

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

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31st PUBLIC MEETING

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TUESDAY
SEPTEMBER 19, 2023

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The Advisory Committee met in the General Gordon R. Sullivan Conference & Event Center, Association of the United States Army building, located at 2425 Wilson Boulevard, 4th Floor, Arlington, Virginia, at 12:30 p.m., Karla Smith, Chair, presiding.

PRESENT

Ms. Karla Smith, Chair
MG (Ret.) Marcia Anderson
Ms. Martha Bashford
Mr. William Cassara
Ms. Meg Garvin *
Ms. Jennifer Gentile Long
Judge Paul Grimm *
Dr. Jenifer Markowitz
Hon. Jennifer O'Connor *
Dr. Cassia Spohn
Ms. Meghan Tokash
Hon. Reggie Walton

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Official

WITNESSES PRESENT

MajGen Leonard F. Anderson IV, U.S. Marine Corps
Maj Gen Kenneth T. Bibb, U.S. Air Force
LTC Julie Borchers, U.S. Army
Brig Gen Christopher A. Brown, U.S. Air Force
CDR Anton DeStefano, U.S. Coast Guard
CDR Ben S. Gullo, U.S. Coast Guard
MG David M. Hodne, U.S. Army
COL Christopher Kennebeck, U.S. Army
RDML Brian K. Penoyer, U.S. Coast Guard
RDML (Ret.) Charles Rock, U.S. Navy
CAPT Anita Scott, U.S. Coast Guard
RDML Jonathan T. Stephens, U.S. Navy
BG Warren L. Wells, U.S. Army
BGen Kevin S. Woodard, U.S. Marine Corps

DAC-IPAD STAFF

Mr. Pete Yob, Director, Military Justice Support Group
Ms. Julie Carson, Deputy Director
Ms. Stacy Boggess, Senior Paralegal
Ms. Theresa Gallagher, Staff Attorney
Ms. Nalani Gupta, Staff Attorney
Ms. Amanda Hagy, Senior Paralegal
Mr. Michael Libretto, Staff Attorney
Mr. 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

* Present via video teleconference

AGENDA

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Day 1: Public Meeting Adjourned

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

2 12:24 p.m.

3 MR. SULLIVAN: Good afternoon. I'm
4 Dwight Sullivan, the designated federal officer
5 of the Defense Advisory Committee on
6 Investigation, Prosecution, and Defense of Sexual
7 Assault in the Armed Forces. It's also known as
8 the DAC-IPAD. This public meeting is open.

9 HON. SMITH: Thank you, Mr. Sullivan,
10 and good afternoon, everyone. I'd like to
11 welcome the members of the DAC-IPAD and everyone
12 in attendance today to the first public meeting
13 of the Defense Advisory Committee on
14 Investigation -- make that 31st public meeting of
15 the Defense Advisory Committee on Investigation,
16 Prosecution, and Defense of Sexual Assault in the
17 Armed Forces or DAC-IPAD. Today's meeting will
18 be in-person, and video-conference via Zoom is also
19 available for members, presenters, and other
20 attendees.

21 The DAC-IPAD was created by the
22 Secretary of Defense in 2016 in accordance with

1 the National Defense Authorization Act for Fiscal
2 Year 2015, as amended, for a ten-year term. Our
3 mandate is to advise the Secretary of Defense on
4 the investigation, prosecution, and defense of
5 allegations of sexual assault and other sexual
6 misconduct involving members of the Armed Forces.

7 I'd like to begin by acknowledging
8 gratitude to the military justice sectors from
9 each of the Military Services' criminal law
10 divisions who generously serve as the DAC-IPAD
11 Service representatives and who have joined us
12 for the meeting today. Welcome and thank you.

13 To summarize our very full two-day
14 agenda, we will begin today's meeting with
15 representatives from the Joint Services Committee
16 who will brief our members on military justice
17 executive order 14103, recently signed by the
18 President implementing the new special trial
19 counsel program within the Services along with
20 other military justice rules and guidance.

21 Next, the designated lead special
22 trial counsel from the Army, Navy, and Marine

1 Corps, and Air Force, as well as the deputy chief
2 prosecutor from the Coast Guard, will appear
3 before the committee to provide an update and
4 answer questions on the programs and policies
5 being established for this joint new office
6 within the Military Services.

7 After a brief break, the final panel
8 of the day will be composed of generals, court-
9 martial convening authorities from each of the
10 Services and the Coast Guard, who will provide
11 their perspectives on court-martial member
12 selection processes and criteria.

13 Tomorrow will be devoted to internal
14 briefings and updates, first from committee
15 members who have attended courts-martial across
16 the country, on their observations from this
17 insightful experience.

18 That section will be followed by
19 briefings from the subcommittees and professional
20 staff discussing current projects, including
21 court-martial panel selection criteria, victim
22 access to information, the court-martial panel

1 composition study, the case adjudication data
2 collection project, and the biennial collateral
3 misconduct study.

4 Committee deliberations will follow
5 each of these meetings. Finally, we will receive
6 public comment from five individuals to conclude
7 the two-day meeting.

8 Now for a few housekeeping items, to
9 those joining by video, I ask that you please
10 mute your device's microphone when not speaking.
11 If any technical difficulties should occur with
12 the video, we will break for ten minutes, move to
13 a teleconference line, and send the dial-in
14 instructions via email. Today's meeting is being
15 recorded and transcribed, and the complete
16 written transcript will be posted on the DAC-IPAD
17 website.

18 Thank you for all being here today and
19 I will now turn the meeting over and offer the
20 committee's very warm welcome to our new DAC-IPAD
21 Director, Mr. Pete Yob, who has been on the job
22 less than two months now, but who is already off

1 to a fantastic start organizing our operations
2 and leading the great staff, most of whom he
3 already knows quite well because he previously
4 served as a staff attorney for the committee.

5 Mr. Yob retired with distinction in
6 2019 as a colonel in the U.S. Army JAG Corps, and
7 before coming to the DAC-IPAD as its director, he
8 served as the victim appellate trial expert with
9 the Marine Corps Victims' Legal Counsel program.
10 Pete, welcome, and we are so glad to have you on
11 board as the new leader of the team.

12 MR. YOB: Chair Smith, I'd like to
13 just thank you and everybody I've been working
14 with for the warm welcome. It's been incredible
15 to join you all and I'm really happy to be back
16 with this incredible, exceptional staff to
17 support the important work that the DAC-IPAD
18 does. I'm just thrilled to be back.

19 And to continue the welcome remarks,
20 I just want to point out that we have a new staff
21 attorney with us. That's Michael Libretto. I
22 think he's back there. Michael has joined us.

1 We're pleased to have him here. He's jumped
2 right in and just done tremendous work already in
3 the first couple of weeks that he's been here.

4 Michael comes from the Marine Corps
5 where he was a civilian working with their
6 defense organization, but prior to that, he had a
7 long and distinguished career in the Marine Corps
8 as a Marine Corps officer. He retired after --
9 his last stint was service on the bench as a
10 trial judge for the Marine Corps, so he brings a
11 lot of welcome experience and good judgment to
12 us. Michael, it's good to have you here with us
13 as well.

14 MR. LIBRETTO: Thanks for having me
15 here.

16 MR. YOB: And now as we turn to the
17 first session, I want to welcome Captain Anita
18 Scott from the U.S. Coast Guard and Colonel Chris
19 Kennebeck from the U.S. Army. They join us as
20 representatives of the Joint Service Committee
21 and are here to give you an update on Executive
22 Order 14103.

1 You all have a copy of their
2 impressive bios in your printed materials, so we
3 won't take any additional time for introductions
4 at this point, but I do want to thank them for
5 being here today and for their valuable time that
6 they're sharing with us.

7 This executive order has been a big
8 project for the Joint Service Committee, and I
9 understand they already are busy assembling the
10 2024 Manual for Courts-Martial which will be
11 printed next year.

12 Please note that in your materials at
13 Tab 3, we've given you a staff-prepared document
14 that summarizes the changes to the Manual for
15 Courts-Martial that came about in this new
16 executive order that we're going to talk about.
17 I want to give kudos to Eleanor Vuono from our
18 staff who really did a tremendous job in
19 preparing and providing that summary to you of
20 this executive order.

21 Chair Smith, at this time, we'd like
22 to turn the floor over to Captain Scott and

1 Colonel Kennebeck to tell us about the executive
2 order with a focus on the new rules for the
3 special trial counsel and the changes to
4 sentencing. Thank you again for being here.

5 CAPT SCOTT: Good afternoon, Madam
6 Chair, esteemed committee members. As mentioned,
7 I am Captain Anita Scott, the current chair of
8 the Joint Service Committee.

9 With me here today is Colonel Chris
10 Kennebeck from the Army, as well as Lieutenant
11 Colonel Julie Borchers also of the Army who is,
12 they are the voting and working group members
13 representing the Army. On my left is Commander
14 Anton DeStefano, the executive secretary of the
15 Joint Service Committee, as well as the Coast
16 Guard's working group lead.

17 So, with that, a quick outline of what
18 I intend to cover. I will briefly discuss the
19 roles and responsibilities of the Joint Service
20 Committee, provide, and then Colonel Kennebeck
21 and I will provide an overview of the EO along
22 with effective dates and key changes from each of

1 the annexes, as well as some further updates.

2 Just to orient everyone, the Joint
3 Service Committee mission is to ensure that the
4 Manual for Courts-Martial is current, relevant,
5 and workable. To do that, we are governed by the
6 DoDI 5500.17 which was established to carry out a
7 1984 executive order to ensure an annual review
8 of the Manual for Courts-Martial.

9 The Joint Service Committee is
10 comprised of judge advocates from all of the
11 Services with the exception of the Space Force,
12 which is represented by the Air Force. It also
13 includes advisors from DoD OGC, I'm looking at
14 him now, Mr. Sullivan, a Court of Appeals for the
15 Armed Forces, as well as the Joint Chiefs of
16 Staff. The Coast Guard assumed the JSC chair
17 role the first of this year and it's for a two-
18 year period.

19 The activities of the Joint Service
20 Committee include proposing changes, soliciting
21 public comments on proposed changes via the
22 Federal Register, and coordinating the

1 publication of the Manual for Courts-Martial.
2 Colonel.

3 COL KENNEBECK: All right, so I will
4 start with our executive order, which we are so
5 grateful that it was signed by the President in
6 July. We had hoped for a signing in February,
7 and then April, and then June, and July 28 it is.
8 This is a unique executive order in that it's,
9 number one, voluminous, and number two, broken
10 into three different annexes.

11 We're going to talk about each of the
12 three annexes in subsequent slides, but as an
13 overview, the first annex was effective
14 immediately, and I would say that's a more
15 traditional executive order. It is what the
16 Joint Service Committee is really all about --
17 complying with precedent changes, rule changes,
18 and making sure that we're consistent with
19 federal, you know, practice and rules of evidence
20 to the degree practicable.

21 That was effective immediately when
22 the President signed it on 28 July, and then the

1 next two annexes, Annex 2 is really related to
2 the Office of Special Trial Counsel and its
3 implementation and various other changes, and
4 then Annex 3 is really primarily focused on the
5 sentencing parameters and criteria. Both of
6 those annexes will be effective 28 December, and
7 for Annex 3, really the sentencing would only
8 apply to offenses committed on or after 28
9 December.

10 So, a little deeper dive into Annex
11 1, the first portion of the executive order which
12 was effective immediately, it had several
13 changes, but some of the key ones I'll mention
14 here, and, you know, I'm happy to talk more if
15 required, but R.C.M. 703(d) was updated to allow
16 for ex parte defense motion for expert
17 consultants. Really, the rule was reshaped to
18 allow defense not to have to divulge their theory
19 of the defense in order to procure a defense
20 expert, and that rule is modified accordingly.

21 R.C.M. 914 was amended to add a good
22 faith exception to the exclusionary rule when a

1 party could not disclose a statement because it
2 is lost. This is -- I think we record a lot of
3 interviews these days and sometimes that video
4 can either be destroyed or lost, and this would
5 be, so long as it's not purposeful and truly was
6 an accident, then there's an exception to allow
7 it.

8 R.C.M. 1115(a) amended to allow
9 appeal for any conviction of a special or general
10 court-martial, including any finding of guilt, so
11 broadening appellate rights for our accused.

12 And then Part 5 of the Manual for
13 Courts-Martial was amended to establish a
14 consistent burden of proof at non-judicial
15 punishment, and that burden of proof is
16 preponderance. Some of the Services had it
17 beyond a reasonable doubt self-imposed by the
18 Service Secretaries, so Part 5 has now made it
19 preponderance -- consistent across the Services.

20 CAPT SCOTT: So, Annex 2 is effective
21 on the same date as the effective date, one year
22 from the FY22 NDAA, but as written, it is

1 expected to cover offenses after 27 December of
2 2023, so hence 28 December. Annex 2 focuses
3 largely on the amendments required to implement
4 the special trial counsel or STC authorities, and
5 I will go through a few of the highlights now.

6 Under the umbrella of STC authorities,
7 R.C.M. 303(a) is a new provision providing rules
8 for the exercise of authority by special trial
9 counsel over the covered, known, and related
10 offenses. 306(a), another new provision, provides
11 rules for STCs' initial disposition of offenses.

12 R.C.M. 401(a) provides rules for STCs'
13 disposition of preferred charges and
14 specifications. R.C.M. 704(c)(2) amends, is
15 amended, enabling an STC designated by the
16 secretary concerned to grant immunity. And
17 lastly, I wanted to point out 705(a), which allows
18 for plea agreements between special trial counsel
19 and accused.

20 Another highlight of Annex 2 is it
21 discusses randomized panel selection. R.C.M.
22

1 503(a)(1) is amended to require convening
2 authorities to provide a list of detailed members
3 to the military judge to randomize.

4 R.C.M. 911(b) to be amended to
5 require the military judge to randomize the
6 detailed members, as well as determine how many
7 members are required to be present. R.C.M.
8 912(A)(a) was amended to require impanelment of
9 members following excusals and challenges in the
10 randomly assigned order.

11 And R.C.M. 912(a), subsection (b),
12 was amended to allow the military judge to direct
13 the presence of additional enlisted members and
14 to prioritize impanelment of the number of
15 enlisted members needed at that particular forum.

16 On the topic of referral
17 considerations, R.C.M. 601(d)(2) was amended to
18 require referral authorities to consider whether
19 the admissible evidence will probably be
20 sufficient to obtain and sustain a conviction.

21 I understand and recognize the
22 committee may have an interest in potential

1 updates to Appendix 2.1 given the shift in
2 language in R.C.M. 601(d)(2). While I am unable
3 to discuss the specifics, which are pre-
4 decisional, the JSC has reviewed the committee's
5 proposal and is very appreciative of the time and
6 effort put into it.

7 The appendix receives approval from
8 the Secretary of Defense per Article 33, and
9 should there be modifications, the submission and
10 review would follow the process outlined in the
11 DoDI that I discussed previously.

12 Within Annex 3, as mentioned earlier,
13 the effective date is December 2023, with the
14 sort of notable exception that the military
15 sentencing parameters and criteria are applicable
16 to offenses committed on or after that date. So,
17 generally speaking, the amendments contained
18 herein were what is required to implement the
19 sentencing reform.

20 A few highlights, under the umbrella
21 of victim rights during presentencing
22 proceedings, R.C.M. 1001(c)(3) was amended to

1 allow a victim to recommend a specific sentence in
2 non-capital cases.

3 R.C.M. 1001(c)(5) was amended to
4 remove the requirement for VLC to show good cause
5 to read a victim impact statement, as well as it
6 removes the requirement for a written proffer of
7 the victim impact statement contents to the trial
8 counsel or defense counsel.

9 The sentencing parameters and criteria
10 themselves were required under Section 539E of the
11 FY22 NDAA and amended Article 56 to require the
12 military judge to sentence an accused where the
13 accused is found guilty at a general or special
14 court for an offense occurring on or after 27
15 December of '23.

16 In sentencing the accused, the
17 military judge is required to consider the
18 applicable sentencing parameter or criteria.
19 Sentencing parameters identify a delineated range
20 for a typical violation of the offense.

21 If the military judge sentences the
22 accused outside the parameter's delineated range,

1 the military judge must provide a written
2 statement in the record of the factual basis for
3 the sentence outside the range. Sentencing
4 criteria identify defense-specific factors for
5 the military judge to consider, but do not
6 establish a delineated range.

7 Also in that section, the Military
8 Sentencing Parameters and Criteria Board was
9 created. The voting members include the chief
10 trial judges of the Army, Air Force, Navy, Marine
11 Corps, and Coast Guard, and directed, the NDAA
12 rather directed the Military Sentencing
13 Parameters and Criteria Board to develop the
14 sentencing parameters and criteria and submit
15 them through the Secretary of Defense to the
16 President for approval.

17 Appendix 12B contains six offense
18 categories for the parameters. Each category
19 contains a delineated range of months of
20 confinement, with offense Category 1 including
21 the lowest range of confinement and offense
22 Category 6 including confinement for life with

1 eligibility for parole.

2 Appendix 12C identifies the offense
3 category applicable to each of more than 250
4 offenses sentenced by the parameters, and
5 Appendix 12D includes the criteria applicable to
6 18 offenses. The sentence by criteria primarily
7 include military-specific offenses or offenses
8 occurring in time of war.

9 COL KENNEBECK: So, if you go to the
10 Joint Service Committee website today, you'll
11 find the "Blue Manual" in PDF version available.
12 That's the 2023, what we're calling the 2023
13 Manual for Courts-Martial. It will have a short
14 lifespan of July 28 to December 27 this year, so
15 we will not print this manual because of its
16 short lifespan. Instead, we're focusing our
17 efforts in printing the next manual, which would
18 be Annex 2 and 3 of the executive order and
19 effective 28 December.

20 Ideally, we'll have it on the street
21 28 December, but, you know, let's just say by the
22 beginning of the new year, we'll have these

1 manuals in our practitioners' hands so that they
2 are ready to apply all of the new rules and these
3 voluminous changes that we've just discussed with
4 you very briefly, so available on the street by
5 January '24 is what we're saying.

6 MS. BASHFORD: It's probably just that
7 I'm not reading this correctly, but I understand
8 705 says special trial counsel and the accused
9 can come to a plea agreement with a specified
10 sentence that must be accepted, shall be
11 accepted. 910 though says the court can reject
12 the plea agreement, and 1002 says they can reject
13 when the sentence is plainly unreasonable. So,
14 is it binding or is it non-binding, or is it
15 sometimes binding and sometimes not?

16 CAPT SCOTT: Our resident expert --
17 (Simultaneous speaking.)

18 CAPT SCOTT: -- Colonel Kennebeck, we
19 have discussed this issue ad nauseam, and I will
20 turn it over to Colonel Borchers.

21 COL KENNEBECK: Yeah, go ahead.

22 LTC BORCHERS: Well, I think your last

1 statement, ma'am, was exactly right. Sometimes
2 they accept it and sometimes it will be found not
3 to be binding. I think that's the -- you've
4 correctly, I guess, correlated all of the
5 appropriate rules, but it would be kind of on the
6 facts and circumstances of that case and that
7 agreement and then the military judge's
8 determination whether the specified sentence is
9 plainly unreasonable or not.

10 MS. BASHFORD: Do you have any sense
11 of -- I mean, does this really bind the court or
12 are the exceptions wide enough to allow them to
13 basically use their own judgment?

14 LTC BORCHERS: I will say only within
15 the Army, I mean, this is a topic of discussion,
16 but the Military Justice Act of 2016 and whether
17 a plea agreement or a specific sentence -- I
18 understand adding parameters and criteria now to
19 this has just been added, but, you know, we have
20 -- the guidance that we have provided here has
21 focused on terms of a plea agreement that would
22 limit, for example, introduction of otherwise

1 admissible evidence or limit a full and fair
2 sentencing proceeding rather than --

3 Those types of terms are things that
4 would make the agreement unreasonable as opposed
5 to a specific sentence at a specific point in
6 time. I don't know that that fully answers your
7 question, but that's sort of based on the case
8 law, the way that we've analyzed the issue.

9 MS. BASHFORD: I just know in my
10 civilian practice, if I came in front of a judge
11 and said we've worked out an agreement and you
12 have to accept it, I'd be laughed at pretty hard.

13 COL KENNEBECK: I think judges will
14 still have that authority. I think really this
15 is -- there were provisions that have not been
16 practiced upon, so I think it's yet to be seen
17 how this will play out.

18 I've practiced in federal court too
19 and I know exactly what you're talking about.
20 Judges don't like to be told what the deals are
21 and to be treated as though their hands are tied,

22

1 so I think there's probably goodness in allowing
2 a judge to not agree to the plea. I think we
3 have a hard to follow scenario.

4 MS. BASHFORD: Thank you.

5 (Simultaneous speaking.)

6 MS. BASHFORD: From the good faith
7 exception, because things can get lost, they get
8 lost all of the time with no bad intent, but
9 sometimes things get lost less frequently when
10 there's really bad consequences to losing them.
11 People are more careful about keeping them in
12 place.

13 And I'm not at all suggesting that
14 people would be trying to subvert this. It's
15 just, if carelessness doesn't have quite the same
16 effect, do you think -- it would just be
17 interesting, I think, if you see these good faith
18 exceptions increasing when there's not a big
19 exclusion.

20 COL KENNEBECK: Well, obviously
21 there's going to be more to follow as well
22 because it's a new rule. I have to say I don't

1 think judges like the idea of the government not
2 having the evidence they're supposed to have, and
3 if your excuses sound weak when compared to, you
4 know, the impact on the accused.

5 In my practice, I think what I've seen
6 recently in the last 15 years, as our MCIOs began
7 to use video recordings of testimony, it's the
8 digital safekeeping of that video that has been
9 in peril a few times, and the alternative might
10 be to bring the agent in who took the statement,
11 but, you know, obviously, there's peril there as
12 well, so not ideal.

13 I hear what you're saying about the
14 policy and loosening up the measures to keep the
15 government, you know, doing its job properly, but
16 I don't think -- I think actually as our
17 technology increases, the likelihood and the, you
18 know, recurrence of losing that evidence has
19 decreased over time, so I don't think this is
20 going to be a gap in the door that's exploited.

21 HON. SMITH: What do you think the
22 most impactful change is, or even, you know, what

1 do you think is going to present the biggest
2 implementation issue for you, and is there
3 something that you would like -- this is a
4 compound question -- something that you would
5 like for the DAC-IPAD to look at where we could
6 be of service? Perhaps you don't want us to look
7 at anything, but --

8 (Laughter.)

9 CAPT SCOTT: Madam Chair, I think if
10 I were a practitioner right about now, or still a
11 practitioner operating in a courtroom, I would
12 say can we please let us learn the new system
13 before we try and change it further? They are
14 anxiously awaiting the go-live date at the end of
15 the year and everybody is working tremendously
16 hard to, you know, be ready for go-live, and when
17 that happens, we will have more to say on where
18 the gaps and seams are.

19 COL KENNEBECK: I think in that vein,
20 we do have new sentencing parameters. That's a
21 pretty big change and, you know, we have a
22 committee set up to take a look at that

1 regularly. That is, in my opinion, exciting and
2 big, almost as big as special trial counsel in
3 that entire period of time.

4 But I think I agree that helping us
5 mind the margins was probably where there would
6 be most useful so that we can stop the bigger
7 changes for a while and manage the system that we
8 have in place.

9 As I'm going around the world teaching
10 people what the Office of Special Trial Counsel
11 is supposed to look like and what the authorities
12 are, and what the judge impacts are, I can see
13 angst among my compatriots in the number of
14 changes afoot and just the amount of, you know,
15 distinction between practice in March of '23 to
16 March of '24.

17 CAPT SCOTT: Yeah, it's to the point
18 where even our seasoned practitioners are, well,
19 you know, I think, are at risk of relying on
20 their experience without double-checking every
21 move they make because of the volume of changes
22 to the rules.

1 COL KENNEBECK: And there could be
2 goodness in that, right? We should think about
3 what they're doing. I mean, we're telling judges
4 when you enter into a proceeding, you should have
5 a discussion about which rules apply based on the
6 effective date of these executive orders and, you
7 know, making that a part of the practice,
8 changing the very script and sort of the basic
9 how we proceed in a court-martial to ensure that
10 we're all on the same page. There's probably
11 goodness in some of that, but, you know, change
12 or die. So, changes come, but we'd like to get
13 closer to maybe a little less in the near term.

14 HON. SMITH: So, looking at the idea
15 of having a binding plea or asking the judge to
16 go along with a binding plea, what role will
17 victims have in that kind of decision making? Is
18 there still going -- because if it's a binding
19 plea, obviously, even if the victim says
20 something at sentencing, the sentencing is
21 already determined. The sentence is already
22 determined. So, what --

1 (Off-microphone comments.)

2 HON. SMITH: Would you mute your mic?
3 What role will victims have and do you envision
4 that that's going to create or kind of make it
5 more difficult for counsel to handle those issues
6 or that issue?

7 COL KENNEBECK: I think that's, first
8 of all, a great question for the lead special
9 trial counsels, but I can tell you in my practice
10 already, without any of these changes, if a
11 victim opposed a plea agreement, that is almost
12 dispositive in practice today.

13 You know, obviously not in every case,
14 but it has a very heavy sway on the deciders. I
15 imagine that would continue to be true when you
16 have special trial counsel making those
17 decisions, and there's certainly room for that
18 level of sway in the way the rules were crafted.

19 MS. TOKASH: This is Meghan Tokash.
20 Thank you so much for your time and for
21 presenting to us today. I just wanted to get
22 your points of view on the PBS story that came

1 out in July of this year regarding the executive
2 order.

3 I don't know if you've had the
4 opportunity to hear it. I'll just paraphrase
5 kind of the three concerns that the former chief
6 prosecutor of the Air Force and I think it was
7 Professor VanLandingham raised, and then the
8 White House came back with a kind of
9 counterpoint.

10 So, the initial concerns were about
11 commander influence still in convening courts in
12 ordering a case into pretrial confinement, and
13 then this national security exception. If these
14 sound familiar, do you have any comment on these
15 alleged concerns? Are they concerns? Where do
16 you see these going perhaps? Thank you.

17 CAPT SCOTT: I think there is a
18 difference between are there -- I mean, we'd have
19 to break them down and bifurcate those into the
20 various questions, but where there's a perception
21 problem, it's still a problem. I mean, I think
22 the entire executive order speaks to that.

1 Whether or not there's an actual
2 problem on each of those issues is a harder
3 conversation, but at a minimum, there certainly
4 are perception concerns and considerations that
5 have driven considerable change, and taking a
6 look at each of those issues individually with,
7 you know, separating out what is a perception
8 problem and what does the, you know, what
9 evidence do we have that, you know, changes need
10 to be made outside of addressing the perception
11 problems.

12 COL KENNEBECK: I think that convening
13 authorities will have standing panels, sort of a
14 list of selectees, and that is the convening
15 order that the special trial counsel will use, so
16 there's not a whole lot of interaction with the
17 convening authority.

18 When it's time to refer a case, it
19 will be referred, and there will be a standing
20 panel to which it is referred, and the panels
21 will be randomized thereafter. So, I don't think
22 there is an issue there.

1 I also don't think that for the
2 special trial counsel who are in the field and
3 executing day to day, where they're willing to
4 have conversations with commanders, I do not know
5 one special trial counsel who is going to be
6 hampered by one millisecond about what a
7 commander thinks about the prosecution of a
8 covered offense, because you have the evidence or
9 you don't.

10 It doesn't matter what the commander
11 wants, and I think that's already enough in the
12 culture. You know, I think that is more true
13 when the decider is the attorney and the decider
14 is not the commander, which I think effectively
15 has been done with these changes.

16 I think the notion of the national
17 security exception is kind of a red herring
18 issue. It's going to go straight to the
19 secretary, so the secretary is going to have to
20 be personally involved in a decision affected the
21 prosecution of a covered offense.

22 So, I just -- you know, the command

1 doesn't really get a vote in that either. You're
2 already talking to the secretary side, not the
3 green suit side of any Service. I just don't see
4 that as an issue.

5 While commanders have the authority to
6 put a Service Member in pretrial confinement, I
7 think that's probably a necessary tool,
8 especially in places where good order and
9 discipline matter a lot, in environments where
10 you're in austere environments far away, but the
11 command is required to notify the special trial
12 counsel immediately because theoretically that
13 could start your clock.

14 So, yeah, I think commanders do need
15 to have that authority. I don't think it will be
16 abused because the special trial counsel will be
17 made aware and will react accordingly to manage
18 the potential prosecution of any offense
19 thereafter.

20 CAPT SCOTT: So, to double down on
21 Colonel Kennebeck's point about PTC, you know,
22 the rules need to apply not just in peace time

1 but in war time, and so the retention of the
2 ability of a commander to effectuate an
3 appropriate placement of a member in pretrial
4 confinement remains necessary.

5 Additionally, I think you're going to
6 talk to the GCMCAs, the convening authorities,
7 later today, and having spoken with the Coast
8 Guard representative at length yesterday, I mean,
9 I think that's a worthwhile conversation about
10 exactly how they create these standing panels and
11 how, in reading the materials prepared by the
12 committee, there was a reference up front to the
13 rules which require the convening order to be
14 made contemporaneous, and that's not verbatim,
15 but with the charges, but how in practice, the
16 standing panels that Colonel Kennebeck referred
17 to operate differently.

18 You're not choosing a panel for a
19 specific accused or a specific, you know, offense
20 or set of offenses. That's, as a practical
21 matter, not how it works, and so how they go
22 about doing, performing that particular function,

1 I think, is critical because it hits at that, you
2 know, perception problem versus, you know, the
3 Article 25 criteria versus pure randomization.

4 MS. TOKASH: Thank you. Your
5 perspectives are really helpful on that point.

6 MR. CASSARA: So, as somebody that
7 tried cases a long, long time ago, I'm wondering
8 if you can just explain to me in fairly simple
9 terms how the preferral and referral process will
10 be different?

11 In other words, I'm used to CID
12 investigates, they brief a trial counsel, trial
13 counsel briefs his or her SJA, the SJA goes to
14 the convening authority, the convening authority
15 says yea or nay, if they say yea, here is the
16 panel it's going to be referred to.

17 CAPT SCOTT: Respectfully, sir, we'd
18 like to punt that to the speakers right after us.

19 MR. CASSARA: Okay.

20 CAPT SCOTT: Because the --

21 MR. CASSARA: Well, I figured it was
22 one of the two, so, okay, okay.

1 CAPT SCOTT: We certainly have had
2 those conversations within the committee.
3 However, the SOPs are wrapped at this point, you
4 know, the business rules for how they intend to
5 effectuate exactly what you just asked, so I
6 think --

7 MR. CASSARA: Okay, perfect. Thank
8 you.

9 COL KENNEBECK: There is a document on
10 the JSC website.

11 MR. CASSARA: Oh, that makes it much
12 easier.

13 (Laughter.)

14 COL KENNEBECK: In your spare time, if
15 you want to look at the charts, this would be
16 helpful to you. They were created by somebody
17 local. So, anyway, that's another tool for you.

18 CAPT SCOTT: Thank you very much.

19 MR. CASSARA: Thanks, folks.

20 MR. YOB: If I could just also thank
21 the JSC panel for being here and today's
22 presentation. Let's just sort of take a break in

1 place while the OSTC personnel come up. If
2 anyone needs a break, they can take a quick break
3 as well while we get set up.

4 (Whereupon, the above-entitled matter
5 went off the record at 1:12 p.m. and resumed at
6 1:19 p.m.)

7 MS. VUONO: Okay, wonderful, I think
8 we're going to get started. And before we
9 introduce our next panel, we are all going to
10 practice projecting our voices today. We had a
11 little bit of an issue with the mics. They're in
12 the ceiling, not on your tables as we
13 traditionally have them.

14 So, for the last panel, we were unable
15 to hear some of the conversation, so if some of
16 the questions were asked and you want to discuss
17 them again with our new panel, that's perfectly
18 appropriate. Not everyone may have heard the
19 responses. We're working on the sound a little
20 bit, but just we'll all speak loudly and clearly.

21 But we are very pleased to welcome the
22 lead special trial counsels from the Army, the

1 Air Force, the Navy, Marine Corps, and the deputy
2 chief prosecutor for the Coast Guard. The
3 purpose of this next session is to discuss the
4 operation of the offices of the special trial
5 counsel.

6 We have received all of the Services'
7 standard operating procedures or SOP manuals.
8 These SOPs inform the new prosecutors and their
9 support staff on best practices, policies, and
10 guidance for assessing, investigating,
11 prosecuting, or declining to prosecute covered,
12 related, and known offenses.

13 I know the DAC-IPAD members and the
14 staff very much appreciate your attendance today.
15 We know how much thoughtful work has gone into
16 building your teams. The goal today is to speak
17 with you on specific topics of interest to the
18 DAC-IPAD. We may not focus so much on the
19 minutiae of the SOPs themselves.

20 All of the speakers have bios that are
21 in your read-ahead materials, so I will turn it
22 over to each speaker to briefly introduce

1 themselves beginning with our lead special trial
2 counsel from the Army, General Wells, and we'll
3 follow in the order everyone is seated, and then
4 we'll leave the remainder of the time open for
5 your questions. So, thank you, and welcome.

6 BG WELLS: Great, so I'm Brigadier
7 General Warren Wells and the lead special trial
8 counsel for the Army.

9 RDML STEPHENS: Good afternoon, I'm
10 Jon Stephens, lead special trial counsel for the
11 Navy. So, thanks for the opportunity to come and
12 speak with you today. I'm looking forward to it.

13 BGen WOODARD: Good afternoon, I'm
14 Brigadier General Scott Woodard. Kevin is the
15 first name, long story there, but, and I'm the
16 lead special trial counsel for the Marine Corps.
17 It's great to be here with you today.

18 BRIG GEN BROWN: Good afternoon,
19 everyone. Brigadier General Chris Brown, lead
20 special trial counsel for the Air Force, also
21 always happy to have a dialogue with you all, so
22 thank you. CDR GULLO: Good afternoon. Commander

1 Ben Gullo. I serve as the deputy chief
2 prosecutor. On behalf of Admiral Dwyer, I'm
3 delighted to be here this afternoon. Thank you.

4 (Off-microphone comments.)

5 MR. CASSARA: So, I don't know if you
6 all were in the room when I asked my question.
7 I've been trying cases for well over 30 years.

8 PARTICIPANT: Speak up a little.

9 MR. CASSARA: I'm sorry. It's a very
10 different world from CID investigates, I bring a
11 charge then to my staff judge advocate, and my
12 staff judge advocate brings it into the convening
13 authority, and the convening authority says yes
14 or no.

15 I'm wondering if you can just give us
16 a brief summary of how this system, how you
17 envision this system will work under the OSTC now
18 that the convening authority is not part of the
19 referral process and now that we have
20 randomization of panels? Because I'm a little
21 bit confused about standing panels and
22 randomization, how you can have randomization of

1 something that is a standing panel.

2 So, I'm wondering if somebody can just
3 sort of walk me through the basic steps of what's
4 going to happen now as opposed to ten, 20, 30
5 years ago when an allegation was brought up to a
6 trial counsel by a CID agent, or OSI agent, or
7 whatever, of an offense that happens? What
8 happened? What mechanics are put into place?

9 BG WELLS: Well, I'll start. I think
10 we'll pretty much align across systems, but there
11 may be some differences. I think the first piece
12 is that we expect our special trial counsel and a
13 trial counsel from the Office of Staff Judge
14 Advocates, the command's legal advisor as well, to
15 be involved with CID, or OSI, or NCIS from the
16 very beginning, so during the investigative stage.
17 So, it's not merely, you know, plop and then oh,
18 look at this.

19 We expect the attorneys to be involved
20 right from the beginning so that as the case
21 develops, the special trial counsel are involved,
22 providing advice, and that at the time, you know,

1 they're able to make a determination on whether
2 there's enough evidence and whether, what the
3 charges should be, if it falls within a covered
4 offense or if it's known or related, and so
5 they'll craft that charge sheet not necessarily
6 in a vacuum.

7 We expect communication during this
8 time to be going to the command to keep them
9 updated, and that the anticipated recommendation
10 to either preferred charges that go forward
11 toward a court-martial or to return the
12 investigation to the command, that that decision
13 will be made in conjunction with, you know,
14 talking with the victim, with looking certainly
15 at the evidence, and being able to talk with the
16 command up to that point. Does that help?

17 MR. CASSARA: It helps. You said an
18 anticipated recommendation from the command? I
19 mean, is the command still going to make a
20 recommendation as to the disposition of charges?

21 BGen WOODARD: Under the Statute, we
22 are obligated statutorily to seek the input from

1 not only the victim, but also the commander of
2 the accused, as well as the commander of the
3 victim if the victim is part of the military.
4 So, yes, our special trial counsel will be
5 seeking, again, non-binding input from the
6 commanders with regard to those.

7 MR. CASSARA: But that trial counsel
8 is nowhere in the stovepipe rating chain of that
9 convening authority?

10 BGen WOODARD: That is correct, sir.
11 As you look up here, those who are special trial
12 counsel, they work -- we are the avenue through
13 which those ratings, the fitness reports come
14 through.

15 MR. CASSARA: And then once -- are we
16 still using the old charge sheets? I mean, once
17 a charge sheet is signed off --

18 BGen WOODARD: It is the DD form, yes,
19 sir.

20 MR. CASSARA: Okay, I always hated
21 those things, but anyway. So, once the special
22 trial counsel says I am referring this case, I

1 mean, it's literally their decision that says I
2 refer this case to a GCM, can you now explain to
3 me the difference between or the interplay
4 between a standing panel and a randomization of a
5 standing panel?

6 Brig Gen BROWN: I should probably
7 take that since I think I'm the only one that's
8 not had standing panels. So, we would actually
9 need to have the court convene first.

10 So, we'd hand down a decision memo
11 that basically says we're going to take this to
12 court and request that the convening authority
13 convene the court. It's a binding
14 recommendation, but we would do that with command
15 input, and we'd also leverage the convening
16 authority's SJA to make sure the convening
17 authority was well aware of what's going on.

18 And then in terms of randomization,
19 what that would mean is randomly picking members
20 that are qualified under Article 25. Right now,
21 the convening authority is basically handed a
22 list of X number of members, we'll say 25 for a

1 general court-martial, picks, initials those, and
2 convenes the court. In a randomization process,
3 somehow they would randomly get those members
4 from that particular installation to serve on the
5 base and then the convening authority would
6 approve that.

7 So, because we don't have standing
8 panels as opposed to the other Services, and I
9 certainly don't want to talk for them,
10 randomization for us just means that there is
11 some function to grab qualified members as
12 opposed to just handing the convening authority a
13 list to initial off again.

14 All of those folks are chosen because
15 they meet the qualifications of Article 25.
16 They're not nominating them. They're not saying
17 they meet those qualifications.

18 We use member data sheets to make
19 sure, but when you're talking about
20 randomization, and again, I hope the other
21 Services speak as well, that would mean there's
22 some function where you're just handed a panel

1 basically picked from the qualified members and
2 put in the whatever tool you're using to pick out
3 those folks, and again, I hope the other Services
4 chime in.

5 RDML STEPHENS: Yes, sir. So, on the
6 Navy's side, we don't technically have standing
7 panels either. What we have -- so, kind of using
8 your experience from the past, we do just as
9 General Wells said. We're going to be working
10 with the investigation all the way up through it,
11 and then in the Navy, traditionally what happens
12 is the SJAs work with the convening authorities
13 for GCMS.

14 In the Navy, it's typically our
15 regional commanders who convene the courts-
16 martial, and they would, at the beginning of
17 every year, they would draft out the new
18 convening order 1-A for 2020, so let's say this
19 January 2024, and then the convening authorities
20 traditionally refer to that convening order.
21 That is typically amended because throughout the
22 year maybe we have to find new members or

1 whatever.

2 And so, the only difference here would
3 be we're still going to need them to do their
4 convening order with the advice of their SJA.
5 It's just that we will sign the referral block on
6 the charge sheet as opposed to the convening
7 authority previously was signing the referral
8 signature block, and that would be the change.

9 And as to the randomization piece,
10 everybody is working very hard on trying to
11 figure out within each system how that is going
12 to work, and so we haven't quite gotten there
13 yet, but the thought is the same thing. We still
14 have to comply with Article 25, so there has to
15 be a way to make sure that Article 25 is
16 followed, and then maybe, you know, we have a
17 certain amount of names and now they're
18 randomized as General Brown said, and then those
19 are how we select the members.

20 And so, we're working through some of
21 that right now, but from the process that you
22 knew, it really should be very similar all the

1 way up until the point that we are signing the
2 referral block vice the commander. We're going
3 to be using the same convening orders.

4 The challenge there then becomes we
5 have to work with the commanders to ensure the
6 convening orders are in place, and before we,
7 excuse me, decide to even prefer charges, we need
8 to be advising them that that's where we're going
9 to go to ensure that they're ready to support,
10 because once we prefer charges, right, we start
11 the clocks depending on different types of
12 things.

13 And so, we don't want to prefer a
14 charge and then come knocking on somebody's door
15 without any knowledge and say hey, we'd like you
16 to refer, and they're not ready and they have no
17 idea what we're talking about, so it's incumbent
18 upon us to be advising them throughout the
19 process. So, we're hoping that it's very similar
20 to the process that you're familiar with, sir.

21 MR. CASSARA: Thank you. Please, sir.

22 CDR GULLO: I'm supposed to follow the

1 Navy, so this is my cue here. So, on the
2 randomization piece, I don't have anything
3 further to add. I think just to go back to the
4 system that you know versus the system now, at
5 least for the Coast Guard and the Office of the
6 Chief Prosecutor, in the old system, or quite
7 frankly, the system that we have right now, we
8 have practically 11 field offices that advise
9 convening authorities, and so they're drafting
10 those charge sheets, again, that you dislike.

11 In the new system effective 28
12 December, all of those charge sheets, it's the
13 intent of the Office of the Chief Prosecutor,
14 whether it's a covered offense or a non-covered
15 offense, that our office handles all of those
16 courts-martial. So, practically, our office is
17 preferring on those charge sheets and then
18 working in close coordination with those field
19 offices to have charges served on the accused,
20 and then the process continues from there.

21 MS. LONG: Can I just ask a follow-up
22 question to that? You mentioned that the special

1 trial counsel will now be involved with the CID.
2 Do you have any ideas on how that might impact
3 the timing of investigations?

4 BGen WOODARD: I can -- I'll address
5 that because we're kind of out in front of that
6 right now. We already have Marine Corps judge
7 advocates who are embedded in our field offices
8 within NCIS. Just to -- the sooner they can get
9 engaged, the better.

10 I will have, in Okinawa, Pendleton,
11 and at Camp Lejeune, special trial counsel who
12 will be located in those field offices at those
13 locations because that's where the vast majority
14 of our covered offense investigations come
15 through.

16 But at least on the West Coast, as we
17 took a look at the timing of that, and having the
18 counsel who, as the victim -- usually it takes
19 about four days from the allegation notification
20 to NCIS getting the victim in for an interview,
21 that victim is meeting with a prosecutor the day
22 that they are sitting down with NCIS.

1 The trial counsel is watching and the
2 special trial counsel will be watching those
3 interviews as they take place. They are working
4 on and preparing subpoenas and warrants for
5 electronic media, as you might expect, for, you
6 know, to get the emails, get the texts, those
7 types of things, and get the preservation letters
8 out.

9 We've seen a precipitous drop in the
10 amount of time it took from initial notification
11 to getting that case work to a decision point
12 currently for the commander of the 06, the
13 commander of the SAIDA, the sexual assault
14 initial disposition authority, by months, not by
15 days or weeks, but by months.

16 So, there is some -- we have that
17 experience already in the Marine Corps, and it
18 was a good news story and made the rounds at
19 least in the Department of the Navy and I think
20 even an ex-general from the Department of the
21 Navy out to the other secretaries.

22 So, we have seen it. We've seen the

1 value that it brings, especially getting those
2 prosecutors in there to help the agents focus to
3 ensure that the techniques that are being used
4 are not overboard because that's not good for any
5 of us. Does that answer your question, ma'am?

6 MS. LONG: Yeah, thank you very much.

7 HON. SMITH: How many STCs does each
8 Service have?

9 BG WELLS: So, for the Army, we've
10 got 65. Now, 58 are out in the field and spread
11 amongst 28 field offices. We've also got a
12 complex split team as well that they can go
13 anywhere, six of those are reservists, assistant
14 U.S. attorneys and assistant district attorneys
15 in various places, but moved the vast majority of
16 them back.

17 HON. SMITH: So, and I should have
18 asked this also, once you give us the number, do
19 you think that you're going to have a sufficient
20 number of STCs to handle the caseload, and if
21 not, what would the plan of action be from there?

22 BG WELLS: So, I hope so. We did

1 our analysis. The working group that worked on
2 this did their analysis on looking at the number
3 of investigations, and we tried to place those,
4 and a portion of them crossed within those 28
5 field offices and places that had, of course, the
6 most investigations historically.

7 I think with the addition of sexual
8 harassment, we are going to be going back,
9 because when we first were designing this, it was
10 before Congress added, I guess, what, three other
11 covered offenses to the initial 11, including
12 sexual harassment, which is a whole new piece.
13 And while many of those will not end up in court-
14 martial, they're going to have to be looked at,
15 and so we are looking to perhaps grow resources
16 to cover that eventuality.

17 RDML STEPHENS: So, yes, ma'am. We're
18 going to have 47 officers spread across ten
19 offices around the world. Of those 20, excuse
20 me, 47, 24 have been certified as STCs and
21 they're basically filling all of the 0-4
22 positions and above around, so kind of the senior

1 leadership litigation billets throughout our
2 offices.

3 We will have -- we expect when we have
4 our next course next year, that number, once we
5 kind of reach a steady state, will be around 30
6 throughout the process. I do think that, similar
7 to the generals, that was enough, and we have
8 followed the same metrics-based analysis for, you
9 know, kind of what the numbers were. With sexual
10 harassment, we do anticipate perhaps a little bit
11 bigger number.

12 The other kind of set of cases that
13 I'm a little concerned about is just domestic
14 violence generally. I mean, our numbers, as I
15 know the panel is probably aware, a lot of the --
16 traditionally those cases hadn't gone to courts-
17 martial.

18 A lot of them were handled maybe
19 through, in the Navy, FAP or something that the
20 prosecutors didn't see, and so they weren't
21 reflected in the numbers of investigations that,
22 you know, when we apportioned out people.

1 So, we've been -- the good news to
2 that is we've all been talking with not only the
3 Department of the Navy, but the DoD, the forces'
4 MCIO offices. They've been great working with us
5 in trying to kind of identify and wrap our heads
6 around all of this, how we're going to identify
7 all of these cases, and so we may need more
8 people.

9 I know I can speak for the Marine
10 Corps too. The JAG and SJA commandant have been
11 very dedicated to making sure that we have the
12 adequate resources based on the Secretary's
13 guidance to ensure that we are being trained and
14 equipped properly.

15 So, if we do come back and say that
16 we'll need more, I'm confident that they will
17 help us provide it. It's just that right now,
18 you can't go say I don't know. We don't have the
19 metrics to say that yet, but I do think that --
20 and not even maybe this next year.

21 The good news about the sexual
22 harassment being a year off is that we can

1 analyze, it will give us this year to see what
2 the variable is just with respect to domestic
3 violence and to see what that impact may or may
4 not be, and then we can also figure out from
5 there what the impact, if any, the sexual
6 harassment numbers will be.

7 BGEN WOODARD: Yes, ma'am. From the
8 Marine Corps -- so we have 33 Special Trial
9 Counsel billets in the Marine Corps. You're
10 looking at one of those 33. With regard to those
11 in place, I have -- we have one that we'll be
12 filling in the next FY's rotation.

13 We had an officer who had to drop out
14 of the -- out of our organization, and then we
15 also have one who is stuck in the -- any of you
16 who have military experience, experiencing OCONUS
17 medical screening, not only for you but your
18 families and apparently your pets as well -- is
19 having a little bit of trouble getting the
20 OCONUS.

21 And then I currently have my deputy
22 officer at my headquarters who is also a Special

1 Trial Counsel and certified as an STC. He had,
2 prior to coming into the OSTC, had done a lot of
3 training and planning and to assist with a MARSOC
4 mission in the Philippines.

5 And then just out of a wanting to
6 ensure that that officer, when I receive him
7 back, is the most well-rounded officer and having
8 the opportunity to deal with commanders in
9 person, up close, I thought that was something
10 that would be very important. So he will be
11 coming to our organization in December, before
12 the FOC.

13 Understanding that the sexual
14 harassment piece -- and this was something that
15 came from the SJA to me -- SJA to the Commandant
16 to me, not me asking the SJA to the Commandant,
17 but Major General Bligh, when the sexual
18 harassment was passed, he came to me and asked
19 whether or not next year it would be good to have
20 at least four more judge advocates within the
21 Office of Special Trial Counsel. Whether or not
22 they are certified as Special Trial Counsel is

1 yet to be determined. And I did not say no.

2 So FY24, our numbers will go from 33
3 to 37. So, as Admiral Stephens said, we have
4 been looking at this from -- and we all have,
5 from every which way we can. We don't know what
6 we don't know yet. We looked at the metrics. We
7 are beginning a transition phase from our Trial
8 Service Office to the Office of Special Trial
9 Counsel with regard to getting involved in cases.

10 So that's kind of given us a little
11 better idea of what the workload is. And I know
12 the Navy is a little bit more expansive on their
13 transition than the Marine Corps is. But that's
14 helping to give us an idea of what the workload
15 is, and we all have a pretty good understanding
16 of what the right caseload for our counsels are.
17 And we'll be certainly going back to our Services
18 if the indication comes that we don't have the
19 resources that we need.

20 But at least within the Department of
21 the Navy, those resources have come already
22 without even having to ask to receive those

1 resources.

2 BRIG GEN BROWN: So we'll end up with
3 82 personnel in the Air Force Office of Special
4 Trial Counsel. That includes JAGs, paralegals,
5 and a couple of civilians.

6 The way our billets are rolling out,
7 we currently have 42, and then the billets come
8 each Fiscal Year after that, getting us to FOC
9 end state. This gives us the opportunity to work
10 some of the issues my fellow LSTCs have just been
11 talking about.

12 Certainly, we looked at the five-year
13 look back of covered offenses, and we feel like
14 we have the right amount of personnel to take
15 care of those. But again, when sexual harassment
16 comes -- and I also share the same concerns about
17 DV -- there's a potential that we may need to ask
18 for some more billets. But I'm very comfortable
19 -- our TJAG has really made sure we have every
20 single resource we need.

21 We are well integrated already. We
22 have what's called an Investigation Prosecution

1 Support Team, very similar to what General
2 Woodard was talking about, where we have an STC
3 embedded, although distance-wise, they're not
4 physically there with law enforcement and local
5 trial counsel during the investigative phase of
6 the case.

7 So they're working evidentiary issues.
8 They're advising law enforcement. They're
9 helping to train and mentor young trial counsel
10 along. And we're currently exercising those and
11 providing recommendations on cases, even though
12 we don't have authority.

13 So we're getting an idea on the
14 workload. But until we see 2025 come and see
15 what happens with that, I think we don't know.
16 But again, I'm very confident that if we needed
17 to go back and say we need more than the 82
18 personnel we've been allotted -- again, including
19 paralegals and civilians -- we would be able to
20 solve that problem.

21 CDR GULLO: How many, where, and
22 sufficient number -- so OCP right now, the Office

1 of the Chief Prosecutor, has a total of 30
2 personnel. Of that, 19 are attorneys. And we've
3 identified seven to serve as Special Trial
4 Counsel.

5 Where are they? They are located in
6 Alameda, California; Norfolk, Virginia; and
7 Charleston, South Carolina. Our intent is to
8 phase out Norfolk, Virginia and consolidate most
9 of our office in Charleston, South Carolina. So
10 we expect a footprint there that handles the bulk
11 of the cases, and then we'll keep a footprint on
12 Alameda. Geography, 2,400 miles. We need to
13 keep a West Coast presence.

14 In terms of sufficient number, we do
15 believe we have a sufficient number right now.
16 We also looked at the historical data of number
17 of investigations, number of courts-martial, and
18 number of sexual harassment
19 allegations/investigations per year.

20 So I mentioned that number of 30. We
21 are expected to grow to 62 by the time we get to
22 2026. And within that, we will grow not just

1 attorneys, but also, we're going to in-house our
2 own Special Agent, a forensic psychologist. We
3 are going to civilianize paralegal positions and
4 court reporters.

5 So what you know of at a district
6 attorney's office or a U.S. attorney's office,
7 that is our at least notional intent moving
8 forward, is to have that in-house resources. And
9 I don't think I need to tell this group, if you
10 have that professionalized, civilianized
11 infrastructure to support your blue-suiters that
12 are in those three- to four-year tours and have
13 that continuity, we believe right now we have the
14 right number of personnel.

15 MS. TOKASH: This is Meghan Tokash.
16 I just wanted to follow up for each of the
17 Services to tell us a little bit about the
18 demographics, including experience, of the
19 workforce that you have selected to serve as
20 Special Trial Counsel.

21 And then my follow-on question is,
22 also, with respect to large criminal

1 jurisdictions, for example, Fort Hood, if --

2 (Simultaneous speaking.)

3 CDR GULLO: Fort Cavazos now.

4 MS. TOKASH: Oh. That's right. Thank
5 you. Fort Cavasoz.

6 For example, a criminal jurisdiction
7 as large as that, if there are only two or three
8 Special Trial Counsel, how is that or will that
9 work practically within each of the Services?

10 BG WELLS: So I'll start with large
11 jurisdictions. Yes, I think Fort Cavazos, we
12 have three attorneys assigned to the field
13 office. Additionally, we've divided all of our
14 field offices and organized them under eight
15 circuits.

16 And so the circuit -- the Chief
17 Special Trial Counsel for that circuit will be
18 there and have an additional swing Special Trial
19 Counsel that will be available throughout the
20 circuit but will stay at Fort Cavazos -- so for a
21 total of five, ultimately, there, but three in
22 the field office.

1 And they will handle all of the cases
2 that come forward. There are multiple GCMCAs
3 that are there at Fort Cavazos, and they will
4 work with all of those. I think each one will --
5 they'll probably have a primary intake, but the
6 field office OIC will adjust how the caseload
7 works between them.

8 You asked about -- you know, one of
9 the things about the Army is we have prided
10 ourselves on being deployable and doing justice
11 when we deploy. This organization probably
12 wasn't built -- it was more built for a static
13 installation Army. And so, this summer, this
14 coming summer, we're going to be certifying an
15 additional 20 reserve component officers as
16 Special Trial Counsel to give us the flexibility.

17 When you have units at Fort Cavazos
18 who, for example, go to Poland or elsewhere on
19 the frontiers of where conflicts are, we'll be
20 able to either send folks, Special Trial Counsel,
21 from Fort Cavazos forth or send those certified
22

1 reserves, or a mixture, and be able to back them.
2 I think that -- hopefully, that addresses your
3 large installations.

4 With regard to experience -- I
5 apologize. I don't have a matrix, but I can get
6 the organization -- we've got a matrix that shows
7 all the experience, both civilian and military
8 justice experience, of each of our counsel and
9 various courses they've gone to.

10 Among our Chief Circuit Counsel, which
11 are generally Lieutenant Colonels, they've all
12 had multiple years of corporate, many of them
13 both trial and defense side. Some of them have
14 taught at U.S. Army Judge Advocate General's
15 Legal Center and School on the faculty. Others
16 have had some civilian time either during the
17 break in the Army or prior to the Army.

18 So we feel like the Judge Advocate
19 General has picked the best and the brightest and
20 looked very closely at the experience in the
21 assignment process.

22 RDML STEPHENS: With respect to the

1 large offices, we kind of divvy it up with the
2 number of investigations and then have
3 proportionately placed people where we have the
4 big -- so, for example, Norfolk is our biggest
5 office. 40 percent, roughly, of the Navy is in
6 Norfolk. So roughly 40 percent of our trial
7 assets will be there.

8 So, for example, in Norfolk, we're
9 going to have one 0-6, one 0-5, and four 0-4s,
10 all of whom are certified -- well, one of whom is
11 not yet certified, but she will be. But the
12 remainder are certified. And then we will also
13 have five Lieutenants who work there who are not
14 certified. And so that kind of -- it kind of goes
15 -- and it'll be there. So Norfolk's our biggest,
16 the most people.

17 San Diego and Florida are -- so they
18 basically have one fewer person in each place.
19 In the beginning, I mentioned that we had ten
20 offices. So we have some offices that are very
21 small, so, for example, Naples.

22 We have one Lieutenant in Naples, and

1 she's there -- she is certified. She's primarily
2 there to ensure -- because our number of ports
3 and investigations in Naples are traditionally
4 very low, but she can be there to be hands-on
5 liaising with NCIS, liaising with victims,
6 liaising with everyone there.

7 And so that's how we've kind of
8 proportioned the people out. With respect to
9 experience, we have leveraged our litigation
10 track. I know that you're familiar with that.
11 So we have -- in the Navy, you cannot be
12 certified unless you've already been selected as
13 a member of that litigation track.

14 And so that means that there is a
15 baseline. And so, to be certified, generally
16 speaking, you need to have had at least five
17 contested courts-martial. So that would be
18 somebody who's filling, for lack of a better
19 term, a core STC type billet.

20 We have -- similar to the Army, we're
21 calling them Chief Special Trial Counsels at our
22 six biggest offices, all of whom are O-5s.

1 They're all at least Specialists, too, which is
2 the midlevel in our track. And then we have
3 myself and the Deputy and then an O-6 on each
4 coast to have requisite kind of experience on
5 both coasts.

6 And all four of us are experts. All
7 four of us have been trial judges, and one of us
8 has been an appellate judge as well. So that's
9 how we're kind of apportioning across the
10 enterprise.

11 And, in addition to the 24 who we
12 have certified, we had another 13 officers who
13 attended our initial certification course. And
14 so, to the extent that when they have enough
15 cases to be qualified and get into the litigation
16 track, we then would expect to certify them as
17 well.

18 We will have brand-new lawyers -- not
19 brand new, at least second-tour attorneys. One
20 of the things that we all came up with to
21 normalize across the baseline and to ensure that
22 we have the requisite experience is we said that

1 nobody with less than two years of -- or, excuse
2 me, litigation experience would appear in front
3 of the -- get in the well, so to speak.

4 And so we will have some attorneys who
5 are going to work with us for a year and help
6 support the investigations, support referral
7 decisions, watch how we do business, and then
8 once they've finished one year with us, that will
9 be two years of litigation experience.

10 Then they would be able to second-
11 chair cases. We wouldn't certify them, but they
12 could then -- because we need to grow our next
13 couple years of attorneys. And so that's how
14 we've kind of envisioned doing it.

15 BGEN WOODARD: So I'm going to take
16 the demographics and experience piece first. I
17 think we've talked in the past, I think when I
18 was a Deputy Director, or it may have been
19 General Bligh when he was here.

20 The Marine Corps -- our demographics
21 are not good across the Marine Corps. Our legal
22 community is very much a reflection of the Marine

1 Corps. However, in the Office of Special Trial
2 Counsel, at least right at one-third of our
3 officer personnel and more than 50 percent of our
4 enlisted support personnel are from minority
5 categories, so just to address the demographics.

6 Their experience -- until recently,
7 the Marine Corps did not have a track. We still
8 don't have a litigation track. But in accordance
9 with the IRC's recommendation with regard to
10 establishing a career that engaged in billets,
11 the Marine Corps has followed through on that
12 task from the IRC.

13 And we have established four
14 litigation, additional MOS's for our military
15 justice folks. They're the 4450, 4451, 4452, and
16 4453. That's a litigator, must have at least 24
17 months of litigation experience; a senior
18 litigator with 48 months; a supervisory litigator
19 with 72 months; and an expert litigator with 96
20 months, which fairly closely tracks the Navy's
21 track system.

22 I just returned from Colorado this

1 past week, where we had the first screening of all
2 judge advocates in the Marine Corps with regard to
3 the litigation experience. And I tell you we were
4 surprised, once you did the study pencil work, the
5 amount of litigation experience that even some of
6 our operational-type lawyers had.

7 But within my organization, within the
8 OSTC, all are at least -- have at least 24
9 months' experience. The vast majority, even the
10 vast majority of our Captains, are approaching 48
11 months of litigation experience. My team leads,
12 with the exception of one -- that would be my O-
13 4s -- were the installation leads, although one
14 of those -- and there's nine of those. All but
15 one of them would meet the supervisory litigation
16 additional MOS, and by December, he will.

17 And then all of my O-5 regionals, as
18 well as my Deputy and I -- we're all at the
19 expert, well beyond the expert -- I mean, we have
20 some who had over 200 months in litigation. My
21 Deputy -- many of you know Colonel Glen Hines
22 (phonetic) -- over 200 months of litigation

1 experience as a prosecutor and as a military
2 judge. So that is our experience. That is our
3 demographics.

4 How are we handling our large
5 jurisdictions? Our large jurisdictions have both
6 a -- and think Camp Lejeune, Camp Pendleton, and
7 Okinawa, those three for the Marine Corps. We
8 have co-located at those three installations. We
9 have our installation Office of Special Trial
10 Counsel that is headed up by that Major, and we
11 also have a regional office that is headed up by
12 that O-5 Lieutenant Colonel.

13 So, instead of just the team lead with
14 their typically three Special Trial Counsel who
15 are working directly for them, you also have that
16 O-5 more experienced litigator there to add. But
17 we knew going into this that the math does not
18 work for us with regard to 33 Special Trial
19 Counsel handling this mission.

20 So what we have done is we are looking
21 to our Trial Service Office to provide support to
22 us when and where we need that support. And

1 that's as simple as an ask from me to the Chief
2 Trial Counsel for that support. If the answer
3 is, we can't support you because we've got to do
4 X, Y, and Z, that's an indicator to me that I
5 need to go back to the SJA and say, I need more
6 assets and resources.

7 So that's how we're going to do it.
8 We mentioned the case screening teams. I will
9 have one at those three locations in the --
10 embedded in NCIS, but the Trial Service Office
11 has at those locations a minimum of three, some
12 four, and then they also have them at some other
13 -- the satellite locations, like at Miramar, like
14 at Hawaii.

15 And those Trial Service, straight
16 judge advocate prosecutors, will essentially be
17 performing an OSTC function. So General Bligh
18 and I have already had a discussion. It's like I
19 know where I'm going to be looking if I need
20 additional assets and resources. I hope that the
21 relationship -- and the relationships have been
22 great -- continues to be great. And we don't

1 have to go there, but that's how we intend to
2 address those -- the number.

3 And again, already have next steps why
4 another identified for O-3 Judge Advocates to
5 come into the OSTC.

6 MS. TOKASH: Thank you.

7 BRIG GEN BROWN: So we are organized
8 along MAJCOM and FLDCOM lines. So, prior to our
9 stand-up and during our IOC, we reorganized from
10 geographic locations across the United States and
11 OCONUS to MAJCOM and FLDCOM on the line so that we
12 can better service commands and allow us to take
13 care of the larger area.

14 So take, for instance, District 1.
15 I'll just use that as an example. That has Air
16 Combat Command. That has AFSOC -- generally two
17 of our very busy commands in terms of military
18 justice business. So, when we end up getting all
19 of our billets, that will be the largest OSTC
20 office. They're going to have 16 personnel total.

21
22 The lead District Trial Counsel is an

1 O-5. All of my District Trial Counsel, whether
2 they're at the four districts here in the CONUS
3 or two overseas districts, the Pacific and Europe
4 are O-5s. All but one have graduated SJAs, which
5 is great because it really helps them integrate
6 with the Wing-level SJAs.

7 They've also either been circuit
8 counsel back when we were geographic, or some of
9 them have actually been on the defense side,
10 working the defense side -- so really super
11 experienced. But the way we handle it and the
12 way we think we can make sure that we're
13 providing the best support and making the best
14 decision and integrating the best not only with
15 the Wing legal office personnel across these
16 commands, but also with OSI, is by having the
17 same folks that they're always working with.

18 So they'll always be working with
19 those folks. Those will always be the people
20 that will be trying those cases. They'll be the
21 folks that are advising or helping to advise OSI.
22 And I mentioned this when we were talking about

1 OSIs, but I also have two OSI agents on my staff,
2 one who works policy, one who works operations.
3 So that also gives us a window into helping to
4 inform investigations at a much earlier level.

5 Then, in terms of experience, well, we
6 don't call them tracks. We have levels of
7 military justice experience to meet the IRC
8 recommendations. And really, I have been given
9 some of our most experienced litigators. I don't
10 have any non-certified STCs right now among my
11 personnel.

12 Now, eventually, as we roll out to our
13 82 folks that we get in the upcoming fiscal years,
14 potentially I will have some folks that aren't
15 certified that will be doing the same thing.
16 We'll be growing the next generation of Special
17 Trial Counsel.

18 But for right now, they're all
19 certified STCs, meaning they had the requisite
20 level. A lot of them are former ADCs. I have
21 some former circuit defense counsel. I have a
22 couple of special victims or victims counsel. So

1 we've tried to take some of the most experienced
2 folks, and we send them through a very rigorous
3 qual course. This is their second qual course.
4 This year, we certified 21.

5 And then they also go through an
6 interview process where they're interviewed by
7 three sitting STCs before we recommend to the
8 Judge Advocate General that he certify them. So
9 we're very happy with the experience level.

10 Again, some of the challenge will be -- like the
11 other folks have talked about, is growing the
12 next set of Special Trial Counsel.

13 And we'll do that by integrating with
14 the Wing legal office from the get-go, whether
15 it's during the investigation and helping to
16 integrate there and helping to train and mentor
17 there. We'll also have Wing-level personnel
18 sitting sometimes second, sometimes third chair
19 on a covered offense so that they can get that
20 experience under the supervision of one of our
21 Special Trial Counsel.

22 And then, of course, as we talked

1 about, as we grow out, we'll have some billets
2 that are not certified folks but are doing case
3 triage and things like that, probably for a year.
4 Then, once they get the requisite experience to
5 be certified, we'll look at certifying them and
6 making them Special Trial Counsel.

7 CDR GULLO: So, with regards to the
8 demographics question, I think the Panel has hit
9 on it, but it's a twofold question, right? So I
10 think you're scratching a little bit at what we
11 look like. And I would say, at least on behalf
12 of the Coast Guard, I echo General Woodard's
13 statements to this Panel in terms of trying to
14 get better.

15 Our recruiting folks are going to
16 different places and actually increasing their
17 recruiting efforts to find people that may not
18 look necessarily like this panel. So I think,
19 from a male/female perspective, we're doing very
20 well, but I think that we could be doing better
21 in other categories. And that's something that
22 the Coast Guard is very attuned to.

1 With regards to the litigation skill
2 side of it, as I mentioned before, OCP handles
3 both covered, non-covered, and all courts-
4 martial. That means that we're going to get
5 newbies in addition to our Special Trial Counsel.
6 So those are two very different individuals,
7 right?

8 In my conversations with detailers for
9 the new folks that are working under close
10 supervision of folks that have been in the shop,
11 my one criteria is that they're interested in
12 litigation. This is really hard work. This is
13 terrible work. And I don't want anybody that
14 comes to the office that says, I didn't know what
15 this was, or, I was watching television; I
16 thought it was cool, but then I got here and I'm
17 actually touching files that I never, ever want
18 to touch again in my life.

19 So that is the one criteria I am
20 personally using for bringing on the newer folks,
21 the first-tour judge advocates. As far as
22 seasoned attorneys go, we're going to look very

1 similar to what the Navy described earlier.
2 Depending on where you are in rank is where we
3 welcome you to serve as Special Trial Counsel.

4 So, if you are a Lieutenant or a
5 Lieutenant Commander, you might need to meet
6 certain time components, number of cases that
7 you've tried, investigations you worked on,
8 trainings, all those criteria of education,
9 experience, training, and temperament. Those are
10 the four in the Statute, and we will, as you grow
11 in rank, require you to do more. So, at my rank
12 -- I'm a Commander, but I'm filling a Captain
13 billet. I am expected to have a certain number
14 of contested cases.

15 The other thing that the Coast Guard
16 is sensitive to is we want to bring in people not
17 just who are straight out of law school; we would
18 like to bring in people that have been an
19 assistant district attorney or a public defender
20 for a number of years. So we welcome that
21 civilian experience, too.

22 I had the opportunity to work in a big

1 district attorney's office, as well as a U.S.
2 attorney's office. Those skills in the courtroom
3 are translatable to the military justice system.
4 So we are factoring in criteria that don't just
5 take into account the number of times you've set
6 foot in a military courtroom, but in a courtroom
7 at large.

8 As far as the other question for
9 larger installations, look, this is the beautiful
10 part about being the Coast Guard. We have some
11 larger places. But we are confident that, as I
12 described our footprint to you -- that we can
13 home-port essentially most of our folks in
14 Charleston, keep a smaller footprint in Alameda,
15 California, and be able to service all of our
16 larger installations.

17 And that goes back to the Statute,
18 right? When we have a covered offense or we
19 think we have a covered offense, we need to be
20 notified promptly. So we are setting up our
21 business rules that if you're a local legal
22 office in New Orleans and you may have a covered

1 offense or you think you may, at least our
2 business rules as we've currently drafted them
3 is, within a day, you're going to notify the
4 office of the chief prosecutor so that we can
5 assign a Special Trial Counsel to that case.

6 MS. TOKASH: Thank you so much.

7 DR. SPOHN: Thank you very much for
8 your presentations. You mentioned in your
9 presentation today the new rules for the courts-
10 martial indicate that the Commander for the
11 accused will have the opportunity to provide non-
12 binding input regarding the case disposition.

13 I'm just curious about how that will
14 actually work in practice. Will the STC solicit
15 input from the Commander, or will the Commander
16 provide that input in cases in which he or she
17 thinks that it's appropriate? What is the
18 process for providing this non-binding input?

19 BG WELLS: So we see that as prior
20 to referral. We will solicit, and we'll give a
21 suspense, essentially. What we won't, though --
22 we don't anticipate holding a case forever, there

1 are speedy trial rights. But we'll solicit that
2 information.

3 As I mentioned, we anticipate that for
4 every case that goes to trial, there will be a
5 Special Trial Counsel, but there will also be a
6 trial counsel from the office of the Staff Judge
7 Advocate of that installation. And so that person
8 should have great relationships with all the
9 Commanders of that organization and to be able to
10 -- you know, we anticipate they will know that
11 that process is coming, that it won't be a
12 surprise.

13 I'll tell you one of our concerns:
14 there are -- you know, we -- to the expedited
15 transfer process, Congress has mandated that we
16 get the victim's command. But sometimes with the
17 expedited transfer process, some victims don't
18 want their command to know. And so that is one of
19 our concerns, is what do you have when you have a
20 victim who doesn't want -- they want a fresh
21 start; they don't want their command to know? And
22 the law says we have to get the commands now.

1 What we've looked at is -- we've
2 certainly looked at the brigade at the O-6 level,
3 even with an expedited transfer, it may not be
4 known at lower-level commands, but at the O-6, it
5 should. And we can start there and work that.
6 But that is one of our concerns, is Congress has
7 said to get the victims -- and I think in most
8 cases, the victim is happy for their command.
9 They'll -- the commands in charge are making sure
10 and taking care of that Soldier. But that is one
11 potential for us.

12 RDML STEPHENS: For us, I think it's
13 kind of -- it depends, like all lawyers say,
14 right? So I anticipate that some Commanders will
15 be very free-flowing with their thoughts on what
16 the case will be. But I do think that we will
17 try to make sure that we're dealing with their
18 SJAs, for the most part.

19 Certainly, we will be supportive and
20 willing to speak to their Commanders. I think it
21 could be at varying stages, too. So General
22 Wells mentioned prior to referral. I think,

1 often, too, it could happen prior to preferral,
2 right? So we'll just be reaching out; this is
3 our notice.

4 I think there are a couple points
5 where we would notify the Commander our intent.
6 The first one would be, is this maybe a covered
7 offense or not? If we say that it's not, we will
8 provide notice through their SJA for that. And
9 then, once we make a decision, we're going to
10 have a notification of disposition decision that
11 we provide to the Commander. Before we do that,
12 we will solicit his or her opinion as to what
13 they should do.

14 And so, if we haven't received it,
15 it'll be incumbent upon us through their SJA to
16 go get the input. And if they -- some of our
17 Commanders at the smaller levels don't have SJAs,
18 and so in those instances, I think we would reach
19 out to them directly. But that would be
20 incumbent upon our prosecutors and Special Trial
21 Counsel to be kind of leveraging these
22 relationships with people on the waterfront to

1 make sure that they have good relationships with
2 the Commanders.

3 BGEN WOODARD: Yes, ma'am. Very
4 similar in the Marine Corps. I mean, it's --
5 there's nothing that brings frustration and ill
6 will or division as much as just not keeping
7 everybody informed.

8 Again, we're dealing -- even though we
9 are making decisions on whether or not a case is
10 a covered offense or whether or not there's going
11 to be charges preferred or referred or plea
12 agreements reached in those cases, we're still
13 talking about a Commander's Marine, Sailor,
14 whether it's as the subject -- always, it's going
15 to be at least the subject, but also potentially
16 the subject and the victim.

17 So keeping those Commanders informed
18 so that they have an avenue to provide input into
19 the decisions that are being made, even if they
20 are non-binding inputs -- we need everyone to
21 trust the system and to have faith in the system,
22 that the system is working to achieve a just

1 outcome.

2 So, much like my counterparts up here,
3 we will have predetermined points where we are
4 going to be going to the Commander, you know, the
5 notification of whether it's covered or not
6 covered. Why? Because if it's not a covered
7 offense, it's coming back to the Commander to
8 handle. So they're not surprised about that.

9 The initial -- I call it our initial
10 disposition decision. Are we going to defer it,
11 or are we looking at preferring charges? Getting
12 the Commander's input on that. Once we get -- if
13 we're holding on to the case, the preferral part,
14 notify the Commander that this is what we have
15 preferred, and we're headed -- you know, because
16 in most of our cases, at least in the sexual
17 misconduct arena, minus maybe the sexual
18 harassment, but in a sexual assault arena, we're
19 going back to that Commander for the appointment
20 of a preliminary hearing officer.

21 So having -- again, keeping that
22 Commander informed, typically through the SJA

1 referral -- again, once we refer the charges,
2 we've just signed a check on that Commander's
3 checkbook for his people and his money to support
4 that potential trial.

5 The plea agreements -- that as well,
6 obtaining that input, and also, final
7 adjudication or final resolution of that offense,
8 making sure the Commander knows, okay, this is
9 what happened, and this is either who I'm getting
10 back or who I'm not getting back.

11 And so I think that is one of the
12 important roles in the -- not just because it's
13 statutorily required but because the Commander
14 needs to know what's happening with their Service
15 Member as well.

16 BRIG GEN BROWN: So we are very
17 similar. What we hope is that the Commander,
18 through the Wing-level SJA's office, will have
19 the same site picture on a case that we do.
20 That's why it's so important that our folks and
21 the Wing legal professionals are integrated very
22 early during that investigation, so there's no
surprises as we

1 get towards disposition.

2 And first, we're going to determine,
3 is it a covered offense? If not, we're going to
4 -- it's immediately going to go back to command.
5 And then, if it is a covered offense, obviously,
6 we must exert authority over that. And then,
7 depending on the offense and the seriousness will
8 depend on the investigation and what has to
9 happen and how quickly we can make a disposition
10 decision.

11 But if we all have the same site
12 picture on the case, we're going to do that
13 through the Commander's SJA because that's that
14 Commander's SJA's role. And certainly, we're
15 there to answer any questions. We're happy to go
16 alongside and answer any granular questions if
17 it's a serious case.

18 But before we make that disposition
19 decision, we're going to reach out and we're
20 going to get that input. And again, I think if
21 we all are involved and integrated properly, it
22 shouldn't be any surprise with a disposition

1 decision -- or I think we'll get -- generally,
2 we'll be able to be in agreement on that.

3 And again, we'll get that input, and
4 then we'll make a decision. And then, again,
5 throughout the process, our preferral process,
6 our District Counsel will be signing the charge
7 sheet. And then we'll have the legal office
8 facilitate preferral through that Commander.

9 So, all throughout the case, and then
10 when we get to referral, we already talked about
11 that. We'll give a decision memorandum and ask
12 for the Court to be convened so we can sign the
13 referral referring it to that Court -- again, all
14 the way, keeping that Commander in the loop and
15 getting input as appropriate through their --
16 whatever echelon of legal offices servicing that
17 Commander. So we intend to be totally
18 collaborative and totally integrated with them.

19 CDR GULLO: So OCP is a litigation
20 job. And that's our mission. And R.C.M. 105
21 says that the SJAs are responsible for advising
22 their convening authorities on military justice.

1 So OCP certainly has no intent to usurp the law
2 and the traditional role of the SJAs.

3 Like everybody else has stated, we'll
4 certainly hit major milestones, whether it be
5 deciding that this is a covered offense that
6 we're taking exclusive authority over for charges
7 -- we'll be getting that input because -- not
8 just because the Statute requires it but because
9 it's just good practice.

10 And so, in addition to the major
11 milestones, we've set up, at least for our --
12 we've set up an O-5 Commander pre-litigation
13 department head. And she's responsible for
14 holding monthly calls with Staff Judge Advocates
15 and as-needed phone calls with Staff Judge
16 Advocates.

17 So it's not just maybe that the case
18 is about to get preferred or referred. It also
19 might be, hey, our federal agents just found a
20 new piece of evidence, or a victim is now
21 uncooperative. So that allows us to provide more
22 information to Staff Judge Advocates to continue

1 to best inform convening authorities.

2 HON. SMITH: Thank you. This is
3 really a two-part question. In the very
4 voluminous procedures that each Service sent to
5 us for the Special Trial Counsel, the Navy had
6 one that says, before charging an offense
7 requiring subsequent notification, the prosecutor
8 must be confident that the offense was
9 sufficiently severe that civilian jurisdiction
10 would likely pursue such an offense.

11 So my question is, do the other
12 Services have anything similar? And two, many
13 times when we have brought up what appears on its
14 face to be a very low conviction rate and court-
15 martial for sexual offenses, we've been told
16 that's because the military brings cases that
17 civilians wouldn't.

18 So I guess, first, do you all have
19 something similar? I believe it's on page 21 of
20 the Navy's SOPs. But I guess, how are you going
21 to determine that? And if nobody else has that,
22 would that mean that that the Navy has a

1 different acceptance policy than anybody else
2 because -- at least for the sex crimes?

3 BGEN WOODARD: I think all of us -- we
4 all have pretty much the same charging standard.
5 And that is sufficient admissible evidence to
6 obtain and sustain a verdict. That's the
7 charging standard that we're all looking at and
8 operating towards. We all have maybe a little
9 tweak in the language, but that, I think, is --
10 across the board, that's what we are all looking
11 at.

12 So I guess the Navy's -- what you're
13 talking about there, that provision and our
14 charging standards and our charging
15 considerations are in Chapter 5 of our -- of the
16 Marine Corps' standard operating procedures. And
17 it is. You know, that is the U.S. Attorney --
18 Department of Justice's standard in their
19 criminal -- in their justice manual.

20 So, if it's good enough for our top-
21 line federal prosecution offices, it's certainly
22 something we should strongly consider. It's also

1 -- although, to a point, I think it's R.C.M. 6-
2 something, but -- 601 to 2.1, Appendix 2.1.
3 Where previously it was like, Commanders, this is
4 here and you can consider it, or you should
5 consider it, now it's embedded into the R.C.M.

6 That's what we're really doing is
7 we're looking -- we are making, first and
8 foremost, evidence-based decisions in our --
9 whether or not we're going to be charging the
10 case.

11 MS. BASHFORD: But doesn't this seem to
12 add an extra little tweak to it that if your
13 civilian counterparts -- it's not the type of
14 case your civilian counterparts would bring when
15 sex offender registration is required, then would
16 -- if you're not confident they would bring it
17 and you would, that seems to be different than
18 evidence-based. That seems to be, what would
19 somebody else do and not --

20 RDML STEPHENS: And so the extent --
21 so we're not trying to create confusion. I think
22 the civilian counterparts -- and when we were

1 working through this, we've been liaising with
2 the U.S. attorney and trying to just get some of
3 their expertise with how they do it.

4 And I think to General Woodard's
5 point, they would say also that their decisions
6 are evidence-based. Right? And so, to the
7 extent this was just to clarify that we are
8 really trying to make an evidence-based decision
9 so the civilians would see -- and I don't plan on
10 consulting the civilians on every case, but so
11 the question is just to focus on borrowing from
12 their manual, but the primary focus is being
13 evidenced-based and not considering other
14 potential influences that don't involve an
15 evidence look at the case.

16 And so that's what we were trying to
17 convey in our SOP, is that we really are driving,
18 much like the civilians, to be an evidence-based
19 review of the case and adopting the prosecution
20 standard that's pretty much based on the federal
21 standard and had since been in a general order.
22 It's highlighted in R.C.M. 601. It's now been

1 pulled up to say something similar in that, which
2 is Commanders must consider whether it's probably
3 likely that the trial will obtain and sustain a
4 conviction.

5 BG WELLS: In the Army, we do not
6 have a provision exactly like that. However, we
7 point our Counsel heavily to consider the non-
8 binding disposition guidance, one of which is the
9 nature, seriousness, and circumstances of the
10 offense, and another is the extent of harm caused
11 to any victim of the offense.

12 And so those probably would be
13 analogous. And that's experience and judgement.

14 BRIG GEN BROWN: We also do not have
15 that provision. And again, I think it goes right
16 back to what General Wells said. We're going to
17 use the referral standard, obviously sufficient
18 to obtain and sustain a conviction, and then
19 we're going to look at Appendix 2.1. And a lot
20 of that -- things that General Wells just cited
21 -- tells us whether it's in the interest of
22 justice to take that particular charge to court.
And that's

1 what we're looking at.

2 So we won't specifically talk about
3 whether or not they're a sexual offender
4 registration, but all those things should be in
5 the back of anyone's mind when we're talking
6 about the interests of justice and taking a
7 charge forward. So -- but we will consider
8 Appendix 2.1, and we will use the referral
9 standard.

10 CDR GULLO: Same.

11 (Laughter.)

12 CDR GULLO: We just had our annual
13 off-site and we sat everybody down and hit them
14 over the head a couple of times which would
15 probably be sufficient to obtain and sustain a
16 conviction. And what we're obviously trying to
17 remove is the concept of let's charge and hope
18 for the best later. Let's get it right, and get
19 it right up front. And as my colleagues
20 proffered, 2.1 is definitely a resource for us
21 as well as like was said, DOJ prosecution
22 principles are helpful. There is ADA ethical
standards out there that touch on this.

1 guess, to manage the OSTCs that are coming and to
2 be able to help guide them, make these decisions
3 so that you're determining sufficiency of
4 evidence and you're not doing it with an eye
5 towards maybe taking a mix or things that may not
6 be understood when you don't have experience.

7 BG WELLS: So I'm going to talk
8 organizational. At least one of the things here
9 to become certified is a certain amount. So
10 right now the only, who within four weeks of
11 certification training, two of which -- I think
12 some members of this organization came to week
13 one. We followed over to week two. Right now at
14 the Advocacy Center at Fort Belvoir we're having
15 -- we're at week four right now. Last week was
16 three. So we bifurcated that.

17 But we're also requiring as --
18 training guidance that I put out for the Army is
19 each special trial counsel will attend a
20 prosecuting domestic violence course. It's a
21 week-long course. Military Institute for
22 Prosecuting Sexual Violence Course, which is

1 really looking at sexual assault. And the third
2 course is a child abuse course.

3 So in each one of those we bring in
4 experts, sometimes doctors, nurse practitioners,
5 attorneys who specialize in those cases, and
6 members of our own team who have worked in that
7 area. And we look at victim perspectives. We
8 look at counterintuitive behavior. We look at
9 all of those things. So that's three weeks of
10 training.

11 We're going to apply that within the
12 first two years. Because, of course four weeks
13 plus -- I mean, at some point you've got to be in
14 the courtroom, too. But within the first two
15 years they're supposed to hit all of those. Years
16 ago, when I was younger I would get some
17 analogous cases. I attended all three of those
18 courses in the spring. And so we'll run those
19 courses once or twice or year.

20 And then I also am requiring somebody
21 get some type of non-DoD training course as well.
22 And so organizationally I think that helps,

1 because you're right, you could have plenty of
2 litigation experience doing bad checks, although
3 I don't know how many people do checks anymore,
4 but --

5 (Laughter.)

6 BG WELLS: Some drug offenses. But
7 you're right, there's a special care for special
8 victim cases. And so that's what those courses
9 are trying to do.

10 And we also in the selection process
11 -- we don't have an interview process, but we
12 have a networking during the selection process.
13 We have input. And those who've done special
14 victim cases before are looking out for those who
15 have the temperament, the empathy to be able to
16 do those types of cases.

17 RDML STEPHENS: So in any case the
18 training is very important, right? And so we too
19 have a -- we had our certification course that we
20 put everybody through which we combined
21 components of those. We had kind of three:
22 domestic violence, sexual assault, and child sex

1 cases, and we combined those for the training.
2 And we had great experts who came in, some of
3 whom are on this panel, right? So we had people
4 who'd come in and speak to us and had spoken to
5 us throughout.

6 We also, through the collective of
7 our organizations, have some really good
8 civilians who have come in and will be helping us
9 kind of guide how we do these things. And so I
10 think -- and so me personally one of things is
11 I've just been around the litigation for a while
12 and so I've seen how some of the programs have
13 started.

14 So when the VLC Program in the Navy
15 began in 2012, it started late November and then
16 by the time I took over as the lead prosecutor in
17 Norfolk it was just trying to work with the VLCs
18 and figure out how we can do things better to
19 help them. So I've had an opportunity to get to
20 know people that have done a lot of these cases,
21 so if I don't know -- and there's lots of things
22 I don't know, right? So what we're trying -- I
know who to go ask.

1 And so to -- and that's how we're --
2 now that we're coming on line, we have some good
3 training ideas collectively to train together and
4 bring in civilian experts and work with them for
5 -- to ensure that -- people who maybe have a bit
6 more experience on certain things. But we do see
7 unfortunately a lot of sexual misconduct cases.
8 And so all I've done in the Navy is litigation,
9 whether it's from prosecuting, defending, or
10 being on the bench. So from -- I've been able to
11 see a lot of that, but I do think it's the
12 relationships that we forged throughout and with
13 -- not just within the Services, but in the
14 civilian sector that kind of helps dictate where
15 we go moving forward.

16 BGEN WOODARD: And I'll just say ditto
17 to the training piece. The Navy, Marine Corps,
18 Coast Guard, we're kind of side by side on -- in
19 the sea Services and in all our training. And we
20 also -- sometimes maybe the Army thinks we're a
21 little bit parasitic at times, but we also love
22 to plug in with them and the Air Force where we

1 can.

2 But training is important, and not
3 just training of the blocking and tackling kind
4 of stuff, but it's -- and that was one of the
5 things that we -- at least I experienced through
6 our certification training was it was so good to
7 move beyond the 101. This is a document. This
8 is how you get the document into evidence -- to
9 actually challenging the participants -- to
10 challenging some of their norms.

11 Because I know we brought into our --
12 the Marine Corps OSTC some dyed-in-the-wool
13 defense counsel. Why? Because they're great
14 litigators. And trying -- and having to convince
15 them that this is a good system, this is a fair
16 system. And you can see over the first couple of
17 days those defense counsel who started day one
18 like this -- by day three, day four, by the time
19 our guest lecturers got there, they're the ones
20 lobbing the questions you would think a more
21 experienced long-time prosecutor would be
22 lobbing. So training, absolutely.

1 Those in my -- in the leadership
2 positions in the Office of Special Trial Counsel,
3 they've seen these cases, not just litigation,
4 but these types of cases from all different
5 views, whether it's as defense counsel, whether
6 it's as a VLC, whether it is as a prosecutor,
7 whether it's a trial judge, or appellate judge.

8 So in the Marine Corps in order to be
9 a special trial counsel one of the things that is
10 required by the SJA before even consideration is
11 that they have tried to verdict a case that would
12 be a covered offense case.

13 Personally, much like Admiral
14 Stephens, there is not many litigation billets
15 that I have -- and I think the only litigation
16 billet that I have not done that currently exists
17 is Victims' Legal Counsel. Appellate judge,
18 trial judge, defense counsel, prosecutor, line,
19 supervisory, regional, all the way across, and as
20 well as time at DOJ. So I think we're well-
21 suited and well-rounded to be able to handle
22 these.

1 BRIG GEN BROWN: I hate to echo
2 everybody, but training is obviously critical for
3 us. I mean, we also leverage our sister Services'
4 training. We have advanced training that we run,
5 advanced sexual assault litigation course as
6 advocacy courses. One of my 0-6 Reservists is
7 actually an SES in charge of child exploitation
8 for Department of Justice. He's a great training
9 asset for us, not just providing training, but
10 also allowing us windows into using some of that
11 training. So I mean that's critical in getting
12 our already experienced litigators even more
13 training.

14 And in terms of leaders that I have in
15 my organization, I also have a former appellate
16 judge. I also have folks that have done high-
17 level litigation on all sides, whether it's on the
18 trial side, whether it's on the defense side. I've
19 got former victims' counsel. And they all bring a
20 different perspective which makes a really well-
21 rounded organization, able to handle these cases.
22

1 For me I've been through a lot of
2 change. I was in charge of the Military Justice
3 Division during MJ16. That was supposedly the
4 most monumental change ever. Now we've got this,
5 which some would argue is a more monumental
6 change. I was lucky enough to instruct at the
7 school and then come back as a Commandant and get
8 to run some of those high-level litigation courses
9 and get some of that perspective that you need to
10 lead a large organization through change.

11 And then finally I think being a SJA
12 at multiple levels including the MAJCOM level and
13 understanding the commander's perspective in
14 that. Because we can talk about our authorities,
15 we can talk about the decisions that we have that
16 are binding, but the commanders are a critical
17 stakeholder and we have to understand their
18 perspective.

19 And they're still responsible for good
20 order and discipline. Still they're Airmen and
21 still they're Guardians, still they're Marine,
22 they're Soldiers, they're Sailors, they're Coast

1 Guard. So we have to understand that perspective
2 and I think that that's valuable in this
3 organization having that experience and
4 background.

5 CDR GULLO: I think the panel
6 obviously is talking about training because
7 logically we're accessing lawyers with maybe 0 to
8 10 years of experience. After that they're
9 probably well-established, whether they're in
10 private practice or doing public service work.
11 So it's critical for us as they're coming out of
12 law school to get the training that they need.
13 And the Coast Guard is a huge benefactor of all
14 these fine gentlemen's training that they convene
15 and we send folks to all of them.

16 What we've also done to kind of bridge
17 the gap in addition to that one or two or three-
18 week training, is we just hired a GS-15 litigation
19 expert. She comes with over 20 years of
20 litigation experience. And we actually stole her
21 from the Navy. And so she is that person that's
22 been in the courtroom and handled victim-centric

1 cases her entire career. And she walks in and
2 sees brand new attorneys or attorneys in their
3 second or third tour and saying that's a good way
4 to do it, but here's another way. And so we're
5 supplementing that way.

6 MR. YOB: We're approaching time where
7 we need -- time for one more?

8 HON. SMITH: So we had the same
9 question, which is moving forward and even
10 currently how often do you all meet? Are you
11 still meeting and working together to try and
12 create a system that is somewhat uniform?

13 BGEN WOODARD: Yes, ma'am. At least
14 once a month we gather in our -- in someone's
15 headquarters, or temporary headquarters, or
16 borrowed headquarters, or whatever place we can.
17 But we have one-on-one personal meetings as best
18 we can. I know Admiral Dwyer, who is down in
19 Charleston, CAPT Scott, who was in earlier,
20 attends a lot of those just because he does. But
21 he's always available online. But once a month.

22 And I went back because I saw the

1 question. I went back and I looked at my emails
2 for that time when I was actually in the office.
3 How often am I getting stuff from my fellow lead
4 special trial counsel? And I would say on at
5 least a weekly basis there is something that goes
6 between the leads and the chief prosecutor.

7 Our staffs I think are probably
8 factored by five of that as well. They try to --
9 I know my staff tries to keep me out of their
10 business that they're dealing with, but monthly
11 interaction. And I don't think there's any
12 desire or want to change that because it's a
13 great opportunity for us to all level the
14 bubbles. And when we're coming to speak before
15 panels such as DAC-IPAD to collude and to
16 conspire --

17 (Laughter.)

18 BGEN WOODWARD: Just kidding. But to
19 basically just make sure that we think we're all
20 level set, but to just do that double tap to make
21 sure that we are.

22 BGEN WELLS: 7 September, Admiral

1 Stephens hosted us over at the Navy yard. So I
2 think the Air Force is up next. So we rotate.

3 HON. SMITH: Okay. Excellent. Thank
4 you very much time for spending so much with us
5 this afternoon. This was really helpful and
6 insightful, so we appreciate it.

7 PARTICIPANT: Thank you for the
8 opportunity. Have a good day.

9 (Whereupon, the above-entitled matter
10 went off the record at 2:37 p.m. and resumed at
11 2:55 p.m.)

12 MS. GALLAGHER: Good afternoon, Chair
13 Smith and Committee members. Our next panel is
14 composed of the senior general officers from each
15 Military Service that have served as a general
16 court-martial convening authority. They've been
17 invited to provide their perspectives on Article
18 25 court-martial member selection criteria and
19 processes, including their insights on
20 randomization of that process.

21 Please refrain from asking them
22 questions that would cause them to have to answer

1 based on their individual practices as general
2 court-martial convening authorities. They have
3 some cases still pending appeal.

4 This discussion is future dates. It's
5 using their insights and experiences to give us
6 some insights into what the process should look
7 like in the future, the policy, cautions and
8 improvements.

9 Their biographies are provided in your
10 materials at Tab 5F. Topics for discussion are
11 included in your materials at 5G. They are Tab 7
12 in your original binder of materials.

13 So at this time it's my pleasure to
14 introduce our presenters. We have Major General
15 David Hodne from the United States Army; Major
16 General Len Anderson IV for the Marine Corps;
17 Major General Kenneth Bibb, United States Air
18 Force; Rear Admiral Retired Charles Rock from the
19 United States Navy; and Rear Admiral Brian Penoyer
20 from the United States Coast Guard.

21 I'm now going to turn the floor over
22 to our general officers to go down the line and

1 provide the committee a brief description of
2 their military background and a general
3 description of their convening authority
4 experience.

5 So, General -- and I'm speaking loudly
6 because we are having issues with projection. So
7 if you could please remember to keep your voices
8 up.

9 General Hodne, the floor is yours.

10 MG HODNE: Thank you. Ladies and
11 gentlemen, thank you for the opportunity to
12 present today. My name is Dave Hodne. I've been
13 in the Army for 32 years. I commanded from the
14 company, which is about 200 Soldiers, to the
15 division, which is 20,000 Soldiers, and the
16 installation, which is 30,000 Soldiers.

17 I've had multiple opportunities to
18 serve as a court-martial convening authority. I
19 serve as a convening authority in both
20 conventional and special operations and most
21 recently commanding the 4th Infantry Division in
22 Fort Carson. I served as a general court-martial

1 convening authority in what is the third largest
2 city in Colorado, in Fort Carson. And I also
3 served as a general court-martial convening
4 authority in AO Victory North in Europe,
5 essentially from Poland all the way to Estonia
6 and now Finland.

7 Lastly, I also served as the
8 Commandant of the U.S. Army Infantry School for
9 three years. In that capacity I saw the
10 reception, integration, and initial entry training
11 for new infantry Soldiers and new infantry
12 officers in what is the Army's largest military
13 occupational specialty. And by way of scale
14 that's approximately 20,000 new recruits annually
15 that would go through that program. Thanks for
16 your time.

17 MAJGEN ANDERSON: Good afternoon. My
18 name is Len Anderson. I've been in the Marine
19 Corps 31 years. My first experience as a
20 convening authority was in 2013 in my first
21 command, and that's at the squadron level in the
22 Marine Corps. I'm an aviator by trade, so most of

1 mine is aviation background. But again as a
2 colonel. And most recently I turned over 4th
3 Marine Aircraft Wing, which is a Marine Corps
4 Reserve Air Wing based out of New Orleans. It
5 covers every -- basically coast to coast, 7,000
6 Marines and Sailors that are part of that -- was
7 my most recent experience. Currently working in
8 the Pentagon.

9 MAJ GEN BIBB: All right. Good
10 afternoon. Major General Thad Bibb. I've been in
11 the Air Force for 32 years after graduating from
12 the Air Force Academy. Most of my experience is
13 in aviation. It's my third tour at the Pentagon.
14 I'm currently the Deputy Inspector General for
15 both the Air Force and the Space Force.

16 My previous job that I left about a
17 year ago was commander of 18th Air Force. 18th
18 Air Force has 12 wings plus 2 geographically
19 separated units overseas with 36,000 Airmen.
20 18th Air Force flew all of our cargo and tanker
21 missions worldwide and we were involved in both
22 combat and humanitarian airlift including the

1 airlift of the 128,000 Afghan refugees two years
2 ago.

3 In my capacity as 18th Air Force
4 commander I was the general court-martial
5 convening authority. I don't have the numbers
6 today, the number of cases we saw, but well over
7 100 general court-martial cases that I would have
8 empaneled jurors for. Thank you.

9 RDML ROCK: Good afternoon. Rear
10 Admiral Retired Charles Rock. I've been retired
11 from the Navy for one year, retiring out of Navy
12 Region Mid-Atlantic in Norfolk, Virginia. The
13 Navy divides the globe into 10 regions in terms
14 of providing support to our operational forces,
15 so I was largely responsible for running bases on
16 -- east of the Mississippi and that included in
17 practice a court-martial convening authority for
18 Navy forces in that area.

19 I've been a convening authority since
20 2016 and from 2016 to 2022 convened 116 courts-
21 martial, which represented 23 percent of the
22 Navy's caseload. Thank you for having me today.

1 RDML PENOYER: Good afternoon. I'm
2 Rear Admiral Brian Penoyer with the United States
3 Coast Guard. Most recently served in a general
4 court-martial authority role as the commander of
5 the 11th Coast Guard District based in Alameda,
6 California.

7 In that role the commander is
8 responsible for all Coast Guard operations
9 essentially halfway to Hawaii and all the way
10 south to Chile, which involves drug interdiction,
11 pollution response, and a variety of other
12 missions that has us work domestically across the
13 four states of Arizona, Nevada, Utah, and
14 California.

15 Prior to that I served as the
16 commander of the Coast Guard Force Readiness
17 Command, which as we're on a ship down in Norfolk
18 we had responsibility really as the Coast
19 Guard's Training and Education Command, so I had
20 our recruit basic training command at -- up at
21 Cape May, New Jersey as well as all of our other
22 training centers nationwide.

1 I have been in the Coast Guard for
2 33, going on 34 years and I'm delighted to be
3 with you here today and talk about some of the
4 differences in our small Service, which unlike my
5 colleagues who bring you scale, I bring you small
6 distributed units and that experience, which also
7 matters to military justice. So thank you.

8 HON. SMITH: I guess I'll start us
9 off. So obviously Article 25 talks about the
10 best qualified criteria. How important do you
11 think each of those criteria are and do you think
12 there should be criteria either added or taken
13 away from Article 25?

14 MG HODNE: Ma'am, I'll start off.
15 From my perspective all of the Article 25
16 criteria are important. The purpose of military
17 law is to promote military justice. It's to
18 ensure good order and discipline. It's also to
19 ensure readiness, all of which contributes to
20 national security. And when considering good
21 order and discipline, context matters. Age,
22 training, experience, education, length of
service all

1 inform context, but it's part of judicial
2 temperament.

3 I think it's best to consider a panel
4 member's intellect, objectivity, reasoning,
5 problem solving skills that I was -- that I
6 understood as a court-martial convening
7 authority. And ultimately the Article 25
8 criteria, judicial selection to best qualified
9 versus minimum qualified personnel to support the
10 purposes of military justice.

11 MAJGEN ANDERSON: Right down the line.

12 HON. SMITH: We don't have to. We can bounce
13 around --

14 (Laughter.)

15 MAJGEN ANDERSON: Okay. Thank you.

16 No, I just -- some additional context I think
17 from my perspective on that and some of the
18 requirements that are there now. If we were to
19 delve or try to tighten any of those up and put
20 additional requirements there -- I think would be
21 unnecessary for what we currently do with -- as a
22 convening authority. I don't think that it's

1 going to either improve or widen the base pool of
2 potential members that we'd be able to select
3 from.

4 MAJ GEN BIBB: I think the variety of
5 criteria is important. It gives commanders
6 important tools with the goal of having the most
7 qualified panel members assigned. And if you
8 take away some I think it impinges on the
9 commander's ability to get the most qualified.

10 And as an example I think every
11 Airman, Soldier, Sailor, Marine, and Guardian are
12 different. And I was at the Air Force
13 Association Conference last week and there was a
14 39-year-old Airman that got on stage. She joined
15 the Air Force at the age of 39 with two high
16 school kids. And she's a fire fighter and she
17 had, I forget, a bachelor's or master's degree.
18 And she said I always wanted to be an Airman and
19 I asked my kids if I could be away from home and
20 they said absolutely.

21 (Laughter.)

22 MAJ GEN BIBB: But it made me think that as

1 a commander if you eliminate somebody just
2 because of their lack of experience as a brand
3 new Airman that's been in the Air Force less than
4 a year, then maybe that's not the right criteria.
5 This is a 39-year-old, highly-qualified fire
6 fighter Airman that with her life experience I
7 would think would be highly qualified to come and
8 do that, where maybe a brand new 18-year-old
9 Airman that just came out of basic training I
10 might want to have a little more seasoning before
11 they come into play. So I think having a variety
12 of factors considering that every Airman is
13 different. Thank you.

14 RDML ROCK: Yes, I agree with the
15 generals on that one. I don't believe the
16 criteria needs to be defined any further because
17 you've got to rely on the convening authority
18 experience in selecting the panel members and
19 taking into account all the factors that General
20 Bibb just talked about. It gives that convening
21 authority the leeway to pick the best qualified
22 members for the panel. So I think the criteria

1 is sufficient as it stands.

2 RDML PENOYER: Yes, I would echo. I
3 think the criteria are not -- at least in my
4 experience, I did not view the criteria as a
5 sequential list that could be hierarchically
6 ranked or as a series of gates that I had to
7 process through as I was making selections for a
8 standing panel.

9 I tended to look at it as an
10 enumeration of the various factors which
11 different people would bring different aspects of
12 on balance. In other words, there are -- as
13 General Bibb put it, there are countervailing
14 facts for each individual that need to be
15 considered. And I found the idea that you would
16 have like a rigid criteria, for instance even
17 age, would necessarily exclude some who I might
18 want to include because of other factors or
19 include folks who probably aren't ready for other
20 reasons.

21 And in particular while I was
22 exercising this God-awful process of looking

1 through all of these questionnaires and employee
2 summary statements it mattered to me not just how
3 long you were in the Coast Guard, but what kinds
4 of things you had seen, what degree of military
5 and mission-specific exposure you'd had. And so
6 a person with an equivalent length of service is
7 not automatically comparable to another person
8 with the same length of service. So I found
9 those criteria to be a whole rather than a
10 sequence.

11 MR. CASSARA: My fellow committee
12 members have all heard this. So, I'm going to
13 ask you, I've tried cases in the military for
14 over 30 years, both on active duty and as a
15 civilian.

16 The very first case I tried was as a
17 prosecutor. When I walked into the courtroom,
18 the accused was the only African-American in the
19 courtroom. Everybody on the panel was white.

20 The last court-martial I tried was an
21 Air Force case. My client was the only African-
22 American in the courtroom.

1 That creates, I believe, a perception,
2 if not a reality, of unfairness, in terms of
3 experience.

4 In terms of experiences like the
5 accused. In terms of being able to empathize
6 with an accused.

7 What changes, if any, would any of you
8 make to ensure that that does not happen?

9 MAJ GEN BIBB: I'm happy to jump in on
10 that one. My understanding is, as a court-martial
11 convening authority, I could consider the
12 demographics as a whole of the panel. And while
13 I didn't eliminate anybody just because of their
14 race or their sex or other factors that can be
15 seen by the panel, I think it's incredibly
16 important to have a fair system. It's also
17 incredibly important to have the perception of a
18 fair system.

19 And our Airmen are watching. And if
20 we want to have good order and discipline, if they
21 don't believe it's a fair system, that impinges
22 our good order and discipline.

1 And so, I think just whether it's fair
2 or not, I think the perception that it's unfair by
3 having all of one demographic -- an all-White-male
4 panel, etc., or all-Hispanic panel, or an all-
5 Black panel.

6 And so, I would look at that. It
7 wouldn't be my primary criteria, but as I would
8 glance through it, I would make sure I had the
9 right balance.

10 And I wanted the most qualified, but
11 usually I can do that and also have some
12 diversity across the panel.

13 MR. CASSARA: Would you advocate for
14 any systemic change in the system to ensure that?
15 And I'm going to ask that of all the gentlemen on
16 the panel.

17 MAJ GEN BIBB: I wouldn't tie a
18 commander's hands to say that they had to. But I
19 like that the commanders have the ability to make
20 those considerations without being second-guessed.

21 And I think we go to an all-randomized
22 process, obviously the NDAA said we could look at

1 randomization, and I'm sure we'll do that in some
2 fashion for the Air Force.

3 We randomized at the very end today,
4 but final was the panel members that are selected
5 are of the final group, and so we do that
6 randomization today.

7 I think if you go to all-randomized
8 process and take the commander out of it, I do
9 think you run the risk of, based on population in
10 some bases -- because the demographics of our
11 bases are not the same at every installation.

12 And so, I think you could end up with,
13 for example, all young, white, male panel at some
14 bases, and I think that could be perceived as
15 unfair, whether the defendant is white or black,
16 or whatever.

17 MG HODNE: I would just kind of echo
18 General Bibb's comment. Random selection in some
19 cases could result in less diverse panels. I
20 agree with his comments about the convening
21 authority should have the ability to consider a
22 wide range of factors in the Article 25 criteria.

1 But in the U.S. Army, some units
2 demographically won't give you the diversity
3 you're looking for.

4 So, random selection out of a unit
5 that may not have that diversity, won't result in
6 a more diverse panel.

7 MAJGEN ANDERSON: I would be cautious
8 in limiting or excluding qualified members from
9 being installed in court-martial, regardless of
10 race or gender. Although this is from an old all
11 White panel, this is a randomized selection in a
12 way.

13 RDML ROCK: I would agree with all of
14 that, and would not support establishing a quota
15 system. Because I think you risk selecting the
16 best qualified members for the panel.

17 If we do anything, perhaps as a factor
18 we encourage diversity of selection, but shouldn't
19 put quotas on that diversity.

20 RDML PENOYER: I'd probably only offer
21 the following additional thoughts, because I
22 generally agree. I think it's maybe two

1 thoughts.

2 The first is sort of more structural,
3 which is to say I think all of the Armed Services,
4 the Air Force, doesn't maybe, I think as I
5 understand it, are slightly different.

6 It's basically the same thing of
7 creating a standing convening order. A pool, if
8 you will. That's where I spend all of my time as
9 a convening authority.

10 And then I think, so we've already
11 touched on the idea of randomization. But a
12 panel that you're convening, where you modify
13 your convening order, doesn't seem a natural
14 panel.

15 Obviously -- it's called sample sets.
16 And so, the gymnastics that may be required to
17 acquire randomization effectively, are cautionary.
18 Although I would tell you that as a convening
19 authority, that was exactly what was on my mind.
20 I didn't want it to be building a panel specific
21 to my selections, for a court-martial.
22 I wanted to draw on the pool, and let that be as

1 random as it could be.

2 But I do have a concern that attempts
3 to increase that desirable outcome could have a
4 counterintuitive effect.

5 In other words, I suspect, like, for
6 instance, in the pools that we were all creating,
7 we may have had greater diversity than you get
8 through any other system. I would hate to
9 reverse that.

10 And then the second caution I would
11 offer the panel, as you're thinking about
12 structural changes like this, is that whatever we
13 do, it has to be applicable and implementable,
14 both in times of war and in diverse formations.

15 I commanded a district where the
16 average unit size was 25 to 35 people. So,
17 running a general court-martial candidate pool
18 required a regional approach, which involved an
19 extensive balancing of suitability and
20 availability of the members, right?

21 And so, I would caution against any
22 system that automatically assumes that we're a

1 peacetime large garrison setting, where broad
2 options are largely available. Because that will
3 not serve military justice reform.

4 MAJ GEN BIBB: And, sir, I'd just
5 circle back real quick and say, your example was
6 one on race, but with your focus on sexual
7 assault in the military, I think an all-woman
8 panel or an all-male panel could have the same
9 misperceptions of justice delivered. And so, I
10 think it'd be well worth considering.

11 MAJGEN ANDERSON: When we spoke
12 briefly on -- as we have a list of potential
13 members, regardless of what the case may be, you
14 have, as a convening authority, have that ability
15 to identify personnel that are going to
16 eventually, if there is a court-martial to be set
17 up, be filtered, selected by the judge, there's
18 opportunity for members that aren't the right
19 fit, to not be placed on that court-martial along
20 the way.

21 So, I think there's already some
22 measures in place that continues to make sure the

1 process is accurate.

2 MS. BASHFORD: At our last meeting,
3 another one of the panels that said, don't assume
4 you're always doing courts-martial in a peacetime
5 setting, which stuck with me.

6 I just wanted to follow up on that.
7 For those of us without a military background,
8 how does that work? And so, if we were to
9 recommend changes, how will that affect your
10 ability to hold a court-martial in combat?

11 MG HODNE: Units deployed. I already
12 account for a team deployed on short notice, in
13 response to the Russian's invasion of Ukraine.

14 And they fell under a different court-
15 martial convening authority, including following
16 the demographic changes, the pool of available
17 people to take a look at that, as well as
18 understanding the context of the environment
19 they're serving.

20 Justice should be timely. It's really
21 critical that it's timely, when you're going
22 forward and continuing operations.

1 Operations in Europe today are
2 different than operations in Afghanistan
3 yesterday, and may be different than the
4 operations against a threat like China tomorrow,
5 and you're establishing court-martial
6 jurisdictions in INDOPACOM, and have to be
7 casual, responsive, timely, and promote good
8 order and discipline.

9 So, a garrison or a system -- I'll
10 speak for the Army -- doesn't distinguish
11 garrison and combat. The U.S. Army's constantly
12 in motion, as we see today. That's got to be
13 your system.

14 MS. BASHFORD: And so, if there was a
15 broader randomization requirement proposed, how
16 would that affect getting a panel together for --

17 MG HODNE: I think it'd be very
18 difficult. Convening authorities -- and frankly,
19 I flatly disagree that randomization ensures more
20 trust and transparency.

21 I think that applying that Article 25
22 criteria and judicial temperament make convening

1 authorities understand the pressures on the force
2 -- that mission's roles, responsibilities to
3 those units, the determination of availability
4 and non-availability with a unit that needs to be
5 moving quickly and spread across multiple
6 locations, will never be accounted for in a
7 random process.

8 And in the U.S. -- I'll speak to Army
9 culture -- in the U.S. Army, random processes are
10 limited to two things, drug testing and weekend
11 duty rosters.

12 Both are viewed negatively. And both
13 still require commander involvement to ensure
14 they're done right. And so, any random process
15 external to the U.S. Army, one, will likely be
16 viewed negatively, by not only the chain of
17 command, but like any Soldier told your number
18 came up on a urinalysis, the current system, when
19 convening authorities are involved in the
20 process, that the current system, frankly,
21 provides more trust built into the system, from
22 the lower usage factor.

MAJGEN ANDERSON: I'd like to second the

1 deployed piece as an expeditionary force. It is
2 crucial that the convening authority has some
3 input on who is not available due to operations
4 that are currently ongoing.

5 With a randomized selection like that,
6 it'd be detrimental to the unit that's forward.
7 Sometimes, a convening authority has to choose a
8 like-minute, or a last-personnel from that region,
9 to sit on the panel. But randomization could be
10 certainly, let's say, a negative effect on op-
11 tempo in a wartime, or forward deployed,
12 experience.

13 MAJ GEN BIBB: Ma'am, I'd just add,
14 and it doesn't have to be wartime. Even in
15 peacetime, as we get ready for deployments, or get
16 ready for training exercises, sometimes you have
17 key officers that are in leadership roles in
18 those, or they're commanding a unit that's getting
19 ready to deploy.

20 And if I have a general court-martial,
21 I want every panel member fully focused on that
22 panel, and on getting to justice. And so, if I

1 note their mind's somewhere else, or their mind's
2 on the mission, or they're taking care of their
3 200 Airmen or their 1,000 Airmen, then I want to
4 take that into consideration. I probably don't
5 want them on that -- and while they may be
6 qualified in general, I'm aware of the operational
7 constraints on the unit and the operational
8 constraints on that officer.

9 And then I think especially as you get
10 a court-martial that involves a more senior
11 person -- a captain, a major, lieutenant
12 colonel -- because your pool gets much smaller.
13 Right? Because you have to get to somebody
14 that's senior. Thank you.

15 MAJGEN ANDERSON: And I would say
16 while we're doing better in the DoD, as soon as we
17 start talking majors, lieutenant colonels,
18 colonels, and you're starting to look at diversity
19 and gender, we have something to work on. Right?
20 And we're getting better. But it starts really
21 narrowing down some of the variances we have.
22

1 MG ANDERSON (Member): Just to kind
2 of follow on to your question, the discussion
3 about readiness, I had the opportunity to observe
4 a trial at an Air Force base. And one of the
5 people who was excused was an F-35 pilot, because
6 pilots have requirements to get a certain number
7 of flight hours.

8 In your experience, for those of you
9 who have aviators in your area of responsibility,
10 how common was that, that they would not either
11 be on the standing list because of the readiness
12 requirements, or would be excused?

13 MAJ GEN BIBB: I'm probably talking
14 too much, but just as an Airman, I would say I
15 would never -- I shouldn't say never -- but it
16 would be very rare to remove somebody just for
17 flying currency.

18 So, that we had aviators that were on
19 our panels, they were in our structure. And I
20 look at it for a variety of experience across the
21 panel.

22 So, the other thing that randomization

1 takes away from you is, I found a lot of value in
2 having an operator's perspective, but I didn't
3 want twelve operators.

4 It was valuable having a medic's
5 perspective, it was valuable -- because they're
6 going to bring other things to the conversation.
7 I think having a variety of ages and ranks and
8 experiences that you bring to the table gives
9 them more diverse thought, and hopefully a more
10 in-depth discussion for the panel before they
11 come to their decision.

12 And so, I definitely included my
13 operators. I personally have never seen an
14 operator excused for currency reasons. There may
15 be other things that, as far as maybe they keep
16 their currency, leave it out of deployment the
17 next week. They decided they're more tied to it.
18 But just currency? No.

19 MAJGEN ANDERSON: Yeah, I would have
20 to say, without knowing any further background on
21 the specific individual, but unless this was a
22 Marine pilot that's getting ready to deploy in

1 the near term, there would be no restriction on
2 having an aviator be part of the panel.

3 And in fact, much like we have with
4 promotion boards, commanders' business. This is
5 Marine Corps matters. This is commanders'
6 business. Congress has entrusted us to do this.
7 There's nothing more important.

8 So, everybody's going to get their
9 turn through this and make sure that the
10 commander's business is handled.

11 So, for the good order and discipline
12 and readiness of the unit, to the point of being
13 expeditious, to the point of being a well-rounded
14 panel, that's how we gain that confidence of the
15 individuals under your unit.

16 MG HODNE: The excusal can be denied.
17 So, the convening authority can say, you're not
18 excused from this panel, and emphasizes the
19 priority of that duty, the importance, the solemn
20 nature of what they're asked to do.

21 And so, in that case, I'm sure that
22 excusal had to go to the convening authority, and

1 there was a good reason why that person was
2 excused, but it wasn't solely because of their
3 MOS condition specialty.

4 RDML ROCK: And this extends beyond
5 just operational forces. The excusal process is
6 very regimented. People have tried to pass --
7 I'm a doctor, so I'm too busy. Or, I'm in a
8 leadership position and I can't afford to be
9 absent from my unit. And I'd always call BS.
10 This is your responsibility.

11 RDML PENOYER: I have nothing to add.
12 That's exactly right. I never saw it myself, I
13 never did it myself, and I would have rejected
14 that.

15 HON. SMITH: So, let's say that you go
16 to a completely randomized methodology for
17 picking the panel. What becomes the most
18 important factor for you, in terms of -- it's
19 randomized, and you can't consider race. This
20 case looks like an condition of two --

21 PARTICIPANT: Jeter.

22 HON. SMITH: Jeter. Okay, Jeter case,

1 let's say it comes down and the court says, you
2 can't consider race, gender, ethnicity, anything.

3 In that world, with randomized
4 selection at that point, or even just the
5 convening authority, what factor becomes the most
6 important?

7 In other words, is it rank, to try and
8 get a cross-section of the military community, so
9 that you're avoiding having a panel that's all
10 one group?

11 MG HODNE: I'm going to leave off --
12 I'm not being disrespectful. I can't imagine a
13 world where randomization will allow for
14 evaluation of judicial temperament.

15 As a convening authority, where
16 context matters for good order and good point,
17 the judicial temperament aspect of it, which I
18 attempted to describe previously -- intellect,
19 reasoning, problem-solving skills, judgment --
20 just rank may not be context in good order and
21 discipline for certain cases. Age certainly does
22 not.

1 If you look at this panel, between
2 pilots, infantry division, I don't think you can
3 compare the experience and challenges somebody
4 experiences in the cockpit versus on the ground.

5 So, I would not, as a convening
6 authority, I would not vote on this criteria as
7 most important concerning the rank and process.
8 I think that would probably be neglectful on
9 that.

10 I've made a lot of decisions in the
11 command of a division. And I don't remember a lot
12 of them, quite frankly. You make a lot of
13 decisions, sometimes through the course of the
14 day.

15 But I vividly remember poring over the
16 rosters and records associated with panel member
17 selection. That's burned in my memory.

18 And I remember vividly a more extreme
19 adjustment we had to make because units deployed
20 to Europe.

21 So, my court-martial panels either
22 expired because people had at Fort Carson -- just

1 for context, I had the infantry division that
2 deployed to Europe. I had an Army Brigade combat
3 team that deployed to Europe.

4 Fort Carson also had the Army's only
5 space brigade, with responsibilities around the
6 globe. It had the Army Special Forces Group,
7 which is responsible for Europe, and the Security
8 Forces Systems Brigade, also responsible for
9 Europe.

10 So, you could imagine the standing
11 panel impacts when Russia invades Ukraine, you've
12 got to go through -- and I can't imagine -- maybe
13 it's my own lack of imagination -- I can't
14 imagine a random criteria that rapidly
15 reconstitute the experience that just left for
16 Europe, to be able to still provide.

17 And, oh, by the way, most of those
18 folks deployed likely wound up on court-martial
19 standing panels in Europe, as they became part of
20 that new organization that's tackling pretty
21 significant responsibilities.

22 MAJ GEN BIBB: I think for me, all of the

1 criteria are important. I think a lot of them
2 kind of funnel into experience in judicial
3 temperament.

4 And I think it's worth noting --
5 because at first thought, I was like, well, if
6 they went randomization, that's what we do in our
7 civilian communities, right? My parents got
8 called for jury duty, right? And that judicial
9 system works.

10 Through the voir dire process, we
11 eliminate people that aren't fit. But when you
12 look at our military, it's not the same
13 population that you have in our communities.
14 Right?

15 So, my parents aren't getting called
16 for court-martial duty, right? So, they're not
17 going to be on a panel at 80 years old.

18 So, the average age, the average
19 experience of the average American that gets
20 randomly selected for jury duty, is going to be,
21 what, 35? Thirty-eight? Forty?

22 I'm not sure what the average American

1 age is. The average age of a Marine is maybe
2 nineteen? Right?

3 (Simultaneous speaking.)

4 MAJGEN ANDERSON: Nineteen.

5 MAJ GEN BIBB: Right? So, now you're
6 saying your judicial process, if fully
7 randomized, for the Marine Corps is going to be
8 nineteen. For the Air Force it might be 20. We
9 may be a little older Space Force. I bet it's a
10 little older. Maybe 22, 23. Right?

11 But that's still -- it's not the same
12 population at that time. Thank you.

13 HON. SMITH: Well, you were kind of
14 saying this, the fact that the average age is
15 very young for the different Services. Do you
16 think that the nineteen-year-old Marine, or the
17 twenty-year-old person in the Navy, is capable of
18 understanding what their duty is when they're
19 sitting on a jury, if they're selected on a jury?

20 Let's say it is a random process and
21 you end up with a jury of predominantly under the
22 age of 25.

1 RDML PENOYER: So, I'll just take a
2 quick stab. I think my colleagues here have got
3 more to offer you. But I'll just quickly say --
4 and for a panel like this, you'll understand --
5 it depends.

6 They're really not all the same. We
7 do have a fear that in the first year or two,
8 people are learning a culture to the military.

9 And there is a fear that they might be
10 over-deferential to the rank during that early
11 period, and under-appreciate a responsibility
12 they have to the process.

13 But I will tell you that, again, not
14 all of our nineteen-year-olds are the same
15 nineteen-year-olds. And there are plenty that
16 are completely capable of that. They understand,
17 and they're not over-ranked deferentially, having
18 been in the Service for a year.

19 Others, on the other hand, I would
20 tell you well-past the -- I know the two-year
21 mark is something that used to be part of the
22 system, right?

1 There are others who retain that well-
2 past the two-year mark, because of the nature of
3 their service.

4 And like I said, I would hate to
5 exclude somebody you should have on a panel, and
6 bring somebody into a panel who really shouldn't
7 be there because of that bright line.

8 MAJGEN ANDERSON: And with those
9 young Marines, we are very fortunate. We all
10 have a baseline to get into the Marine Corps.
11 There's a baseline understanding, or a baseline
12 education, whether officer or enlisted.

13 Obviously, there's a security
14 requirement. Be a part of that, as they first
15 start in the military.

16 So, we've got that baseline
17 understanding. And then with each individual
18 court-martial, the judge is going to spend time
19 educating the procedures for that panel. And if
20 there's any misunderstanding, or making sure that
21 this is all clear before we even get started, to
22 ensure that the panel members know or understand

1 what their duties are.

2 MAJ GEN BIBB: And, ma'am, I didn't
3 mean to insinuate that a nineteen-year-old
4 necessarily isn't qualified. I think if you look
5 across the other six criteria, I think they may be.

6 I guess my point was, if it's fully
7 random, you may have a lot of those eighteen-,
8 nineteen-, twenty-year-olds on a panel, compared
9 to a variety of ages.

10 And so, when I look to build a panel,
11 it was important to have those variety of ages.
12 Especially as you guys are looking at sexual
13 assault cases, I think a 40-year-old senior NCO
14 is going to view things a little differently than
15 a nineteen-year-old Airman.

16 And I think having that discussion
17 with the panel on what they see and what they're
18 hearing, I think having that variety of thought
19 and diversity of thought is important. So, I
20 guess that was my point on the age.

21 To me, it really goes to experience.
22 And for me, I'd like a variety of experiences.

1 RDML ROCK: I think this becomes a
2 risk when you have a random selection process and
3 you then try to apply on top of it an age limit.

4 You remove the other factors that
5 currently exist that allow you to build a best-
6 qualified panel.

7 So, it's difficult to take any one of
8 the current factors out from the other, and apply
9 it to a random process, without creating some
10 imbalance.

11 MG HODNE: Just to pile on what
12 General Bibb said, I am going to insinuate that
13 they are less qualified. And this is informed by
14 my -- and again, this is about getting the best
15 qualified.

16 So, I ask the question, why settle for
17 less. The best-qualified, again, communicates
18 the solemn importance of the duty that they're
19 asked to do.

20 Three years as the Commandant at the
21 U.S. Army Infantry School, seeing our
22 eighteens -- the Army minimum age for entry --

1 seeing our eighteen-year-old Soldiers get
2 indoctrinated into military culture, and learn
3 basic foundational skills.

4 They go on this journey, their
5 conformity. And along the way, we're discovering
6 that many of them lack life skills that come with
7 the values that were taught at home. And some of
8 them are not consistent with the Army values.

9 So, I do think, in the context -- I go
10 back to my opening comments about the convening
11 authority considering the context that informs
12 judgments and good order and discipline.

13 That context is not informed in
14 initial entry training. They're not familiar
15 with what happens in a unit. Their hours are
16 accounted for from sunrise to sunset, and even in
17 our officers who are college graduates, when I
18 was teaching 6,000 infantry officers, I would
19 remind them they were more apt to cause problems
20 when they got to their first unit, than solve
21 them.

22 It's not because they're not great

1 Americans who are eager. It's because they're
2 oh, so eager to do well, that they may not see
3 the context around them that helps them solve
4 problems.

5 And as young privates graduate from 22
6 weeks infantry OSUT, maybe fall out of an
7 airplane in three weeks of an airborne course --
8 I saw them go through that; there's a journey --
9 and I couldn't be prouder of when you see someone
10 complete that journey, and then develop.

11 But that development doesn't occur
12 until at some point in their first unit
13 assignment, where they're actually living on
14 their own, and in some cases they're still in the
15 barracks and they're under the close supervision
16 of their sergeants, but less-qualified to allow
17 and categorize filling panels with our youngest
18 members.

19 HON. SMITH: So, how do you then
20 maintain this best-qualified standard, while at
21 the same time concretely addressing optics of
22 having one person?

1 In other words, part of the issue that
2 we hear about all the time, is that it's one
3 person who's picking, and they get to pick the
4 good one, and etc.

5 So, how do you work with both those
6 things and create a system where people feel it's
7 transparent, but also effective?

8 MG HODNE: I was convening authority
9 on an installation. Fort Carson is 30,000
10 Soldiers.

11 And the process that provides a pool
12 of folks, and the binders the team provides, to
13 pour through that grouping, the command is one
14 person. So, everything good or bad that happens
15 at the installation is still on -- that's what
16 command's about.

17 Command's often referred to as a
18 burden. But there's a lot of -- the rosters, the
19 records, the demographics that are available to
20 you as you make that decision.

21 Because in the end, the outcomes --
22 you've got to have faith and confidence. And

1 it's not to pick a set of panels that always
2 arrive at a guilty verdict, or always arrive at a
3 not-guilty verdict. It's not about that at all.
4 It's about the Article 25 criteria, and knowing
5 you've selected, because of your own judgment
6 that's inserted in that process.

7 The 39-year-old private that has a
8 PhD, that would be available. That knowledge
9 would be available to the convening authority, if
10 they wanted to consider that.

11 Not every private is eighteen, and not
12 every sergeant is 30, either. So, there's a wide
13 range of things that go into that.

14 MAJ GEN BIBB: Ma'am, can I just add
15 on to that real quick? It was very important to
16 me, as a general court-martial convening
17 authority, like I talked about earlier, on the
18 perception of justice.

19 And so, while there were times I could
20 have picked twelve 0-5 lieutenant colonel
21 commanders wearing the command pin, and they
22 probably would have been highly qualified to do

1 that, Airmen first-class that was looking at that
2 panel would have said, hey, I'm not sure that
3 that defendant is getting a fair shake.

4 And so, it was very important for me
5 to have some balance, so that Airmen across that
6 wing viewed it as a fair process.

7 So, I think there is a check there,
8 but I think it's maybe a little bit more of a
9 self-imposed check, because of the importance of
10 the perception of fairness.

11 If I would say my SJA reviewed every
12 list, and sometimes if he saw that it looked a
13 little to junior or too senior, especially after
14 sometimes things change -- as you know, courts
15 get delayed months at a time sometimes, and so
16 the panel members have to kick out, people PCS,
17 people retire, and so people change in and out --
18 and so, sometimes while every individual on the
19 panel is highly qualified, as a group maybe
20 there's a number of reasons that -- so we have to
21 kind of re-look at that for that perception of
22 fairness.

1 MAJGEN ANDERSON: Tied into something
2 there I'd like to mention. I know you said
3 something about one voice. I'm not sure exactly
4 what lane that was in. But I was reminded that
5 none of these decisions were done without my legal
6 team.

7 SJA is key to our command deck. None
8 of these discussions would happen without having
9 somebody there in the room giving advice and
10 covering these topics that we've mentioned.

11 I was not alone in my office just
12 coming up with a scheme that I thought was going
13 to be great, was going to be the perfect fit.

14 It is key on our military lawyers, our
15 military legal system, to be part of this command
16 team.

17 Congress has entrusted officers and
18 commanders to do this. They didn't change the
19 randomization, and maybe a president may put
20 something forth -- right? -- if there's going to
21 be randomization, we would certainly tackle that
22 if that ever came to fruition.

1 But I think we've seen demonstrated
2 that that procedure that we have so far, back to
3 the randomization piece, I think if the convening
4 authority understanding that people are going in,
5 and not only the accused, but perhaps the victim,
6 how this all looks with our legal team, it is the
7 best way to do it.

8 I think it is critical to both the
9 accused, and the rest of the military members
10 within those units, to see and understand that
11 this is, no kidding, a quality panel
12 representation of that unit in front of them.

13 And I think if we took that away with
14 randomization, or something from a computer, I
15 think we'll lose trust from our junior enlisted,
16 and perhaps our junior officers, if we went that
17 route. My opinion.

18 HON. SMITH: Why do you say that?
19 What about the look of that random computer
20 versus picked by the convening authority? Is it
21 because you're saying that they wouldn't be as
22

1 educated, and maybe wouldn't be as old, etc.,
2 etc.?

3 MAJGEN ANDERSON: Yeah, the things,
4 like when we get back to, certainly the judicial
5 temperament. The biases that we know, or the
6 patience, do they have -- you can understand what
7 an individual's career has been, or how they've
8 come across, to the point of, we don't want to
9 have twelve, or let's just call it eight, former
10 commanders on a panel. That doesn't -- and
11 there's a broad gap between the people on the
12 panel and the accused.

13 We need to have, again, that wider
14 variety. And I'm not sure -- and I believe --that
15 the opinion of a random computer-generated list
16 may not get us there.

17 Could there be some way to refine that
18 later? Perhaps. But I think what we offer as
19 commanders, with a list that goes to a judge that
20 is going to run the proceedings, and then perhaps
21 people are excluded from that list for the case,
22 that that's the best way to go.

1 I'm not sure -- again, my opinion;
2 personal opinion only -- is our military panels,
3 how do they compare to the random jury selections
4 on the civilian side?

5 Are we better served in the military
6 with the selection the way it is? And I believe
7 we are.

8 RDML PENOYER: And if I could just add
9 just a quick point to that. I think with regard
10 to this question of randomization -- right? -- in
11 order to assure you get an outcome that generates
12 a truly random-seated panel, the waiting and the
13 gymnastics, you would have to put that
14 randomization algorithm through -- to me, it
15 strikes me as unlikely that such an algorithm
16 would generate a better result than what you're
17 getting from commanders doing that themselves,
18 with knowledge not only of who's suitable and has
19 the temperament, but who's available.

20 I think when you add that piece to
21 this algorithm, it's going to be very hard to
22 keep that in a pool that's executable, without

1 flying people around the country to try and seat
2 juries and so on. That would become an
3 unworkable system.

4 MG HODNE: Commanders, they're the
5 face of good order and discipline. They're also
6 responsible for the good order and discipline on
7 their installation.

8 This is not solely about the
9 commanders either. It's about the installation
10 consists of Soldiers, family members, civilians.
11 They all care that there's good order and
12 discipline.

13 And in the end, when things go wrong,
14 the commander's accountable. The commander's
15 responsible. And they know it.

16 And the community looks to the
17 commander, and expects that you're judiciously,
18 thoughtfully, deliberating over the selections,
19 to make sure the best -- I keep going back to
20 best-qualified -- best-qualified is not a random
21 process. Best-qualified is, to Leonard's point,
22 about looking through the record briefs of where

1 people have served to get a wide range of
2 experience to pick from.

3 It's certainly carefully thought
4 through. And even the local community, City of
5 Colorado Springs outside Fort Carson, publicizes
6 the results of courts-martial in the local
7 newspaper.

8 And people will ask me about the
9 outcome of a case. And I have to be able to
10 respond with that I have full trust and
11 confidence in the judgment of a panel member,
12 made months ago, I selected because of the range
13 of experience, age, judicial temperament they
14 display.

15 HON. SMITH: Okay. Judge Walton
16 first.

17 HON. WALTON: I'm not unsympathetic to
18 the challenge that you face. We can talk about
19 who's going to sit in judgment of somebody who's
20 been accused of a crime, whether it's in the
21 civilian world or in the military world.

22 I've been a judge for 40 years, and I

1 struggle constantly with the reality that when I
2 go into many communities, there's a perception
3 that the system is unfair, and it's rigged
4 against them. And to a large degree, it's
5 because who is serving on juries.

6 And in the civilian world, to a large
7 degree, that's the product of people not showing
8 up who may be of a demographic of the individual
9 who's on trial.

10 I would presume that there are
11 probably younger, maybe minority people, who in
12 the military, who are charged with a crime, who
13 may feel that the convening authority's decision
14 as to who is best-qualified, is prejudiced
15 against them, because the convening authority is
16 selecting people who he or she believes are best
17 qualified.

18 But what does best-qualified mean?
19 When I was a defense lawyer, best-qualified meant
20 one thing. When I became a prosecutor, best-
21 qualified meant something else.

22 And I know, when I see lawyers making

1 decisions as to who they want to serve on the
2 jury, that they're making a decision that's a
3 biased decision, to try and get the individuals
4 on that jury panel who are going to rule in their
5 favor. Not because they're the best-qualified
6 from an objective perspective, but best-qualified
7 from a subjective perspective, from that lawyer's
8 perception.

9 And I don't know how we overcome that
10 through the civilian world, and I don't know how
11 you overcome it in the military world.

12 But I think it's something that we
13 have to continually struggle to try to address,
14 because there is a perception in the civilian
15 world, and I know from people I've talked to
16 who've been in the military world, that there's a
17 perception there too, that the process is not
18 fair.

19 And I don't know how we fix it. It's
20 a challenge that I think we have to continually
21 struggle with, because, as you know, perception
22 sometimes can be more significant than reality.

1 It's not a question, it's just a
2 statement. I mean, the demographics of the
3 District of Columbia, where I sit, has changed
4 drastically.

5 When I was a prosecutor back in the
6 late-'70s, early-'80s, I tried my cases almost
7 before all Black juries.

8 The demographics of the city have
9 changed drastically. Now, the last trial I just
10 finished, I had two Black jurors on my panel. And
11 that's because the demographics have changed.

12 Now, there's still a large number of
13 African-American people in Washington, but it's a
14 larger percentage of poor people, and they don't
15 show up.

16 So, one of the things we tried to do
17 when I was on the local court before I went to
18 the federal court, was we tried to use an
19 addition to the voting rolls and the motor
20 vehicle rolls.

21 We started to try and bring people on
22 welfare. But we still couldn't get people to

1 show up.

2 So, again, it's just very frustrating
3 from my perspective, and I assume it's probably
4 very frustrating from your perspective, that
5 there's a perception of unfairness, despite the
6 fact that we're doing the best we can to make the
7 process fair.

8 MAJ GEN BIBB: Judge, that's a great
9 perspective. A couple of thoughts that came to
10 my mind. Some differences in the military.

11 One is we have the right to order
12 folks -- we as a panel. Right? So, it's not
13 just waiting for them to show up.

14 And so, you're like, well, why would
15 that happen? Why would somebody that -- but what
16 does happen sometimes, is you'll have a junior
17 commander that's a new commander, and what do
18 they want? They want their best-and-brightest in
19 their unit doing their mission, getting ready to
20 execute their mission, ready for the deployment,
21 ready for the next thing. Right?

22 And so, sometimes you'll see them put

1 forward an officer that's been passed over to
2 major, or passed over to lieutenant colonel, or
3 maybe not our best-and-brightest, for an officer
4 that has an LOR, an LOC, or LOA in their record,
5 that might not give them the best judicial
6 temperament.

7 So, senior commanders, I think we've
8 all probably turned that around and said, no, no,
9 no, I want your very best for this process.

10 And so, luckily, we do have a little
11 more control right now at least. And then --
12 there was something else I was going to add and I
13 forgot what it was. So, thanks.

14 MG HODNE: Can I frame -- I don't have
15 an answer, necessarily, fully to question, but
16 I'm just learning best-qualified applies to so
17 many other aspects of what's a hierarchical
18 system.

19 So, how you're selected for promotion
20 falls under best-qualified perspective. How
21 you're selected for schools if you're best-
22 qualified.

1 How, when you're a new private in
2 OSUT, how you're selected as the guide-on bearer
3 as best-qualified. How you're selected as the
4 honor graduate, Commandant's list.

5 So, it goes beyond panel member
6 selection, best-qualified of 6,000 lieutenants
7 commissioned in one year, ten years later only
8 3,000 will be majors, and only 1,000 will be
9 lieutenant colonels, and so on.

10 They're all, it's a best-qualified
11 system that makes it a little more -- there's a
12 little more context to it.

13 MAJ GEN BIBB: I don't think we can
14 guarantee that bias doesn't exist across the
15 system, but I think, in my experience, and I'd
16 imagine the other Services would share the same
17 as a junior commander, good order and discipline,
18 I wasn't sure what that meant.

19 And I watched a one-star general that
20 was very tough, very scary, very passionate, I'd
21 say, and you did not want to mess up in front of
22 that general.

1 And when it came to discipline cases,
2 and when it came to the UCMJ, he was the very
3 first one to turn a case back if he thought that
4 the defendant's right had been abused, or that
5 had been overstepped.

6 And so, the process we have, when-in-
7 doubt, leans towards the accused. And I think
8 our commanders, you're taught at a young age that
9 you're not the prosecutor, you're not the
10 defense, you're the commander, and your job's to
11 ensure good order and discipline.

12 And sometimes, that's something that
13 isn't prosecuted, because we got our processes
14 wrong, or somebody overstepped the line.

15 RDML PENOYER: Sir, I wouldn't even
16 hesitate to -- I wouldn't even hazard to offer an
17 opinion on what to do about it. But I will say
18 that with regard to the general's earlier point
19 about judicial temperament, when I was becoming a
20 general court-martial authority, the way I had
21 been enculturated, the way I learned, was that
22 certainly all the points the general made about

1 temperament and critical thinking, and all of
2 that, that's certainly part of it.

3 But a larger part of it for me, was
4 also the ability to empathize with the actual
5 situations of the personnel that the panel would
6 be reviewing. To actually be able to have walked
7 through that part of life, right?

8 And in that regard, it's always on our
9 mind -- I knew at least it was always on my
10 mind -- composing panels, whether the people that
11 I was reviewing questionnaires for, whether they
12 could actually sympathize, empathize, understand
13 what might lead a person to do something like
14 that, that is a recoverable event, and maybe not
15 meriting the most severe punishment available to
16 us.

17 It is not formulaic in any way. And
18 I was deeply concerned by that aspect of a person
19 coming in front of one of the panels that I
20 convened, and not being able to believe that
21 those people could understand and empathize that
22 they were unable to do so.

1 And I consciously composed those
2 panels for the maximum amount of inclusion that I
3 could, not just on the basis of race, but on the
4 basis of all of the experiences that military
5 members have, for that example.

6 RDML ROCK: You've got me thinking,
7 Judge, on how you completely remove any
8 perception of bias with any process, to include
9 random selection.

10 I think the perception of the accused
11 is going to be the perception of the accused,
12 regardless of how the jury or the panel is
13 selected.

14 And at least under the current
15 Article 25 factor, we have an opportunity to do
16 our very best to make sure the panel is balanced.
17 You lose complete control when it's randomized, I
18 would think.

19 So, it's not an answer to your
20 comment, but it certainly, I think, gives us all
21 pause to think are we creating something that
22 really doesn't solve the problem.

1 MG HODNE: And this process allows for
2 feedback. If a convening authority were ever at
3 any point in his or her tenure to get feedback
4 that, hey, there's perception a convening
5 authority can adjust, and dig into that with
6 their legal teams, and with subordinate
7 commanders, and make adjustments.

8 Okay, we're going to pick new panels,
9 and for the next standing panel, and so on. So,
10 the convening authority --

11 PARTICIPANT: Random's not
12 accountable. The commander is.

13 MG HODNE: Because the commander wants
14 good order and discipline. And that means people
15 believe they had a fair shake.

16 And if there's a perception where
17 that's communicated to the convening authority,
18 hey, your panels aren't fair, a convening
19 authority's going to take that very seriously.

20 HON. WALTON: Yeah. I mean, I think
21 obviously the Supreme Court in the Batson decision
22 tried to do the right thing in saying

1 that race and gender can't be taken into account
2 in exercising peremptory strikes.

3 But the reality is that race and
4 gender can cause a person to have a certain
5 perspective about certain issues.

6 So, to say that race and gender can
7 never be considered as an appropriate factor in
8 deciding whether somebody can render a fair and
9 just decision, and then given the situation, may
10 be naive.

11 But I understand, I guess
12 philosophically, we don't want those factors to
13 come into play when we're making an assessment as
14 to who should sit on a jury.

15 But the reality is that those factors
16 may in fact be significant in one's perception of
17 a particular situation.

18 MG HODNE: And the accused may not be
19 homogenous in race either. It covers the broad
20 cross-section of our U.S. Army. So, that's
21 equally as diverse as the panel members.

22 DR. SPOHN: Just to follow up with the

1 Judge's comments, first is that quite a bit of
2 information - - the state of Arizona recently - -
3 because of concerns about race and gender
4 influencing peremptory challenges, the Arizona
5 Supreme Court eliminated all peremptory
6 challenges in all civil and criminal cases.

7 And so, based off that is the
8 potential solution to the problem that you've
9 mentioned.

10 But what I wanted to ask about is the
11 Article 25 criteria, the six criteria. Five of
12 them I think are arguably objective, in the sense
13 that you have a measure that you can find an
14 objective measure of age and experience and
15 training, and so on.

16 The sixth one is the one that we as a
17 committee have talked about. And that's the
18 judicial temperament, which is, I think many
19 would argue is a subjective indicator.

20 Subjective in the sense that the way
21 you measure it can vary from one person to
22 another. And so, I'm just interested in how you

1 determine, when you're making that determination
2 of whether someone has an appropriate judicial
3 temperament, what are the factors that go into
4 that decision for you?

5 RDML PENOYER: It was pretty simple
6 for me. I got my phone book of questionnaires --
7 complete summary sheets. So, I could look at the
8 variety of military experiences that the person
9 had. It gave me that sense of whether they could
10 empathize with a variety of walks of life that
11 they would encounter on the panel.

12 But I found the questionnaires -- I'm
13 thinking about the burned-in-your-memory comment.
14 Those questionnaires are burned in my memory.

15 Because we would ask, is there
16 anything that would hold you back from making a
17 fair and impartial judgment? And it was shocking
18 to me how often the answer was yes.

19 It didn't feel like an
20 entirely -- there was a very objective aspect of
21 people telling you, I don't think I can make a
22 fair judgment in this or that kind of case.

1 I found it harder to compose a panel
2 of people who were fully ready to do their duty
3 than you might think. You might expect, oh, we
4 have a plethora of overqualified individuals.

5 But it turns out people have
6 complicated lives. There's a lot that goes on in
7 a person's life. And in many cases, they did not
8 have that temperament, for a variety of
9 reasons -- I was accused of that same crime; I
10 sat on a panel previously for someone who we
11 punished for that crime; or, I'm uncomfortable
12 with this topic. It was sufficing to me what,
13 when you ask people, what they will tell you.

14 So, I vividly remember that as the
15 most time-consuming and memorable part of the
16 process.

17 MG HODNE: Not to muddy the waters,
18 but I'd argue that training and experience
19 criteria are not objective.

20 DR. SPOHN: Not as objective.

21 MG HODNE: So, I can look at an
22 officer's record brief and see what location you

1 were at in Iraq or Afghanistan, what year they
2 were at, and I'd know exactly what they were
3 doing.

4 And so, there's a lot of nuances that
5 go into a convening authority's authority that
6 aren't solely to the judicial temperament.

7 So, going through those records,
8 rosters, and surveys, is extremely important.

9 MAJGEN ANDERSON: Doctor, if I could,
10 I failed to mention at the start of this, for the
11 last sixteen years I've been in the Reserves. So,
12 I'm in and out of the Reserves. Currently on
13 active duty.

14 So, when we start looking at the
15 majority of my military members are living
16 civilian lives, perhaps have experiences that are
17 outside of the military, perhaps have been
18 charged outside of the military, that I'm not
19 perhaps previously aware to.

20 So, it doesn't fit into that one
21 category of judicial temperament, the same as we
22 get to understanding the individual and where

1 they are, the officers, and who we're going to
2 bring in for this commander's business. I have
3 to take a look at the whole picture of that.

4 And I think what you've heard here is
5 that it's more of a limitation, and again, for us
6 finding the best-qualified.

7 I know it really seems objective, but
8 we're trying to make the best that our command
9 can offer for the court-martial. So, it's a
10 limiting factor, more than what I would say
11 bringing in the incorrect person.

12 I think you have to be part of that,
13 living with a unit, to understand a little bit
14 across the whole spectrum. I know that's not a
15 very good, defined answer. It's very squishy,
16 and, doctor, I hear you.

17 But it's just something that you can
18 tell when you're in command.

19 DR. SPOHN: Sort of like pornography?
20 You know it when you see it?

21 MAJGEN ANDERSON: Right. Yes. Yes,
22 ma'am.

1 HON. WALTON: But is it a greater
2 challenge when they're talking about officers
3 that's compared to enlisted members. Just asking
4 judicial temperament.

5 MAJGEN ANDERSON: Yeah, thanks for
6 that, Judge. I meant to make a comment after
7 your last statement there, because I can
8 certainly empathize with some of those challenges
9 that you have.

10 I'd like to talk just real quickly
11 about what has changed in courts-martial, for the
12 military.

13 One, when you speak of enlisted,
14 before, they did not have the right to have
15 enlisted members on the panel. Now, we do.
16 Right? We get up to a third.

17 So, they at least have that -- we can
18 have that representation for them when they're
19 going through their legal proceedings.

20 What do I see as a difference with
21 officers? I take it back to Congress, and where
22 we are with commissions. What's responsible, and

1 the responsibility that we are given from
2 Congress is weightier, in my opinion.

3 It's nothing against the individual,
4 but just what we've been asked to do. And if we
5 violate that, it seems to me there's a little bit
6 of a higher bar there for an officer that's going
7 to be on a court-martial.

8 MAJ GEN BIBB: I think judicial
9 temperament, there's so many things besides the
10 obvious of, have they committed a crime, or have
11 they been through a trial.

12 But also, just the ability to listen.
13 The ability to think critically. The ability to
14 come onto a panel with an open mind. It's the
15 ability to change their mind. Right?

16 And not everybody has that. Not
17 everybody has that emotional intelligence to be
18 able to sit on a panel and to be the best to
19 serve on the panel. Right?

20 And so, it's unique in the military
21 that, as a NAF with 36,000 Airmen? No, that's
22 something I'm not able to tell. But I'm

1 hoping that my subordinate commanders do know
2 their people. Right? And do know the right
3 judicial temperament to sit on a panel. Thanks.

4 RDML PENOYER: If I can add just one
5 thing out of the officer versus enlisted. I was
6 racking my brain trying to remember if I could
7 think of it being harder with officers or
8 enlisted, with regard to judicial temperament.
9 And I couldn't think of any distinction.

10 And that sort of surprised me in the
11 nature of your question. I saw a little
12 difference.

13 But it occurred to me, if you think
14 about the changes in society and the changes in
15 the armed forces over which the UCMJ has
16 presided, our enlisted core, in an all-voluntary
17 military that we've had, is not what the UCMJ of
18 1950 -- it is a completely different caliber of
19 force.

20 So, when I remembered that, I guess I
21 wasn't as surprised as my initial reaction, that
22 I didn't really see judicial temperament being

1 more of a problem than the enlisted corps, which
2 you might presume it to be. I think that's left
3 over from a different era. That is not the case
4 in current times.

5 MAJ GEN BIBB: Just a shout-out for
6 our enlisted force. I think every officer here
7 would say this. But what sets us apart as a
8 nation is our additional force, compared to other
9 militaries.

10 And it has gotten better and better
11 and better. Does it surprise me actually though?
12 See a defender at the gate, hey, you look
13 stressed, defender. What's going on?

14 Officer, I've got finals next week,
15 and as soon as I get off-shift, I've got to study
16 all night.

17 And I was like, well, what are you
18 studying? What are you getting your bachelor's in?

19 No, sir, I finished my bachelor's a
20 long time ago. I'm working on my master's. I'm
21 almost done. This is my last class for my
22

1 master's.

2 And so, a lot of our Airmen come into
3 the military, and cross to officers, with a
4 bachelor's degree, or even a master's degree.
5 It's really incredible.

6 So, if you're from a different
7 generation, or haven't been around our enlisted
8 lately, they're really phenomenal.

9 MR. SULLIVAN: So, a question in
10 terms of exactly what information do you have in
11 front of you when you're making the choice of
12 your court-martial panels.

13 So, you have the record briefs, which
14 is essentially a one-pager of all their
15 assignments, all of their education.

16 MG HODNE: I mean, everything, all of
17 the objective criteria, their age, education,
18 training, schools they've been to, you've got all
19 of that information, sort through that whole
20 document. The binders come with each batch.

21

22 MAJ GEN BIBB: For the Air Force, I don't

1 recall any ethics questions that you guys are
2 talking about. Ours was a little more fact-
3 based. I think there was a question on, is there
4 any reason you couldn't serve on a panel. But I
5 didn't see too many responses like you said.

6 Maybe just culture difference, I don't
7 know.

8 RDML PENOYER: Yeah, size. I suspect
9 my phone book once a year was probably a shadow of
10 what you were doing corps-related. But same thing
11 with the one-page summary.

12 The questionnaire largely asked that
13 question, is there any reason that you couldn't
14 impartially decide cases brought before you?

15 But it also asked a variety of
16 tactical questions, like, can you sit for this
17 period of time?

18 All of that sort of stuff, and then
19 some availability detail as well. Because there
20 are things that you can guess at, but are
21 difficult from the summary sheet. Like, whether
22 a person's got retirement orders pending, or

1 whether their unit is deploying, or --

2 PARTICIPANT: I'm getting married next
3 month.

4 RDML PENOYER: Yeah, exactly.

5 PARTICIPANT: Those comments.

6 RDML ROCK: Same in the Navy. About
7 a six-page questionnaire that would come with
8 every potential candidate.

9 MG HODNE: And I'd just offer, as big
10 as Army installations are, convening authorities
11 largely know every lieutenant colonel, every
12 major, most captains, certainly every colonel,
13 every sergeant major, most first sergeants.

14 So, one of the questions on judicial
15 temperament, it's not just who you select, it's
16 who you don't select. Personal and professional
17 reputation is something that won't go into
18 judicial temperament, per se, but if someone has
19 a poor reputation, then you know, and you know
20 that person, that convening authority's never
21 going to select them to sit on a best-qualified
22 panel where you're expecting to make significant

1 decisions and outcomes.

2 So, you know a lot of the folks on the
3 installation.

4 MS. BASHFORD: Having picked juries in
5 civilian contexts for 40 years, it's very random
6 when they walk into the courtroom. But it's
7 upstream/downstream.

8 When they walk in the courtroom
9 downstream, first of all, they deselect
10 themselves -- a whole group -- by saying they
11 don't understand English correctly, or because
12 they don't want to serve. You get rid of a lot of
13 people that way. We have very, very wide --
14 unlike, they said, what, Arizona? Mexico? We
15 have a lot of peremptories. And so, it's very
16 inefficient, this jury selection. Any high-
17 publicity case could take two weeks. It's rarely
18 done in less than two days.

19 I had one judge who would say, what a
20 great system, you're getting tried by twelve
21 people too stupid to get out of jury duty.

22

1 I don't think this happens in the
2 military, at least once they've been put on the
3 list, where they simply say, I can't be fair, or
4 I think he looks guilty, or whatever.

5 The attorneys derandomize it,
6 rightfully or wrongfully. Sex assault cases,
7 defense attorneys tend to kick women off. I
8 don't know that that's a wise decision or not a
9 wise decision.

10 (Simultaneous speaking.)

11 MS. BASHFORD: It's just, it's very
12 inefficient. So, I think of the same thing. You
13 make a decision, I don't think this person's
14 smart enough to understand the DNA evidence that
15 is going to be presented.

16 You're randomizing one place or
17 another. It's just less efficient I think. I
18 can't imagine that you'd have too many cases
19 where voir dire would take two weeks.

20 MAJ GEN BIBB: Ma'am, I think you
21 bring up some good points. It made me think.

22 I talked to one SJA and she was
talking about, you know, is jury duty, is that

1 something you want to do or is that something you
2 do not want to do?

3 And she was at one base and some
4 commanders were certainly not the best candidates
5 for the wing commander. And the wing commander
6 said, here's my list of top 25 percent in the wing
7 for each rank. And if they are not in that top 25
8 percent then I won't even go through and consider
9 them.

10 And then she said she had one officer
11 call her directly and say, well, is there a panel
12 I can get on, you know, because, you know, they
13 call for a panel and, you know, that's, you know,
14 the top 25 percent panel members.

15 You know, and she said that's not the
16 way it works.

17 So, anyway, just that, that perception
18 that you know that your commander values it, and
19 values justice, and values our JA. And with that,
20 I mean, they value everything. But they
21 prioritize that above other things.

22 MS. BASHFORD: I would personally go

1 with the theory that you would want to be on --

2 MAJ GEN BIBB: Yes, ma'am.

3 MS. BASHFORD: -- a jury. And you'd
4 defer the people who didn't want to be on a jury.

5 MG ANDERSON (Member): I just want to
6 go back to, General, your comment about the
7 record brief. And I was always uncomfortable
8 when I just got that. And so maybe I, you know,
9 broke tradition or broke some unwritten rule, but
10 I would always bring my sergeant major.

11 And that speaks to your comment about
12 reputation. But there were things I would, I
13 would think I knew and the sergeant major would
14 say, no, ma'am, that's not -- that was printed on
15 paper but you'd never want to work for him
16 because he lacks the temperament to listen to
17 people, to be measured in his responses and his
18 critical thinking skills are just -- don't exist.

19 So, that's kind of how I had to kind
20 of fill in some of the blanks when we didn't have
21 a questionnaire like some of you do. So, it does
22

1 make it hard when you try to get enlisted and
2 officer. I would ask him for his opinion on
3 officers because, you know, NCOs run the Army, so
4 they know what's going on.

5 So, I don't know that there's a, that
6 there's a best practice. But I certainly like
7 the idea of a questionnaire as a way to ferret
8 out and take out some of the subjectivity.

9 RDML PENOYER: You may have more input
10 here than me. We only had three-quarters of the
11 page. Got to get your copy. But --

12 RDML ROCK: No, you don't want my
13 copy.

14 RDML PENOYER: I don't want your copy.

15 (Laughter.)

16 RDML PENOYER: But we found a little
17 bit of the -- to the point you made, ma'am,
18 earlier -- a little bit of it was, it was
19 surprising to me how many members would attempt
20 to excuse themselves from completing the
21 questionnaire, so that I wouldn't have a full
22 portfolio of information.

1 And that told me a lot about them and
2 gave me the opportunity to instruct them as to
3 the chain of command, how, how we could get their
4 questionnaires with them. But it is, it is not a
5 perfect system with questionnaires sitting
6 around.

7 RDML ROCK: No, to me that, that spoke
8 to bias. The way people would answer a
9 questionnaire would give me some insight into,
10 into their particular personal bias, which in
11 some cases would lead me to, to not select them
12 for sure.

13 There is no way to, I think, remove
14 total subjectivity from it. Certainly when
15 you're trying to evaluate judicial temperament, I
16 don't know how you do it better.

17 MR. CASSARA: How many of you have sat
18 on panels as panel members before becoming a
19 convening authority? And how did that affect
20 your decision-making process out of the convening
21 authority?

22 MG HODNE: I was a board member on a

1 Board of Inquiries. I went to three court-
2 martial panels and was excused from all of them.

3 MR. CASSARA: That impacted? As you
4 were going through the process did that enter,
5 you know?

6 MG HODNE: No.

7 MR. CASSARA: Okay.

8 MAJ GEN BIBB: I sat on one panel
9 all the way to conclusion. The defendant was
10 found not guilty. And I do think it shapes my
11 context and understanding of the process --

12 MR. CASSARA: Right.

13 MAJ GEN BIBB: -- having seen it as a
14 panel member and to the deliberations. And we had
15 a, you know, a split decision on the, on the
16 panel. And I think the in-depth discussions that
17 we had gave me a lot of insight on picking panel
18 members.

19 MR. CASSARA: Thanks.

20 RDML ROCK: Now you've got me
21 questioning my own abilities for a convening
22 authority because I've never sat on a panel

1 before.

2 (Laughter.)

3 RDML ROCK: I, I think that insight
4 would be helpful, though.

5 MAJ GEN BIBB: Yeah. I was a major at
6 the time.

7 RDML ROCK: Yeah.

8 RDML PENOYER: I didn't. I was not. But I would
9 hazard that for all of us we've all, speaking on
10 the nature of the command progression that it
11 would become a GCM authority.

12 You'd been deeply enmeshed in military
13 justice up until that point. So, because it
14 didn't feel like a bright line to me, like, this
15 is something that will be different, this is a
16 system that I have been enmeshed in for a long
17 time.

18 And certainly other administrative
19 panels of merit, it felt very familiar. But as
20 you asked your question, like, how did that
21 influence you or not? My immediate reaction was

22

1 it didn't influence me.

2 What drove me was, just like the
3 general, good order anticipates burden that was
4 on me as commander. Really that was the thing I
5 found brought to mind really the more compelling
6 informative topic.

7 MG HODNE: Good order and discipline
8 also subjective, plus it's occurring randomly.
9 It requires deep, deep thought, teamwork, you
10 know, up and down the chain. And so this, though
11 I may not have sat on a court-martial panel, you
12 know, might sit in courtroom and a few hours
13 later this downshooting effect, I guess, someone
14 looking, someone made that determination just
15 looking at my record. And for whatever reason,
16 like, we don't want this person to sit on this
17 panel. But good order and discipline is often
18 important.

19 And again, I've been involved in non-
20 judicial function since I was 25 years old. And,
21 you know, involved in that process which
22 certainly informs your understanding of good

1 order and discipline in the role of the military
2 justice system involved in that.

3 And I stood in front of convening
4 authorities as a captain, you know, with my
5 Soldiers that were going through the process and
6 then the record level beyond that.

7 MAJGEN ANDERSON: I never sat on a
8 panel. And to give you a sense of the young
9 Americans that we have serving today, for my two
10 years in command as a convening authority I never
11 stood a court-martial for 7,000 individuals
12 across the entire nation. So, it's the kind of
13 quality people that we spoke to earlier, whether
14 or not enlisted or officer, that are serving our
15 nation today.

16 HON. SMITH: Anyone else have
17 questions for the panel?

18 MAJ GEN BIBB: Something else I'll add
19 there that we haven't brought up on this as far
20 as the diversity across the panel, you know. The
21 panel I was on I was a major and was the senior
22 officer. And so, you know, if you had a enlisted

1 on the panel I'd be really careful on, you know,
2 listening to the other Airmen on conversation out
3 of them. Some of them, you know, hadn't been
4 around.

5 You know, some of our units don't have
6 very many officers. And so, you know, first time
7 they'd really spent that much time with an
8 officer. And so I do think it's different than
9 our civilian system. There is a possibility of,
10 and not in a bad way, but panel members being
11 intimidated.

12 And so, as we have that variety, you
13 know, if you only have -- if you do randomization
14 and we have a lot of young Airmen and randomly
15 you get one chief or one senior NCO that, you
16 know, there would be some dynamics. And there's
17 dynamics on civilian panels, too, so.

18 HON. SMITH: I was going to say.

19 MAJ GEN BIBB: And I don't want to
20 discount that.

21

22 HON. SMITH: Yes.

MAJ GEN BIBB: But I do think --

1 HON. SMITH: -- for all these people.

2 MAJ GEN BIBB: But I do think the
3 rank issue is unique.

4 MS. GALLAGHER: If I can ask a couple
5 follow-up questions.

6 The rules for a court-martial member
7 are changing. They are no longer going to be
8 called upon to adjudge sentences. And there is
9 no longer an option for a special court-martial
10 presided over by panels.

11 So, their role is fact finding based
12 on the instructions of military judge.

13 Does that, do those changes to the
14 system matter as far as whether the best-
15 qualified are still needed or whether you can
16 step down a little?

17 MG HODNE: I would not recommend
18 stepping down, even in the fact-finding role.
19 This criteria still apply.

20 RDML PENOYER: And I would add to
21 that, I understand the question particularly as
22 it relates to sentencing and all of that. But

1 to my mind many of the military specific parts of
2 the UCMJ require the exact same judgment and
3 experience with military matters that would drive
4 you to a best-qualified panel.

5 You know, dereliction is not a, is not
6 a calculus problem. It requires judgment and it
7 requires a diverse panel with the skills for
8 delivery on those things.

9 RDML ROCK: I think there's a risk, or
10 a perception risk here if you, if you dial it
11 back to something less than best-qualified where
12 in practice it might not make a difference but in
13 perception-wise it certainly could for the
14 accused.

15 And if you've got the ability to
16 select the best qualified, why would you want to
17 compromise that?

18 MAJ GEN BIBB: I agree. It would be
19 hard if I was a subject or a defendant I think I'd
20 want the best-qualified panel making that decision
21 that I could.

22 MS. GALLAGHER: So, if there was a

1 shift to a randomized selection process and all
2 the screening that goes into the selection of
3 members under this best-qualified system of
4 selection that we have, that isn't done before
5 trial, it's done through the voir dire process at
6 trial. It would require probably a detail of
7 more members so that you have enough members
8 remaining after excuses and challenges.

9 What, if any, effect on missions or
10 impact on readiness should we account for in
11 having more people be available to show up for
12 court, the voir dire process anyway?

13 MG HODNE: Ma'am, I think it would be,
14 immediate response would be added staff burden.
15 That would be the result, to sort through that.
16 Cost. If it is a security environment you're
17 already under a lot of pressure with the, you
18 know, just to meet demands of training and
19 readiness timelines, and random detailing
20 additional members without regard to that I think
21 would insert unpredictability in our units.
22 Because now you're asking to stand a larger pool

1 of folks, you know, without regard to what
2 positions they serve and what operations they're
3 executing.

4 I think that would be harmful to
5 mission readiness.

6 MS. BASHFORD: If I could just
7 interject one thing.

8 A sexual assault case our juries
9 routinely call for panels of 60 to 80. And
10 usually that calls for a follow-up panel of
11 another 50 to 70 before they seat 12 people and 2
12 or 3 alternates.

13 Just for the numbers.

14 MG HODNE: But that, that has, ma'am,
15 that has not been the experience as a convening
16 authority that I see with the panel selected.

17 MS. BASHFORD: That's because you're
18 not randomizing up front.

19 MG HODNE: Right. Right.

20 And if I can add, the impact if you
21 had to do that with the op-tempo, there was not a
22 single day where any, all of my units were on

1 Fort Carson. And so, just randomizing that
2 selection, some of those, some of those
3 notifications to deploy occur inside 96 hours.

4 So, when you're now increasing the
5 burden of folks that are expected to be available
6 for these panels on the tempo and pace that units
7 are operating on, I don't think we can absorb the
8 stretch that you're asking there to detail more
9 panels based on, based on that.

10 MAJ GEN BIBB: Ma'am, especially if you
11 consider if it's a defendant that's an officer;
12 right?

13 So, if it's a captain and now you have
14 to find 60 to 80 majors and lieutenant colonels
15 across an installation, and a lot of
16 installations aren't getting, you know -- it
17 would have a huge impact on operations. If you
18 had that many, or you might have to bring in
19 officers from other bases, other installations to
20 get, even get at that.

21 HON. SMITH: What's the number now
22 that you pull without the randomization? What

1 number are you generally seeking?

2 RDML ROCK: Eighteen, 21, something,
3 something on that order.

4 I, I think you can work through the
5 impact of readiness challenges. In my role,
6 particularly out of Norfolk, the pool of people I
7 had to draw from was essentially a third of the
8 Navy.

9 But for the general --

10 MG HODNE: I could not have a third of
11 the Army.

12 (Laughter.)

13 RDML ROCK: It took a staff of six
14 people just to keep that, that machine going.
15 So, the administrative burden is just, just
16 really, really heavy. You can work through it
17 all but you create, you create a real challenge.

18 RDML PENOYER: And I would add, you
19 know, bearing in mind the wide array of
20 formations that we have in the armed forces now,
21 my Coast Guard has got, again, I commanded a
22 district with units that were typically 25 to 35

1 people, and, you know, we were drawing from them
2 for a pool in our annual standing convening
3 order.

4 But I would also say that, you know,
5 we had the balance in the readiness action, we
6 were doing that up front. To do that ad hoc
7 would all involve an enormous burden on the unit,
8 only to have peremptorily removed or excused
9 because now you've taken too many from a unit for
10 a random draw.

11 I think it would be very challenging
12 for formations like Coast Guard has to do that.
13 It would almost become a continuous draw process
14 just to come up with the numbers.

15 MS. GALLAGHER: So, following up on
16 that aspect, several of the stakeholders that we
17 have gathered information from have advocated for
18 not just command lines for the original pool of
19 panel members, but to go to geographic, you know,
20 standard geographic boundaries to perhaps address
21 issues of diversity in maybe your jurisdiction,
22 to localize.

1 Can you kind of explain what type of
2 complications would arise if your -- when you're
3 going outside of your command for selecting
4 members and extending more to geographical lines,
5 and maybe into areas that, that don't fall under
6 your command but someone else's?

7 RDML ROCK: I think, I think that's
8 the way the Navy has operated in practice with
9 their regionalization, essentially, of convening
10 authorities.

11 Aside from the administrative burden
12 it takes to coordinate all that, I think it does
13 allow you to expand the pool quite, quite
14 rapidly.

15 There's, there's also a cost that
16 comes with it, too. And we've been -- a
17 financial cost for travel. And we've gotten
18 cross-threaded between commands on who's going to
19 pay for that, and whose requirement is it really.
20 And if the convening authority is generating the
21 requirement, then why shouldn't they be the one
22 that burdens those expenses? And it can add up.

1 So, financial impacts as well as
2 administrative burdens are really the thing that
3 challenges regional approach.

4 MG HODNE: I think the awareness of
5 the convening authority on the, you know, the
6 challenges, constraints facing those other units
7 that extend beyond the convening authority's, you
8 know, situational awareness, so and ruling on
9 excusal requests without -- which is something
10 that I'm sure every convening authority here, you
11 know, weighed deliberately, and the ability to
12 weigh on excusal requests, and you don't
13 necessarily fully understand the context of their
14 availability.

15 If you took Colorado, Utah, Wyoming,
16 I'm not as familiar with that.

17 MAJ GEN BIBB: And, ma'am, I would
18 take across, I was allowed to take across
19 commands. And I could pick from other
20 installations as well if I wanted to. But I
21 usually would pick from, like, at an installation
22 there might be Airmen there working under two or
three different

1 commands.

2 You might have Special Operations
3 Airmen. You might have, you know, AGOW, Air
4 Ground Operations Wing personnel at a base. And
5 so, that would come on my list of selections that
6 I would -- and they would have a star next to
7 them and it would say, you know, with the
8 approval of the owning commander.

9 And I never had an owning commander
10 push back; right? So, it would have -- and that
11 was, you know, part of the diversity, too, right,
12 of having folks sometimes -- and sometimes I
13 would also get an Airman for a court-martial, the
14 way our system worked, that was assigned to one
15 of the bases that we're in charge of that wasn't
16 in my command. And so, I would work with that
17 owning commander as we brought charges, et cetera.

18 So, right now we are crossing command
19 lines. And then sometimes if selections are of
20 the more senior folks, when I was at Ramstein we
21 had a very senior lieutenant colonel who was
22 brought to trial at another base. And they flew

1 in two C-21s and loaded them up with four
2 colonels. There was eight colonels on each
3 airplane that flew to the other base so they
4 could conduct the court-martial.

5 MG HODNE: And in the Army the senior
6 commander is the GCMCA on an installation. So,
7 that senior commander can reach already to the,
8 you know, the health agency, the Special
9 Operations formations, and detail all them to sit
10 panels.

11 RDML PENOYER: Ma'am, I think we, I
12 think we're all doing some version of what you've
13 described already. But as I, as I'm reflecting
14 on that, my own experience is that there's sort
15 of a sweet spot where you could get enough of it
16 that it's still manageable, and not so much that
17 you start flying people, you know, intercoastally
18 and it becomes unmanageable.

19 So, I think we're doing that already.
20 And how much further you would go before you
21 started really becoming unmanageable, I don't
22 know.

1 MS. GALLAGHER: And, General Anderson,
2 if you could speak to that, because we've had
3 Marine Corps stakeholders. You have a very --
4 your demographics are varying through the Marine
5 Corps.

6 How often and how problematic is it
7 to, to expand to completely different
8 geographical regions, or is it even done, in
9 order to perhaps capture a more diverse
10 community? Whether it be by, you know, expanding
11 beyond the 19-year-olds at one particular
12 location to, you know, to more diversity in rank
13 in other ones, or more diversity in gender?

14 If you can kind of explain?

15 MAJGEN ANDERSON: Sure.

16 I think the diversity just through
17 geography has been sort of normalized in the
18 command that I've come from because we already
19 are spread across the entire nation.

20 And we don't -- I wouldn't limit it
21 by, by region per se within our, within my
22 command. The only thing I will say, you know,

1 along with the admiral there, the only downside
2 really is cost.

3 And depending on how long that's going
4 to be, how many people you're bringing in, that
5 money, I know it seems like it's, it could be an
6 insignificant amount, but it does add up our
7 readiness accounts. It comes from readiness to
8 war fight. The money comes from that to do these
9 type of travel and administrative moves for
10 people to be in a court-martial.

11 Is it a cost worth it? Again I'll go
12 back to commanders' business, if that's how we're
13 going to get it fixed, then yes, we're, to carry
14 out a court-martial we will do that. But it's
15 going to come out of costs.

16 So, we always have to consider the
17 financial side of it, too.

18 MS. GALLAGHER: I do have another
19 question, but I want to make sure all members --
20 Okay.

21 So, another question would be in
22 regards to if the best-qualified mandate for you

1 all to select the best qualified based on that
2 particular criteria were eliminated, and it was
3 more of a randomized system in which, you know,
4 programs should be created in order to factor in
5 different criteria, and one of them would be, of
6 course, is an Article 25 requirement that the
7 members be senior in grade to the accused. And
8 when you factor that into the rules, you would
9 spit out all those people that were senior.

10 What is your opinion on the diversity
11 in rank, whether that would be something -- I
12 mean, frequently we see in the selection process,
13 at least in some Services, they'll say, hey, give
14 me, give me three lieutenant colonels, give me
15 four majors, give me 18 command sergeant majors,
16 you know, whatever the numbers are.

17 So, in part some of the selection
18 process is already looking at the ranks, even
19 though, you know, you can't select based on rank.
20 The pools in order to have it diversified is
21 something that's already being looked at.

22 Is that something that you would

1 recommend be put into the program to, to have not
2 just those 18-, 19-year-olds, but to get
3 representation from a variety of ranks on that
4 random selection now?

5 MG HODNE: Just so I'm clear on your
6 question.

7 MS. GALLAGHER: Yes.

8 MG HODNE: You're saying that the rank
9 of the panel members must be higher than the rank
10 of the accused?

11 MS. GALLAGHER: Correct.

12 MG HODNE: Yes.

13 MS. GALLAGHER: Yes. And that's
14 already an Article 25 criteria that is factored.

15 MG HODNE: Right. Right. Yeah, I
16 think the right panel constitutes any combination
17 of best-qualified panel members who outrank the
18 accused plain, plain and simple, is how I'd frame
19 that.

20 RDML PENOYER: I think you're
21 suggesting an algorithm that somehow weights
22 force of diversity in to the output by

1 considering grades, as long as they're senior to
2 the accused.

3 MS. GALLAGHER: Right. Trying, trying
4 to get a variety of grades as opposed to random
5 selection, a pure random selection which then
6 that is going to generate all E-3s, because
7 that's the vast population. Making sure that
8 that selection criteria going --

9 RDML PENOYER: I understand, ma'am.

10 MS. GALLAGHER: -- going into the
11 computerized program says 10 percent E-4s, and 20
12 percent E-5s to E-6. Or, you know, so that
13 there's some mechanism to ensure diversity of
14 rank on the selection list. Is that important?

15 RDML ROCK: If randomization was the
16 only choice, I think that would be beneficial.
17 Because what that would essentially do is, is
18 also give you some diversity of training,
19 diversity of experience, diversity of age. So,
20 you're kind of walking your way back to the
21 Article 25 factors anyway.

22 So, I think that would be important to

1 have that, that built into the selection model.

2 MG HODNE: At the risk of being the
3 dissenting vote, I'm with you on this. I can't
4 even answer that question because I can't arrive
5 at a random because back to my earlier comment
6 about I can't see randomization inspiring more
7 trust in the system. So, I can't imagine that.

8 Because to me the outcome you
9 described automatically means we're not at a
10 best-qualified panel.

11 MAJGEN ANDERSON: When we, when I
12 start with framing the problem, what are we
13 trying to fix? What are we trying to fix with
14 randomization? Right?

15 That's, that's where I start from
16 trying to see and look to, you know, what we want
17 to or what changes we would recommend. What is
18 the problem that we're getting at with that sort
19 of percentage criteria?

20 And I don't -- I guess I'm not, yeah,
21 I don't know what that is.

22 RDML PENOYER: And I suspect, you

1 know, if you kind of root through this you could,
2 you could hypothesize that the problem we're
3 scratching is that, well, or the reality that
4 we're getting, we're always getting convictions
5 when we go to the general court-martial. And I
6 can tell you that is not -- that's not correct.

7 (Laughter.)

8 RDML PENOYER: And as the GCMCA
9 authority I didn't want it to occur; right?
10 Because remember --

11 MS. GALLAGHER: I think it's a
12 perception of bias.

13 RDML PENOYER: Yes. So, you get the
14 perception of bias.

15 And I think that's exactly the point,
16 though, that I wanted to make about these
17 algorithms being pushed through gymnastics. They
18 approach a black box. It's almost like asking
19 ChatGPT to generate my list. I don't know how it
20 did that.

21 You can't explain it or repeat it. It
22 doesn't inspire any more confidence in me than

1 human beings have in a set of criteria and a
2 process.

3 And I tend to align with the general
4 on this. If you can't convince the accused that
5 they've got the best panel we could generate,
6 then you're not going to affect that perception
7 of bias.

8 MAJ GEN BIBB: When I was the 18th Air
9 Force commander, in one year I was selected, I was
10 randomly selected five times for urinalysis.
11 Right? You know what I mean?

12 So, there are some -- there's just
13 kind of wonky things that come out of
14 randomization sometimes. Right?

15 Ma'am, I guess I'm where Admiral Rock
16 is. I mean, if that's all you're going to give
17 us, I mean, as opposed to just, you know, pure
18 randomization, or pure randomization with rank,
19 you know, maybe I'll take the rank to have some
20 kind of, you know, surety that we'll have some
21 more senior folks and maybe a better chance of
22 best-qualified or more diverse pool.

1 But I'd go back to every Airman, every
2 Guardian is different. Right? And so, you know,
3 in general if it was a brand new second
4 lieutenant that had only been on base two weeks,
5 and that would come across my desk, I'd say, nah,
6 probably not ready to sit on a panel, probably
7 not the most qualified.

8 But then if you look a little deeper
9 in there and say, oh, but they have 14 years
10 serving as a tech sergeant, and they were below
11 the zone as a senior Airman, and they've got a
12 bachelor's degree, and they're working on their
13 master's, then, like, okay, they're only been
14 here three weeks and they're a second lieutenant
15 but, you know, they, they have other
16 characteristics that make them highly qualified.

17 And so, there's a lot hidden behind
18 just looking at rank, or just looking at age, or
19 just looking at any one of these things. I think
20 together it's very powerful, they're a very
21 powerful tool for commanders.

22 MS. GALLAGHER: So, currently we have

1 the configuration where we have a congressional
2 mandate to impose, you know, to implement some
3 kind of random selection process by December of
4 2024. But we also still have Article 25
5 requiring the best qualified members to be
6 detailed by their convening authority based on
7 the criteria.

8 So, you have those, those two systems.
9 Some would say that they're simply not
10 compatible. But that's, that's what we have.

11 Do you have any input on whether it is
12 better to have the randomization of,
13 randomization of the selected members come before
14 or after the convening authority -- would you want
15 to take that final list that you're given and
16 select the best qualified of those randomly
17 generated? Or would you want to weigh in and
18 select the members and then have them be
19 randomized?

20 MG HODNE: That would be best
21 qualified. And because they're best qualified,
22 I'm confident in their judgment. And whether

1 they're -- how they're organized among those pool
2 of best-qualified panel members that can be
3 randomly selected.

4 RDML PENOYER: And I would add I
5 completely agree. And I would, I'd say that's
6 pretty close to what we try to do now.

7 And when we, when you include the
8 peremptory challenge process, right, from my
9 perspective the idea that somehow we're going to
10 see just the people we wanted on that panel,
11 that's already not happening. Right?

12 So, from my perspective I think I
13 would want to keep the best-qualified system for
14 the standing convening order and then let
15 specific seating for a particular general court-
16 martial that, that could be randomized within
17 that pool of selected folks fairly, fairly
18 without -- as pretty close to what we're trying
19 to do now.

20 MAJ GEN BIBB: So that today -- the
21 Air Force uses randomization at the end. And it's
22 not very much; right? So, you know, if I put 20

1 names on the list and say these are the most
2 qualified, and then they go through the voir dire
3 process and they get down to 16. And then, you
4 know, out of those 16 they will randomly pick the
5 12 that are going to be on the panel and the four
6 that are going to be alternates or the, you know,
7 two that are going to be alternates and two that
8 are sent home without having the alternates be
9 decided.

10 So, I mean, there's a little
11 randomization there. It's probably not going to
12 get to the congressional intent, I would guess.
13 I think there is something to be said for putting
14 that commander later in the process to be able to
15 look at that.

16 A little different between the
17 Services, too, because the Air Force I actually
18 pick for a particular case. Right? Where I'm
19 thinking the Army and Marine Corps maybe, or at
20 least Army it's they're picking a pool for any
21 case, right, or a panel for any case that would
22 come up.

1 MAJGEN ANDERSON: For a period of time.

2 MAJ GEN BIBB: For a period of time. So, a
3 larger number of people. So, it's a little
4 different.

5 But I think for us, I think the
6 ability to look across that panel and do one last
7 double check is, this is how the racial diversity,
8 this is how the, you know, the sexual assault
9 case, you know, what I mean, there's no women on
10 the panel. Right? Is this, you know what I mean,
11 you know, would it be good to have a woman on the
12 panel?

13 Or the other way, it's all, you know
14 -- or anyway, there's a number of different things
15 that I think give it one last glance that, yeah, I
16 think I'm happy with that.

17 And, you know, and maybe that's an all
18 or nothing. Maybe it's, you know, I can replace
19 one person, or I can replace two, or I have the
20 option to say, yeah, I'd like to put this one back
21 in the hopper, put a person in the loop to kind of
22 get the final table slot that, you know.

1 But I think having some ability, you know, if
2 they randomly pick 25 percent of my installation,
3 you know, that gets you the larger group that I
4 can choose from I think would be helpful. And
5 then, and then go from there.

6 RDML ROCK: General Bibb's comments
7 get me thinking about, you know, what, to what
8 extent is random random? Right? If it's a list
9 of 20 that you're getting down to 12, is that
10 random enough? Or do you need to go to, you
11 know, a list of 80?

12 So, in either of these scenarios I
13 think you still have that challenge of pool size
14 to get to whatever the intent is on randomness.

15 RDML PENOYER: Yeah. And I would say,
16 you know, again, a smaller number of GCMs, but we
17 would convene these standing panels for a period
18 of a year. With anticipation that could be a
19 draw of three to five different GCM cases.

20 So, I was already creating a bigger
21 pool. And I suspect that that's perhaps the
22 difference.

1 I felt a lot more comfortable with the
2 second randomization because my experience was
3 for the cases where we were going to court-
4 martial that, like I said, I went in with what I
5 thought was going to be, you know, the panel
6 convening order with alternates and enough room
7 for peremptory challenges.

8 And I found myself adding candidates
9 back to that pool on many occasions because
10 they'd ripped through all those peremptory
11 challenges. Somebody wasn't available. The next
12 thing you know, I'm back in the pool again.

13 So, I do think you have to be
14 cognizant that you're going to need that larger
15 standing pool if you go to that second
16 randomization to really have it be randomization.

17 HON. SMITH: Okay. Any last
18 questions?

19 All right. Thank you very much. This
20 was very informative. Though I think you left us
21 with more questions.

22 (Laughter.)

1 MR. YOB: Before we conclude I just
2 have a couple of quick comments.

3 First, I want to apologize for the
4 acoustics today, particularly for the people
5 behind the speakers. We're working around it and
6 hope we can implement.

7 Secondly, for purposes of putting a
8 quorum on the record, I just want to note that we
9 had 10 committee members present today, or in
10 attendance today, nine of whom were present and
11 one of whom was attending virtually.

12 And the third thing is just to note
13 that we will reconvene tomorrow at 08:25. 8:25
14 in the morning.

15 And the last thing is just for the
16 staff members, the entire staff, take 5 minutes
17 after we adjourn but then reconvene for just us
18 for 5 minutes only.

19 And that's all.

20 (Whereupon, the above-entitled matter
21 went off the record at 4:49 p.m.)

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Before: DAC-IPAD

Date: 09-19-23

Place: Arlington, VA

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