions, the directors in
9 those divisions, to also have a discretionary
10 petition power to CAAF, so they can ask for
11 review of errors in the CCA opinions.

12 CAAF says that the JAG certification
13 power is quasi-judicial. So, they say it's
14 basically like a federal appellate court sending
15 something up to the Supreme Court.

16 So, we don't think that should go
17 away. The JAG does that at the behest of
18 anybody. So, the government can ask for a
19 certification, the victim can ask for a
20 certification, and the feds can ask for a
21 certification, and they do, but this would be
22 something in parallel, to give the government the

1 ability, as litigator -- which the JAG is not,
2 it's a discretionary executive actor -- but as
3 litigator, to ask for review if the CAAF thinks
4 there's good cause.

5 So, they could easily deny it. So, it
6 would basically just be a mirror in 67(a)(3) and
7 67(b).

8 And then, the final thing, and this is
9 another difficult appellate issue -- I think it
10 was mentioned by somebody else, maybe when I was
11 on the phone listening this morning -- is the
12 committee should consider recommending the
13 addition of statutory language addressing when
14 matters in the appellate record can be used by
15 the Court of Criminal Appeals or the CAAF to act
16 on finding some in-sentence, and a new rule for
17 court-martial, defining what an appellate record
18 is and its contents.

19 So, Congress a few years ago codified
20 Dubai. So, now there's an ability for the CCA to
21 send back for a fact-finding hearing.

22 If you look at, or your staff looks

1 at, the appellate decisions coming out of CAAF
2 just in the last year, there have been two cases.

3 And we litigate day-in and day-out
4 what can be added to the record, when they can
5 bring new evidence into the record on appeal,
6 etc.

7 There's a debate about whether mental
8 health records can be added on appeal. I think
9 that's commented in one of the dissents of the
10 CAAF. But there are two cases just recently at
11 CAAF that talk about the difficulties. I think
12 they talk about the incongruities in the case
13 law.

14 So, the bottom line is, right now it's
15 pretty much completely judicially made, the law,
16 that when you can add things to the record on
17 appeal. So, that means that it goes back-and-
18 forth and back-and-forth. And I think that's it.

19 Can I add on just one more thing to
20 the comment that the Army Major said, which is
21 factual sufficiency, I think that you should just
22 wait and see what happens with the new statute,

1 because the old statute is gone. So, I agree
2 with those comments.

3 MS. SCOTT: For the Coast Guard, I
4 certainly agree that sharing information is a
5 worthy effort. To that end, when we chop the two
6 billets next year for Appellate Government to the
7 Office of the Chief Prosecutor, they will be co-
8 located at the Navy Yard with the Navy to gain
9 synergies that that brings.

10 I don't think we did enough appellate
11 work in the slides to speak to reoccurring
12 issues.

13 MEMBER WALTON: What needs to be done
14 to enhance the sharing of information and greater
15 collaboration between the various branches?

16 MAJ MORGAN: Sir, I think the answer
17 exists already. So, with the enactment of
18 Article 140(a) was mandated that we publish our
19 court-martial materials, we publish the motions
20 that are being filed, we publish the briefs that
21 we're filing with the appellate courts.

22 It just needs to be utilized to a

1 higher degree. And if there was a way that we
2 could search by record or search by issue
3 utilizing the systems that exist already, that
4 would solve a lot of the sunshine issues that
5 we're having.

6 So, the systems are in place, it's
7 just greater utilization, I think.

8 CHAIR SMITH: So, they're being
9 published, but you don't have access to them? Or
10 they're not being published?

11 MAJ MORGAN: I can't speak to the
12 frequency to which they're being published. I
13 know at Army government appellate divisions, we
14 have a two-day turnaround to redact our briefs
15 according to the rule, and then get published to
16 that system.

17 So, where we are at or near
18 100 percent, I just said the trial level, we're
19 not at that number. I think that's where the
20 problem lies, at least in the Army system.

21 MEMBER WALTON: So, what could we do,
22 by way of a recommendation, that would enhance

1 what you say needs to be done?

2 MAJ MORGAN: Article 140(a) reads
3 pretty clear to me. I just think it's taking
4 time to get there. Change is slow, it's a new
5 system, I think we will get there. It's just
6 making sure the trial documents are being
7 uploaded will solve the issue.

8 MEMBER GOLDBERG: Is part of what --
9 oh, sorry, Mr. Lewis. I just to check if I'm
10 hearing correctly that one possibility would be
11 we might remind people that the language of
12 Article 140(a) is quite clear, and that there's
13 an expectation that there's compliance with that.

14 I wanted to ask you about a second
15 issue, which is searchability of the database,
16 because I thought you said it's not that
17 functional if you just lots of docket information
18 but have no way to search it. Is that a gap as
19 well?

20 MAJ MORGAN: That's right. Yes,
21 ma'am. It's more searchable by, like case name
22 or docket entry, or -- but you have to know the

1 parties involved most of the time. It's
2 definitely not like Lexis, where you can go in
3 and search by issue. That would be helpful as
4 well.

5 MEMBER GOLDBERG: Can I ask just one
6 other question? Is there -- this may be obvious
7 to everybody here -- but is there a reason that
8 this isn't managed on the Lexis platform? Are
9 there privacy or other kinds of reasons? Or is
10 it cost-prohibitive?

11 Because, I mean, most courts kind of
12 funnel into the Lexis platform, and then the
13 wheel doesn't have to be reinvented for
14 searchability.

15 MAJ MORGAN: Hey, I cannot answer
16 that.

17 MEMBER GOLDBERG: Or maybe I can ask
18 the question more broadly. If something like
19 that were possible, do the panelists think that
20 would be a good idea?

21 MAJ MORGAN: Yes, ma'am.

22 MR. KELLER: Yeah, I'd just add, yes,

1 I think that'd be a good idea, because we use
2 that in my office all the time to look for
3 pleadings at the SG's office and DOJ, and we
4 steal things from them to file in our courts and
5 they seem to be pretty successful because they're
6 usually good pleadings.

7 But, I mean, I guess for the question
8 that you ask, what would you need to do, I mean,
9 I guess that I would look at the capabilities
10 that are being developed in the military, and
11 compare them to successful systems that make that
12 available, and see if there's a delta.

13 I just know right now we don't have
14 the capacity. And I don't know what the vision
15 is for 140(a), so I won't speculate. Maybe it's
16 going to be a joint system. I'm not aware of
17 that though.

18 And then, also, I guess as far as
19 structure goes, I would also look at structures
20 that make a successful appellate and trial
21 office, and see if we're doing that.

22 Because one of the things about the

1 military is that of course people rotate. So, to
2 me at least, I think that structures are super-
3 important to encourage success, because you have
4 people rotating all the time, so it's structures.

5 I think that's why the Navy set up
6 this military justice track, but structures can
7 result in efficiencies when you have a system
8 where people rotate all the time.

9 And one more comment about Article 67,
10 which was the petition power that would really
11 help at the Appellate Government Division level.

12 Another thing that would encourage
13 cross-communication between the services, is if
14 you look at the statute where the JAG has a
15 certification power. Again, it's quasi-judicial.

16 The Congress recently added a
17 provision requiring the JAG to notify the other
18 services. The same thing should be in the power
19 for the Appellate Government Division, so that if
20 my colleagues at the Air Force, Army or Coast
21 Guard, decide that they want to certify
22 something, they should notify the other services

1 first so we know what it is they're doing.

2 Because otherwise, we don't see the
3 positions, from arraignment until an opinion is
4 issued, which can be years. And I think that's
5 why the stuff that's being posted right now we
6 may not know, unless we can search it.

7 (Audio interference.)

8 MAJ SPEIRS: So, for the Air Force,
9 the Court of Appeals has taken on the role of
10 uploading their -- after an opinion is decided
11 for any case after December of 2020, they've
12 taken on the role of uploading the briefs to
13 their website.

14 Searchability is by case name only, or
15 by date decided. CAAF does a digest for their
16 cases that's very helpful to search. You can
17 just go on there and -- they don't have the
18 briefs uploaded, but they have at least the
19 opinion, so you're able to go to the digest and
20 search by your specific issue, which is helpful.

21 MEMBER BASHFORD: I have a question
22 about the record on appeal. The Air Force

1 prosecutors were noting a trend for defense
2 attorneys to file an unsworn statement by the
3 accused in aid of sentencing. Is that considered
4 part of the record for an appeal?

5 MAJ MORGAN: Yes, ma'am, that would
6 become part of the trial documents. I don't know
7 how it varies between services, but in the Army
8 at least it's generally read into the record by
9 the accused during the presentencing proceeding.

10 So, that's typically part of the
11 verbatim transcript. And often, we'll get the
12 actual written statement, if there is one, as an
13 appellate exhibit as well, so it is part of the
14 record, in the Army system at least.

15 MR. KELLER: Oh, sorry, was the
16 question on appeal they're sending out a sworn
17 statement?

18 MEMBER BASHFORD: The unsworn
19 statements are being submitted at the sentencing
20 hearing, would it be part of the record for
21 appeal?

22 MEMBER SCHWENK: So, why is jointness

1 the wrong answer to better coordination among the
2 services at the appellate government level? So,
3 why isn't there one appellate government division
4 for all the services? Then, we would have a lot
5 less problems with people knowing what everybody
6 else is doing.

7 MAJ MORGAN: They are very different
8 systems. And I think that's the real answer.
9 So, for instance, if you have an Article 92
10 violation, which is a violation of a lawful
11 general order in the Army, I mean, the orders
12 differ a lot from what would be in the Air Force
13 or in the Navy, for instance.

14 I wouldn't understand an Air Force
15 case or a Navy case of that magnitude where it's
16 military-specific. I think that it requires
17 being on the ground and knowing those specific
18 issues. That's one hurdle that comes to my mind
19 immediately, sir.

20 MEMBER KRAMER: We heard about the
21 recurring issues most often discussed in service
22 opinions, and two of them were post-trial

1 processing errors and post-trial delay.

2 I don't exactly understand what they
3 are, and also, since they seem to be very big
4 issues in numbers, what could be done about them.
5 So, maybe you could explain just what they are
6 exactly, and what could be done about them.

7 MR. KELLER: One comment on the last
8 question, I think that there is a lot of
9 commonality between the services. The statutes
10 we generally take the same positions on, the RCMs
11 we take the same positions on.

12 But there are obviously service
13 differences, like orders, etc., that the Army
14 commented on, which are differences between
15 services.

16 For the post-trial delay and post-
17 trial processing errors, we don't have a post-
18 trial processing -- I'm sorry, we don't have a
19 post-trial delay issue right now. We did about
20 ten years ago.

21 We had a docket of about, like 1,500
22 cases, or something like that. Right now, I

1 think we have about 300 cases docketed per year
2 at the Navy/Marine Corps Court of Appeals, maybe
3 400 cases. So, we're not having a delay issue
4 now. I understand it may be different with the
5 other services.

6 The reason it's a big issue in the
7 military is partly because of about ten-odd years
8 ago we had that backlog, and that caused a logjam
9 and that caused CAAF to then weigh in with the
10 Moreno case, and then at the CCA level there was
11 a Brown case that used the old Article 66 power.
12 And so, it created two ways of addressing post-
13 trial delay. One is with the Barker v. Wingo,
14 applied post-trial -- speedy trial, post-trial,
15 constitutional -- and one under the 66 power.

16 So, now Congress has codified the
17 66 power and says if there's post-trial delay,
18 it'll provide appropriate relief, whatever that
19 means.

20 And then, I guess we have to litigate
21 that. And then, you have the constitutional
22 issue, which is still being litigated.

1 So, we don't have a post-trial delay
2 issue. There's also a post-trial processing
3 issue, which we do have an issue with.

4 MEMBER KRAMER: So, the post-trial
5 delay is just in the filing of the record and the
6 briefs? Or is it something else?

7 MR. KELLER: It's raised in a lot of
8 ways. It's raised when it takes too long to file
9 briefs, it's raised when it takes too long for
10 the CCA to issue an opinion.

11 There's a timeline which is used to
12 trigger the Barker v. Wingo analysis. It
13 generally results in no relief in our courts. It
14 gets raised a lot, like all the issues I think
15 was mentioned earlier today. I think your staff
16 mentioned that.

17 A lot of these things get issue-raised
18 a lot. Factual sufficiency gets raised all the
19 time because the CCAs must do factual
20 sufficiency. You don't usually get relief for
21 it. It's the same with post-trial delay.

22 MEMBER KRAMER: And then, sorry, and

1 what are the processing errors?

2 MR. KELLER: Well, one of them I think
3 is the adding of things to the record on appeal.
4 The definition of what an appellate record is,
5 because you've got a statute that says what a
6 record is, but you have no statute that says what
7 an appellate record is.

8 It's easy in the federal courts. It's
9 not for us because we're Article 1 courts of
10 limited powers. So, there's nothing on the
11 paper, so they make it up. And also, we don't
12 have an RCM that talks about it.

13 We have RCM 1112 that talks about a
14 record at trial, but you don't have anything that
15 talks about what's in the appellate record. So,
16 you have case law that tells us what's in the
17 appellate record, and that kind of ebbs-and-
18 flows. So, I think that causes some errors.

19 MEMBER KRAMER: Do the other services
20 have these issues too, and what might be done
21 about them?

22 MAJ SPEIRS: Yes, sir. One post-trial

1 process initiative the Air Force has faced is the
2 convening authority having to take action under
3 Article 60.

4 The convening authority now has to
5 specifically say whether or not he's going to
6 approve or commute the sentence. And typically,
7 what the bases have been doing is, they'll just
8 say that we're taking no action on the sentence.

9 And that has not been good enough
10 because there has to be some action if you're
11 approving or dismissing a sentence.

12 And so, that's something that has been
13 a problem. We've had multiple cases remanded for
14 that. But the message is clear out the bases,
15 that if it's not specifically in the convening
16 authority memorandum that action was taken, it's
17 going to be remanded back.

18 So, that's fixed itself just by the
19 nature of the process.

20 MEMBER ANDERSON: You alluded to delay
21 in filing briefs. There isn't a briefing
22 schedule issued by the appellate court, so the

1 parties know when they have to file the briefs?

2 MR. KELLER: There is. Yeah, I think
3 probably is more the court taking time doing it.

4 But sometimes there's a delay in
5 filing briefs too, where the defense counsel will
6 ask for multiple enlargements of time. So,
7 they'll take like eight enlargements, which will
8 be eight times -- yeah, eight months -- right? --
9 filing something.

10 Then, they'll trip the deadline and
11 it'll be too long, and then they might not have
12 consulted their client, and then the client
13 complains, and then there's an issue that they
14 can't get a job when they get out, etc. So,
15 there's a bunch of reasons that it can be posted
16 on delay.

17 MEMBER GARVIN: I have two questions
18 and they're quite different, so choose which one
19 you want to answer, I guess.

20 The first one is, earlier we were
21 talking about -- and it was just raised again by
22 Mr. Kramer -- like, the most common issues that

1 have been identified by the staff. However,
2 those were about common issues in decisions that
3 don't factor, than issues that were raised in
4 briefs but never get commented on.

5 And so, I was curious if there are
6 issues that you consistently brief that do not
7 get resolved, that there's a unique frustration,
8 or is a common challenge for you, that you really
9 wish the courts would be looking at.

10 And then, the second question is, when
11 you are involved in appeal, what does the
12 collaboration with the SVC or VLC or VC, or
13 civilian victim counsel, look like?

14 MAJ MORGAN: I would say most of our
15 issues get solved in some form or fashion. Just
16 because something's a summary or affirmance or a
17 memorandum opinion that not a formal opinion of
18 the court, doesn't mean that we get some sort of
19 guidance on it.

20 So, the courts are issuing memorandum
21 opinions all the time, they just don't get
22 published in the MJ registrars. They don't

1 become part of the actual record, they're not
2 binding.

3 So, we're getting resolution, it's
4 just not serving at a precedential value. So, I
5 don't think that's a big of an issue, in the Army
6 at least.

7 And then, the second question, I
8 previously served as an SVC. So, at least in my
9 practice -- and it was mirrored by a lot of my
10 Army colleagues -- is there was coordination
11 directly between the appellate counsel and the
12 SVC, if they wanted to play some role in the
13 appellate process.

14 And there is a victim/witness liaison
15 that works specifically at our Army Court of
16 Criminal Appeals, who does coordination as well.
17 So, typically, they're in charge of more of the
18 docketing and the schedule of when a case will be
19 heard, if it is.

20 And then, we're more focused on if the
21 victim has any input into the appellate process
22 and what their concerns are, particularly at

1 least at the attorney level, ma'am.

2 MAJ SPEIRS: Yes, ma'am. For your
3 first question, not that it's a common issue that
4 doesn't get resolved, but sometimes severity is
5 one where I feel like there's not a lot of
6 guidance on the decision.

7 The Air Force recently had a case,
8 United States v. Driskill, that came out and it
9 was an individual who was convicted of a 134 for
10 graphic drawings of a child, and then for rape
11 and sexual abuse of a three-year-old child.

12 And he was sentenced by a military
13 judge -- or no, not by a military judge. I'm
14 sorry, by members, to 40 years, a dishonorable
15 discharge, and reduction of rank and all those.

16 But after the Air Force court looked
17 at it, even though you're supposed to take into
18 account the appellant's service, his background,
19 sentence uniformity -- this was a member who I
20 think had been in the Air Force for maybe about
21 four years, he'd never deployed, he had never
22 been to any remote assignment, so his record was

1 not particularly compelling at all.

2 He did not present any sentencing
3 information at all, and the Air Force court
4 knocked off ten years for sentence severity based
5 on their experience, and based off of what they
6 ruled sentence uniformity was. So, that's a
7 frustrating one. It's addressed, but it's still
8 a frustrating one to look at.

9 But I think maybe with the new NDAA
10 and the sentencing guidelines that should be
11 coming out, that might be something that'll fix
12 that.

13 And then, for the SVC for appellate we
14 have an individual who is assigned to be the SVC
15 for a victim who's going to have their case go up
16 before the appellate court. It's only one
17 individual though, for every single victim.

18 And right now, the coordination,
19 they're copied on all briefs that are filed if
20 they're involved, if there's a representation for
21 it.

22 MR. KELLER: Yeah, those are hard

1 questions. So, the first one, what doesn't get
2 resolved? Well, I think the first issue would
3 be -- the first answer is, like everything that
4 we would like to get to CAAF, all the legal
5 issues, that for wholly discretionary reasons
6 don't get to CAAF and they don't get a C. And
7 those are all pre-decisional. So, I can't talk
8 about them.

9 I mean, you may glean them from the
10 cases, right? So, second, this should-be-
11 approved power used to be tied to the findings,
12 and the CCA used to exercise the should-be-
13 approved power to set aside the findings.

14 And I was prepared to talk about that
15 with you today, but then I noticed there's a
16 period in there the Congress inserted that I
17 didn't know about.

18 So, now, this should-be-approved power
19 only applies to the sentencing power. So, things
20 should get a lot more normal now that the factual
21 sufficiency power is pretty much gone. It's
22 different. It's got a test.

1 And now, that should-be-approved power
2 is not just flapping in the wind causing strange
3 results.

4 And then, I guess the third issue that
5 doesn't get resolved is, you know, what's the
6 standard for getting things attached to the
7 record at trial? Because that's just all it was.

8 For the SVCs, we have a pretty robust
9 collaboration with the SVCs on appeal. My
10 office, I think they're the first appellate
11 training for them, because they have a very low
12 caseload. There's not a lot of 6Bs that go up.
13 So, we work with them in that way in the training
14 capacity.

15 They also call and we sometimes, when
16 we notice something is amiss with the opinion --
17 like, there's stuff that's sealed information
18 that's accidentally been put into an opinion --
19 we'll let them know.

20 We try to look out for them when we
21 know that we can, when we notice something wrong.
22 I think that there's one issue with the SVCs, is

1 that I'm not sure where their power to
2 participate at the CCA stems from in the statute.

3 I have encouraged them, when they've
4 called asking questions, well you can file as an
5 amicus, right?

6 And they do. And that produces
7 results. I have no opinion about whether that's
8 the best way to make that happen, but that's what
9 they do. And I think that's good collaboration
10 with them.

11 MEMBER GOLDBERG: If I could ask a
12 follow-up question, because this last part just
13 keyed into an issue that I had raised this
14 morning, which was about the variability in rules
15 around VC or SVC, or the victims counsel
16 participation.

17 And it seems, again based on my
18 limited experience, that there's a lot of
19 variability in understanding of the VC role and
20 in the rights that victims' counsel have to
21 participate at the trial level.

22 And I just want to be sure I'm hearing

1 correctly that it sounds like there's maybe a
2 similar lack of clarity at the appellate level,
3 both within certain branches, and then across the
4 branches.

5 Is that right? And if it is right,
6 I'm interested in your thoughts on if you think
7 it's an issue that's worth trying to correct.

8 MR. KELLER: If I could just quickly,
9 the statute authorizes them to take 6Bs from
10 trial to the CCA. So, that's how they
11 participate.

12 And I don't believe that it says
13 anything about their participation at the CCA
14 later on when it comes up for direct review.
15 Right? So, it's just an interlocutory fashion
16 that they're authorized to participate.

17 MEMBER GOLDBERG: So, are you saying
18 that they don't have statutory authority, so
19 there's not a --

20 MR. KELLER: Well, I mean, I think
21 currently they participate at the CCA level after
22 it goes back down, the 6B's done and it goes up

1 on appeal, and you have the parties filing
2 pleadings.

3 And they could have missed something,
4 like this should be approved. They could have
5 missed some change in the statute because there's
6 so many, so frequently.

7 But I think that when it gets up there
8 for direct review, I think how they participate
9 is just by filing an amicus brief, generally.
10 Not because there's a specific statute of
11 authorization.

12 And, I mean, they seem to get results
13 that way. And maybe that's right. Maybe that's
14 the right result. I'm not sure I can opine about
15 whether that's the right result or not.

16 MAJ SPEIRS: Yes, ma'am. And just to
17 piggyback off of that, I think procedurally, for
18 how they interact with the court in amicus brief
19 is, it's typically what we've seen. But it's
20 also just, I mean, their ability to interact with
21 the victim so that the victim knows what's going
22 on with their courts, or with their case at that

1 level. I think just having that feedback and
2 that person that they can talk to about it is
3 also a big part of their role.

4 And, for instance, in a Dubai hearing,
5 if it's been reordered that there has to be a
6 rehearing, they'll play a role in that as well.

7 MEMBER GOLDBERG: And in helping the
8 victim, would they have more information than,
9 say, I would if I was sitting with the victim and
10 trying to explain what I understand is the
11 process?

12 In other words, do they have special
13 access to information that's not public and the
14 confines of those proceedings?

15 MAJ SPEIRS: In the Air Force they'll
16 have access to the briefs that have been filed,
17 and if the briefs haven't, they're not uploaded
18 by AFCA until after the opinion's been filed.
19 So, they'll have access to those ahead of time,
20 because they'll be copied on the pleadings ahead
21 of time.

22 MEMBER GOLDBERG: But they weigh in on

1 any drafts of appellate briefs.

2 MAJ SPEIRS: Not that I'm aware of,
3 no.

4 MR. KELLER: I don't think the statute
5 provides for consultation on appeal but I could
6 be wrong. But we do have a JAG man, so internal
7 Navy regulation that requires us to send copies
8 of the pleadings to them. So, they do see them
9 when they're filed.

10 MAJ MORGAN: And that's typical in
11 the Army too. They get a copy of the pleadings
12 after they've been filed, but no consultation
13 during the brief-writing process, ma'am.

14 MEMBER GOLDBERG: Sorry, just one last
15 question. I'm just trying to piece it here. Is
16 this all written down somewhere, where we could
17 see these rules? Or are they more kind of
18 informal norms?

19 MR. KELLER: No, we have published
20 regulations on the JAG instructions website. We
21 can get a copy to you.

22 MEMBER GOLDBERG: On the role of the

1 VC in this respect.

2 MR. KELLER: Right.

3 MAJ SPEIRS: And, ma'am, I'd have to
4 get back to you on what the guidance is, if it's
5 actually published or not, for the Air Force.

6 MAJ MORGAN: That same answer from my
7 side. I'd have to look a little bit more
8 closely.

9 MEMBER GOLDBERG: Thank you so much.

10 MEMBER KRAMER: Thanks. I have two
11 totally unrelated questions. One is about the
12 CCAs. Did they make an attempt to have their
13 opinions consistent with each other? I know the
14 federal courts of appeals at least say that they
15 want to try to be consistent, and then they do
16 whatever they want.

17 But do the CCAs do that and the courts
18 of appeals leave it to the Supreme Court? Do the
19 CCAs do that and leave it to CAAF to do that?
20 That's the first question. Or do they try to be
21 consistent?

22 And the second question is, who makes

1 the decision about an interlocutory appeal? Does
2 that require approval of your offices, or is that
3 done somewhere else, when the government decides
4 to take it like account dismissed or evidence --
5 or whatever. Thank you.

6 MAJ MORGAN: Sure, sir. So, I'm
7 taking each of those in turn. We argue our
8 sister services courts of appeals opinions that
9 have persuasive authority, and in my experience
10 they remain pretty consistent. And then, the
11 CAAF does come over the top sometimes where there
12 is an inconsistency.

13 In my experience, that's where they're
14 most typically willing to grant certification on
15 an issue, and then come over.

16 For interlocutory appeals, that was
17 actually part of my job when I was at Government
18 Appellate Division for the Army. So, the field
19 would consult with myself and my direct
20 supervisor. And ultimately, that decision lied
21 with our boss, the head of Government Appellate
22 Division for the U.S. Army.

1 The Staff Judge Advocate and the
2 installation would coordinate with him directly,
3 after we would give our advice on whether or not
4 they had a fruitful appeal. And then, my boss
5 would decide to take the appeal or not and we'd
6 file with the Army Corps.

7 MR. SULLIVAN: And if I can interject
8 for just one second there, so that's going to
9 change under the OSTC construct.

10 So, in the March 11, 2022 guidance
11 that the Secretary of Defense issued when he
12 issued the policy guidances for the OSTCs that's
13 required by Section 532 of the NDAA for FY22, he
14 provided that for a case in which an office of
15 special trial counsel is exercising authority,
16 the lead special trial counsel would be the
17 authority to decide whether to file an
18 interlocutory appeal, also known as 62 appeals.
19 You might hear somebody refer to those.

20 MAJ SPEIRS: Yes, sir. So, currently,
21 for consistency, we always cite -- well, not
22 always. If it's something that his helpful for

1 us, we will cite to it and we'll explain that
2 there is a difference between the services. And
3 then, for the Article 62(a) appeal, it's a
4 similar process for us right now.

5 For the Air Force, the Office of
6 Special Trials Counsel is in the same office as
7 appellate government, so we're all in there
8 talking and getting everyone's opinion. Now, we
9 are.

10 But usually, we'll get a question from
11 the field. The judge just ruled this way, what
12 should we do about it? And then, everyone in the
13 office weighs in, and then the pilot office will
14 make a decision.

15 MR. KELLER: Yeah, so we have an
16 internal regulation for the 62s, but as Dwight
17 said, it's OSTs, it's bifurcated. Office of
18 Senior Trial Counsel is the one -- or Special
19 Trial Counsel, I guess, is the one that makes
20 that call for his cases, or her cases, and we
21 make the call for all other cases. In
22 consultation with us, I think is how it works

1 internally.

2 For the CCA's remaining consistent,
3 well I think you need to look no further than
4 513. You see Rodriguez went one way in the Army,
5 you see Mellette went another way, you see
6 Kitchen went yet another way.

7 And as far as litigation at CAAF, it's
8 the jack-in-the-box effect. It's whichever
9 service happens to be the first one to get there,
10 is the one that sets the position on behalf of
11 the United States.

12 MEMBER SCHWENK: That puts us back to
13 a joint appellate division.

14 MEMBER KRAMER: And in conjunction
15 with that, I guess one of the reasons I ask,
16 would it be better, whatever, in conjunction with
17 General Schwenk's question, to have one
18 intermediate appellate court across all the
19 services that would be the court of first resort,
20 and then CAAF would take the important issues
21 from that court?

22 Given the number of cases is not

1 overwhelming, I just wonder if one intermediate
2 appellate court might be --

3 MR. KELLER: I want to hopefully
4 channel my Army colleague here, that the service
5 Courts of Criminal Appeal judges are all
6 officers.

7 So, you do have Army officers at the
8 ACCA, and they probably have specific knowledge
9 of the Army regulations that we don't have in the
10 Navy and Marines, that the Air Force doesn't have
11 and the Coasties don't have.

12 I mean, it does also produce -- I
13 mean, we try to red-team everything in my office
14 and try to get different views to try to emulate
15 what's going to happen at CAAF when we get there.

16 And having the different service
17 courts of appeals also has that effect too. I
18 mean, you have Rodriguez come out with something,
19 you have Kitchen come out with another, the
20 Mellette, and then CAAF gets to see that, which
21 then kinds of builds on the expertise get a draw
22 from.

1 So, somebody else has thought about it
2 before it gets to their clerks.

3 CHAIR SMITH: So, let's, Ms. Long, I
4 think, had a question. You still have your
5 question? And then, Ms. Tokash has a question.
6 So, let's hear from Ms. Long, and then we'll hear
7 from Ms. Tokash.

8 MS. SCOTT: May I speak to that last
9 issue? I'm sorry.

10 CHAIR SMITH: Oh, I'm sorry.

11 (Audio interference.)

12 MS. SCOTT: I don't have much to say.
13 But structurally, the Coast Guard Court of
14 Criminal Appeals, we do have authority and have
15 civilians on the court, so of the seven judges,
16 we have two full-time, and then five collateral-
17 duty appellate judges, and the two full-time are
18 both civilians.

19 However, of the rotators who serve as
20 the third person on panels that we rotate
21 through, there are military officers. So, it is
22 a combined civilian and military appellate court

1 for us.

2 MEMBER GENTILE LONG: This a little
3 bit of a related question to what's been asked
4 before. I'm interested in your feelings on your
5 access to resources or specialized training, or
6 experts, that help you feel like you're writing
7 competent -- not competent, but really expert
8 legal briefs on sex crimes issues that go beyond
9 what the reported case decisions say, but maybe
10 go into a little bit more of the social science,
11 research, or other areas that would be relevant
12 to making strong arguments, especially if they
13 push back on precedent.

14 Perhaps things we're learning about
15 serial rapists for more untested -- things like
16 that. Do you get training in sex crimes, or have
17 access to people that help you pull those briefs
18 together?

19 MAJ MORGAN: Yes, ma'am. I would say
20 most lecturing occurs while you're a trial
21 attorney actually prosecuting and defending
22 courts-martial, but I came, before I went to

1 Government Appellate Division, from the system in
2 the Army that provides that training to field
3 practitioners.

4 And Government Appellate Division
5 works on the same corridor of our building as
6 that organization in the Army. So, I would say
7 that yes, we definitely do.

8 MAJ SPEIRS: I would just echo that
9 most of it comes from when we're out on the field
10 actually litigating, have the access to the
11 experts.

12 And as I said before, we've had so
13 many senior litigators come into the position
14 since last year, that we still talk to our
15 experts and have those relationships with them.
16 It's nothing formalized, it's just relationships
17 we've built.

18 MR. KELLER: Yeah, I'd echo that. We
19 have people in our TCAP that are in the same
20 building as us that we can talk to.

21 MS. SCOTT: We tend to go to the Navy
22 for help first and/or even just to get points of

1 contact or other things. But it tends to be just
2 in time kind of assistance, based on the issue
3 before us. We don't tend to have them at the
4 ready.

5 CHAIR SMITH: Ms. Tokash.

6 MEMBER TOKASH: Hi. Thank you so much
7 for your time. I really appreciate it. I have a
8 question piggybacking off of my colleague,
9 General Schwenk, who talked about jointness.

10 And what I heard from some of you was
11 that if uniformity is a challenge that you're
12 looking at, why could not the CCAs function like
13 CAAF does, which has been functioning jointly for
14 decades?

15 And if the CCAs were a joint body, if
16 an issue like an Article 92 appellate issue came
17 up that, say, was Army-specific, the idea would
18 be that this office would be staffed jointly as
19 well, so that issue could go to an Army lawyer
20 for drilling down, or if it was an Air Force-
21 specific issue on Article 92, an Air Force
22 counsel could chime in and address that.

1 Could you speak to that a little bit
2 more, so that we can get a little more flesh on
3 the bone, so that we can consider other thoughts
4 if we tend to make some type of a recommendation
5 with respect to jointness? Thank you.

6 MAJ SPEIRS: Ma'am, just from a
7 practicality standpoint, I think one of the main
8 things that could hurt this is just efficiency
9 and the number of cases that each branch sees
10 separately. CAAF doesn't take as many cases as
11 the Air Force court or the Army court or the Navy
12 court takes. And so, I do think that there would
13 be a problem with efficiency, and that's one
14 reason why that would be a bad idea.

15 And I do feel like even though there
16 are some discrepancies in how the different CCAs
17 are handling cases, CAAF usually resolves them --
18 I don't know if quickly is the right word, but
19 they are usually resolved. I mean, the unanimous
20 verdict issue that we've been facing, while there
21 hasn't necessarily been differences of opinions,
22 CAAF has taken that up.

1 And so, the Air Force is going to be
2 handling that case that's an issue that we've all
3 faced. So, it will be handled by CAAF, who is
4 able to look at these cases as sort of a joint
5 effort, I suppose.

6 MR. KELLER: Okay, I'll try to make it
7 super fast then, since she wants to talk.

8 Yeah, I mean, I think that what
9 happened with the OSTC was brilliant, because it
10 kind of made an efficient structure for making
11 things happen for sex assault cases. Right?

12 And they can authorize the appeals.
13 I have in my office role the structure of U.S.
14 DOJ. And so, you've got the SG's office that
15 does all the appellate litigation, and SCOTUS --
16 right? -- and then you've got the USAOs, who take
17 the lead from the SG's office and the criminal
18 appellate.

19 Then, you've got the attorney general
20 over that thing. But still, they practice in
21 front of multiple regions, so you have that
22 diversity of opinion.

1 So, I mean, I guess it seems a
2 beneficial thing to have different sets of judges
3 that aren't in some kind of echo chamber
4 producing opinions.

5 I mean, they still have differences of
6 opinion, but they produce different opinions
7 because they're in different places. Just a
8 thought.

9 MAJ MORGAN: I just worry about the
10 learning curve if we're going to do that. I
11 speak a different language than my Air Force and
12 my Navy compatriots. I know it seemed that we're
13 all in the military and should be pretty uniform.
14 It's just not. That's not the practicality of
15 it.

16 When my compatriots said JAG man, I
17 only learned what that was yesterday. We
18 literally talk about things in a different way.

19 The learning curve would be
20 extraordinarily steep and it would be painful to
21 do that in a joint environment.

22 MS. SCOTT: If it's okay, I'm going to

1 echo that sentiment. I have served in an other-
2 than-Coast-Guard TC environment for a period of
3 six months. Granted, it was going on two decades
4 ago, and it was very challenging for me to
5 effectively speak Marine to a panel of Marines on
6 a daily basis. And so, the learning curve was
7 quite steep.

8 Additionally, I had trouble valuing
9 cases, things that in the Coast Guard, what
10 sounded reasonable to me given my experience at
11 the time.

12 Mercifully, there was a military
13 justice officer there to stop me from taking such
14 a deal.

15 MR. KELLER: Just an add-on that. So,
16 that's the should-be-approved power will be seen
17 differently by the different services, I think,
18 at the CCS.

19 MEMBER SCHWENK: I think your problem
20 was you were too articulate.

21 CHAIR SMITH: So, I did have a
22 question. I'm trying to remember who asked

1 about -- I think it was Ms. Long asked about
2 resources.

3 But more generally, just in general in
4 terms of preparing for your appellate cases, do
5 you feel that you have a appropriate resources?
6 Are there places where you're lacking in
7 resources? And if so, what are those areas?

8 MAJ MORGAN: I have never felt more
9 prepared in my career than before I stand up
10 before an appellate court in the Army. One
11 hundred percent, we had time, we had energy, we
12 had the resources to get that done.

13 MAJ SPEIRS: I would echo that.

14 MR. KELLER: Yeah, we need computers
15 and a podium. That's all we need. We're fine.

16 MS. SCOTT: For the Coast Guard, we
17 obviously continue to struggle with resources.
18 However, we have made resource proposals to
19 address these issues, based on the recent
20 legislation. So, we are taking steps.

21 However, just given resourcing cycles,
22 it'll take us a couple of years before we're

1 going to be at FOC, but we're on track to do so.

2 CHAIR SMITH: So, I guess that means
3 caseloads are manageable as well, so the
4 attorneys aren't drowning in cases that they
5 can't adequately prepare.

6 MAJ MORGAN: That's been my
7 experience. Yes, ma'am.

8 MAJ SPEIRS: Ma'am, I mentioned
9 manning earlier, but I really do think that that
10 was more of a product of the PCS cycle, that we
11 just lost everybody except for two, and defense
12 didn't lose anyone, so, there was no gap in the
13 number of briefs being filed.

14 MS. SCOTT: For the Coast Guard, just
15 when you have to counsel, they can get
16 overwhelmed fairly quickly, and we're rushing,
17 headed into a period where we anticipate there
18 might be a surge.

19 And our way of dealing with that is to
20 request enlargements -- and by-and-large they're
21 very common -- so that we can stagger the case
22 processing time for them.

1 MR. KELLER: Yeah, everybody in my
2 office, all ten, have been there for zero to
3 three years. And pretty soon the majority of
4 them will be completely new. So, the only thing
5 that can fix that are structures. And we're
6 fine. We don't have too many cases at this
7 point.

8 CHAIR SMITH: Well, it looks like we
9 don't have any more questions. So, thank you
10 very much for your time. And I think we have
11 found your comments and your answers very
12 helpful. Thank you.

13 COL BOVARNICK: Okay. I think we're
14 ready to get started now with the members from
15 the Defense Appellate Division from the military
16 departments. I'll just do a quick intro of the
17 names and then leave it to them to introduce
18 themselves.

19 From the Army we have Major Gordienko,
20 Major Arroyo for the Air Force, Ms. Snyder from
21 the Navy, and Mr. Tom Cook for the Coast Guard.
22 But again, like we did before, we're going to go

1 down the row and please introduce yourselves to
2 the Committee. Thank you.

3 MS. GORDIENKO: Good afternoon. I'm
4 Major Rachel Gordienko. I'm a Branch Chief at
5 the Defense Appellate Division. In the past, I
6 was a special victim prosecutor for three years
7 at Fort Leonard Wood, and I was a trial counsel
8 for the two years before that at Fort Carson.
9 And that is my military desk experience.

10 MAJOR ARROYO: Hi. I'm Major Arroyo.
11 And so, currently, I'm at the Defense Appellate
12 Division at the Air Force. This is my third
13 year. Prior to that, I was teaching at the Air
14 Force Academy for three years. I taught criminal
15 law and law for Air Force officers. I had to
16 think about it. I was like, Law 220, you're not
17 going to know what that is -- our colloquial.
18 And then, before that, I was a defense counsel
19 for two and a half years and a prosecutor for two
20 and a half years.

21 MR. COOK: Good afternoon. I'm Tom
22 Cook. I'm the Chief of the Coast Guard's Legal

1 Assistance and Defense Services Office. I've
2 been in that position for about the last seven
3 years. Before that, I was on active duty as an
4 Army JAG for about 27 years. The last four I
5 spent as an appellate judge. Thank you.

6 MS. SNYDER: Good afternoon. I'm
7 Rebecca Snyder. I'm the Deputy Director at the
8 Navy Marine Corps Appellate Defense Division.
9 I've been in that role for more than 13 years.
10 Prior to that, I was a reservist there for five
11 years. And prior to that, I was on active duty
12 there for three years.

13 So I've been in Appellate Defense for
14 the last 21 years. And also, I wanted to make
15 sure to let you know that the views I express
16 today are my own. They are not the views of the
17 Navy or the Marine Corps.

18 CHAIR SMITH: Why don't you each start
19 by telling us how your divisions are set up and
20 how many attorneys you have, the type of
21 trainings that's required to move to the
22 Appellate Division, and anything else you think

1 just in terms of the setup?

2 MS. GORDIENKO: Sure. So at the Army
3 Defense Appellate Division, we have three
4 different branches that are headed by a Branch
5 Chief, who is an 04. And there are typically
6 four action attorneys who are typically more
7 senior Captains who are assigned to each branch.

8 And then we also have the complex
9 litigation -- kind of our capital defense person,
10 who is a GS-15. And then we have a Deputy SJ --
11 or I'm sorry, a Deputy Chief, who is an 05, and
12 headed by a Chief, who's an 06.

13 When we come in, we have a full week
14 of pretty intensive training for new counsel, and
15 then everybody is assigned cases. So I'm the
16 case assigner for the Division. There's really
17 not much rhyme or reason to how the cases are
18 assigned other than try to distribute guilty
19 pleas and contests kind of equitably, taking into
20 account the experience that a counsel may have,
21 and obviously any conflicts of interest that they
22 might have with the installations that they've

1 previously worked at.

2 Most of the attorneys that work at our
3 Division have significant military justice
4 background. They have mostly all been at least
5 trial counsel. Most of them have been Defense
6 counsel. And the same goes with the Branch
7 Chief. But the case load is pretty manageable.

8 Right now, we average, I would say,
9 between 8 and 13 cases pending before ACCA
10 filing, and then between 10 and 20 cases that
11 would be throughout the remainder of the process,
12 whether pending an ACCA or waiting filing at
13 CAAF. Per attorney, the Branch Chiefs carry a
14 little bit less of a caseload.

15 We have a pretty significant review
16 process. The action attorney will write the
17 brief in consultation with the Branch Chief, and
18 the Branch Chief and the action attorney will
19 kind of go back and forth to finalize the brief.
20 And then that will go through -- most assignments
21 there will go through the capital litigation
22 attorney, so through Mr. Potter, who's our GS-15.

1 He typically will weigh in on most cases, and
2 then it goes up to the Deputy and then to the
3 Chief. And these are any cases that have any
4 assignments of error.

5 For our moot process, that's also very
6 significant. When either the Army Court or CAAF
7 identifies an issue that they want oral argument
8 on, we hold a Division-wide roundtable to discuss
9 how we will address the argument or how we will
10 write the CAAF brief. And then we have a minimum
11 of three moots to prepare for the argument. And
12 those moots are -- typically, the moot judges are
13 more senior attorneys in the Division, which
14 always include the Branch Chief, the Deputy, the
15 Chief, and Mr. Potter.

16 And that's kind of how our process
17 goes. Thank you.

18 MAJOR ARROYO: I was trying to take
19 notes as she went through to remember exactly
20 what she said. Anyways, in our office -- we have
21 a smaller office -- we have a Division Chief,
22 who's an 06. We have a Deputy, who's an 05. And

1 then we have a GS-15, who's a civilian, Mr.
2 Bruegger. And so he's pretty much our
3 continuity. He's been there for several years,
4 and so he has seen a lot of different cases, and
5 he is part of the leadership team. And I'll get
6 to the leadership reviews in a second. So we
7 have a review process as well.

8 Within our actual office, the
9 attorneys who are writing the briefs, there's
10 nine of us. And then Mr. Bruegger himself also
11 writes briefs. And then, usually, those go out
12 to a peer review. So we have someone in our
13 office who reviews them first after we've written
14 them.

15 And then we consult people in the
16 office about ideas before we even write anything,
17 and we have a peer reviewer who reviews it, gives
18 us feedback, and then it goes up to our
19 leadership review. And we get at least one
20 person for leadership review.

21 With regards to, I guess, training,
22 the way that we do training is we have a two-day

1 training when we first come in, within about the
2 first month. And that's all about the different
3 things that we'll see, different issues that
4 we've seen, standard of review, so we know kind
5 of what's in a review for different issues.

6 We also just have created this year
7 more of a brief bank were we're trying to put all
8 of our briefs into a brief bank and kind of
9 create an Excel spreadsheet to know what briefs
10 have different issues. I know that they had one
11 in the past, but it kind of went in
12 disarray/disrepair, and we didn't really fix it.
13 And so we're trying to do that more to be better
14 about knowing issues.

15 We also go to other trainings. So we
16 go to the JATC next week. There's also a North
17 Carolina training that Chapel Hill holds every
18 year. They have not held it the last two years,
19 but they're doing it this year. And I guess they
20 actually have litigators who will take the case -
21 - we bring down a case, and they will go through
22 how to write a statement of facts and kind of

1 work with somebody on how to write a brief. So
2 that's another training that we go to.

3 There's also a judges' training that
4 usually, I think, is in Texas that happens, I
5 think, around November that we sent people to
6 last year. And we typically do. Again, with
7 COVID, that wasn't happening, I think, the first
8 year I was here. And then we typically go to the
9 CAAF CLE since they have one every year, and
10 again, didn't have it the first year, but they
11 had it last year.

12 And so other trainings like that will
13 kind of happen as well. And then, last year, we
14 went to a summit with other defense services.
15 That was actually held at the Army. I think it
16 was the first one that we had done. We're kind
17 of trying to do some cross-pollination with
18 different issues that we were seeing.

19 So those are the different trainings
20 that we do. And again, like I said, once we
21 write a brief, it will go through those two
22 different reviews, the peer review/leadership

1 review, and then it goes up to Air Force Court.
2 And then, for CAAF, if we do actually have
3 something granted, we do a roundtable, and then
4 we do two moots where we will moot that issue
5 before it goes out to the CAAF.

6 MR. COOK: All right. So, from the
7 ground up -- we're actually smaller than you,
8 too. I think you probably knew that as Coast
9 Guard. But two full-time appellate defenders.
10 They're both 03 billets. I currently have an 03
11 and an 04 in those billets. Interestingly, the
12 03 has more experience. They have trial counsel
13 experience, so this is their second tour. The 04
14 is a senior funded attorney, so this is their
15 first tour as Appellate Defense.

16 They're supervised by an 05, who also
17 has some responsibilities in the trial defense
18 arena. And then I supervise everyone over there.
19 The beauty of our program is that they're co-
20 located with the Navy. So I know the Appellate
21 Government attorney alluded to that they were
22 going to move their Appellate Government

1 attorneys to -- was that Code 46 -- in the years
2 out. We've been doing that for -- I don't know -
3 - eight, nine, years. And I can't say enough
4 good things about the Navy.

5 So I'll let you talk about your own
6 program in a minute, but I just want to say
7 thanks to the 06's over there, Andy House, Marcus
8 Fulton, and now Arthur Gaston -- I mean,
9 unbelievably generous leadership. Rebecca puts
10 my Coasties on one of her Navy teams. They get
11 their briefs reviewed by the Navy team. Rebecca
12 looks at them.

13 We actually have had an SOP to make it
14 a little bit more functional as to -- goes to the
15 Navy and the Coast Guard and the Navy. Just
16 superior products. We get the benefit of their
17 training. I think they're in Mickenberg training
18 right now. So we're just really fortunate that
19 we have such a good partner. I hope we can
20 contribute. We have helped out on some Navy
21 cases over the years, so the bond is reciprocal.

22 But then Rebecca's just -- you know,

1 she's just a treasure over there, just tireless,
2 professional, someone I can talk to and bounce
3 ideas off of. And we have a good enough
4 relationship, she can just say, Tom, that really
5 sounds stupid; you can't go forward with that.
6 But I think that responds to your question. Then
7 you can fill in the rest. It's your program.

8 MS. SNYDER: Thank you, Tom.

9 So at the 45, we have a Director who's
10 an 06, and then I'm the Deputy. I'm a GS-15. We
11 rely on a lot of reservists. We have 15
12 reservists, and they do most of the guilty pleas.
13 So, if the case is 200 pages or less, those will
14 go to our reservists.

15 The last two years, we were gapped two
16 billets. We only had nine active-duty counsel,
17 not including the Director. And that really hurt
18 us. We are now at 11, which is where we need to
19 be. Unfortunately, we do not have the experience
20 that we need to have. So I've got seven Navy
21 counsel in my office. Four of them have no trial
22 experience.

1 This has been an ongoing issue since
2 2011. It impacts the caseload because the people
3 who don't know what a trial should look like
4 don't know what they're looking for. It takes
5 longer for them to get through records. They
6 miss issues. And so, then, that puts more cases
7 on the people who are experienced. And it also
8 impacts the quality of the representation.

9 As far as training, I've put together
10 a training program where we cover the basics of
11 appellate practice, go over things like standard
12 review, the basic authorities of the court. We
13 talk about what happens if we win because
14 sometimes there are bad consequences to winning a
15 case. You want to make sure that everyone is
16 looking forward. That's probably one of the
17 areas that's most ripe for appellate IAC, is not
18 talking through all the ramifications of winning.

19 We talk about commonly raised issues,
20 and I also talk about some issues that aren't
21 very common that are just not intuitive to help
22 them start thinking outside the box. And then

1 Tom mentioned Mickenberg training. So we have
2 Ira Mickenberg come every year, and he has our
3 people read a contested case, and then he sits
4 down with them and they go through each case one
5 by one. And he teaches them how to do issue
6 development, theme and theory development. It's
7 excellent training.

8 We try to send people to the Appellate
9 Judges Education Institute training. That
10 usually happens over Veterans Day weekend. And
11 then we have the JATC training in the fall. It's
12 going to be next week that Mr. Keller talked
13 about in the last panel.

14 CHAIR SMITH: So, Ms. Snyder, based on
15 your response, it sounds like there isn't really
16 a requirement with respect to the amount of
17 experience an attorney has before coming to your
18 Division; that's correct?

19 MS. SNYDER: There is not now. There
20 used to be. So, in 2003, CAAF decided Diaz v.
21 Judge Advocate General of the Navy. And that
22 case was what kicked off the Navy's response to

1 dealing with the huge backlog that we had in the
2 '90s and the early 2000s.

3 And so, at that time, they decided --
4 there was a lot of things that happened, but one
5 of the things was they said, you cannot come here
6 straight from NJS, Naval Justice School; you have
7 to have trial experience before you come here.
8 And we got the right to say yea or nay on people
9 who were coming. So we can veto someone and say,
10 no, they don't have the right qualifications.

11 So we were operating under that policy
12 until 2011, when I was mobilized to active duty.
13 And then, because of turnover in the detailing
14 shop and turnover in our building, that -- it
15 just didn't get turned over in the turnover. So
16 that policy fell away. I've been trying to get
17 it reinstated since then unsuccessfully.

18 For a short time -- well, I'm not
19 quite sure how long it was, but there was a
20 policy, sort of an unwritten policy, that you
21 couldn't be a VLC unless you were going into your
22 third tour. And so that created an inventory

1 problem. That is no longer the case, and so the
2 inventory problem has gone away.

3 Now, whether having to stand up the
4 STCs are going to create a new inventory problem
5 I don't know. But as of right now, the detailing
6 authorities have not agreed that trial experience
7 is a need for us. And so we don't know if
8 there's an inventory problem or not.

9 Now, I also can say that in the past,
10 when we have not had experience on active duty,
11 the Navy has mobilized people. So Mr. Sullivan,
12 for example, was mobilized in the early 2000s to
13 work on death penalty cases because we do not
14 have qualified people on active duty. And that's
15 happened since then. We also had a reservist
16 mobilize for three years. He left about three
17 years ago, so in the not-too-distant past. But
18 that's not something that is occurring right now.

19 MEMBER MARKOWITZ: Just to clarify --
20 maybe I missed this with the previous briefing,
21 but is this an issue for your counterparts in the
22 Government Appellate Office as well?

1 MS. SNYDER: No, and it's because they
2 don't believe that trial experience is as
3 critical for them. They're responding to issues
4 that are raised; they're not having to develop
5 the issues. And they believe that they can
6 handle it adequately without having had trial
7 experience.

8 MEMBER KRAMER: Sorry. I must have
9 missed something, Ms. Snyder. What's wrong with
10 winning?

11 MS. SNYDER: Well, you don't want to
12 get a worse sentence when you go back than you
13 did the first time --

14 MEMBER KRAMER: Oh. Okay.

15 MS. SNYDER: -- which happens
16 sometimes, right? That's one of the
17 consequences. There's -- I mean, I could go on,
18 but --

19 MEMBER KRAMER: I do have a more
20 fundamental question. I'm sorry. How often is
21 it that a brief is -- is an Anders brief in
22 civilian court saying that there's no issues --

1 MS. SNYDER: A merit.

2 MEMBER KRAMER: How often is that
3 filed? And also, do you ever have conversations
4 with the person about whether they should drop
5 the appeal because there's nothing to raise? And
6 how often do they agree to that? I'm just
7 curious, everybody.

8 MS. SNYDER: So merit briefs are --
9 well, it's not a brief. It's just a merit
10 submission. Merit submissions are filed most
11 often in guilty plea cases, and they are filed in
12 most guilty plea cases. They are rarely filed in
13 contested cases. And if we're going to file it
14 in a contested case, we make sure to have a
15 thorough conversation about that before we do
16 that.

17 We are seeing a lot of people who want
18 to withdraw from appeal because of the Google
19 effect. So, if they have an unusual name, this
20 is the first thing that pops up. If there's a
21 decision about their case, the facts are going to
22 be out there, and the Court often will discuss

1 the facts whether it's relevant to the appellate
2 issue or not.

3 That is probably going to become less
4 of an issue because now the Navy is putting
5 everything online anyway. So, even if they don't
6 appeal, you can find the entire record of trial,
7 and that will be there. So that may be falling
8 away.

9 But sometimes they want to withdraw
10 from appeal because they want their DD-214. And
11 that actually is not a good reason to withdraw,
12 because if you withdraw from our process, then
13 you get kicked over to the Article 69 review
14 process, and it doesn't actually speed things up.
15 It probably slows things down. So we have that
16 conversation.

17 MEMBER GOLDBERG: May I ask a follow-
18 up question, too? It sounds like you've tried
19 multiple times to get trial lawyers back into
20 your system, and it hasn't worked out. Can you
21 say a little bit about -- have you been given
22 reasons why they're not re-adopting that policy?

1 MS. SNYDER: So, most recently, the
2 conversation with a detailer was that everybody
3 wants experienced people. And we tried to
4 explain that, well, we don't have a want; we have
5 a need. Yes, it's great to have people at the
6 trial level who already have trial experience.
7 But when you're a supervisor at the trial level,
8 you can see more of what's going on. You're
9 seeing the motions. You can go to court and
10 watch them.

11 We can't read every record. And so
12 there's just a level of supervision that we just
13 are not able to have. So that's kind of how the
14 conversation has gone.

15 MEMBER GOLDBERG: Okay. Thank you.

16 MEMBER BASHFORD: Can we hear the
17 other services' response to Mr. Kramer's question
18 about meritless appeals?

19 MR. COOK: I echo -- well, first of
20 all, I forgot to read my disclaimer. So comments
21 I make today are solely my own. As such, they
22 may not reflect the views or opinions of the

1 Coast Guard or the Army.

2 So I echo what Rebecca said, and
3 typically in the guilty pleas, which they call
4 dives -- which is sort of cool. It's like a
5 boxer taking a dive. I never heard that in the
6 Army. But -- and then what are you going to
7 raise? It's a guilty plea. I mean, once in a
8 while, we get into Coast Guard because they don't
9 do a great job on the providency.

10 But I think they do get the 214s
11 quicker in the Coast Guard. So you waive the
12 appellate review. The guy just wants to get on
13 with his life. He wants to get his -- whatever
14 bad conduct's certainly not great, but he has
15 something to show his employer: look. I'm not
16 AWOL. Please give me a job.

17 So that's what I would add to that.

18 MAJOR ARROYO: I'm not sure if it's
19 more common or less common in the Air Force, but
20 I will say, just personally, I've only filed two
21 merit briefs, even with my guilty plea cases.
22 Usually, I can find something. And I talk to my

1 clients, and I find out what they want to do.
2 And even if I don't find something, often, they
3 have something that they feel strongly about and
4 they want to raise it.

5 There's also kind of when you're
6 having a conversation, if they want to remain on
7 active duty, they still have certain benefits.
8 So, to them, it might make sense to allow the
9 process, even if it's merits brief -- or merit
10 submission to be filed, to allow them to still
11 get access to healthcare while they still have
12 the opportunity before they, again, are
13 discharged.

14 So it's just one of those things -- I
15 might file one. I've only filed, I think, two or
16 three in all of my cases. And in general, there
17 is usually something that I can find. And I'll
18 be honest. Usually it is prosecutorial
19 misconduct that I'm saying that happened during
20 sentencing. And I've had the Air Force Court
21 agree with me and say there's error in several
22 cases there were even guilty pleas.

1 MS. GORDIENKO: So, in the Army, we
2 have a more boring name. We call them P-1s. I
3 might have to see if dive can get adopted. I
4 might just start calling them that and see if it
5 works.

6 But I would say that we file a fair
7 number of pro forma, P-1, briefs, typically in
8 guilty pleas, hardly ever in contests. You can
9 normally find something that went wrong somewhere
10 in a contest. But a lot of times, in guilty
11 pleas, we will file the P-1s.

12 As far as withdrawals, they don't
13 happen too often, mostly because of the timing
14 issue. Since it kicks it over to the 69 process,
15 we have even less control over the timing there.
16 So my advice to clients who want to get things
17 done quickly is to just let me file the P-1
18 today, and then hopefully it'll come back in
19 about a month, and I can file the CAAF the day
20 after it comes back. And that'll come back in
21 about another month, and that'll speed things
22 along a little bit more quickly than they might

1 otherwise take.

2 CHAIR SMITH: We heard from Ms.
3 Snyder, but could the three of you address the
4 issue of experience, what the requirements are?

5 MS. GORDIENKO: Yeah. Sure. So, as
6 far as experience goes, there's not any -- that
7 I'm aware of -- formal requirement to have any
8 level of experience to come to either the
9 Government or the Defense Appellate Divisions in
10 the Army.

11 Typically, it is a tour for a second-
12 or third-term Captain. We have started to try
13 and take some more junior people to help with --
14 because it is typically kind of the high
15 performers that go to the appellate divisions,
16 and that can cause a problem with a senior
17 rater's ability to -- what's called top-box
18 somebody on their evaluations. And typically,
19 our Captains are going into their promotion
20 boards. So that can just cause kind of a backup
21 issue.

22 But we typically see people who have

1 at least some experience either in their prior
2 career or some military justice experience
3 throughout their military career. But there's no
4 formal requirement. I haven't seen it be an
5 issue with experience at the Defense Appellate
6 Division.

7 All of our counsel are pretty high
8 performing, and we have a wealth of knowledge and
9 experience throughout the office. And we have a
10 lot of cohesion within the office, and we do
11 bounce ideas off of each other frequently. And
12 particularly Mr. Potter, who is the continuity,
13 is kind of our go-to if we don't know what to do.

14 MAJOR ARROYO: I don't know that we
15 have a specific policy. However, the way it is
16 set up for us is that your first assignment, you
17 will be a trial counsel. You'll go to a legal
18 office. You would not be a Defense counsel. I
19 think the Navy might be different for that. So
20 you will have at least had trial counsel
21 experience.

22 None of the people in my office are in

1 their second assignment, which means they went
2 somewhere else first before coming here. And
3 usually, that would be Defense counsel. So
4 everyone in my office currently right now was
5 either a Defense counsel in their last
6 assignment, or for me, it was two back because of
7 the Academy.

8 So we've all had Defense counsel
9 experience. And specifically, the people who are
10 in charge -- our Deputy, he was a senior Defense
11 counsel as well as a Circuit Senior Defense
12 Counsel. So he was in charge of a group of
13 people. So he has a lot of experience. And our
14 Division Chief was a prior Government Appellate
15 Counsel.

16 So everybody has experience with
17 regards to it. And so I don't think anyone is
18 unsure what to be looking for.

19 MR. COOK: Yeah. Like I said, I got
20 someone right out of Naval Justice School. So
21 there's no experience requirement. But my 05
22 does have experience, and she's very involved.

1 And I find myself reviewing records myself and
2 then talking to the lead attorney. And then, if
3 they're getting it, I understand if they're
4 missing some stuff.

5 I remember having a conversation with
6 you on a record of trial, too. It's like, hey,
7 here are some issues. And I think that's one --
8 you didn't say stupid, but you were like, yeah,
9 Tom, that's a loser.

10 But no, we keep a close eye on them
11 because a lot of them don't have the experience.
12 So thank you.

13 MEMBER BASHFORD: As you know, we've
14 been tasked by DOD with assessing the most common
15 errors in Article 120 cases on appeal. What do
16 each of you see as the most common errors in
17 those sorts of cases?

18 MS. GORDIENKO: So I can start. I
19 think one of the most common errors is going to
20 be, probably, kind of factual sufficiency or
21 instructions. When there's contested cases, a
22 lot of times, there are maybe some instructions

1 that should have been read or weren't read that
2 comes up as an error.

3 But factual sufficiency seems to come
4 into play. Particularly in the colloquial he-
5 said/she-said, alcohol-facilitated, sexual
6 assault, factual sufficiency seems to be a pretty
7 big issue.

8 MAJOR ARROYO: I'll echo that on
9 factual sufficiency, and also waiver. So, with
10 regards to waivers, specifically in instructions,
11 since CAAF decided Davis in 2020, as long as you
12 affirm that there is no objections to the
13 instructions, you've now waived the issue. And
14 so that is a problem, as the error could be of
15 pretty large magnitude.

16 But if they determine that it's
17 waived, they won't even review it. So they do
18 have the ability to pierce waiver based on CAAF
19 case law. It's somewhat unclear, at least in the
20 Air Force -- I'm not sure when they decide to
21 pierce. Usually, they'll tell us, we have the
22 ability to pierce, and we're not going to. So

1 it's one of those things that you're just not
2 sure when they will.

3 MR. COOK: Yeah. I'm going to cede my
4 time to Rebecca. She let me look at her
5 homework, and she has several here. But you saw
6 the number of Coast Guard cases, so it's hard to
7 get a pattern with so few cases.

8 MS. SNYDER: Thank you.

9 I would say prosecutorial misconduct,
10 which is usually in the form of improper
11 argument; waiver and ineffective assistance of
12 counsel, which go hand in hand; factual
13 insufficiency -- those are the top ones. Beyond
14 that, other common issues are MRE 513, which is a
15 psychotherapist- patient privilege; improper
16 instructions; search and seizure issues; member
17 selection; and obtaining expert witnesses or
18 consultants.

19 And I know there was a conversation
20 this morning about member selection and
21 challenging the convening authority's selection
22 of members, particularly with regard to race, and

1 I thought you might be interested to read the
2 United States v. Bess decision, which is that 80
3 M.J.1. It got into those issues.

4 I would point you particularly to
5 Judge Ohlson's dissenting opinion where he
6 details the Defense's discovery request and talks
7 about how the denial was improper.

8 Unfortunately, that was a dissent. But we are
9 also arguing a similar case within the same
10 convening authority challenging the Panel on the
11 basis of racial bias in United States v. Jeter.
12 That's going to be the first case argued this
13 term in San Diego on October the 12th. So that
14 might be an oral argument you want to look up
15 and listen to online.

16 MAJOR ARROYO: Really quickly echo
17 with the Jeter. We also have United States v.
18 Anderson, which is unanimous verdict, which will
19 be heard on the 25th. That's a case I'm on with
20 Mr. Cassara. And so, that one, we actually cite
21 to Jeter in it based on racial issues.
22 Potentially, if you have not a unanimous verdict,

1 then you don't know potentially if people who are
2 on the jury -- their minority views might have
3 been, again, not allowed.

4 MR. WALTON: The military personnel
5 who work in your shops -- are they there because
6 they volunteered? And since you indicate that
7 you have some appeals involving instructional
8 errors, do each of the branches have standard
9 instructions that have been approved by your
10 respective branches?

11 MS. GORDIENKO: So, first to the
12 instructional errors, yes, there are a standard
13 set of instructions in the Military Judges'
14 Benchbook that are typically read in cases. But
15 in every case involving the members, the military
16 judge will kind of print the proposed
17 instructions and hand them to counsel and say,
18 hey, are these okay? Do you want any other ones?
19 Do you see any typos? Should any not be here?

20 It's a process between both Government
21 and Defense counsel and the military judge prior
22 to any instructions that are read to or given to

1 the members. But there are -- I mean, that is
2 written based on case law, and sometimes it's not
3 updated based on case law, or there are certain
4 arguments that are to be made that the existing
5 case law is incorrect and should be changed.

6 So the Defense Counsel Assistance
7 Program will push instructions that maybe should
8 be requested. Consent is kind of a big one right
9 now that we're looking at and adjusting the
10 definition of consent based on the existing case
11 facts.

12 Regarding the voluntariness of being
13 at the appellate divisions, at least in the Army,
14 it is a highly requested position. The
15 assignment process isn't ultra-transparent, so I
16 don't actually know that everybody who is there -
17 - if it was their top choice or not. But
18 everybody enjoys being there. Typically, it's
19 not an assignment that somebody's forced into.

20 MAJOR ARROYO: In the Air Force, same
21 thing. It's very highly sought after. It was a
22 job that I definitely requested as my number one,

1 and I was very excited when I got it. I would
2 have been happy to go to either appellate shop
3 because I thought appellate law would be
4 something very interesting to practice after
5 being a trial attorney. Everyone in my office
6 currently who just came in this season -- it was
7 their number-one choice.

8 So the other thing that they might
9 look at in placing somebody in this area is if
10 they have a joint spouse assignment. So I do
11 know one of the people in my office -- it might
12 not have been on her list, but her husband is in
13 the military. He's OSI, Air Force Office of
14 Special Investigations. And his assignment was
15 already coming here.

16 So, in general, I think they try to
17 work with, again, people who are asking for it.
18 But everyone who's in the office loves the job.
19 So they think it's a great opportunity to be a
20 lawyer.

21 Oh. The instructions. So the
22 instruction issue that I've seen recently

1 sometimes maybe is one that you may not have
2 realized at trial. And so, for example, not
3 everything is defined. One of the more recent
4 cases that CAAF, United States v. Schmidt -- that
5 one had to do with whether or not in the presence
6 was defined.

7 And it was something that no one had
8 really, I guess, maybe thought about at that
9 point. So they were determining whether that was
10 something that was waived based on the fact they
11 didn't raise it at trial because that definition
12 is not specifically there.

13 So I think sometimes you might not
14 realize that these instructions are missing
15 something. It doesn't get asked. And then we
16 see it on appeal, and then they determine whether
17 it's waived or not.

18 MR. COOK: Yeah. I'm not sure if it
19 was top choice, but it's top three of my whole
20 seven years here at the Coast Guard. So people
21 definitely are there that want to be there. As
22 for instructional error, I can't remember any

1 issues with that.

2 MS. SNYDER: So, in the Navy and
3 Marine Corps, it's a negotiation with the
4 detailer. If they did not want to come, I don't
5 think they would tell me that. So they all tell
6 me that they want to be there.

7 As far as instructions, one of the
8 most common instructional issues that we see is
9 whether the defense of mistake of fact should be
10 given. Sometimes the defense asks for it, and
11 the Judge says no. Sometimes the Defense doesn't
12 ask for it, and then it's an issue of IAC. But
13 that's a very common one that we see with
14 instructions.

15 MEMBER KRAMER: Oh. Thanks. I have
16 one quick question of Major Arroyo and then
17 another bigger question. Is it waived or
18 forfeited when you don't object to the
19 instruction? Do they say it's actually waived?

20 MAJOR ARROYO: Sir, so it depends.
21 Our case law is not super clear. So, in general,
22 if you say no objections, CAAF has said that that

1 is waived. However, it depends on whether or not
2 it's like clear precedent is out there.

3 And so, for something that maybe --
4 again, with Schmidt, they had determined it was
5 actually something they were going to look at and
6 not waived because there was no specific case law
7 on that specific issue about the presence of a
8 child. And so it kind of depends. But then,
9 once you get past waiver, if you actually get to
10 forfeiture, it's often hard to show it's clear
11 error if, in fact, no one raised it and if there
12 is no clear precedent on it.

13 So you are kind of in, I guess, not
14 the greatest state of review on either of them.
15 But at least if you get past waiver, then you
16 would be all clear.

17 MEMBER KRAMER: Thanks. And then I
18 have a specific question for everybody about
19 sexual assault cases. Do you have any idea what
20 percentage of your caseload sexual assault cases
21 are, and do they present any special issues for
22 your lawyers?

1 And then a bigger question, I guess --
2 and I'm sorry to make this so long -- is,
3 especially with special trial counsel -- and it
4 may be too early -- do you see that the trial
5 counsel for the Government may have certain
6 advantages that trial counsel for the Defense
7 doesn't have? Are you seeing an imbalance at all
8 in your review of the trials between the
9 Government counsel and Defense counsel?

10 So there's three -- sorry. There's
11 three questions there about the percentage of
12 your caseload, special issues, and reviewing the
13 trial counsel.

14 MS. GORDIENKO: So, as far as
15 percentage of caseload goes, I would say a
16 majority of the contested cases are sexual
17 assault cases. And contested cases make up
18 probably about a third of our cases. And then,
19 as they had said earlier in the day, the ones
20 involving children or child pornography end up
21 typically going to guilty pleas. So we do get a
22 portion of guilty pleas, as well, that are sexual

1 assault cases. But a vast majority of our
2 contested cases are probably sexual assault
3 cases.

4 And as far as issues within the sexual
5 assault cases, I would say factual sufficiency
6 tends to be a pretty high percentage of them,
7 only because the evidence involved is often
8 intangible and involves -- turns largely on
9 credibility.

10 And then the imbalance between
11 Government and Defense at the trial level -- I
12 have not seen anything that would lead me to
13 believe that there is a large imbalance. Even
14 throughout my time as a prosecutor, I always felt
15 that the Defense counsel is very well prepared
16 because typically the Defense counsel are not
17 doing that as their first tour. There was some
18 concerns with Defense counsel who were doing it
19 as their first tour, but in general, I think that
20 the balance of available resources and expertise
21 is similar.

22 MAJOR ARROYO: So, prior to coming

1 here, I did asked our paralegal if there was a
2 way to check the number of cases in our office,
3 and there is not, unfortunately. But I will say
4 I think probably similar -- I was looking at my
5 docket, and of my about 18 or 19 cases, I'd say
6 that I have maybe five that are litigated, six
7 that are litigated, and the others are probably
8 guilty pleas.

9 And then, looking at those cases, the
10 majority of them are either sexual assault,
11 sexual misconduct -- and that covers, I think, a
12 lot of things. I had a case involving someone
13 who sent pictures of his private area to people.
14 So that's not what we think of as sexual assault,
15 but that would be sexual misconduct -- and then a
16 lot of cases involving, potentially, attempts.

17 So, if you are involving OSI within a
18 case where -- if you think like a To Catch a
19 Predator type case, those would be other types of
20 cases as well. With regards to --

21 (Off-microphone comments.)

22 MAJOR ARROYO: Oh, the issues I see.

1 I'm sorry. The issues that I see -- yeah,
2 especially factual sufficiency. I have seen
3 several instructional issues with regard to
4 sexual assault cases. I think that entrapment is
5 one. With To Catch A Predator, you'll see that
6 being raised within the factual insufficiency.

7 Sentence severity sometimes comes up,
8 depending on how long a case happened. I know
9 that Brittany Speirs mentioned the Driskill case,
10 and that was one that had come up recently in our
11 office that was kind of, I guess, almost a
12 surprise when we were looking at how they had
13 determined it, and they didn't give us a lot of
14 feedback on why they determined the sentence was
15 too severe.

16 So, for us from the defense
17 perspective, it's not the easiest case to cite to
18 in support of other cases in the future because
19 it's not super clear. Obviously, Government was
20 looking at it probably in the same way. So
21 things like that, sentence severity -- I think
22 those are probably the most common.

1 Sometimes you'll see some Military
2 Rule of Evidence 412 or 413 issues. The 412,
3 maybe they wanted to get into something and they
4 were unable to. I know that CAAF is hearing a
5 412 case soon. And so things like that, I think,
6 are typical.

7 And then, from the imbalance, I think
8 our shop does a pretty good job in general, or
9 the Air Force, of having people who have had
10 experience. And I know they're thinking about
11 changing this process, but we have a process
12 where we're required to be certified as a trial
13 counsel. So, your first assignment, you're a
14 trial counsel. And then you have to be certified
15 to be able to do a case on your own.

16 And so they usually look at anywhere
17 between, I think, three to five cases before they
18 -- and they want some litigated cases, not just
19 guilty pleas, right? They want you to have to go
20 through opening, closing, witnesses, things like
21 that to get certified. Again, I know we are
22 thinking about changing that process.

1 But then, before you would go and be
2 a Defense counsel, you would again have to be a
3 trial counsel and certified. You can't go be a
4 Defense counsel until you're certified. And so,
5 at that point, you've had at least five cases,
6 maybe more. And then you're a Defense counsel.

7 And then, with any type of sex assault
8 case or anything that's very, I guess, a more
9 severe punishment, is authorized for -- serious
10 crimes -- you would have, probably, a senior
11 Defense counsel. They obviously have the
12 opportunity to get a civilian counsel, and that
13 might be where, maybe, there's an imbalance. I
14 would say not all civilian counsel are
15 necessarily -- I mean, some are probably really
16 great. Maybe some aren't. I don't know. But it
17 just depends on who the client decides to hire.

18 MR. COOK: So I actually have a
19 tracker, we only have a handful of cases. So the
20 cases that are in appellate review -- we've got
21 14 in some stage, and six of those are sexual
22 assault cases. And then, pending at the trial

1 level, we've got nine cases pending, and three of
2 those are sexual assault cases. So I've got a
3 good answer on that.

4 Next question?

5 MEMBER KRAMER: Is there any special
6 issue related to sexual assault cases?

7 MR. COOK: No. No. And then we have
8 a formal agreement with the Navy. The Coast
9 Guard and the Navy have an MOU. So we send the
10 Navy eight Coasties, and they give us a full-
11 service trial defense. So it's Coast Guard
12 prosecutors versus seasoned Navy and seasoned
13 Coast Guard defenders.

14 So I don't want to spike the ball, but
15 I seldom see a record where we're outgunned at
16 the trial level. And I've had trial judges
17 comment on the same about Navy really has some
18 phenomenal trial defenders. So another
19 compliment for the Navy. And you know I'm an
20 Army guy. It's a little hard for me.

21 MS. SNYDER: I paid him before we got
22 here today. So I think the first question was

1 what percentage of cases are sexual assault
2 cases. So I was really surprised when I got the
3 slide deck from your staffers. I think they
4 identified that 30 percent of the cases were
5 sexual assault cases.

6 We talked about that at lunch
7 yesterday, and I kind of did an informal poll.
8 And there were some people at the office who
9 didn't have any case that wasn't a sexual assault
10 case, which is more along what I was thinking.
11 There are a few that had a mix. I feel like I am
12 always editing a brief that's on a sexual assault
13 court-martial conviction.

14 So, if I had to guess, I would say it
15 was more in the range of 60 to 70 percent. But
16 that's so different from their numbers that
17 that's probably not right. But that's what I
18 would say.

19 In terms of any special issues -- so
20 this is a different kind of issue. We have a lot
21 of trouble getting our clients access to the
22 record of trial. So they do not have a right to

1 review the record and to assist in their appeal
2 by reviewing the record. At trial, they are
3 given the opportunity to say where they want
4 their copy of the record to go, to them or to
5 their Defense counsel.

6 It is the practice that Defense
7 counsel tell them to give it to the Defense
8 counsel. But then what happens is the client
9 never can get a copy of it at that point. We've
10 tried to get them copies on appeal, but because
11 they don't have a right to the record, it's very
12 difficult.

13 And then the other issue is that brigs
14 have inconsistent policies, or the policies are
15 inconsistently applied. So some brigs will not
16 let clients have CDs, which kind of surprised me
17 because back in the day, I think they were
18 researching Lexis cases on CD-ROMs. But if the
19 record isn't electronic, then they can't access
20 the record. So then you got to have 3,000 loose
21 pages floating around.

22 Some brigs will only let a client have

1 maybe an hour or two a day to look at his record
2 of trial. If you have a very long record, that's
3 not a lot of time. So there needs to be more
4 consistency, and so far, we've been unsuccessful
5 in changing the policy of advising clients to
6 give their copy of the record to their attorney.

7 Oh. And there was one more question.
8 Are we outgunned at trial? I don't think so for
9 the most part. But I will say sometimes when
10 experts are at issue, the Defense gets a
11 substitute from what they're requesting. And
12 sometimes that substitute does not match the
13 Government expert in either experience or
14 qualifications.

15 So I remember there was one case where
16 they gave the Defense a nurse that had done just
17 a handful of SANE exams, and that was supposed to
18 be the Defense expert. Meanwhile, the Government
19 expert had done hundreds of them. So that would
20 be an issue where there is a disparity, but on
21 the whole, I don't see that.

22 MR. WALTON: One of the reasons for

1 the adoption of sentencing guidelines in federal
2 courts was because of the huge disparity between
3 sentences being meted out in different
4 courtrooms. And to a large degree, that was
5 predicated on racial prejudice, or at least a
6 difference in race. Is that something that
7 you've experienced in the military, and if so, is
8 that grounds for appellate review?

9 MS. GORDIENKO: So, just anecdotally,
10 I think that there is a very large disparity in
11 sentences. I don't necessarily think it's based
12 on any type of bias. I think it's more judge-
13 dependent and how that judge views different
14 crimes. Some judges are really hard on military-
15 specific crimes. Some judges are really hard on
16 child crimes.

17 So I think that it's just very judge-
18 specific. And as far as it being ripe for
19 appellate review, because there's no real numbers
20 that are published or out there, it's hard to
21 come up with an -- because there's so few trials
22 -- to come up with what the -- like child sexual

1 assault deserves 30 years of confinement in this
2 set of circumstances.

3 I don't think there's really enough
4 information to be able to say, hey, this guy got
5 30 years, and this guy only got five years. So
6 this one is really unreasonable. It's so fact-
7 specific, I think, that it would be hard to make
8 that argument that it's not correct in law. So
9 sentence appropriateness is not something that we
10 raise very often, in the Army, at least.

11 MR. WALTON: That's something that the
12 federal system is grappling with now because when
13 the guidelines were initially adopted, they were
14 mandatory. And that had a significant impact on
15 reducing disparity. However, once the Supreme
16 Court held that the guidelines were not mandatory
17 and only advisory, we now have seen disparity
18 creep back into the system.

19 And clearly, that disparity, at least
20 to a degree, is predicated on race. Now, there
21 are a lot of arguments as to why that's the case.
22 Maybe it's criminal history. Maybe it's other

1 factors. But clearly, race is playing a role in
2 the sentences that are being meted out in federal
3 court. And I hope that's not the reality in the
4 military, but I find it hard to believe that
5 that's not a reality.

6 MAJOR ARROYO: Sir, I think looking at
7 cases, at least when I was Defense counsel and
8 even some now that I've seen in my office, it's
9 actually a bigger difference between judges and
10 panel members. So you had a panel who, again,
11 has never sat on a trial before, which makes
12 sense, or even someone who might have, and that
13 might assess something very differently than
14 maybe a judge who's seen that same type of
15 offense numerous times.

16 And so I think usually when you see a
17 big difference or big disparity, it's usually
18 more within the panel versus what a military
19 judge might do in a similar situation. And
20 again, that might be influenced by factors that
21 we're not aware of, like, again, race, gender --
22 we don't know. But I think that's where I've

1 seen the bigger discrepancy.

2 MR. COOK: Yeah. I would echo the
3 second question, the response to that as to the
4 disparity between trial judges. And I'm relying
5 on my Army experience, too, having been an
6 appellate judge there and reviewed hundreds of
7 cases. So that -- big disparity back in the day
8 between different judges.

9 I'm familiar with the history and some
10 horrific treatment at the hands of the military
11 that the minorities have had. I don't recall the
12 Defense Appellate ever bringing that up when I
13 was appellate judge, and I sure haven't seen it
14 in the Coast Guard. So I'm not saying it's not
15 out there, but I just haven't seen any examples
16 of that.

17 MS. SNYDER: Yeah. It's not an issue
18 that we've raised. I guess we haven't seen
19 information that would cause us to raise that
20 issue -- not that it's not there, but we're not
21 aggregating the information. We don't keep track
22 of, what is the race of the client? What was the

1 sentence? What were the charges?

2 So, if we did that, maybe we would
3 have data that could lead us there. But we don't
4 have that information.

5 MEMBER GRIMM: Madam Chair, this is
6 Paul Grimm, if there's a chance I could ask a
7 question.

8 CHAIR SMITH: Yes, Judge. Go ahead.

9 MEMBER GRIMM: Thank you. I wondered
10 -- the comment I just heard that was intriguing
11 to me in terms of sentencing disparity based upon
12 the notion of whether the individual sentencing
13 was the military judge or the members -- do you
14 all have any stance -- are there any data that
15 say what percentage of the courts-martial are
16 tried before members as opposed to before judges?
17 Is it that members are asked more infrequently?
18 About equally? I'd be interested in knowing that
19 if you have any information on that.

20 MR. COOK: Hey, Your Honor. Yeah. I
21 can respond for the Panel. This isn't the Panel
22 that's going to be able to respond to that, I

1 don't think. I think that's going to be a
2 Government representative that'll know that.
3 We're at the appellate level. We're not tracking
4 all the cases at the trial and who's asking for
5 judges and who's asking for panel members. Is
6 that --

7 MS. GORDIENKO: Yeah. I don't have
8 that information.

9 MR. COOK: I don't think we're going
10 to have that information. Sorry about that.

11 MS. GORDIENKO: Yeah. No, because we
12 only see cases in which there are convictions,
13 right? So we have no idea how many cases are
14 actually out there and whether they went
15 contested or judge alone and with panels.

16 MAJOR ARROYO: And, sir, there has
17 been a change, as well, with the way the rules
18 changed. So, before, when you would go with
19 members for findings, you had to go with members
20 for sentencing if you were convicted. And
21 obviously, we have made that change now, so you
22 can go with members for findings and then, if

1 convicted, can go with the judge.

2 And so that's more recent, though.
3 So, when I was practicing in 2017, if you went
4 members, you went members with findings and
5 sentencing, and that is when I saw some of the
6 bigger, what I would say, disparities, probably,
7 than with the judge.

8 MR. SULLIVAN: Judge Grimm, if I may,
9 Dwight Sullivan here. Also, a reminder that come
10 December 27th, 2023, in cases in which all
11 convictions are for offenses that postdate that
12 date, all sentencing in non-capital courts-
13 martial will be done by judge alone. There will
14 be non-binding sentencing parameters for most
15 offenses. Parameters is just the word that the
16 Military Justice Review Group used for guidelines
17 because they thought the word, guidelines, had
18 certain pejorative connotations.

19 So there's going to be non-binding
20 guidelines. The military judge can choose to go
21 above or below the guidelines but must do so
22 accompanied by written explanation. And then the

1 Government will be able to appeal any case in
2 which the judge goes below the guidelines, and
3 then the CCA will evaluate whether there was an
4 abuse of discretion based on the judge's
5 explanation.

6 And then, similarly, the accused can
7 appeal any case in which the judge goes above the
8 guidelines with a similar abuse-of-discretion
9 analysis. Over.

10 MEMBER GRIMM: Thank you. That's very
11 helpful. I appreciate that.

12 MEMBER GARVIN: So I want to follow up
13 on the racial discrimination question because it
14 sounds to me like the challenge right now to
15 actually analyzing that is we don't collect the
16 data. Did I hear that correctly? So what's the
17 hurdle to collecting the data? Because it seems
18 like we need to be collecting the data of
19 demographics about the victim, about the accused,
20 because then you can also look at cross issues in
21 terms of -- we know historically when the racial
22 discrimination was elevated in certain moments,

1 at least in the civilian world.

2 So I'm just curious what the hurdles
3 are to collecting that information.

4 MS. SNYDER: So somebody might be
5 collecting that data. Code 20, our military
6 justice policy command, might be collecting that.
7 But Appellate Defense is not collecting it.

8 MEMBER GARVIN: Okay. Thank you.

9 MR. SULLIVAN: I can tell you those
10 data are collected. There's a requirement to
11 send them to Congress every year. GAO did a
12 study on racial disparities in the military
13 justice system in 2020 and a follow-on in 2021 --
14 2019 and follow-on in 2020. Thank you Janet. So
15 --

16 MEMBER GARVIN: Did it get at the
17 issue of disparate sentences?

18 MR. SULLIVAN: Yes.

19 MEMBER GARVIN: And it found none? I
20 can't --

21 MS. MANSFIELD: It found that Black
22 and Hispanic soldiers were less likely to receive

1 a severe sentencing than White soldiers.

2 MEMBER GARVIN: And did it have a
3 cross moment of what the race of the victim was?
4 Because historically, that has been an issue.

5 MS. MANSFIELD: No, it did not.

6 MEMBER GARVIN: Okay.

7 MEMBER GOLDBERG: Thank you for -- you
8 asked the question that I was going to ask, so
9 I'll just proceed back to my question about panel
10 composition related to something I said earlier
11 in the day. And you might not have been here,
12 understandably. But the question is -- I mean,
13 I'm going to go with the fold several questions
14 into one, but happy to repeat any of them.

15 With respect to sex, do you see the
16 panel composition in sexual assault or other kind
17 of sexual misconduct cases being different than
18 from in non-sexual-assault or non-sexual-
19 misconduct cases in terms of the number of men
20 and women who are seated on a panel?

21 And related to that are sort of the
22 three sub-questions. When I was observing a

1 training recently, it had been suggested to me
2 that there's a general practice of dismissing for
3 cause anybody who has experienced sexual violence
4 or sexual assault, and that that would lead
5 disproportionately to the exclusion of women from
6 panels, and that there was a related practice of
7 dismissing for cause people who have had training
8 as a victims counsel or victims' advocates of any
9 sort. And that also would disproportionately
10 result and excluding women from panels.

11 So a question is, is that consistent
12 with your experience? Are there instructions
13 around that? Is that a norm? I realize you're
14 at the appellate level, but you presumably know
15 what happens and raise these panel selection
16 issues. Would you consider an error on appeal if
17 a panel member was kept in who had said they
18 experienced sexual assault or had been trained as
19 victims counsel?

20 And then a third is just also sort of
21 an observational question at the officer level.
22 My understanding -- and I am not claiming

1 expertise here -- is that there are many fewer
2 women than men who are officers, also fewer
3 people of color who are officers than White
4 officers. And do you see that when you're in
5 officer cases and the panel is officers? Are
6 there many fewer women and people of color on the
7 panels than in other kinds of cases?

8 MS. SNYDER: Yeah. So, in terms of
9 people having victim training and sitting on
10 panels, that happens. Riesbeck was the CAAF case
11 that said you just can't stack the panel with
12 people who had that experience. I think they,
13 what, put three or four on there?

14 MR. COOK: Four. It was five out of
15 seven were women, and then four of those had the
16 training.

17 MS. SNYDER: Right. So that was a
18 court stacking case, right? There's plenty of
19 cases where people have that training and they're
20 sitting on the panel. I do think that if someone
21 has personally experienced sexual assault,
22 whether they are male or female, they're probably

1 less likely to be on the panel. But it's not an
2 automatic disqualification.

3 So there's going to be discussion
4 about it. It'll be outside of the hearing of the
5 other members, and the judge will make an
6 assessment on whether they think the person can
7 hear the evidence and follow the instructions
8 without basically drawing on their own experience
9 to sort of influence what they think about the
10 case. So that would be sort of a very factual-
11 based inquiry.

12 People of color, yes, that's true. We
13 have many all-White male panels because that's
14 who the officers are, for the most part. So
15 sometimes you will get panels without women. You
16 often get panels without minorities. If you do
17 have a minority, it might be one or two. So that
18 is a reality. If you have an enlisted panel, you
19 will have more diversity, typically.

20 MR. COOK: Yeah. I would just add
21 that -- and that was a Coast Guard case,
22 Riesbeck, as to deliberately putting females on

1 the panel, which is not in Article 25, UCMJ
2 criteria. And then CAAF wrote a pretty lengthy
3 opinion on it. You can't do that.

4 I would say that is one thing we
5 definitely look at, is panel composition. And if
6 there is a victim advocate or someone with that
7 extensive training -- I'm sure there's been some
8 extensive voir dire at the trial level, and there
9 is a liberal challenge mandate that the uniformed
10 services are supposed to follow. So, if that
11 person was to stay, that would be something that
12 we'd look at as appellate defenders as a possible
13 issue.

14 MEMBER GOLDBERG: And was that both
15 for somebody who had experienced sexual assault
16 and somebody who had been trained as a victim
17 advocate? You would be more likely to challenge
18 the panel composition?

19 MR. COOK: I can't recall doing that,
20 but I would say for the VA training, definitely,
21 we've challenged that, and we've done that
22 successfully, too.

1 MS. SNYDER: And I would say just the
2 same thing. If you were having a larceny case
3 and someone had been a victim of robbery or
4 larceny, you would want to ask questions about
5 that -- can you follow the instructions of the
6 judge dispassionately and decide this case based
7 on the evidence?

8 So, absolutely, you're going to look
9 at that. And if you don't look at that as an
10 Appellate Defense counsel, I would say you're
11 probably ineffective.

12 MEMBER GOLDBERG: I'm not trying to
13 suggest you shouldn't look at that. I'm really
14 trying to understand the impact of this on the
15 composition of panels and whether there's a
16 presumption in your appellate work that somebody
17 who is either having experienced sexual assault
18 or having been trained in some way is -- that's
19 probably a basis for a challenge to panel
20 composition, a presumption that maybe they can't
21 deliberate dispassionately.

22 MAJOR ARROYO: Yes, ma'am. I was

1 going to say, kind of echoing what they said, I
2 mean, as reviewing the voir dire and the
3 questions that are asked both by the Government
4 and the Defense, even by the judge if they have
5 follow-ups, you will look to see what the answers
6 are. I mean, if there's an answer that would
7 suggest that they're biased, whether it be actual
8 or implied, then that challenge should be made.

9 And if it's not made, then obviously
10 we'd be looking at potentially IAC at the trial
11 level or, again, whether the judge has used their
12 discretion in letting the person remain. But if
13 they are asked a bunch of questions and it
14 doesn't appear they have any bias, then I don't
15 think that would be an issue that we would raise.

16 I know that I had a case involving a
17 voir dire issue, and the person who did remain on
18 the panel had VA training. And we actually were
19 looking at a different issue on somebody else
20 they wanted to kick, and so that was the issue
21 that we actually raised, not about the person
22 with the domestic hit.

1 From the person who's potentially been
2 a victim, whether it's male or female, I know we
3 always ask the question about if you have a
4 relative, if you yourself -- and even sometimes
5 when someone has a relative, if it's significant
6 enough and it's affected them enough, they might
7 get kicked there. So it doesn't even have to be
8 the person themselves.

9 It's just how significant has it had
10 an impact on that person based on the knowledge
11 of knowing somebody or them themselves? And then
12 that person might not be able to be fair and
13 impartial. And so I think that we would be
14 looking at that.

15 And then, oh, officers. I haven't
16 seen that be as much of an issue, and I've
17 definitely looked through several voir dire
18 recently with regards to officers. And I've even
19 asked clients, did you have any concerns?
20 Because knowing that certain cases have been
21 granted in CAAF, it's one of those things that
22 you want to know because maybe if it wasn't

1 raised or you don't see it in the record -- and
2 my clients will usually tell me, oh, no, there's
3 this person who was on it, or this person was on
4 it -- and very, very clearly trying to make sure
5 that I capture any issues.

6 And that officer client said, no,
7 there was somebody of different race, and there
8 was this person and that person. So they'll
9 usually tell you. But it's another way to get at
10 it.

11 MS. GORDIENKO: I agree pretty much
12 with what everybody else has said. I don't think
13 that either being a victim of sexual assault or
14 having victim advocate training has a presumption
15 that they have to get kicked off the panel. It's
16 really going to be a fact-specific inquiry based
17 off of all of the follow-up questions that are
18 inevitably asked by both Government and Defense.

19 And if they're kept in is an error --
20 again, that's going to depend on the answers to
21 those questions, whether the questions were
22 asked, and -- but if it's a per se error, no,

1 it's not a per se error by any means.

2 And then, as far as the minorities go,
3 I mean, just given the demographics of the Army,
4 you are going to end up with officer panels a lot
5 more mostly White males. But as far as it being
6 some sort of systemic discrimination issue of
7 trying to keep certain people off the panel,
8 that's going to be something you're going to have
9 to talk to your client about because a lot of
10 those facts are not going to be evident for the
11 record.

12 You're going to have to kind of get a
13 sense of what the base was like and what was
14 going on at the installation. But again, it's
15 going to be installation-dependent, right? If
16 you're on an installation that is more logistics-
17 based, you might have a greater diversity of
18 gender. If you're on an installation that's
19 mostly combat arms, you're probably not going to
20 have a wealth of women to draw from to sit on the
21 panels.

22 And then the kind of minority

1 distinction between officer and enlisted is just
2 there by the nature of the makeup of the Army in
3 general as opposed to it being some sort of
4 systemic selection issue on the part of the
5 convening authority.

6 MEMBER GOLDBERG: And, sorry, if I
7 could just ask one really quick follow-up --
8 thank you very much. Are there any written
9 instructions that you have or that you know of
10 related to voir dire in connection with
11 somebody's experience of sexual assault or in
12 someone's experience with having been trained as
13 a victim counsel or victim advocate or anything
14 like that?

15 MS. GORDIENKO: I can't remember if
16 it's in the standard judge's questions; I don't
17 believe it is. But the training part is
18 typically on the questionnaire that panel members
19 will get before a trial. And if it's a sex
20 assault case, kind of the victim of a crime
21 question is always in somebody's voir dire
22 questions. And if it's a sex assault case,

1 whether they've been a victim of a sex assault,
2 or anybody close to them has been a victim of sex
3 assault is going to be a question that comes
4 typically in the defense questions.

5 It's just kind of asked as a standard
6 question. Same with any training regarding the
7 case, right? If you have any crime, you're
8 asking whether, or not somebody has law
9 enforcement training. If you have a sex assault
10 crime, you're asking whether, or not somebody has
11 any victim advocate training, or any specific
12 training related to the crime itself is going to
13 be relevant to suss out any bias.

14 MEMBER GOLDBERG: Thanks so much.

15 CHAIR SMITH: We asked the last panel,
16 so I think it's important to ask you as well.
17 What might be the largest issue affecting your
18 ability to adequately prepare for appellate
19 cases? And their response, I don't know if any
20 of you were here, but their response was lack of
21 sharing between the branches. So, being able to
22 know what arguments the other branches are making

1 when they're faced with these types of issues.

2 And then I'm going to ask a two part
3 question. My second question is with relation to
4 instructions, how thorough are the pattern
5 instructions that you have? In other words I'm
6 trying to kind of assess the things that go up on
7 appeal with respect to instructions, are they
8 generally instructions that have been created,
9 drafted by the judge, or drafted by the parties,
10 versus instructions that are actually part of
11 your pattern instructions? If you can answer
12 that, I don't know if you can.

13 MS. GORDIENKO: Yeah, so as far as the
14 kind of biggest systemic issue regarding
15 appellate practice, I will echo the earlier panel
16 in knowledge management being the -- knowledge
17 availability being one of the biggest issues. We
18 deal, in the military, I think with a lot of kind
19 of outdated systems that don't have the greatest
20 ability to search, and find all of the things
21 that are out there, which could really add some
22 efficiency to our practice.

1 And could aid in the fact that we move
2 frequently, and are constantly having to relearn
3 our jobs. So, knowledge management across the
4 legal infrastructure in the military would be
5 very nice. But this is -- case visibility is
6 something that we really don't have. Unless you
7 know a specific case with a specific issue, you
8 can go in, and you can read that brief. But you
9 can't just search MRE413 in ACCA's case log, and
10 find all of the MRE413 briefs that are out there.

11 And this is particularly frustrating
12 in the Army, because ACCA does give summary
13 affirmances quite frequently, even on specified
14 issues. So, we are unable to go back, unless we
15 know of the case, and see what even another
16 counsel in our office say three years ago had
17 written. Now we do have, we're working the same
18 way that the Air Force said they were working on
19 creating a brief bank.

20 But that requires a lot of upkeep to
21 kind of keep up to date. With respect to the
22 thoroughness of the instructions, there is, in

1 the military judge's bench book, the standard set
2 of instructions. There's a checklist that
3 counsel can go through at trial, and kind of tick
4 off, we need this instruction, we need this
5 instruction.

6 So, yes, there is a standard set of
7 instructions. It does take kind of some
8 ingenuity, and creativity, and thought to be able
9 to request those additional instructions with
10 respect to things that maybe aren't defined. And
11 I would say that that comes with experience. A
12 lot of counsel at the trial level maybe don't
13 realize the importance of the instructions until
14 it's too late.

15 I speak from personal experience. So,
16 I think that the training around instructions
17 could definitely come. But it also just comes
18 with experience, and practice, and knowing that
19 you need to pay attention to the instructions.

20 MAJ ARROYO: I think within our
21 department, we are very good at sharing our own
22 briefs. But like you asked, I don't know that

1 we've necessarily reached out to the other
2 services for their own briefs, and right now it's
3 not easy with the way things are setup to be able
4 to find them. We also -- we all have access to
5 things like CAAF digest, as well as their
6 opinions.

7 And when they have oral arguments, we
8 can read their briefs, so if anyone wants, the
9 upcoming arguments, those briefs are posted, and
10 you can go read them, but that's after a case has
11 been granted. Which doesn't necessarily help you
12 if you're hoping to get a case granted on an
13 issue that they haven't granted yet. So, that
14 would probably be helpful.

15 We are, like I said, creating that
16 brief bank to try, and give continuity for once
17 we leave, that people would be able to have our
18 briefs. But again, the cross pollination, and
19 potentially across the services, we might want to
20 come up with a way, or again, if it's already in
21 the works, to be able to better search each
22 other's briefs.

1 With regards to how thorough the
2 instructions are, I'll echo what she said in the
3 military judge's bench book. I mean I think it
4 is pretty thorough, I know that CAAF has had
5 several cases where they've looked at
6 instructions, and in general it seems like they
7 find mostly that the instructions were
8 sufficient. It's again, one of those nuanced
9 areas, or a lot with the sexual assault if you
10 didn't request a certain thing.

11 Or if the evidence raised it, but you
12 didn't think to ask for it, and again, I do think
13 that comes from experience. If you haven't
14 looked at the instructions, and you haven't
15 really searched them, and you haven't thought
16 about that was in there, or I didn't ask for it,
17 then you're not going to realize. And then we're
18 going to realize, and it might be too late.

19 MR. COOK: I think I've said this a
20 couple of times, we're really blessed, and hooked
21 our wing into the Navy appellate defenders to the
22 extent that I think they have a pretty darn good

1 brief bank. I'll let Rebecca speak for herself,
2 but again, we're really fortunate to have access
3 to that, and be working at Code 45. As for
4 instructional errors, I don't recall a whole lot
5 since I've been with the Coast Guard.

6 But going back to my Army time, I sort
7 of recall the trial judges messing up the
8 standard instructions, and just not reading the
9 darn thing out of the script correctly. Because
10 we go to the same course that they go to, the
11 appellate judges. Defense appellate typically
12 raise it, and I go come on, you couldn't read the
13 script right?

14 And then yeah, I messed it up. I mean
15 it's not so much the novel, but it's just follow
16 the darn script.

17 MS. SNYDER: So, on the systemic
18 issues, my number one issue is lack of experience
19 of counsel. IT is also a big issue for us. Just
20 as a couple of examples, two days ago it took me
21 25 minutes just to login to my computer. Adobe
22 crashes if you try to do almost anything in it.

1 When you try to create a joint appendix it's
2 impossible, because you can't merge documents
3 without it crashing.

4 But we do have another issue that I
5 think is the alligator closer to our boat than
6 not being able to share pleadings, or to search
7 pleadings, and that is our own counsel getting
8 access to the records. So, increasingly, there
9 is digital evidence in the record, right? So,
10 that's not typed out on a paper, and because we
11 have so many reservists, and even civilian
12 counsel, we don't have any way of getting that
13 digital evidence to them, because it's on CDs in
14 the court.

15 And we don't have the staff to go up,
16 and just be constantly burning copies of CDs.
17 And so what we end up having to do is assigning
18 another counsel that's not on the case to go up,
19 and look at the evidence, and try to tell the
20 other person what it is, and it's bad. So, we're
21 in the process of trying to solve that, but
22 that's becoming an increasing problem, and it's

1 also a big time drain.

2 In terms of instructions, there's two
3 things I see. One is there's a disagreement --
4 so, in order to get an instruction, there has to
5 be some evidence on the record. So, there's a
6 disagreement between the judge, and the attorneys
7 about whether there is some evidence to support
8 this instruction that they want. The other
9 thing, and this is probably becoming more common
10 now.

11 Is that Congress is changing the
12 statute faster than we can implement it, right?
13 Certainly through the appellate process. So, a
14 good example of this is the offense of indecent
15 acts in the presence of a child. Congress didn't
16 tell us how to define a lot of these words, and
17 so the military judges don't know, they don't
18 have any guidance on this.

19 The appellate courts can't figure it
20 out. So, in Schmidt, our Navy Marine Corps
21 court, when they first looked at it, they said
22 awareness of a child is required. Then they went

1 to CAAF, and CAAF said we can't agree on this, so
2 we don't know what the answer is. Navy court
3 then reversed itself in Tabor, they reversed
4 their decision in Schmidt.

5 Which then they held awareness is not
6 required. So, the appellate courts are all over
7 the map on this. So, if they can't agree, if
8 five judges at CAAF can't agree, how are you
9 going to expect the military judge at trial, and
10 the defense counsel, and the prosecutor to figure
11 this out when they're looking at it for the first
12 time? So, I would say Congress needs to slow
13 down with the changes.

14 We need to implement them, and work
15 through things, or they're going to have to give
16 more guidance. Because a lot of these people are
17 doing the best they can, and they just don't have
18 guidance.

19 MEMBER GARVIN: I know you all just
20 mentioned your top issues, but I want to ask
21 about something that I think I heard you say, and
22 I just want to see if it is an issue. So, both

1 the majors, and I believe Ms. Snyder, you
2 mentioned that sometimes talking directly with
3 your client reveals issues that you can't see as
4 clearly from the cold record.

5 And Ms. Snyder, you didn't mention
6 that, but my experience with newer lawyers,
7 sometimes they go right to the papers, and they
8 don't talk to clients in the same way, at least
9 the lawyers I've trained. So, do you have enough
10 resources, and enough time with your clients for
11 your preparation? And I heard also the brig
12 differentiation, do your clients have enough
13 time, and resources to be able to participate in
14 their own defense?

15 MS. GORDIENKO: So, I would say yes.
16 I mean the amount of kind of client input that
17 you need at the appellate level is a lot less
18 than you need at the trial level. There can be
19 at times some difficulties talking to the client
20 if they're located in confinement. It can take
21 longer than you would like to be able to talk
22 with them. But in general, I don't think that

1 there is any sort of systemic issue there, at
2 least not on the Army side.

3 MAJ ARROYO: So, the Air Force
4 requires the client to receive a copy of their
5 record of trial, so slightly different. So, we
6 get a copy, the defense counsel who said they
7 were going to be served it, as well as the
8 client. Now, clearly potentially, and obviously
9 very different than what Ms. Snyder is saying,
10 because they should have a copy, sometimes the
11 civilian defense counsels have issue getting a
12 copy.

13 So, because we don't have the
14 resources to give them a copy. Most of our
15 records are still hard copy for exhibits, so we
16 just have an electronic transcript, but the rest
17 of the entire record of trial is all paper. And
18 so we can't create, we're not going to copy that
19 for them. So, I have heard working with civilian
20 counsel, sometimes they get frustrated, and I
21 understand it, they don't have a copy.

22 So, the client has to send them a

1 copy, and then the client doesn't have the copy,
2 and they have to wait for it to come back. So,
3 that potentially takes some time. Sealed
4 materials are also an issue. So, if you have
5 sealed materials, we have to go to the Air Force
6 Court to see them. Civilian counsel is not
7 located often in D.C., or in Andrews, which is
8 where I am.

9 So, they have to depend on me, or I
10 have to ask to transmit them, and if it's CP,
11 clearly I'm not transmitting it. So, it really
12 comes down to that can be an issue too. But --
13 now I've lost my train of what you were asking.
14 So, with regard to at least the Air Force, I've
15 not had an issue with my copies. I know they
16 have seen that though as being a problem. What
17 was the other?

18 Time to prepare. I feel like I have
19 had some issues with certain confinement
20 facilities who will just call me out of the blue
21 when I have no meeting. Other times you can't
22 get in touch with somebody. COVID has kind of

1 made that sometimes difficult when they have
2 outbreaks, but that's obviously we're in a weird
3 situation right now.

4 But other than that, my clients
5 usually have their record, usually have had a
6 chance to review it. The biggest issue I had is
7 when they lost my client's record of trial in
8 between confinement facilities, and then they
9 gave him just discs, and it was a 1300 page
10 transcript that he's trying to listen to. And he
11 ended up at a certain point saying ma'am, I'm
12 good with whatever issues you want to raise.

13 I'm not going to sit there trying to
14 listen to this thing. So, that was one, so
15 hopefully not other ones.

16 MR. COOK: So, I'm not dealing with
17 the clients directly, but when I've talked to my
18 appellate defenders, the only time I've -- this
19 is counter intuitive a little bit, but the only
20 time they've complained is when they weren't in
21 confinement. So, when they're back at home, and
22 then they won't return calls, or their email has

1 changed, or their address has changed. So,
2 that's not -- hasn't been an issue.

3 MS. SNYDER: So, I think if the
4 clients are in the brig, we have enough time with
5 them on the phone. When they get out of the
6 brig, sometimes we lose track of them, they lose
7 track of them. For about the last 18 months
8 we've been trying to get a policy pushed through
9 that when they leave the brig, the brig will give
10 them a form that says this is where you can reach
11 your appellate defense counsel.

12 And either you let us know where they
13 can reach you, or you tell us you don't want to
14 provide that contact information. And then they
15 would fax that information to us. We can't get
16 that pushed through, right? So, sometimes I
17 think clients get out of the brig, but they don't
18 know how to reach us, and then we don't know
19 where they've gone, because we don't have any
20 contact information for them.

21 CHAIR SMITH: So colonel, are we
22 taking a 15 minute break? 3:45, is that the --

1 (Whereupon, the above-entitled matter
2 went off the record at 3:30 p.m. and resumed at
3 3:45 p.m.)

4 COL BOVARNICK: So, for this session,
5 for the staff appellate team, project team that
6 you heard from earlier today is going to kind of
7 walk the full committee through some more
8 discussion about the appellate project. And so
9 the only thing I want to mention is this is the
10 tricky part about pending our subcommittees, we
11 all know that, it's taking a long time, they
12 should be here soon.

13 So, the full committee, what we don't
14 want to do is commit the entire committee here to
15 start reviewing all of these cases, when we know
16 hopefully subcommittees will be approved, members
17 appointed by Secretary of Defense. And so that
18 original tasking we talked about in June of this
19 appellate case review will go to those
20 subcommittee members.

21 Obviously our team here is aware of
22 that, but they still want to get the full

1 committee's views on a lot of these appellate
2 issues that were discussed today. So, I'll hand
3 it back over to Ms. Critchley here.

4 MS. CRITCHLEY: Thank you. Okay, it's
5 been a long day, we're near the end. We've had
6 several hours now of presentation. The staff
7 presented data on the review, and preliminary
8 review of the military sexual assault appellate
9 decisions, and then we've heard from appellate
10 practitioners-defense in government. And a lot
11 of issues have been discussed, and the
12 committee's asked a lot of questions about
13 recurring issues, and efficacy of how the system
14 is working.

15 So, for the next 30 minutes, or so,
16 our goal is to get your guidance on which of
17 those many questions that came up, and issues
18 we've talked about, you'd like to see a deeper
19 dive into to focus. So, just to briefly recap
20 how we got here, the January 2022 memo that
21 launched this project, the Office of General
22 Counsel asked the DAC IPAD to analyze the most

1 commonly occurring appellate issues in military
2 sexual assault cases.

3 And to analyze the efficacy of the
4 military systems at handling those cases to make
5 recommendations for reform, and directed the
6 committee to take note of recent changes to the
7 standard of review for factual sufficiency, and
8 sentence appropriateness. With that guidance in
9 mind, the staff recommends that we undertake a
10 deeper dive into factual sufficiency, and
11 sentence appropriateness, and whatever other
12 issues the committee is interested in.

13 And in light of the discussion today,
14 and starting from the questions in the morning
15 from the very beginning, before we even got to
16 the appellate review, there's been a lot of talk
17 about member selection, and panel composition.
18 And so one recommendation is that we, in addition
19 to the factual sufficiency, and sentence
20 appropriateness, that we take a look at member
21 selection.

22 And the question would be what are the

1 questions we need to get at? In that issue, what
2 should we focus on? And so some things that came
3 out, questions this morning, would be questions
4 about bias, questions about relationship between
5 the panel, and the sentencing, we had questions
6 about that, whether sentence is more harsh
7 depending on the forum. So, as a starting point,
8 we wanted to put that out there.

9 So, our first question is what issues
10 do you want to discuss? And there are three
11 recommendations for us to begin with. The next
12 question would be what are your question with
13 respect to those issues? And then the third
14 question would be what do we do, would the
15 committee like to participate in reviewing cases
16 related to those issues?

17 CHAIR SMITH: So, I guess I'll start,
18 because I don't see anyone else raising any
19 hands, putting the pressure on me again people.
20 So, with respect to sentence appropriateness, and
21 I can't read this representative's last name, the
22 woman, but she indicated that there was a study,

1 I think that DAC IPAD had commissioned previously
2 related to racial disparity in sentencing, and
3 sentencing appropriateness.

4 A couple of us were chatting, and we
5 were curious that there was no -- that the study
6 didn't look at the victims, right? Because if
7 it's a White victim, is the sentence different?
8 Is the case handled differently? Versus if it is
9 a victim of color. So, I think that we would be
10 interested in a study that kind of expands, or
11 information expanding on that study, because we
12 were all pretty shocked that this study found
13 that White servicemembers were sentenced more
14 harshly in the sex offense category.

15 MS. TAGERT: And Chair Smith, just to
16 clarify, is that a GAO report?

17 CHAIR SMITH: I'm not sure. Yes,
18 okay, GAO, yeah. And I don't know if anyone else
19 has anything else they want to add to -- yes, Ms.
20 Goldberg.

21 MEMBER GOLDBERG: Thank you chair.
22 One point to add on this, first of all thank you

1 again for all of your work, and excited to see
2 the next round of it. In looking at possible
3 racial disparities in sentencing in relation to
4 both the defendant, and the victim, I think it
5 will be important, and hopefully how the data is
6 kept is not just sort of White and not White, but
7 a breakdown by race, ethnicity across the board.

8 And I'm sure you'll identify other
9 sort of questions on panel selection, which is
10 obviously something that I have raised probably
11 at every panel today, so why not on this one
12 also. I would really -- I think this is a very
13 important issue, when we think both about
14 prosecution, and defense of sexual assault cases
15 in the military.

16 And it seems that a useful starting
17 point is just to understand empirically where we
18 are, to the extent that information is even
19 collected, both at the enlisted, and the officer
20 level, what do panels look like? And what kind
21 of instructions are out there, or not out there,
22 and to the extent we can learn anything about --

1 I think I was asking questions today about what
2 are the norms surrounding the -- that are
3 exercised in connection with the instructions.

4 About what somebody's prior training
5 is, or whether somebody has experienced
6 victimization, or knows somebody who has
7 experienced victimization. Because I think that
8 is probably going to skew to affect more women as
9 well, given the way disclosures work. There is
10 an additional piece to this that I'm sorry to say
11 just flew out of my head.

12 So, I will probably just have to put
13 my red light on again in a moment. Yeah, so
14 thank you. I know what it was, I don't remember
15 the name of the case, if it's Reeves, is that the
16 name of it?

17 MS. PETERS: Riesbeck, that the
18 previous panel referred to.

19 MEMBER GOLDBERG: Right, the case that
20 the previous panel had referred to, and that I
21 had heard about in my observation sessions.
22 Where the case in which I get maybe there was a

1 skewed panel, or something. But what I had heard
2 was that this case has led many prosecutors, as
3 well as judges, to be much more conservative in
4 terms of whether they would allow somebody who
5 says they can deliberate fairly to remain on a
6 panel if they have had either of those prior
7 experiences.

8 And that together with -- now I'm
9 forgetting the phrase, but the liberal --

10 MS. PETERS: Grant mandate.

11 MEMBER GOLDBERG: The liberal grant
12 mandate which would also require judges to grant
13 more liberally dismissals proposed by -- I don't
14 know if it's defense counsel, or both, but
15 defense counsel. That there are a number of
16 structural pieces that may have the effect of
17 disproportionately excluding women in very
18 significant numbers, and I think that would be
19 important to know.

20 And obviously we talked about the
21 racial, and sex disparities at the officer level
22 of panel composition. So, gathering empirical

1 evidence first, but to the extent there's any
2 ability to find out more about how judges are
3 reacting, or prosecutors are reacting to the
4 Riesbeck case. I think that it struck me as it's
5 having a chilling effect that is far beyond maybe
6 what the CAAF intended, and I think it would be
7 useful to start to understand that as well.

8 MEMBER O'CONNOR: I would just add on
9 to that, that all of the information you could
10 gather about what the judges are -- I'm sorry,
11 the potential -- the SJAs who are giving the
12 advice to the generals who are doing the
13 instructions, what the guidances that they get,
14 or the training that they get, or any standards
15 that they might get around that.

16 And the guidance that the generals
17 have, whether it's training, or guidance, or
18 whatever for the panel selection, any kind of
19 inputs into that. And if there's any data at all
20 about sorts of pools that you're selecting from,
21 and what the panel then is made up of coming from
22 those pools. Just sort of like -- it's again,

1 data, but I think it's even more broadly, and I'm
2 sort of curious, just anything along those lines.

3 CHAIR SMITH: And also looking at why
4 at this point are they still having the general,
5 or whomever checking off a list, why haven't they
6 moved onto a random selection method with an
7 algorithm? And perhaps that's the ultimate
8 recommendation to kind of remove the human aspect
9 almost, from creating the pool, and make it more
10 of an algorithm where we have a certain number of
11 colonels, a certain number of majors.

12 I'm going to get it wrong, but
13 whatever it is that they're looking for, but make
14 it more of a neutral method of selection.

15 MEMBER ANDERAON: I want to support
16 both those comments. I was a convening
17 authority, and I can tell you that what was
18 initially brought to me by my SJA was subordinate
19 commanders sending me the usual suspects. And I
20 said no. I know some of the names on this list,
21 and this is not to me going to provide a diverse
22 pool, and an opportunity for people to have a

1 panel that is a panel of their peers.

2 So, I concur with there needs to be
3 some more objective method of doing this that
4 will still provide for experience, and
5 temperament, etcetera, somehow, however you can
6 do that. But I think that it's sorely needed,
7 Because otherwise if you're not someone like me,
8 who is sensitive to those kinds of things,
9 they're going to follow what their SJA says, and
10 not necessarily know that they're not providing
11 demographics that reflect the soldiers, and
12 sailors, airmen, marines that are in our force.

13 MEMBER GARVIN: So, I'm changing
14 subjects a little bit, not that I disagree with
15 any of this, I agree with all of this. But to
16 the two issues that you have proposed that are up
17 there, and I know the third issue was in paneling
18 of them. I absolutely agree, and I think it's
19 really critical, since both of those are about to
20 have some changes.

21 So, that we start getting baseline
22 data, and then comparative data. So, I very much

1 appreciate that staff flagged those. And that as
2 the standards start to change, we will have some
3 data for the future DAC IPAD 3.0, or whatever it
4 ends up being. So, I want to concur in those,
5 and then I would like to flag I think the
6 evidentiary issues are pretty critical. I don't
7 know if we want to tackle all of them.

8 But the defense did raise the
9 psychotherapist patient privilege. That is
10 certainly one of particular interest from the
11 victim side as well. It would be lovely if we
12 could tackle all of them, but I think that's a
13 heavy lift. So, if we listen to some of our
14 panelists, at least the one evidentiary issue of
15 the 513, and I believe 412 might have been
16 mentioned also, I can't remember.

17 But I think if we're going to look at
18 these appellate cases, they are built on
19 evidence, and so looking at the evidentiary
20 issues seems critical to me as well. Sorry, one
21 more point someone mentioned, I believe I heard
22 it, maybe letting panelists, members here start

1 to look at the cases too. I want everyone to
2 hear this very clearly.

3 I think staff does a brilliant job,
4 and I love being able to read your summaries, and
5 my brain works really well if I can see some of
6 it myself too. And so I know we don't have
7 subcommittees yet, but if there was a way to have
8 some members start digging in along with staff,
9 that would be, I think very much appreciated.

10 MEMBER WALTON: We discussed
11 instructional error, but we didn't focus on
12 whether there's been instructional error specific
13 to sexual assault cases, and whether that's a
14 recurring problem, and if it is, what needs to be
15 done to address that. One of the issues that
16 we've also never addressed in my time on the DAC
17 IPAD, which I know is a problem at least in the
18 civilian world, and I assume it's a problem in
19 the military world, is same sex sexual assault.

20 And to what extent, if that is a
21 phenomenon, which I would suggest if it's a
22 problem in the civilian world, it's also a

1 problem in the military world, is there an issue
2 of disparity as it relates to the prosecution of
3 those cases, and the sentencings in those cases.

4 CHAIR SMITH: Dr. Markowitz.

5 MEMBER MARKOWITZ: So, just to bring
6 us back to conversation about the fact finders, I
7 don't know that we've ever talked about this, and
8 I guess this is more of a question for the staff.
9 My experience with the trial judiciary, it's
10 overwhelmingly White and male. Have we ever
11 taken a look at the composition of the trial
12 judiciary across the services?

13 Since we know that many of these cases
14 are going judge alone, is there any merit to
15 looking at some of that demographic information
16 as part of the analysis in these cases just as a
17 part of this conversation, because so many of
18 these cases are judge alone. And is that its own
19 dust up right there?

20 MEMBER KRAMER: Thank you. So, of
21 course I have a multi part, but I'm interested in
22 the ineffective assistance of counsel, whether

1 that's civilian, or military counsel, whether
2 there's any difference there, and what the issues
3 are. Is it failure to object to things, is it
4 cross examination, or failure to instructional
5 error, or what type of barriers to
6 ineffectiveness?

7 Is there one thing that seems more --
8 in the sexual assault cases, one thing that seems
9 more prevalent than others? And then this isn't
10 just an appellate thing, but I'm curious to what
11 kind of implicit bias training there is for
12 lawyers, judges, and panels, what kind of
13 implicit bias training there is for the military.

14 MS. TAGERT: Judge Walton, we can
15 break down the IAC -- I'm sorry --

16 (Simultaneous speaking.)

17 MS. TAGERT: Thank you, I think my
18 coffee was decaf after lunch. We can break down
19 the IAC claims from the cases for the panel the
20 next time we see them.

21 MEMBER BASHFORD: It seems to me we're
22 talking about --

1 MEMBER KRAMER: Which one of us is
2 insulted more?

3 MEMBER BASHFORD: We're talking about
4 two separate things, both of which are valuable.
5 I think a wide ranging look at the composition of
6 panels, and the selection process, and the judges
7 is really valuable. I would suggest that we
8 resend to the members, the DAC IPAD report we did
9 on racial disparity, and bias. I'm not sure that
10 that answers any of the DOD taskings we've been
11 given though.

12 So, I think we have to -- there's no
13 reason we can't do both, as far as I can see.
14 And I think -- honestly, I think the racial
15 disparity is more significant, but none the less,
16 DOD has asked us to do this. And I must say, if
17 anybody has -- I have no idea what the second
18 bullet point, analysis of the efficacy of the
19 military appellate systems' handling of the
20 cases, I don't even know what that means.

21 MS. TAGERT: We were hoping you could
22 figure that out Ms. Bashford.

1 MEMBER BASHFORD: Clearly they're
2 effective in handling, the follow appeals. And
3 the prosecution responds to the appeals.

4 MS. CRITCHLEY: I think a lot of what
5 the testimony we heard today might go to that,
6 and the discussion from our panelists about
7 issues that made it easier, or harder to get
8 their jobs done. I mean this issue of
9 availability of briefs, and materials, and other
10 cases. I mean we heard it over, and over again,
11 it's a work in progress.

12 And the staff had initially proposed
13 in March that we would take this in stages.
14 First we would deal with recurring issues, and
15 then in a subsequent phase, we'd look at the
16 efficacy issue. But I think there was a lot of
17 conversation today that would probably go to
18 that.

19 MS. PETERS: If an issue like IAC
20 lends itself to, or member selection, whether
21 it's occurring to such an extent that the
22 appellate court's response is not changing

1 practice, that is one direction to take
2 potentially.

3 MEMBER GARVIN: So, I'd like to -- all
4 of the information we've had today was amazing,
5 and the breadth of the appellate moment was
6 great, and as people probably heard a theme from
7 me, which is we were not talking about
8 interlocutory appeal, where so many issues are
9 making it up to the service courts, and that
10 affects the trial, and that affects the appeal.

11 And I have concerns about not looking
12 at that, particularly when it comes in the sexual
13 assault arena. Because the 412s, the 513s are
14 going up sometimes on interlocutory, or tried to
15 by victim's counsel, sometimes by trial counsel.
16 And then we do have some hiccups in the appellate
17 process right now. While Congress has said you
18 can get to the appellate court, they are not
19 taking certain cases.

20 And so I don't know if that's a part
21 two of all of this, but I don't want to lose
22 sight, and have the appellate review, which is

1 not an appeal review, it's appellate review is
2 what we're tasked with I believe, and so it's any
3 time an appellate court is looking at these
4 issues. And so I think at some point we have to
5 think beyond appeal, and think about writs, and
6 interlocutory appeal.

7 CHAIR SMITH: Ms. Long?

8 MEMBER GENTILE LONG: Mine is just
9 putting a second plug in for the evidentiary, and
10 honestly of all of them, the only one I'd
11 probably knock out is search, and seizure, but
12 because it's so small, and because it probably
13 impacts the child pornography, and other cases, I
14 would keep it in. I can't think of one of those
15 that I would want to get rid of. I'm interested
16 in why.

17 MS. CRITCHLEY: So, one thought is in
18 terms of this coming through the lens of an
19 appellate review, I wonder if your thoughts on
20 all of the ideas that are thrown out here, if
21 some lend themselves more readily to that, or we
22 would just need to use that to hone the issue?

1 So, the panel selection for example. If the
2 questions -- we are going all the way back to
3 before the appeal happened.

4 We'd be coming through the appellate
5 lens, and I suppose we could redefine it, and
6 make it broader, broaden the scope, but is that
7 what the committee would like to do for example
8 if we take that issue? So, evidentiary issues,
9 those are sort of easy to review as an appellate
10 issue, because they're discussed that way. But I
11 wonder if keeping that in mind changes the
12 assessment of which issues the committee is most
13 interested in.

14 COL BOVARNICK: Let me jump in real
15 quick. Is the issue on the panel composition kind
16 of a separate topic to look at? Not necessarily
17 just what cases came up for appellate review that
18 dealt with composition? That's the way I
19 understood it, kind of totally separate,
20 understand that we're talking about it in this
21 particular session, but tracking. So, I think we
22 owe you more information on number one, the

1 empirical data, to the extent we can get all that
2 good stuff.

3 And then as General Anderson
4 mentioned, having been a convening authority,
5 just for the other members that haven't, what is
6 the current process? Kind of we talked about it
7 a little bit today, but maybe just like a
8 practical example. Kind of like teaching, you
9 say here's what happens, here's how we go through
10 it. Showing you the documents for that, and then
11 further discussion on the random jury selection
12 issue, which has come up a lot in many forums,
13 and by academia, and all that.

14 So, tracking the panel composition
15 stuff is separate from the appellate review.
16 And, just to clarify, so, the first couple we
17 would knock here, the post-trial processing
18 errors and post-trial delay, no need to dig in,
19 and so that needs to block out a big block. But
20 focus on in effect, all the evidentiary issues,
21 and then the first two are tasked with the
22 understanding that laws are going to change with

1 respect to those first two. So, I think we're
2 tracking on what issues the panel wants the staff
3 to dig into, and then ultimately funnel some of
4 those cases to the panel members.

5 MEMBER GOLDBERG: Just for the sake of
6 the record, what you described as the scope,
7 breadth of the panel composition inquiry is
8 consistent with at least my hope of what the team
9 will be able to look into. And for the record I
10 see other colleagues here nodding. I can't see
11 all of them, but at least some.

12 COL BOVARNICK: Yeah, I'll go with it,
13 like last method, if there's silence, assume
14 consent from everybody, so we're tracking that.

15 CHAIR SMITH: Have we given you
16 enough?

17 COL BOVARNICK: I believe so, for this
18 session, I know we're getting close to the --
19 sorry, go ahead.

20 MS. TAGERT: For the members, based on
21 kind of these issues, is there any topic that
22 members would like to see cases of? If you're

1 going to review case, are there particular topics
2 that you want us to send you, or mixed bag? Any
3 preference?

4 MEMBER LONG: As a former prosecutor,
5 I would like to see what these prosecutorial
6 misconduct cases are about.

7 MEMBER BASHFORD: I would as well.

8 CHAIR SMITH: But I think also the
9 factual, and legal sufficiency. Maybe we'll be
10 right back at all of them. Not really, we don't
11 mean that. But maybe a mixture.

12 MEMBER BASHFORD: I would be
13 interested also in some of the factual, and legal
14 sufficiency. Just in case it dovetails in with
15 my admittedly limited observations of the lack of
16 attention to detail elicited from people.

17 MEMBER GOLDBERG: If I could just add,
18 if there are panel composition cases particularly
19 that refer to that Riesbeck case, I think that
20 would be of interest. And just totally
21 separately, and we've already sent over a lot of
22 work, so not suggesting that this would be for

1 the next meeting, but I just wanted to mention --
2 sorry, just finish this one thought.

3 Which is I continue to have a question
4 around the clarity of victim's counsel, or
5 special victim's counsel, or by the various
6 acronyms role, and how that is communicated, and
7 trained in the various branches of the service to
8 ensure that everybody -- there's a shared
9 understanding, and a shared set of rules, if
10 there are, and if there are gaps in the rules
11 related to what's expected, and what's provided.

12 That would be useful information at
13 some point perhaps if colleagues are interested
14 to think about what might be areas for further
15 clarification. Again, it's not an ask for --
16 there's a lot on your plates, I'll leave it to
17 you how to divide up the work. But I want to
18 communicate for the long term.

19 COL BOVARNICK: Yes, ma'am, when we
20 have kind of the wrap up, we were going to get
21 into the next meeting, presenters on here for
22 example like victim's advocate, SVC, military

1 judges, retired of course, but so we can
2 definitely tackle that stuff at a future meeting.
3 And talk about it now about how the panel wants
4 to proceed at some future meetings.

5 MEMBER GARVIN: I think I know the
6 answer to this question, but I just want to check
7 that second bullet of analysis of the efficacy of
8 the military appellate system's handling of those
9 cases. There is no legislative history around
10 that, right? Do we know anything more about --
11 or there's no history around that bullet that
12 would help us understand what this directive is
13 to us.

14 COL BOVARNICK: I'm sorry, that's just
15 a pull from the original tasking from the general
16 counsel, and --

17 MEMBER GARVIN: Yes, I'm sorry, I
18 didn't mean legislative history, I just meant
19 history. I used the wrong vocabulary, do we know
20 anything more than that? Like efficacy can mean
21 so --

22 CHAIR SMITH: How can we ask for

1 clarity about that, exactly what is it what
2 you're looking for?

3 MR. SULLIVAN: We can certainly ask
4 for clarity, but I will also refer to the portion
5 of the letter where the general counsel said that
6 she was trying deliberately not to be
7 prescriptive, because she viewed the DAC IPAD as
8 expert in conducting studies, and she didn't want
9 to be overly prescriptive, and limit the DAC
10 IPAD.

11 MEMBER GARVIN: Thank you.

12 CHAIR SMITH: So, I think we've given
13 direction on this, kind of.

14 MS. PETERS: Cases are coming your way.

15 CHAIR SMITH: Okay, sounds good.

16 COL BOVARNICK: Yeah, so we can just
17 kind of take a break in place here, and then we
18 have the public commenters come on board, who we
19 will have come up to the table, and switch out.
20 First off we will have Mr. Anderson. They all
21 know they have about five minutes, the members
22 have their materials, and so they'll (off-

1 microphone comments) whatever you're most
2 comfortable with.

3 MR. ANDERSON: Thank you. Good
4 afternoon. First, and foremost I would like to
5 thank this committee for providing me the
6 opportunity to speak. I would also like to thank
7 U.S. Congressman Barry Moore for listening via
8 Zoom, Senator Tuberville, members of the House
9 Subcommittee for Military Personnel, and
10 representatives from the NAACP.

11 My name is Clarence Anderson III, a
12 former major in the United States Air Force. As
13 a logistics officer, I was a two time squadron
14 commander, deploying five times in support of
15 numerous operations in the U.S. central, and
16 southern command area responsibilities. As a
17 division chief for U.S. Special Operations
18 Command Central, I directed the largest
19 logistical movement in the history of U.S.
20 special operations during Operation New Dawn.

21 And part of the large logistical
22 footprint that aided in the capture, and kill of

1 Osama Bin Laden. Despite my many years of
2 service to this great nation, I found my life
3 turned completely upside down when I discovered
4 my wife was having an affair with a fellow school
5 teacher. I filed for divorce, and was awarded
6 custody of our daughter.

7 In retaliation of me being awarded
8 custody, my wife, and my mother in law colluded,
9 and falsely reported to Air Force officials that
10 while we were married, I sexually assaulted my
11 wife by rubbing her breasts, and additionally
12 penetrating her without her consent. It was at
13 this time in the case United States versus Airman
14 Brandon T. Wright, the Air Force's top federal
15 prosecutor, the Judge Advocate General of the Air
16 Force, Lieutenant General Richard C. Harding
17 revealed his guidance to all Air Force judges
18 that victims are to be believed, and their cases
19 referred to trial.

20 To date, the Department of Justice,
21 Congress, nor this committee have conducted a
22 deep dive to investigate this top federal

1 prosecutor, investigate who gave the order to
2 this top federal prosecutor, investigate other
3 top federal prosecutors for the Navy, or Army
4 provided similar orders, or investigate the
5 secondary effects of this unlawful order on
6 court-martial convictions.

7 In April 2015, contrary to my pleas,
8 with no physical evidence I committed a crime, a
9 judge-alone panel convicted me of sexual assault,
10 and other related charges against my wife, and
11 sentenced me to 42 months in prison.

12 Even though I testified in my own
13 defense, I never committed these crimes, even
14 though I was never arrested, even though my
15 previous command affirmed their investigation
16 concluded I never committed a crime against my
17 wife, and even after civilian police officers
18 also testified at my trial that there was no
19 evidence I committed any crime against my wife.

20 To be clear, I was never arrested, had
21 custody of my child up until my conviction, and
22 the Florida district attorney refused to

1 prosecute me, yet a military judge alone found me
2 guilty. Adding injury to insult, prior to trial,
3 my wife offered a bribe that if I gave her full
4 custody of our daughter, that she would forego
5 testifying at my court-martial. I declined her
6 offer, and presented this evidence to my
7 convening authority.

8 But this overwhelming evidence to show
9 my wife's motives for fabricating accusations for
10 custody of our daughter were ignored. It gets
11 worse. After trial, it was also discovered my
12 mother-in-law paid the man my wife had an affair
13 and child with \$100,000 prior to his testimony on
14 his relationship with my wife. I was awarded a
15 post-trial hearing to evaluate the \$100,000
16 payment and its influence on testimony after U.S.
17 Congresswoman Martha Roby submitted a
18 congressional to the Air Force.

19 Citing court-martial rules, the Air
20 Force responded to Congresswoman Roby stating
21 that the military judge had full authority to
22 order a new trial, or dismiss the charges. But

1 at the post-trial hearing, when my wife, her
2 boyfriend, and mother in law perjured themselves
3 about the payment, and the affair, the Air Force
4 reneged on what was told to Congresswoman Roby,
5 and refused to allow my attorneys to file a
6 motion for a new trial, stating the judge was not
7 authorized because the record of trial was
8 previously authenticated.

9 So, not only did the Air Force ignore
10 court-martial rules on the judge's authority on a
11 post-trial hearing, they also violated federal
12 rules under Brady by not submitting to my
13 attorney what they affirmed to Congresswoman
14 Roby. And by not allowing me to file a motion
15 for a new trial, the Air Force presumably misled,
16 and provided a false statement to Congress.

17 The Air Force closed ranks during my
18 appeals, going against their own case law on
19 authentication, and the judge's authority at a
20 post-trial hearing. Even appearing to have
21 influenced the Air Force Board of Corrections for
22 military Records. Because the BCMR, which it's

1 called, ruled that it does not have the authority
2 to remedy a wrongful court-martial conviction,
3 and that they are only authorized to provide
4 relief on a sentence.

5 Even though the law at 10 USC 1552
6 clearly provides authority for the BCMR to
7 correct a wrongful court-martial conviction. You
8 may be thinking to yourselves that I'm making
9 this up. That the military who are sworn to
10 support, and defend the Constitution would not
11 establish barriers to the due process protections
12 guaranteed by founding fathers.

13 Unfortunately, this is not the case,
14 because in 2017, reports from the Department of
15 Defense Judicial Proceedings Panel concluded the
16 military does indeed interfere with the lawful
17 investigation, prosecution, and defense of sexual
18 assault cases. In fact the findings were so
19 grave from these 2017 reports, I filed a human
20 rights complaint through the Inter-American
21 Commission on Human Rights, which I submitted to
22 this committee for inclusion on the record.

1 Findings from this report include the
2 military prosecutes cases with no probable cause,
3 which conflicts with the standards from the
4 American Bar Association. In the military,
5 there's no such thing as an alleged victim, all
6 accusations substantiating an assault actually
7 occurred. The report also said the special
8 victims counsel on several occasions instructed
9 victims to obstruct justice, and not turn over
10 evidence on cell phones, even when it is likely
11 to contain critical information to clear the
12 accused.

13 The most jaw dropping observation is
14 that the DOD personnel are trained on false
15 victim centric material that biasedly teaches
16 them to believe victims, and that the voir dire
17 process at trial likely does not remove these
18 biases. I'm almost finished. Ladies, and
19 gentleman of this committee, and those listening
20 via Zoom, can any of you honestly say with a
21 straight face that what I just read to you is
22 right, or fair?

1 Unfortunately the reality of what is
2 really happening in our military installations,
3 and I don't understand why the findings from this
4 2017 report aren't cited when the military is
5 accused by certain members of congress for not
6 taking sexual assault seriously. They're taking
7 it so seriously they're even willing to break the
8 law to get convictions.

9 If you don't believe me, read
10 Congressman Barry Moore's request for President
11 Biden to have the Department of Justice to
12 investigate the U.S. Air Force. That request to
13 President Biden has also been submitted to this
14 committee for inclusion on the record. If we are
15 going to enact whistle blower protection laws to
16 protect the likes of an Army Lieutenant Colonel
17 Alexander Vindman for his efforts to support, and
18 defend the Constitution against all enemies
19 foreign, and domestic on a call with President
20 Trump, then we should also protect a Major Erik
21 Burris for his efforts.

22 Major Burris was Fort Bragg's chief

1 prosecutor who testified at a court-martial of
2 another servicemember on the unlawful patterns,
3 and practices the Army wanted him to do when
4 prosecuting cases of sexual assault. The Army
5 went after Erik while he was also going through a
6 divorce. When the investigating officer at his
7 Article 32 hearing, a female lieutenant colonel,
8 recommended that his case not go to trial because
9 she found his wife's testimony to be dubious at
10 best, his convening authority overruled that
11 investigating officer, hand-selected a jury, and
12 Erik was subsequently given 20 years in a
13 military prison.

14 I was incarcerated with Major Burris at
15 Miramar in San Diego, California. Erik was there
16 before I arrived, Erik was still there when I
17 left in 2018. If we do not deal with the truth,
18 and affirm that the military's criminal justice
19 system has been compromised, that a special
20 prosecutor's office isn't equipped to fix, if we
21 do not fix these wrongful convictions, and
22 prevent them from happening again, then we're no

1 different than the mob that attacked our capital.

2 Both were confronted with a reality
3 from the Constitution that they did not like, and
4 both implemented measures to circumvent it.
5 Whether it's attacking Capitol Police with
6 weapons to change the results of an election, or
7 attacking servicemembers with an assault of
8 unlawful patterns, and practices to change
9 results of a court-martial, it's still a matter
10 of national security.

11 Our vow to support, and defend the
12 Constitution does not instruct us to value
13 Amendment 12 over Amendment 5, they're all
14 sacred, and must be protected. Thank you for
15 your time, and I offer myself for your questions.

16 CHAIR SMITH: Thanks very much. Any
17 questions?

18 MEMBER WALTON: So, your rank was, you
19 said?

20 MR. ANDERSON: Major, yes sir, I was
21 lieutenant colonel select, yes sir.

22 MEMBER WALTON: But you said you were

1 convicted in a judge alone trial?

2 MR. ANDERSON: Yes sir.

3 MEMBER WALTON: Why did you opt for
4 that?

5 MR. ANDERSON: Because my panel was
6 all-White.

7 MEMBER WALTON: And you indicated that
8 the post-conviction hearing that was supposed to
9 occur, that you were not permitted to introduce
10 any type of evidence to undermine the fairness of
11 your trial?

12 MR. ANDERSON: Yes sir. So, the Air
13 Force Court of Criminal Appeals ruled that
14 authentication of my court-martial record
15 prevented the judge from introducing new
16 evidence. And so, let me explain the
17 authentication --

18 MEMBER WALTON: I don't understand
19 what that means.

20 MR. ANDERSON: So, the authentication
21 process is, is this was according to the rule of
22 court-martial manual in 2012, which affected my

1 court-martial in 2015. So, the authentication
2 process is after the court-martial is over, the
3 government, and the defense counsel, coupled with
4 the judge, all certify the record of trial. Once
5 the record of trial is certified, that is the
6 authentication process.

7 Now, the court-martial rules at that
8 time stated that if there's any new evidence
9 prior to the authentication process, then the
10 judge may call a post-trial hearing. Any new
11 evidence after authentication of the record, but
12 before the convening authority's final action to
13 send it to the Court of Criminal Appeals, the
14 only person that can order a post-trial hearing
15 is the convening authority.

16 So, what happened with me,
17 Congresswoman Roby submitted a congressional to
18 the Air Force saying there's evidence of witness
19 tampering, which was subsequently because my
20 mother recorded the conversation between my
21 mother, and my wife's boyfriend where he admitted
22 to lying under oath, and being paid money. And

1 Alabama's a one-party consent state, so we
2 recorded the conversation, submitted it to the
3 convening authority, and Congresswoman Roby.

4 Congresswoman Roby submitted a
5 congressional to the Air Force. The Air Force
6 responded back to Congresswoman Roby citing the
7 appropriate rules, and says that the military
8 judge has full authority to rule on any motion,
9 which includes a motion for a new trial, and
10 motion to dismiss. But when they perjured
11 themselves on the record, we attempted to file a
12 motion.

13 And the judge says I don't have any
14 authority because the trial record's already been
15 authenticated, and this was actually
16 substantiated by the court of criminal appeals.
17 The problem with that is if you look at United
18 States versus Roy, which is a 2013 case, a judge
19 at a post-trial hearing ordered a new trial that
20 was ordered by the convening authority. So, the
21 Air Force even circumvented their own case law on
22 that case. So, that's what happened.

1 MEMBER WALTON: And you weren't able
2 to appeal that ruling to a higher --

3 MR. ANDERSON: I was able to appeal
4 the ruling, and the Air Force came back, and says
5 that authentication prevented the judge from
6 ordering a new trial.

7 MEMBER WALTON: And there wasn't the
8 ability to appeal beyond that?

9 MR. ANDERSON: Well, I submitted it to
10 CAAF, CAAF refused to look at it. I presented
11 these matters also in my federal lawsuit in the
12 Fourth Federal District Court here, Judge Anthony
13 Trenga didn't even opine on that issue.

14 COL BOVARNICK: Questions from any
15 other members? Mr. Anderson, thank you very much
16 sir.

17 MR. ANDERSON: Thank you sir.

18 COL BOVARNICK: Next we have Mr. Lopez.

19 MR. LOPEZ: Madam Chair, honorable
20 members of the committee, thank you very much for
21 the staff, and the committee for granting me this
22 opportunity to speak on such an important matter

1 for both military veterans, and the public. I
2 also advocate for service free of sexual assault,
3 as well as fair, and impartial processes of
4 justice. As stated, my name is Darren Lopez, I'm
5 a former Navy intelligence specialist who
6 honorably served my country for 12 years.

7 I was convicted of a sexual assault in
8 2014. Against my plea of not guilty, I was
9 sentenced to three years of confinement, a bad
10 conduct discharge where consent was the argued
11 point. Today, I'm here in the interest of
12 justice, and respectfully request the pursuit of
13 some form of relief past anything that exists at
14 this point in time, such as a conviction
15 integrity unit of some sort.

16 This became knowledge to me when I
17 reviewed, I guess it was an April meeting, it was
18 brought up in that meeting, and I've been
19 following this for the past decade, because it's
20 in my interest. When something bad happens to
21 you, you want to get to the bottom of it, and
22 that's what I've been doing for the past ten

1 years.

2 And when I finally heard that,
3 obviously I tuned in, and I'm very interested in
4 that. And just for -- in thinking of it, and
5 having a lot of time, conviction integrity unit,
6 in the British parliament, they had something
7 that piqued my interest, they call it the FAIR
8 Act. And being as a veteran advocate, I
9 basically just took that, and I believe that
10 something as the FAIR Act seems appropriate for
11 what happened in that time period from, like he
12 said, 2012, but you can go back as far as 2011,
13 2010 really.

14 2014 being the height of it, as I
15 mentioned, a backlog of thousands of cases,
16 whereas there's only hundreds of cases at this
17 time. And I believe that acronym would stand for
18 armed forces, it would be Falsely Accused
19 Individual Review, and that could be a
20 subcommittee. I'm also presenting this to
21 Congress as an act, it is an idea, and I believe
22 it's fair, and that's the premise of it.

1 And I also believe that the committee
2 should be granted fact finding authority, and
3 make necessary recommendations to appellate
4 services, and board of corrections for
5 adjudication. That's a key element, because I've
6 been through every avenue. In a decade I've been
7 on many deaf ears, and short of presidential
8 pardon, there is no relief for somebody who is
9 actually -- could be actually innocent, and in my
10 case is actually, factually, and I think if you
11 review the records, as I believe y'all will in
12 the future, you'll also see legally, my
13 innocence.

14 Although my initial plea is based upon
15 relief for me, I believe that all of those
16 affected by unlawful command influence for that
17 time period specifically is in the interest of
18 all military veterans. Because like I said,
19 there is no process. Once you're out of the
20 service, and your appeals are done, and during
21 that time period, that's what it was.

22 So, there's two key points really, two

1 integral parameters that I propose. First, like
2 I said, the armed forces experience the largest
3 account of unlawful command influence in U.S.
4 history actually, this is the largest, ever in
5 U.S. history. Two accounts, mid 1960s, mid
6 1980s, those accounts weren't at the level, and
7 scope of what happened during our time.

8 It has many variants, it has been
9 exerted as from the President of the United
10 States, the SECDEF, congressional officials,
11 service leaders, the JAG Corps, as we heard
12 today, jury pools. Service members of every
13 armed force through mandatory briefings, the
14 training, and the policy memos, colleague
15 letters, things that influence, whether valid, or
16 invalid.

17 Explicit, and implicit guidance has
18 been a real problem, and manifested this undue
19 command influence. Moreover, UCI has reached
20 extremes where those who are supposed to embody
21 the spirit of justice, the Judge Advocate General
22 of the Navy, and the Air Force were found to

1 individually intercede in cases, and such a case
2 would be with that of Special Operations Chief
3 Keith Barry, that's one very specific example.

4 And you can see that it's all
5 inclusive. There is nobody free from the
6 influence of such command -- of this event,
7 series of events, or time line of events. The
8 alarm has been sounded repeatedly, and despite
9 slow, incremental changes, little substantive
10 change has occurred. I see today, there's a
11 couple things that I saw, that I noted would be
12 very promising, it could be promising in the
13 future.

14 I heard a lot of lack of dead points,
15 I did hear a disconnect between what the defense,
16 and trial counsel came in, they would be asked
17 the same questions, and couldn't answer the same
18 questions. So, there's clearly a lack of
19 communication somewhere on that. Specifically
20 the UCI agenda pervaded, because the procession
21 of the armed forces couldn't manage sexual
22 assault cases.

1 It was Congress saying that military
2 couldn't handle sexual assault cases. Well, in
3 my case that's correct, but not as the agenda
4 presented itself. The military justice system
5 failed even after presenting civilian authorities
6 the opportunity to pursue, but they dropped my
7 case due to a lack of evidence. And that is when
8 the military picked it up, because once again, in
9 2014, in June, this was the height of sexual
10 assault prosecutions, and I was subject to that.

11 COL BOVARNICK: Mr. Lopez, start to
12 wrap up, so we can let them ask if they have a
13 question, or two for you. I don't know if you
14 want to make a couple of closing comments, but go
15 ahead.

16 MR. LOPEZ: Okay. Well, y'all have
17 this on record, I submitted it as a document.
18 There's just one key thing for my specific case
19 that I want y'all to look at. Other than
20 advocating for this review, or subcommittee, or
21 potential subcommittee of integrity past the
22 appellate process. One of the big things that I

1 noticed is that there was a big push to get past
2 the judge.

3 Once you get past the judge, the
4 burden shifts, right? And so that was the reason
5 my attorney wanted to go judge alone. The
6 atmosphere he presented to me, he said we can't
7 go with a jury of your peers, because they've all
8 been influenced. This is happening around,
9 there's major cases around your case, it's just
10 not going to happen.

11 And so we went judge alone, and the
12 judge, his finding of fact was that after two
13 years of investigation, the only thing that he
14 found me guilty on was a statement from I guess
15 the government's accuser, was that I had stated
16 don't worry, I used a condom. This was the whole
17 premise for his conviction. And that would lead
18 to, he said in his response, was that if that
19 statement were made, then he was somewhat aware
20 that there could not be a consent.

21 If you look back in the documentation
22 through the investigation, the statement was

1 actually I have a condom on, given by her. I
2 pled the fifth, and exercised my right. There is
3 nothing that I say throughout the entire thing,
4 throughout proceedings up until now even, still
5 advocating, and pending pardon, which I don't
6 have high hopes on, but this integrity group
7 could be a big deal for me, and people like me
8 who served honorably.

9 COL BOVARNICK: Thank you Mr. Lopez.
10 Do any members have any questions?

11 MEMBER WALTON: So, as I understand,
12 you were ultimately exonerated?

13 MR. LOPEZ: No, I am still a guilty
14 person sir. And I am open to any questions about
15 this, as somebody who has seen it from the inside
16 out, I could probably answer just about -- if not
17 today, in the future, if anybody has any
18 questions about anything.

19 CHAIR SMITH: Thank you.

20 MR. LOPEZ: Thank you very much.

21 COL BOVARNICK: And our final public
22 comment will be Mr. Arvis Owens.

1 MR. OWENS: Honorable members of the
2 committee, I want to thank you for allowing me to
3 speak today. I also want to thank the League of
4 United Latin American Citizens for monitoring the
5 cases, they've been very helpful. As you might
6 imagine, finding a civic social organization that
7 supports those falsely accused is very, very
8 challenging. My name is Arvis Owens, and in
9 2013, I was accused, and brought on charges for
10 sexual assault.

11 My accuser is White, I am obviously
12 African American, and my panel was all-White
13 males. I asked my attorney at the time, how can
14 the military do this? And he said, well, as a
15 civilian, you have that right, but the military
16 is under a lot of pressure, and so they want to
17 drive you to choose judge alone. So, we
18 investigated the judge, and found out she was a
19 reservist, and she was a victim's rights advocate
20 in her civilian role.

21 And based on her record, he said we
22 have a rock, and a hard place, we should go with

1 the panel. And speaking with other people who I
2 believe falsely accused, their trial defense
3 counsel pushed them in the direction of choosing
4 a judge alone over a panel, and many of those
5 cases they were facing all-White panels, or judge
6 alone.

7 So, I chose to testify on my own
8 behalf, in fact, I let go of one attorney who
9 said don't do it, and then found an attorney who
10 was willing to do it. I was charged with seven
11 counts of sexual assault, the panel found me not
12 guilty of six of those seven, and then during
13 sentencing, when my accuser changed her story yet
14 again, and reversed other comments that she made,
15 they asked to revote the verdict.

16 The judge said no, we asked for a
17 mistrial. The judge said no. When I testified
18 on my own behalf, they obviously asked me
19 questions, we asked the convening authority for
20 an expert, they said no. We asked them for
21 evidence, they said no, they wouldn't give it to
22 us. She hired a civilian attorney to sue the

1 government, so part of my argument was it was a
2 cash play to get money.

3 The government refused to show us the
4 negotiations, we asked her in trial why would you
5 sue the government, and not me? And she would
6 not answer. My attorney said that he believed
7 that if she did, then I would be able to disclose
8 the amount she was asking for, and use that in my
9 trial. The government acknowledged that they
10 were in negotiations with her, but refused to
11 turn over the information.

12 They said you can simply say it out
13 loud, you can say that we're in negotiations for
14 it. At one point in my trial, my accuser said
15 that I didn't raise her pencil skirt, she didn't
16 raise her pencil skirt, that it flew up
17 automatically in the air, causing her legs to
18 open, and her to straddle, and open mouth kiss me
19 on the chair, but she was not consenting.

20 She refused to sign her police
21 statement, because in it she says it was
22 consensual, she changed her mind in the middle,

1 she didn't say no, she didn't say stop, she
2 didn't say quit. She asked about what that
3 relationship meant, because she had been in a
4 bunch of short term relationships, and she wanted
5 to know why she wasn't the one selected for a
6 long term relationship.

7 So, the trial ends, and again, the
8 jury comes back, and asks can they revote the
9 verdict I should say. The judge says no, so my
10 trial attorney goes to them, to see if they would
11 write letters for the convening authority. It
12 was at that time there were seven on my panel,
13 and I had the more restrictive requirement of two
14 thirds to get guilt, and now it's three fourths.

15 So, of the seven, five responded back.
16 Two obviously didn't. And then the judge issued
17 an order, and it was an illegal order, because
18 the prosecution didn't ask for it, and the
19 defense didn't ask for it, telling them that they
20 couldn't break the seal of jury deliberations.
21 She told them what they couldn't do, she never
22 told them what they could do.

1 We objected, we challenged it, she
2 called another hearing, and then what she said --
3 obviously the panel members did not want to speak
4 to us at that point. She had a hearing where she
5 asked the prosecutor to request the order that
6 she had already written restricting what they
7 could do, and they did, they complied. And then
8 she changed her instructions to say well, it is
9 right, and proper for them to ask for these
10 letters.

11 So, the court determined that she had
12 remedied her error. I had a government attorney,
13 a civilian, who admitted under oath during cross
14 examination that he had told people not to
15 testify in my defense. One of them elected to,
16 the other two did not, and again, the judge said
17 she had remedied the error. I argued unlawful
18 command influence, she said so, so she gave me an
19 extra peremptory strike.

20 One thing I did in the military was I
21 did logistics, as well as data analysis. So, I
22 heard a lot of the questions you asked, and I

1 would tell you as somebody with a background in
2 data analysis, you can get any number you want
3 based on the assumptions, based on the data they
4 give you. I use this example, let's pretend for
5 instance -- I did data analysis, and then I did
6 it at the Pentagon.

7 Let's pretend this is a hypothetical
8 scenario, you ran a simulation war game, and you
9 use zero percent attrition. So, tell me which
10 war would have zero percent attrition? None
11 would, but you do that because the amount of
12 equipment you would need if you had even one
13 percent attrition would exceed the amount that
14 Congress might authorize.

15 So, you change the assumptions to get
16 the number. Obviously I went under appeal.
17 Several members said they wanted to write
18 letters, but they did not want to send them to
19 me, they wanted to send it to the convening
20 authority directly. We went for appeal, and the
21 convening authority said they had received zero
22 letters. Personally corresponding with my

1 attorney, at least two of them had come forward.

2 I needed at least three, and again, I
3 told you five were interested at first until the
4 judge's order. So, we go to the Court of
5 Criminal Appeals Navy, and they go just because
6 they said they sent it, doesn't mean they sent
7 it. It's like the check is in the mail. But he
8 ordered a review, again, the military said we
9 didn't get it, and two of them came forward, and
10 said here's a copy of what I sent.

11 And then magically the government
12 found the letters. And so CAAF ordered a new
13 convening authority's action from the same
14 convening authority. And at least three panel
15 members wrote, one didn't even like me, I
16 provided a copy of those letters. We submitted
17 it, and of course he approved the findings. On
18 another count that they found me guilty was
19 violating a general order.

20 We argued that they didn't have a copy
21 of the general order, and the judge in her
22 comments said there's no evidence that he

1 violated the general order by her testimony, and
2 his own. In fact she says we have a problem.
3 So, the court did throw out that, and of course I
4 was convicted of conduct unbecoming an officer,
5 which you'll find is a catch all.

6 You can spit in uniform, and that's
7 conduct unbecoming, literally they use it as a
8 catch all. I went to newspapers, I went to
9 others to try, and get relief, or help, or
10 support, they won't do it. Because at the time,
11 the movement was the military has this issue, and
12 no one cared. So, what I set out to do was I
13 started a small group, there's 400 of us about.

14 We all have various pieces of
15 evidence. I would tell you Clarence Anderson is
16 part of that group. He has the recording that
17 his mom made, and we have that online. We have
18 people who have DNA evidence that the military
19 chose to discard. Witnesses they didn't allow to
20 testify. In one case they talked about racial
21 disparity in panel.

22 There was a lance corporal in the

1 Marine Corps, his name is David Montalvo III,
2 White accuser, Hispanic American, he's enlisted,
3 E3, all-White panel, all-male panel, White judge
4 as well. He was sleeping, and passed out drunk
5 when his accuser was let in his room by his
6 friend because she was a friend of his friend's
7 girlfriend.

8 She initiated a sexual act on him, and
9 then he woke up, and they had sex. The only
10 thing he wasn't convicted of is the oral sex that
11 she initiated when he was sleeping. I asked him,
12 because he got a junior trial defense counsel,
13 did they bring up that you're a victim? You
14 couldn't consent because you were sleeping, and
15 you were intoxicated.

16 He said no, they never said that, he
17 was in the middle of PCSing, so he was busy. I'd
18 like to direct your attention to a letter from
19 Vice Admiral James Winnefeld, I provided that, it
20 went to Senator Carl Levin. Where Vice Admiral
21 Winnefeld said that the military was getting a
22 high conviction rate in cases that civilians

1 would not take.

2 I found it interesting, because no one
3 ever asked how. What legal genius minds do you
4 have in the military that can get convictions in
5 cases that civilians won't take. But no one
6 asked that question.

7 COL BOVARNICK: Mr. Owens, you want to
8 start to kind of wrap up?

9 MR. OWENS: Okay, I will wrap up. So,
10 I'll make one last point, with Rear Admiral
11 Lorge. So, one of the members mentioned, Senior
12 Chief Keith Barry, a whistle blower came forward
13 in his office, heard that the admiral was
14 speaking with the head JAG in the Navy, and was
15 influenced not to overturn his conviction even
16 though he was not guilty.

17 So, basically he finally got a CAAF
18 review, his case was overturned, well guess what?
19 He was my convening authority too. He sent my
20 case to court-martial, they didn't look at any
21 other cases where he was convening authority. In
22 the JPP they found that guess what, there was

1 error, there were things they were doing, they
2 didn't advise to look at any of the cases to see
3 how that error affected those cases. So, I am
4 open to any questions.

5 MEMBER WALTON: What was your rank?

6 MR. OWENS: I was O5, a commander.

7 MEMBER WALTON: Which is in the Navy?

8 MR. OWENS: Navy, it'd be lieutenant
9 colonel in the Army.

10 MEMBER WALTON: And how long had you
11 been in the military?

12 MR. OWENS: At that time 18 years.

13 MEMBER WALTON: And your path to the
14 military was what?

15 MR. OWENS: Annapolis, I went to the
16 United States Naval Academy.

17 MEMBER WALTON: Had you ever had any
18 misconduct, allegations?

19 MR. OWENS: No sir, I have not. I had
20 one speeding ticket in my life, and then I became
21 a registered sex offender. And I would tell you
22 sir, when we started a petition about this, the

1 state of Virginia contacted me within two weeks,
2 and took me off the registry, it's seven years,
3 ten months. It's unique, because I'm the only
4 person it's ever happened to. You have to wait
5 15 years, petition a judge to come off.

6 I called, they wouldn't tell me why.
7 There's a friend I have, he said calls were made.
8 I said who called who? I can't tell you. I said
9 did Virginia call DOD? I can't tell you. He
10 said but they're worried that you're going to sue
11 them. I said well, all Virginia did was what the
12 military ordered them to do. He said that's all
13 I can say, if I were you, I'd speak to an
14 attorney.

15 I have, and that person has said it's
16 DOD, it's not Virginia, all they did was what the
17 military told them.

18 MEMBER WALTON: And you were
19 convicted, you said of what offense?

20 MR. OWENS: Sexual battery, conduct
21 unbecoming, and failure to obey a general order?

22 MEMBER WALTON: And your sentence was?

1 MR. OWENS: Zero, I was dismissed,
2 forced to register as a sex offender, no jail.

3 MEMBER WALTON: I'm not as astute
4 about the --

5 MR. OWENS: A dismissal is a
6 dishonorable discharge for an officer.

7 MEMBER WALTON: Okay. And you said
8 there was an effort to try, and raise a question
9 about the verdict, and what was that process?

10 MR. OWENS: Yes, so you have a
11 convening authority's action. Obviously he had
12 all the information, he chose to affirm it.
13 Again, I've spoken with the Staff Judge Advocate,
14 who said they basically all were. Because to get
15 promoted, their record on sexual assaults were
16 reviewed, to get general officer. I don't know
17 if that's still the case, but that was at the
18 time.

19 So, he reviewed it, and then I had a
20 Navy Criminal Court of Appeals review, and then
21 CAAF declined to look at my case. And again, I
22 never raised the race issue, because I was told

1 that you could not, not in the military. In the
2 civilian side you could. You heard the major say
3 today that you would have to have communications
4 between the SJA, and the convening authority.
5 How the hell would one get that? Sorry for the
6 hell word.

7 MEMBER WALTON: So, you're saying that
8 the entire panel that was available to be
9 selected to your jury, there was not one
10 minority?

11 MR. OWENS: There was an Asian
12 gentleman who was thrown off for bias, but
13 everybody else was a White male. And there was a
14 former law enforcement officer who said he's
15 already guilty. There was a person who probably
16 should have been thrown off, who had submitted
17 two cases to NCIS, and said that he was angry
18 because they failed to pursue charges for lack of
19 evidence.

20 My attorney said that I should go
21 after him for ineffective assistance of counsel.
22 I told that to my appellate attorney who refused,

1 because I hadn't been given any jail time. He
2 said the courts will not do it, I didn't know I
3 could submit it myself, so I did not.

4 MEMBER WALTON: The military base
5 where you were adjudicated guilty was where?

6 MR. OWENS: Naval District Washington,
7 right up the road.

8 MEMBER WALTON: Were there other
9 officers who could have been a member of your
10 jury?

11 MR. OWENS: Thousands. This is one of
12 the largest areas, in fact they didn't pull --
13 they pulled from Patuxent River. I found out
14 they asked for volunteers, and they used that
15 pool of volunteers. They control the pool you
16 pick from, and the thing I would throw out to the
17 panel is peremptory strikes. So, they didn't use
18 any, they got one peremptory strike, how often
19 are prosecutors actually using those strikes for
20 panels?

21 If you get to pick the pool, you like
22 everyone in the pool. I would say that.

1 COL BOVARNICK: Any other questions?

2 Mr. Owens, thank you very much.

3 MR. OWENS: Thank you guys.

4 CHAIR SMITH: Thank you.

5 COL BOVARNICK: And we can start to
6 wrap up this session, a couple of things. Ms.
7 Saunders is going to quickly cover some victim
8 impact information, and then we can do a preview
9 of the due outs, and a quick preview of the next
10 meeting.

11 MS. SAUNDERS: Thank you. Quickly
12 being the operative word, I'll just give you my
13 30 second elevator pitch given the hour. But
14 know that in the December public meeting, we will
15 provide you more information on the victim impact
16 statement study. So, in looking at some of the
17 case files for fiscal year '21, the preliminary
18 step to conducting a case review, we were able to
19 identify 173 cases with a guilty verdict for a
20 wide variety of sex offenses in which a victim,
21 at least one victim provided a victim impact
22 statement.

1 Most of those 173 cases were judge
2 alone sentencing cases. And then from the 173,
3 we found 27 cases in which the military judge
4 limited the victim impact statement in some way.
5 So, my request to you, and going back to what Ms.
6 Garvin said just a few moments ago, is I would
7 like to hopefully solicit your assistance with
8 reviewing the 27 cases.

9 It should be fairly easy, I think it
10 could be done remotely. We could provide you
11 excerpts from the record of trial, and any other
12 relevant documents you might need to be able to
13 do that. But hopefully with a goal of getting
14 these 27 cases reviewed, and perhaps being able
15 to report back to the main committee at the
16 December public meeting. So, hoping to be able
17 to get some volunteers.

18 I see lots of head nods, so that's
19 encouraging, and we can follow up with an email
20 on that point too.

21 CHAIR SMITH: General Schwenk asked me
22 to volunteer him.

1 MS. SAUNDERS: Okay, thank you --

2 CHAIR SMITH: He really did though, I
3 actually wrote it down.

4 MS. SAUNDERS: I think we would have
5 volunteered him anyway, but that's helpful to
6 know that he agrees with that. And then also
7 would the panel be interested in inviting a
8 representative from Survivor's United? This is
9 the group that originally raised this issue,
10 would you be interested in inviting someone at
11 the December public meeting to provide an update?
12 And also an SVC VLC panel to provide their
13 perspectives?

14 CHAIR SMITH: Yeah, I think that
15 sounds good, yeah, everyone?

16 MS. SAUNDERS: Okay, that is all I
17 need, thank you.

18 COL BOVARNICK: And with that part of
19 the wrap up, we took all the do outs of the
20 meeting, and so just a couple of quick things.
21 So, for the Office of Special Trial Counsel, we
22 have the documents, we'll compile those, and get

1 them into a format we can distribute to the
2 matters. But on that line, and then what we
3 heard today with some discussion of the training,
4 and the courses recommendation.

5 So, initially we talked about at the
6 last meeting, the panel wanted to have the senior
7 officials that came at the June meeting to give
8 an update, which by December will be about six
9 months, a lot of work being done on the
10 establishment of the Office of Special Trial
11 Counsel, the training, the selection of special
12 trial counsel as they move towards -- at that
13 time they'll be about a year out from their full
14 operational capacity of end of December of 2023.

15 So, does the panel still want to
16 invite those members back for the December
17 meeting? And then one additional recommendation,
18 along with those senior officials, the heads of
19 someone high up to help develop the training for
20 each of the services. In other words the courses
21 that you go to submit, the committee members
22 could interact now, as they're still working on

1 forming up some of these courses for the future.

2 So, kind of in addition to the general
3 counsel, the military departments, and the
4 service judge advocates, someone that can tackle
5 a bit more specific about the development of
6 these training courses, you could add that into
7 the invitation.

8 CHAIR SMITH: Yeah, everyone's nodding
9 their head yes. I see Ms. Tokash has her hand
10 raised.

11 MEMBER TOKASH: And I don't know if
12 this is within the scope of what you just talked
13 about, but every general officer is required to
14 go to what we call in the Army, GOLO training.

15 COL BOVARNICK: Yes, ma'am, I think I
16 know.

17 MEMBER TOKASH: And I think it's
18 important to maybe look at the curriculum for
19 that. I don't recall it that well, but I do
20 think there was some gaps in my training.

21 COL BOVARNICK: Yes, ma'am, there was
22 a question about this whole process of the Staff

1 Judge Advocate's training to advise on general
2 selection, and then certainly the general officer
3 training, so we can look to that as well for the
4 December meeting. So, what I propose, and I'll
5 come up with a draft agenda I'll share with the
6 chair.

7 But to capture this stuff, so inviting
8 victim advocates groups, and special victim
9 counsel to talk about those issues. And I think
10 perhaps, maybe depending on what we come up with
11 in the next meeting, perhaps some retired
12 military judges. We aren't going to have active
13 judges coming in here, they're all working on
14 cases, but some judges to come in.

15 I know in a prior iteration of the
16 panel, you heard from our military judges, so a
17 lot of these questions are asking some of these
18 other folks, you get actual people who recently
19 did all this stuff, so we could re-explore that
20 for the panel if the panel is interested, at a
21 future meeting. Just because a lot of the
22 questions were kind of geared towards whether the

1 judges, the instructions, things of that nature.
2 Sounds like yes for that as well.

3 MEMBER TOKASH: This is Meghan Tokash,
4 can I make a proposal?

5 COL BOVARNICK: Of course.

6 MEMBER TOKASH: Unfortunately, I'm
7 going to watch this later today, but while our
8 meeting was going on today, the House Armed
9 Services Committee was holding a meeting on
10 implementations of the Independent Review
11 Commission, and the under secretaries of the
12 services gave testimony, which again, I'm
13 certainly going to watch, and I hope my
14 colleagues here get a chance to watch it as well.

15 But I was wondering if they might be
16 in a position better to update us on the
17 formation of the Office of the Special Trial
18 Counsel. I know we heard from the general
19 counsel last time, and that was very informative.
20 I think that it might be good to get their
21 perspectives as well, since they're working right
22 next to the service secretaries. Thank you for

1 your consideration.

2 CHAIR SMITH: Everyone's nodding their
3 head yes.

4 COL BOVARNICK: Ma'am, that's all I
5 had as far as wrap up. I don't know if any other
6 staff members, any other comments, or do outs?
7 So, ma'am, I think I'll hand it back to you for
8 any closing remarks, and then to the DFO.

9 CHAIR SMITH: Well, thank you,
10 everyone, for your time, and attention today.
11 And our next meeting is December --

12 COL BOVARNICK: It's scheduled for two
13 days, December 6th, and 7th. So we'll see how
14 the agenda pans out, ma'am, if that can be done
15 in a day, or if we stick with the two days, but
16 I'll give a proposal to you.

17 CHAIR SMITH: All right, great, thank
18 you.

19 MR. SULLIVAN: All right, this meeting
20 is officially closed.

21 (Whereupon, the above-entitled matter
22 went off the record at 4:59 p.m.)

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Neal R Gross

Court Reporter

NEAL R. GROSS

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