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

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PUBLIC MEETING

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WEDNESDAY
JUNE 12, 2024

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           The Committee met in Convene Hamilton
Square, located at 600 14th Street, NW,
Washington, D.C., at 9:00 a.m., Hon. Karla Smith,
Chair, presiding.

PRESENT
Hon. Karla Smith, Chair
Ms. Martha Bashford
Mr. William E. Cassara
Mr. A. J. Kramer *
Ms. Margaret Garvin *
Ms. Jennifer Gentile Long
Ms. Suzanne Goldberg
Dr. Jennifer Markowitz
SGM Ralph Martinez
Hon. Jennifer O'Connor *
BGen   James Schwenk
Sgt. Lisa Sheppard
Dr. Cassia Spohn
Ms. Meghan Tokash
Hon. Reggie B. Walton

ALSO PRESENT
Mr. Pete Yob, Executive Director
Ms. Meghan Peters, Deputy Director
Mr. William Sprance, Designated Federal Official
Ms. Jennifer Campbell, Chief of Staff
Ms. Gina Acevedo, Attorney Advisor
Ms. Stacy Boggess, Senior Paralegal
Ms. Alice Falk, Technical Writer-Editor
Ms. Breyana Franklin, Communication Specialist
Ms. Theresa Gallagher, Attorney Advisor *
Ms. Nalini Gupta, Attorney Advisor
Ms. Mya Koffie, Intern
Mr. Michael Libretto, Attorney Advisor
Ms. Marguerite McKinney, Management and Program
      Analyst
Ms. Janelle McLaughlin-Ali, Paralegal
Mr. Blake Morris, Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Abigail Sackett, Intern *
Ms. Terri Saunders, Attorney Advisor
Ms. Kate Tagert, Attorney Advisor
Ms. Eleanor Magers Vuono, Attorney Advisor

*   Present via video-teleconference

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

2   (9:37 a.m.)

3   MR. SPRANCE: Good morning, everyone.

4   My name is Bill Sprance. I am the Designated

5   Federal Official for today's meeting of the DAC-

6   IPAD. The meeting is now open.

7   Madam Chair, the floor is yours.

8   CHAIR SMITH: Thank you, Mr. Sprance,

9   and good morning. I would like to welcome the

10   members of the DAC-IPAD and everyone in

11   attendance to Day 2, the 35th Public Meeting of

12   the Defense Advisory Committee on Investigation,

13   Prosecution, and Defense of Sexual Assault in the

14   Armed Forces, or DAC-IPAD. Today's meeting will

15   be in-person, with Video conference via Zoom also

16   available for members, presenters, and other

17   attendees.

18   The DAC-IPAD was created by the

19   Secretary of Defense in 2016 in accordance with

20   the National Defense Authorization Act for Fiscal

21   Year 2015, as amended, for a 10-year term. Our

22   mandate is to advise the Secretary of Defense on

1   the investigation, prosecution, and defense of

2   allegations of sexual assault and other sexual

3   misconduct involving members of the armed forces.

4   I'd like to again acknowledge and

5   welcome our two new DAC-IPAD members, Sergeant

6   Major Ralph Martinez and Detective Lisa Sheppard.

7   Additionally, I would like to acknowledge with

8   gratitude the military justice experts from each

9   of the military services' Criminal Law Division

10   to serve as the DAC-IPAD's service

11   representatives and who have joined us for the

12   meeting today. Welcome and thank you.

13   We will begin today's meeting with a

14   discussion on the feasibility and advisability of

15   establishing conviction integrity units in the

16   military. During this session, we will hear from

17   an organization that assists individuals

18   incarcerated after wrongful convictions and aims

19   to address systemic issues that lead to errors in

20   the criminal justice system.

21   Next, the DAC-IPAD Case Review

22   Subcommittee will present the results of its

1 study of the demographics of courts-martial panel

2 members. The study complements the Committee's

3 review and assessment of the panel members'

4 selection process published in December 2023 by

5 analyzing the demographics of the panel members

6 accused and other courtroom participants in

7 contested sexual assault cases tried before a

8 military jury known as a panel in all of the

9 military services.

10 After lunch, the Committee will

11 deliberate on the findings and recommendations of

12 the Case Review Subcommittee based on their study

13 of military panel member demographics. Following

14 deliberations, we will receive updates from the

15 Special Projects and Policy Subcommittees. After

16 a break, the Committee will receive public

17 comment from several individuals. Prior to

18 concluding the Day 2 meeting, Ms. Meghan Peters

19 will wrap up the meeting before adjournment by

20 the DFO.

21 And with a couple of housekeeping

22 items, to those joining by video, I ask that you

1   please mute your device microphone when not

2   speaking. If any technical difficulties should

3   occur with the video, we will break for ten

4   minutes, move to a teleconference line, and send

5   the dial-in instructions by email.

6   Today's meeting is being recorded and

7   transcribed and the complete written transcript

8   will be posted on the DAC-IPAD website. Thank

9   you again to those in attendance today and I will

10   now hand the meeting over to Ms. Peters. Thank

11   you, Meghan.

12   MS. PETERS: Thank you, Chair Smith.

13   Good morning, everyone. I just want to note that

14   we have a quorum today. We have present Ms.

15   Bashford, Mr. Cassara, Ms. Goldberg, Ms. Long,

16   Dr. Markowitz, Ms. O'Connor, Brigadier General

17   Schwenk, Judge Smith, Dr. Spohn, Sergeant

18   Shepherd, and Sergeant Major Martinez.

19   Before we get started today, I wanted

20   to note for our first session we have two

21   speakers listed on the agenda. Unfortunately,

22   one of those individuals, Ms. Katie Monroe, the

1   Executive Director of Healing Justice, is unable

2   to join us today as planned. Fortunately, Ms.

3   Marissa Boyers Bluestine, the Assistant Director

4   from the Quattrone Center for the Fair

5   Administration of Justice at the University of

6   Pennsylvania Carey Law School, is here with us

7   today. This session was scheduled for 90 minutes

8   and we may have some flexibility in the duration

9   of that schedule. If the discussion ends early,

10   we will just break and move to the next session

11   which is the Demographics of Courts Martial Panel

12   Members. That's scheduled for 11:10, but it may

13   start a little bit earlier today. So that's a

14   note for the public and for you all just to

15   understand what's going on with our agenda and

16   some slight adjustments today.

17   With that, again, Ms. Bluestine, thank

18   you for coming this morning. We understand you

19   have a presentation prepared and you may begin.

20   (Off-microphone comments.)

21   MS. BLUESTINE: Ah, there it is. So,

22   yes, my name is Marissa Boyers Bluestine. I work

1   at the Quattrone Center for the Fair

2   Administration of Justice which is part of the

3   University of Pennsylvania Carey Law School. We

4   do not represent individuals in court. We do not

5   take positions in an adversarial proceeding. We

6   do, however, use data and evidence-based

7   solutions to address error in the criminal

8   justice system.

9   My work, in particular, is with

10 conviction integrity units or conviction review

11 units around the country. We serve as a hub for

12 information and training for these units. We

13 provide information. We develop materials and

14 resources that can be used to help units develop

15 along best practices to ensure the kind of

16 pillars of really reliability that we look for in

17 these units which are flexibility, transparency,

18 and independence, as well as avoidance of bias.

19 And I'll get to kind of each of those in just a

20 moment about what those mean.

21   So in doing that work, we do regular

22 surveys with CRUs. We provide direct

1 || consultation with CRUs. I go out and I visit

2 || with CRUs. We do a lot of work just to try to

3 || kind of understand the phenomenon of what they

4 || are and how they operate and what the best

5 || practices are for them to be able to move forward

6 || in the way that is accepting.

7 || So it's important to understand that

8 || when we're talking about a conviction integrity

9 || unit or conviction review unit, we use the term

10 || kind of interchangeably. We're talking about

11 || independent units within the Prosecutor's Office,

12 || of course, I can't get the thing to move. Any

13 || ideas?

14 || I probably did something wrong. Oh,

15 || there it is. Okay. She just comes over and it

16 || just changes like it's the mere presence, I

17 || think.

18 || So when we're talking about a

19 || conviction review unit or a conviction integrity

20 || unit, those are interchangeable terms. It really

21 || just depends on the elected prosecutor, what they

22 || prefer. We're talking about an organization or

1   group within a prosecutor's office conducting

2   extrajudicial and fact-based reviews, secured

3   convictions to investigate causal allegations of

4   actual innocence. Right? So I'll just break

5   that down just a little bit.

6   When we're talking about

7   extrajudicial, these are things -- these are

8   investigations which are taking part outside of

9   the judicial system. There's no pending petition.

10   There's no pending appeal. There's no pending

11   trial. These are investigations into cases where

12   the prosecutor believes there might be a

13   possibility of a wrongful conviction, usually

14   based on actual innocence, meaning the person who

15   was convicted either did not commit the crime,

16   was not present, or there was no crime committed

17   at all.

18   So these are -- when I say fact-based

19   reviews, I mean fact-based reviews. These are

20   reviews that go outside of what the investigation

21   may have been done that led up to the conviction,

22   may incorporate new evidence, new witnesses who

1 were not involved, new forensic testing, new

2 science which was not available at the time of

3 the trial, all kinds of new evidence. And the

4 reason I am emphasizing new is because the only

5 avenue for relief in the civilian system is to a

6 post-conviction release petition which has to

7 raise new evidence.

8 This isn't about CRUs or CIUs being

9 the 13th juror. They're not reevaluating the

10 evidence as it appeared at trial. They're

11 looking at whether there is new evidence to call

12 into question the integrity of that conviction

13 and whether that evidence comes from witnesses

14 who come forward and admit that they lied at the

15 trial or they were incentivized and that was not

16 disclosed to the defense, that there was a change

17 in science or any myriad number of possibilities.

18 They're always looking for that new evidence.

19 And it is a fact-based investigation.

20 This is not about trying to look for

21 a determined outcome. They're not trying to

22 prove somebody innocent. They are pursuing the

1   facts as they exist and seeing whether it changes

2   the outcome -- whether it changes the perception

3   of the integrity of the outcome at the trial. So

4   it really is the emphasis on new is important.

5   And again, it's about generally,

6   although it is now somewhat changing around the

7   country, started focusing on cases of actual

8   innocence. As I said, is usually defined by the

9   person was not present, did not commit the crime

10   or participate in the crime or no crime was

11   committed and then using that as the basis for

12   starting an investigation.

13   So there are about 125 that have that

14   with asterisk which is really not quite easy to

15   tell how many units there are in the United

16   States right now. When we did our first survey

17   of units back in 2015, there were 27. There are

18   now over 126 at least by my count. It is kind of

19   hard to figure out exactly how many units are

20   because there's no central database other than

21   ours, but when we first did our study back in

22   2015, we were wondering whether this was kind of

1 a flash in the pan, something that wouldn't

2 develop. And I think the numbers themselves

3 indicate that it's not. This is something that

4 prosecutors are embracing, as part of their

5 prosecutorial function, and then they are

6 developing units to be able to undertake this

7 work.

8   Just this last week, I got calls from

9 three units, three emerging units, three emerging

10 units in Ohio, New Mexico, and Texas, who were

11 looking for assistance. So it's something that I

12 would say is kind of expanding out, not going

13 small for sure.

14   It does not like me. If you just get

15 up and walk, that might do it. It's her presence

16 I think is what --

17   (Off-microphone comments.)

18   MS. BLUESTINE: So this is just a

19 geographical representation of the units as they

20 are. Next, please.

21   So when we're talking about CIUs, one

22 of the largest and best resources for tracking

1   exonerations, of course, is the National Registry

2   of Exonerations. It's the only database that

3   exists in the United States to track exonerations

4   and learn from them in terms of the kinds of

5   factors that went into leading to a wrongful

6   conviction. It's important that these are

7   exonerations -- these are cases where the

8   individual has been cleared of their past

9   convictions due to evidence consistent with

10   innocence. That's how the registry defines that.

11   And in tracking the number of cases in

12   which CIUs have participated in exonerations over

13   time, we can see that it is increasing,

14   obviously, as we go. The blips in like in 2015,

15   2016, 2017, those were group exonerations of

16   cases involving corrupt officers out of Harris

17   County, Texas and Cook County which is Chicago,

18   Illinois. And the rest are kind of leveling out

19   as you can see. Next slide, please.

20   When we look at this kind of Venn

21   diagram of conviction integrity units and

22   innocence organizations just from the last year,

1 it gives you a sense of just how important they

2 are to the exoneration process. So there were

3 153 total exonerations noted by the National

4 Registry of Exonerations in 2023; 97 of those

5 involved an innocence organization or/and a CIU.

6 And you can see that 30 of those were joint

7 exonerations meaning that the CIU and innocence

8 organization worked together in a collaborative

9 process. And that's something again we'll talk

10 about in just a moment. So if you just look at

11 exonerations, number one -- next slide, please.

12 A look at exonerations number-wise,

13 Harris County, Texas which is Houston had 12

14 exonerations noted last year. Again, that was

15 predominately around a particularly corrupt

16 officer involving cases of drugs that turned out

17 not to actually have been people who were using

18 drugs, but had been arrested for that.

19 Philadelphia had eight exonerations and then see

20 four and three and many have two or one. May I

21 have the next slide, please?

22 So I spent all this time talking about

1 exonerations. Next slide, please.

2   And then I'm going to tell you that

3 that's really not what we should be looking at.

4 So exonerations are an important metric, but they

5 are not the sole metric for whether a CIU or a

6 CRU is successful or is operating, as I would say

7 with good intent or with sincerity. So what --

8 and there is many, many reasons for that.

9   I ran a Pennsylvania Innocence Project

10 for about ten years and I can tell you having

11 worked on 17 exonerations, but the number one

12 factor in an exoneration is luck, right, whether

13 witnesses are alive, whether there's evidence to

14 be tested, whether there's information that

15 wasn't turned over that now we can find. So luck

16 is such an incredibly high factor in terms of

17 whether a case actually gets all the way to

18 exoneration.

19   So we don't like to use exonerations

20 as any metric of success, like that should not be

21 used to define whether a unit is or is not

22 operating in good faith. Rather, we look to

1 other things like what we call case corrections.

2 So most often with a case that a prosecutor is

3 investigating and conducting a thorough

4 investigation on, they don't get to the full

5 level of innocence. They can't say no, I can say

6 certainly this person was not involved or is

7 actually innocent, but they have enough concerns

8 about the conviction because of the integrity

9 with which it was gotten or the lack of integrity

10 that they feel that they should hold a person

11 responsible for a lower accountability.

12 So for example, you might see a case

13 where an individual is on first degree murder.

14 There is a case correction back to third degree

15 murder and an agreement to release, right? So

16 that's a much, much more frequent occurrence. We

17 don't, however, have an ability to track that

18 centrally, but that's another aspect to consider

19 because, as I said, exoneration is such a high

20 level, all the dominos have to fall in exactly

21 the right way, as opposed to a case correction

22 where you can say the prosecutor loses faith in

1 that conviction, but there still might be some

2 residual evidence of guilt and that then -- or

3 they would retry, and have a new trial if there's

4 evidence that still exists. So keeping in mind

5 exonerations are not the be all and end all, if

6 you will, for conviction integrity units.

7 We look for other things in terms of

8 looking for legitimacy. Is the unit operating

9 independently? Does it have an independent

10 director that reports directly to the elected

11 prosecutor or appointed prosecutor? Is it

12 flexible? Do they have what we refer to as a

13 large funnel for bringing cases in because the

14 more cases you bring in, obviously, the more you

15 can take action on down the line. So are they

16 looking at cases, there was a guilty plea, or the

17 person doesn't actually have new evidence, but

18 has a compelling story of why they're innocent,

19 things like that. Are they transparent? Do they

20 produce a report every year to kind of explain

21 their work and what they do? Do they tell people

22 here's our process, here are the people who do

1   this, here's how we make decisions, here's who's

2   involved in those decisions, here is what we can

3   do, what we can't do?

4   Transparency is a key element with

5   conviction integrity units. And another which

6   we've really recently identified is the ability

7   of the unit to avoid bias. There's a little

8   skepticism in the communities about conviction

9   integrity units or conviction units because this

10   notion of the fox guarding the hen house, right?

11   So the more that they can show that they are

12   trying to avoid the bias of having the trial

13   prosecutor or the appellate prosecutor involved

14   in the process and protecting the process because

15   they want it to be objective.

16   It's not about trying to, like, stitch

17   in the outcome or just affirm a conviction.

18   They're truly trying to look at these

19   objectively. And making sure we're not involving

20   the direct trial prosecutor or appellate

21   prosecutor is important in that, not because that

22   person is a bad person or a bad prosecutor or

1   even badly motivated, but, because we are human

2   beings, we all operate with confirmatory bias. I

3   could run several experiments right now which

4   would prove that every person in this room has

5   confirmatory biases. And if I go into that

6   investigation with the already kind of pre-

7   conceived, you know, I convicted this person, of

8   course he's guilty, we don't want that person

9   involved in the process that we're reviewing.

10   We also look at different factors. I

11   apologize, my allergies are really kicking my

12   butt down here in D.C. today. So, things like

13   how has the unit impacted the District Attorney's

14   culture. Are they looking at things? Are they

15   doing more training on wrongful convictions? Are

16   they trying to prevent them in the first place

17   instead of just addressing them as they come up?

18   Are they looking at -- have they contributed to

19   what we refer to as a just culture? So a just

20   culture being one where people don't -- aren't

21   afraid to come forward because they feel like

22   they're going to be like smacked around. But

1 they come forward because they're admitting their

2 own concerns about a past case and wanting to

3 contribute to the office, learning from that

4 error.

5 A CIU should not be, as my friend

6 Bryce, who runs the Queens unit, says that people

7 in his office they view as the scariest missed

8 call in the office, right? That's not how we

9 want the units to be. We want them to be seen as

10 collaborative and supportive. It's not about bad

11 cop, no donut, or bad prosecutor. It's about

12 trying to understand how a case went awry and

13 then learning from that error to try to prevent

14 it from happening in the future. That's what we

15 mean by a just culture. And so CIUs should be

16 engaged in that in both a forward-looking, as

17 well as a backward-looking process. Next slide,

18 please.

19 So when we talked about -- I talked

20 earlier about flexibility and that's really what

21 we mean by kind of the mouth to the funnel. What

22 kinds of cases is a conviction integrity unit

1   going to look at? Well, we looked at this

2   question over time with units and I'll show you

3   in just a moment what the actual numbers are, but

4   universally, actual numbers, the person wasn't

5   involved, there was no crime. We are going to

6   look at that.

7   The majority of cases of the units

8   will look at kind of the totality of the

9   circumstances, even if they don't think that

10 there's an actual innocence, maybe there is

11 enough of a concern in the integrity of the

12 conviction to be able to do an investigation.

13 The majority have a very broad view on what

14 newly-discovered evidence means and don't require

15 an applicant to have that identified when they're

16 applying. And a minority will actually also

17 include procedural and due process issues and

18 they won't reject cases for that.

19   So you see, and again, I love these

20 little Venn diagrams between the actual innocence

21 question and the due process question, the

22 integrity of the conviction question. There's

1   always that kind of inter-meeting area, right, of

2   the changing in science or ineffective issues or

3   issues involving Brady. Those are overlapping

4   issues between both, and so that's where we have

5   seen most of the work done with CIUs. Next

6   slide, please.

7   So when we talked about that

8   flexibility, as I said, and we looked at units in

9   2021, we looked again in 2023, we saw that in

10   2021 whereas only 68 percent -- well, 68 percent

11   said that they would require actual innocence, so

12   required new evidence to be permitted. In 2023,

13   we see those numbers softening a bit, right? So

14   we have 88 percent will consider actual innocence

15   with new evidence, but 88 percent will also

16   consider actual evidence, even if there's no new

17   evidence, right? So the reason that's a heavy

18   criteria is because when an individual comes to a

19   conviction integrity unit and they say I didn't

20   do this crime, I'm innocent, they're most often

21   indigent, most often incarcerated, don't have the

22   access to be able to go out and investigate a

1   case.

2   When you look at the numbers that I

3   showed you from the National Registry of

4   Exonerations involving conviction integrity unit

5   cases, most of those cases were overturned

6   because of evidence that was developed during the

7   investigation. And so to require someone to have

8   that at kind of an entry-level issue doesn't make

9   a lot of sense and prosecutors actually will

10   leave behind a lot of cases they normally would

11   want to work on. So not having that as a

12   prohibitive issue, as long as a case presents

13   enough questions about the integrity of the

14   conviction or the possible non-involvement of the

15   applicant, that should be enough putting units to

16   look at. May I have the next slide, please?

17   There it is. Legal innocents actually

18   are important to kind of look at, so with --

19   whereas before, in 2021, we were looking at most

20   units would say we are not going to take action

21   on somebody who says they're legally innocent,

22   i.e., they had a legal justification for what

1   they did. They were defending someone else.

2   They were defending themselves. They were under

3   some kind of mental defect, or if there was a

4   legal innocence in terms that they were some, not

5   all, of cases of some guilt, not they're

6   broadening out that understanding. Next slide,

7   please.

8   As I said, independence is another

9   best practice that we look for. One of the

10   issues is how is this unit structured and where

11   is it placed within the organization chart of the

12   District Attorney or Prosecutor's Office? So we

13   want to look for -- we encourage units to be

14   outside of the appellate habeas or trial units,

15   again, to kind of avoid that issue of bias,

16   understandably, because in the Trial Division

17   obviously you have enough evidence, you very much

18   believe that you can prove beyond a reasonable

19   doubt the individual is guilty, so therefore,

20   you're proceeding in that way. And in the

21   Appellate Division, we're usually trying to

22   uphold those convictions against procedural or

1   statutory defense. That's what we do. Putting

2   them outside of those units it kind of takes away

3   that type of mindset for looking at a case and

4   really put's it outside in more of an objective

5   way.

6   We also look for and we can see that

7   even that number has increased since 2021. Now

8   almost all of them are outside of the unit. And

9   the ones that are in the units tend to be in like

10   civil rights units. They're not independent, but

11   they're within some civil rights or other type of

12   broader unit within the office.

13   In terms of the staffing, you can see

14   that the numbers have increased. They should

15   have at least one full-time attorney. Most units

16   do. Many more have more than five now than they

17   did in 2021. That's an issue of resource

18   allocation from the elected to the unit. Next

19   slide, please.

20   The second issue we look for is the

21   procedural transparency which is kind of self-

22   explanatory probably, but we look to make sure

1   that they're not operating behind a closed

2   curtain. They're not conducting what we talk

3   about as black box reviews, but being open and

4   engaging and collaborative in their process which

5   is very difficult, of course, in an adversarial

6   system, but that's what we mean by an

7   extrajudicial fact-based review. It does mean

8   we're taking down some of those walls that exist

9   in other areas.

10   So we're looking at things like are

11   they disclosing evidence during an investigation

12   if they were the only ones who did a witness

13   interview, are they telling the other side about

14   that quickly? Are they showing when exculpatory

15   evidence is disclosed or when Brady evidence may

16   have been found out? Are they disclosing that

17   quickly? Are they open about their decision

18   making, their rational process? Do they have

19   written policies and procedures? And do they

20   keep track of the activities in the unit? Do

21   they post those -- that activity and those

22   metrics on a regular basis so that the public can

1   see that. Next slide, please?

2   Thank you. In terms of transparency,

3   again, the best practice is that a unit should

4   have written policies and procedures so they can

5   be consistent in their application of how they're

6   doing things. We saw in 2021 about three

7   quarters of them do; 2023, now actually slightly

8   more than 85 percent actually have written

9   policies out.

10   Then the second area is one of the big

11   kind of consternation especially among folks in

12   the criminal legal system which is this notion of

13   collaborating and working together. When we

14   looked at that issue in 2021, that 72 percent

15   would work with defense counsel. Now over 80

16   percent will work with defense counsel. And then

17   innocence organizations being kind of separate,

18   self-contained organizations that are devoted to

19   looking for cases of actual innocence, three

20   quarters would work then collaboratively. Now

21   it's more of 82 percent.

22   So why is collaboration important?

1 Because it increases the resources of a very

2 small unit for one. But for two, it brings in

3 objectivity from both sides. I always tell the

4 story I represented a gentleman and I went to go

5 out and speak to the witness, the one witness who

6 had inculpated him in the murder for which he was

7 convicted, falsely, as it turned out. And when I

8 went to go speak with her, I knocked on the door.

9 I told her what I was there for and she just

10 broke down crying, like immediately because she

11 had been carrying this weight with her for 24

12 years. And when we sat down and we did the

13 interview with her, she was physically shaking

14 because of how upset she was and what she had

15 done had resulted -- it wasn't her fault, of

16 course, but she bore that guilt. And it took us

17 about an hour and a half just to get through a

18 fairly simple statement with her.

19   Well, two years later, when we have

20 the hearing and she's on the stand, none of that

21 came through. She was calm and I firmly believe

22 that had the prosecutor been there with me when

1 we did that initial interview and he saw how

2 affected she was physically and emotionally by

3 what she was saying, it would have impacted their

4 assessment of her credibility. Instead, it was

5 just another witness or another recantation on

6 the stand.

7   So for one thing, the collaboration

8 gives you that kind of instant analysis of

9 credibility for witnesses which otherwise could

10 be lost if you're merely translating what someone

11 has said. So it's about increasing resources.

12 It's about increasing the objectivity. Both

13 teams are working together. And the prosecutors

14 who do work collaboratively almost universally

15 say it's absolutely the right way to go. This is

16 about being transparent. It's about being open

17 and it's about sharing an open and fact-based

18 investigation. Next slide, please.

19   So -- I'm not going to go through

20 these, I promise, but they're here if you want

21 them. So we have your kind of best check list,

22 best practices check list for defense counsel and

1   for communities to kind of look for, all kinds of

2   stuff, especially on the independent side, the

3   resource side, do they provide full discovery?

4   Do they prohibit the original attorneys from

5   participating or use their own cases, things like

6   that, despite questions that defense counsel,

7   applicants, or the community can ask. Next

8   slide, please.

9   And there are a lot of them, right?

10   There are more -- I tell them what kind of

11   policies the office has, what kind of

12   communications there are, what kind of web

13   presence they have in terms of their

14   transparency, their openness, their willingness

15   to work outside of their office. Next slide,

16   please.

17   So if you look at the criminal legal

18   system as a whole, it is a very complex system,

19   in terms of from start to finish. And if you

20   think about a CRU that's properly working, it

21   actually has the ability to prevent error at any

22   number of points leading up to a conviction. So

1 as I said, it's not just about looking backward

2 to identify convictions that are egregious and

3 long, it's about learning from those errors to

4 prevent them from happening again. We call those

5 sentinel reviews or root causes analyses, and

6 doing those properly with major stakeholders

7 around the table, judges, and prosecutors, and

8 defense counsel, and employees, we can look at it

9 together because it's never, ever, ever the case

10 that that an exoneration, any exoneration is just

11 one factor. Never. It's always a domino effect

12 error. And there's always, always ways that the

13 system failed to catch that error and resulted in

14 a wrongful conviction. So a conviction review

15 unit or a conviction integrity unit when properly

16 working actually informs the entire criminal

17 legal system in terms of error prevention

18 possibilities. Next slide, please.

19   And these are just resources that we

20 have available for prosecutors. There's a

21 website called convictionreview.net where we have

22 all of these materials collected. Next slide,

1   please.

2   Including resources on how to work

3   collaboratively between prosecutors and defense

4   counsel and especially for prosecutors who want

5   to work in an ethical way with unrepresented

6   individuals because those are the majority of the

7   cases that are applied. So we offer a lot of --

8   we worked with dozens of prosecutors, dozens of

9   defense lawyers, ethicists, others to put those

10   guidelines together and those are available for

11   any prosecutor who would want to engage. And

12   that's the last slide.

13   Thank you, Madam Chairman.

14   CHAIR SMITH: All right, we're going

15   to open it up for questions and I guess I'll

16   start. So military sexual assault cases, a lot

17   of times, involve consent. So to the extent

18   you've seen CIUs handle cases where consent was a

19   large part of the case, rather than forensic

20   evidence or the identity of the accused, could

21   you kind of describe that for us and walk us

22   through that?

1   MS. PETERS: Sure. It's certainly

2   much harder for a conviction, as I said at the

3   beginning, there are not 13 jurors. It's not

4   about reevaluating the case. So they have very

5   deep concerns about a particular complainant's

6   testimony or what was said. When they're taking

7   these cases on and to be fair, it's not a lot of

8   units will, but when they take the cases on,

9   they're doing that same kind of level of fact-

10   based investigation.

11   Are there reasons to have concerns

12   about what the witness says happened? They'll

13   talk to the -- obviously, the witness himself,

14   herself, to family members and others look for

15   things like -- I had one case I know of from the

16   CIU where the woman had made similar, almost

17   identical accusations in other cases, which I

18   only learned about after they started the

19   investigation which obviously calls into question

20   some of the accuracy of what she's saying. There

21   was no physical evidence to corroborate the

22   story. So they would look around and do those

1   investigations as well.

2   There's one very famous case out of

3   California involving Brian Banks, a former NFL

4   prospect, who had been wrongly convicted. The

5   defense was actually to get the woman on tape and

6   not just admitting that she had made the whole

7   thing up, but would she have to return the money

8   that she got, things along those lines. And the

9   prosecutor to their credit, they gave that

10   evidence to the prosecutor and the prosecutor

11   acted on it and said yes, okay, we're going to

12   reverse the conviction because of this. So it's

13   that kind -- it's all about that fact-based

14   investigation and it's being willing to hear it

15   and take it and assess it for what it is in terms

16   of that. So without that extraneous evidence,

17   evidence that might not been offered at trial or

18   evidence which may have been withheld from the

19   court or not turned over to the defense, that's

20   where they're looking. So it's almost into the

21   negative, as opposed to kind of actual --

22   innocence of actual -- actual innocence evidence

1 is what I'm trying to say. It's certainly not

2 impossible and we are taking those on more and

3 more.

4   DR. MARKOWITZ: Thank you very much

5 for the presentation. It's very informative. As

6 my colleagues probably expect, I have several

7 questions for you. But I'll start with following

8 up on your response -- one is following up on

9 your response to Judge Smith which is the

10 question -- you just said that most -- if I heard

11 you right, many or most units don't take on cases

12 related to -- I wasn't sure which kinds of cases

13 they weren't taking on.

14   MS. BLUESTINE: So, many will have a

15 very hard time taking on cases of alleged consent

16 for sexual assault with adults or with any kind

17 of sexual assault involving children, just

18 because it is so difficult to prove that, to get

19 new evidence about that in the past and when

20 you're looking back five, 10, 15, 20 years. But

21 there are many offices where they will say

22 they'll at least pull their own files and say,

1   you know what, let me just look in the file,

2   maybe there's something that wasn't presented at

3   the trial that we don't know about or something

4   that wasn't presented to the defense which could

5   have changed the outcome or kind of, you know,

6   tip-tops the integrity of that conviction. So

7   they will conduct that kind of a paper

8   investigation on many of these cases, and if they

9   find evidence in the paper investigation that

10   should have been turned over or wasn't evaluated

11   properly, that then could spur an independent

12   investigation.

13   But yes, it's because if you're in

14   such a case where there's very likely no physical

15   evidence or no corroborating forensic evidence

16   that can be done, they are much harder cases to

17   take on, but they're not impossible and units are

18   starting to look at them more.

19   MS. GOLDBERG: Thank you. It's

20   helpful. And I guess because those, of course,

21   are the bulk of the cases we're --

22   MS. BLUESTINE: Of course --

1   MS. GOLDBERG: -- speaking about here,

2   not exclusively but many.

3   MS. BLUESTINE: Understand.

4   MS. GOLDBERG: I guess related to

5   that, in those kinds of cases, the threshold that

6   would need to be met for a unit to review those

7   cases, I guess, what would that be when it's

8   really somebody's story?

9   But there's a second question, just to

10   get it out, and then let -- move on to other

11   people. I don't know if you can speak to this,

12   but in conviction integrity units, what -- that

13   are going back to speak to victims in these post-

14   conviction claims, what types of steps, if any,

15   do they take account of trauma to the victim and

16   take account of other victim interests including,

17   I would expect typically, victims in those

18   conversations are represented.

19   MS. BLUESTINE: Sure. Absolutely.

20   Let me take the second part first, because that

21   actually is where Katie Monroe and Healing

22   Justice is the expert. But I will say that we

1   work with Healing Justice closely. If you go on

2   that website, we have a number of their materials

3   because they are taking that victim-centered

4   approach, look at -- and conviction integrity

5   work and in exoneration work, I think, for far

6   too long -- well, shouldn't have ever happened --

7   I think the victims were not taken into account.

8   Like there's all this, you know, fanfare about

9   the wrong person was convicted, now he's out, all

10   this justice is done.

11   And then you kind of pan to the side,

12   and you have this very traumatized victim or

13   surviving family just going through hell because

14   now they're having to go through all over again.

15   There might be residual guilt. They may not

16   accept the outcome. There's all kinds of awful

17   things that happen on the victim side, and we

18   didn't take -- we didn't pay attention to that.

19   But Healing Justice exists in order to pay

20   attention to that. So we bring them in to do

21   trainings with prosecutors; how do you approach

22   victims; what is the right approach; how do you

1 do that; how do you have a victim-centered

2 approach when you're doing these interviews in

3 order to not re-traumatize, to ensure that they

4 had agency and autonomy throughout the process.

5 So prosecutors are becoming very aware

6 of how to conduct those investigations, number

7 one. Number two, and especially in terms of

8 sexual assault, only if they absolutely have to

9 talk to the victim will they talk them to them

10 substantively about the case. Otherwise, it's

11 more informing them of the process as it's going

12 along. So we are training prosecutors in how to

13 do those, to do them in a way that is, you know,

14 protective of the victim, because very often, of

15 course, the victim is the only one who has the

16 information, and they have to be approached very,

17 very carefully. This is not about just hey, you

18 sure you got it right 20 years ago but really

19 approaching it in a way that is ensuring that

20 person autonomy and agency are respected. So

21 that's -- does that answer the second part of

22 that question?

1   MS. GOLDBERG: Yes. For now, it's

2   very helpful. Thank you.

3   MS. BLUESTINE: So -- and I would say

4   see Katie Monroe's presentation when she comes

5   back on exactly like how they are able to do that

6   and what -- I can tell you like what the

7   protocols are. I can't tell you like how we

8   actually sit down and approach people. But on

9   the first -- I'm sorry, I think the first part of

10   the question was about --

11   MS. GOLDBERG: It was, you know, when

12   you have just the victim and the defendant --

13   MS. BLUESTINE: Oh, what's the

14   trigger?

15   MS. GOLDBERG: -- the other parties

16   with evidence --

17   MS. BLUESTINE: Right.

18   MS. GOLDBERG: -- and the defendant

19   has their story about why they were wrongfully

20   convicted, what threshold would have to be met,

21   because any defendant who seeks review --

22   MS. BLUESTINE: Sure.

1   MS. GOLDBERG: -- in conviction

2   integrity, it is going to have their account of

3   why --

4   MS. BLUESTINE: Right.

5   MS. GOLDBERG: -- their conviction was

6   -- you know, lacked integrity. So how does that

7   determination get made --

8   MS. BLUESTINE: That's a great

9   question and I would say that a lot of it has to

10   do with the internal consistency of what the

11   defendant's story is, so is he released with a

12   consistent story; has there ever been kind of a -

13   - did he testify at trial differently; did he

14   testify in other ways; is he presenting motions

15   which are inconsistent with that; and then if

16   they kind of feel that that's a compelling enough

17   story or there might be -- he had no prior

18   record, no allegations of any kind of abuse,

19   nothing in his background that would suggest that

20   this is something which is characteristic, then

21   they might, as I said, do that pull of looking at

22   the internal documents and to make sure that

1 everything was turned over that should have been

2 turned over, that there wasn't anything in the

3 file; they might look to see have we seen this

4 victim in other cases; is there some level of,

5 you know, kind of pattern and behavior on her

6 part. But it would be internal. That's not

7 about going outside the office at all. That's

8 not about conducting investigations. And if they

9 can kind of reach some level of maybe there's

10 something here, then they would conduct an

11 outside investigation. But most of that's going

12 to be done internally on their own process or

13 known paperwork.

14   MS. GOLDBERG: And just -- sorry, one

15 last question just to be sure I understand. That

16 outside investigation, if it were to happen, I

17 would understand it would necessarily involve

18 going back to the victim and really re-examining

19 that person to see whether they were telling the

20 truth --

21   MS. BLUESTINE: Re--interview.

22   MS. GOLDBERG: -- proceeding?

1   MS. BLUESTINE: Right. Re-

2   interviewing, I would say, as opposed to re-

3   investigating. I think I would notch it down a

4   little bit.

5   MS. GOLDBERG: I said re-examining but

6   --

7   MS. BLUESTINE: Right. So I think it

8   might, yes, on that. If there is other evidence

9   that comes out, then yes, that's going to be a

10   necessary part of that.

11   DR. SPOHN: Do -- the conviction

12   review units that you're aware of, do they also

13   have policies regarding second look sentencing,

14   or are those two things completely separate?

15   MS. BLUESTINE: So it's a good

16   question. The second look sentencing is not

17   quite as widespread as people may think it is.

18   It's only a few states that are really engaged in

19   that, and most prosecutors don't have the ability

20   to go back into court and resentence. Those

21   units that do, some of them are kind of combined

22   under conviction review unit protocol although

1 quite frankly, we advise against that because it

2 seems to kind of -- at least has the perception

3 of I don't want to take on a case like that's

4 going to be a very full investigation, we can

5 just resentence, let's just do that instead. So

6 you don't want to have that.

7   Plus they're very different inquiries.

8 One is about actual innocence and was this person

9 involved and looking deep into the case. One

10 might be do they meet statutory criteria or other

11 things. And then to force somebody to make a

12 choice between sentencing versus an innocence

13 investigation is a difficult position to put them

14 in. So yes, some units do that. It is seen

15 somewhat as kind of pulling down on the influence

16 of the actual -- of the ability -- and if you

17 talk to prosecutors who do both, they'll say "I

18 don't have time to do the investigation stuff

19 cause I'm doing all sentencings." So, you know,

20 it's better to have multiple resources for it,

21 because they are very different inquiries.

22   But the short answer is yes, some

1   units do do that. We don't consider that a best

2   practice though.

3   MS. BASHFORD: Well, I have two

4   questions two questions. One in testing a

5   defendant's claim of innocence. Is it or should

6   it be a common practice to ask the defendant to

7   waive attorney-client privilege?

8   MS. BLUESTINE: So you mean so they

9   can be interviewed directly by the prosecutor

10 without counsel present?

11   MS. BASHFORD: And to see what they

12 said to the attorney who represented them at

13 trial --

14   MS. BLUESTINE: Right.

15   MS. BASHFORD: -- if there was a

16 confession to the attorney at trial and so the

17 defendant didn't testify, is that a common

18 practice or should it be?

19   MS. BLUESTINE: I would say it's not

20 a common practice. I mean most investigations,

21 in terms of cases, they don't need to be able to

22 talk to trial counsel cause it's based on, as I

1   said, a fact-based investigation now. But if

2   you're looking at things like a Brady violation

3   or something else, then yes, they would need to

4   be able to get that attorney-client privilege

5   waived but only for that small matter. If it was

6   about something about, as you're saying, you

7   know, did this person confess, frankly, I think a

8   lot of defense lawyers may not -- may just say

9   we're not going to engage them because then they

10   pull back, which CUs take as kind of a red flag

11   to begin with.

12   But yes, they will -- I have seen

13   units who get a fully-executed waiver through

14   defense counsel of attorney-client privilege so

15   that they can go talk to prior counsel. Usually,

16   they'll involve the defense counsel in that

17   discussion with counsel, but sometimes they'll

18   just do it on their own to do that. So I know

19   that that does happen. But what we are concerned

20   about is units which require a full waiver, you

21   know, before anything happens; right? That's

22   just -- it's just not necessary to have that, the

1   defense side information in order to start an

2   investigation. Obviously, it may become

3   necessary down the line but then the individual

4   should be fully advised.

5   And then this guidelines which we have

6   up here, that's exactly what the prosecutors and

7   others say is that you shouldn't require that as

8   a requirement to be able to be reviewed. If it

9   becomes necessary, you do a limited waiver on

10   what the issue is that you need, and you make

11   sure the individual has been fully informed of

12   that.

13   MS. BASHFORD: My second question is:

14   do you think an appellate review of the

15   transcript of trial for sufficiency of the

16   evidence negates the need for a conviction

17   review?

18   MS. BLUESTINE: I don't, frankly,

19   because we are talking about outside the

20   transcript investigations, things that could have

21   changed the outcome of the trial by definition.

22   So it might be helpful in terms of understanding

1 the evidence as it was presented or how it might

2 have changed in light of new evidence of new

3 witnesses coming forward or witnesses admitting

4 that they misspoke at trial and because they are

5 accepting -- they're expecting a favor or some

6 kind of benefit, you know. So a fact-based

7 investigation is important, of course, on the

8 appellate review, but we're really talking about

9 something entirely different of a new

10 investigation outside of the process itself and

11 then being able to gather that information and

12 bring it back in. So I don't think that that --

13 it negates it anyway.

14   DR. MARKOWITZ: So I'm a clinician.

15 I know nothing of this world. So for my own

16 edification, can you give me a sense of what the

17 time frame is for, if possible, a conviction

18 review or an innocence investigation; is there a

19 way to give us a sense of like what the typical

20 time frame is for conducting from beginning to

21 end?

22   MS. BLUESTINE: Sure. So it's quite

1   typical for a minimum of months depending on the

2   complexity of the case, and I've seen some cases

3   go on three to five years just because, like I

4   said, you are doing new investigations, out

5   talking to witnesses, gathering evidence, testing

6   evidence, doing all kinds of new things which

7   weren't done before. Trying to get access to

8   evidence is very difficult. Trying to get access

9   to police files or access to files from the

10   medical examiner's office or others can be very

11   taxing and takes a long time. In fact, that's

12   one of the biggest criticisms on the defense side

13   is how long this takes, because they would say,

14   well, I can just file a petition and I can, you

15   know, be off and running within months, you guys

16   are taking years. That is a reality. That's

17   what happens. And part of that is because of the

18   lack of resources that these units have to be

19   able to staff them fully, to be able to have god,

20   you know, three or four investigators, three or

21   four attorneys to be able to go out, but it does

22   take a very long time.

1   DR. MARKOWITZ: And if I can just

2   follow-up on that. In an ideal situation, what

3   does a fully staffed unit look like?

4   MS. BLUESTINE: So I would say it's

5   commensurate with the other units in the office;

6   right? If you have a non-violent shooting unit

7   that has seven attorneys, right, then probably

8   five or six attorneys in the conviction review

9   unit. If you're in an office where you only had

10   nine attorneys total, right, then you don't need

11   nine attorneys on the conviction review side. So

12   it really -- in law school, they teach us -- the

13   first two words they teach us are "it depends."

14   So it depends on the size of the office and the

15   number of convictions that they're showing each

16   year, but at the minimum, there should -- there

17   has to be one full-time dedicated attorney as

18   opposed to somebody who does other things, an

19   investigator and somebody to assist on the, you

20   know, administrative side. So we really talk

21   more about minimums as opposed to well-sourced

22   maximums.

1   MS. LONG: Thank you for being here

2   and just for everyone, I worked with Marissa,

3   sort of.   She's on the PD side of DA side in

4   Philadelphia, although I don't think --

5   MS. BLUESTINE: We still talk to each

6   other though.

7   MS. LONG: Yes.   We did a lot of work

8   around sexual exploitation and share U Penn so.

9   I want to thank you for being here.   I have some

10   questions, especially because you're talking

11   about conviction integrity units now looking at

12   sexual violence cases with consent but any of

13   them.   I'm curious what type of training the

14   attorneys in these units have on sexual violence,

15   understanding that they research nationally and

16   when you look individually, and offices

17   demonstrate, that will usually mirror the

18   national research that these are the cases that

19   have the highest level of attrition.   Dr. Spohn

20   did --

21   MS. BLUESTINE: Yes.

22   MS. LONG: -- probably the first work

1 in that area that's been replicated. And some of

2 the reasons for the attrition are really based on

3 myths maybe of victims' behavior, which I was

4 very happy to see you talk about in terms of

5 victims who might show one piece of behavior in

6 the beginning when they're disclosing and then

7 show something else on the stand, but areas of

8 consent, understanding intimidation, intimate

9 partner sexual violence, just the whole scheme

10 because I get concerned that we know that there

11 are staffing issues across the country with

12 people who specialize in these cases, and now you

13 have someone with no specialization.

14   MS. BLUESTINE: Right.

15   MS. LONG: Are they just digging up

16 cases based on their misunderstanding?

17   MS. BLUESTINE: So I think that's

18 probably a larger -- or the reason why a lot of

19 units won't look at these cases, because they

20 don't have the expertise, they don't understand

21 the nuances of all the issues. I will say that

22 we have offered training on -- you know,

1   particularly on sexual assault issues and some of

2   the considerations that prosecutors have,

3   especially when you're looking backwards; you

4   know, what are the concerns and what are the

5   issues that we can raise. But it's not training

6   that is, as you know, widely offered or widely

7   available for people. So I would say that the

8   units, which I -- and I'm literally kind of

9   thinking of them in my head as I'm speaking --

10   the prosecutors were not specialized in sexual

11   assault prosecutions, but they have a sensitivity

12   to it in terms of they've reached out to us for

13   additional resources and information and training

14   opportunities, and we try to provide those.

15   So the short answer is, it's not a lot

16   that's out there in the post-conviction world on

17   any topic quite frankly, but it's something that

18   we try to provide and we are providing as we move

19   forward.

20   MS. LONG: Thank you. Oh, can you

21   give me a sense of what you would call slags

22   because one think you raised an example of is

1   someone who didn't have previous reports against

2   them, but we understand that this is so often --

3   this is a crime that isn't reported a lot --

4   MS. BLUESTINE: Of course.

5   MS. LONG: -- and we may have cases

6   where law enforcement doesn't take so --

7   MS. BLUESTINE: Of course.

8   MS. LONG: Or what are the things that

9   you might look at as indicia of a case needing to

10   be looked at again?

11   MS. BLUESTINE: So honestly, I'm

12   really not qualified to answer that question

13   because I'm ignorant and certainly not as well-

14   versed as you. No. And I mean that in my most

15   sincere way toward myself and so just -- I just

16   don't have that knowledge. But when we're

17   approached on a case of a sexual assault, we will

18   reach out to people to have that expertise to

19   connect them, and we have the ability to do that

20   in the Quattrone Center because I know what my

21   own limitations are.

22   MS. LONG: Thank you -- thank you so

1   much.

2   MR. CASSARA: Hi, ma'am. First off,

3   I'd like to thank you for just an unbelievably

4   fascinating presentation. I sincerely mean that.

5   It was extremely, extremely thorough. One of our

6   -- I think our main question is, you know, are we

7   going to recommend that the Department of Defense

8   or the services implement a conviction integrity

9   unit. How do you start? I mean like what's --

10   we say yes, we think this is a good idea.

11   They're going to say, okay, how do we do that.

12   MS. BLUESTINE: Right.

13   MR. CASSARA: How do you start?

14   MS. BLUESTINE: So I would suggest

15   that you start like you would any other new

16   enterprise; right? You sit down, you decide what

17   are the goals, what do we want to do, what are

18   the --

19   MR. CASSARA: I start most enterprises

20   by asking my wife, so I don't think that'll work.

21   MS. BLUESTINE: Well, then maybe your

22   wife should be head of this so that would work.

1   So -- but asking the deep questions, what are the

2   kinds of cases we want to look at; why do we want

3   to do this; what is the problem that we're trying

4   to solve? And to get -- so we actually, on the

5   convictionreview.net site, we have what we call a

6   discussion tool for a prosecutor to have to sit

7   down with a conviction integrity unit director

8   and answer some of those macro questions, right,

9   because we see too often, to be perfectly honest,

10   that a CIU is talked about in a political sense,

11   you know, during a campaign or, you know, in the

12   face of political opposition and then they'll

13   appoint somebody and then the elected walks away;

14   right? So the poor director sitting there has no

15   idea what to do, like what do I -- so my first

16   thing is call the Quattrone Center, we'll be

17   happy to help you with that.

18   But there are very deep questions that

19   need to be asked first on what we refer to as a

20   macro level; why are we doing this; what's the

21   mission; what kind of cases do we want to review;

22   you know, what is going to be our internal kind

1 of click in terms of when we want to conduct an

2 investigation; how do we want to conduct that

3 investigation; how transparent do we want to be;

4 how open; how independent.

5   Once those big macro questions are

6 taken into place, then you can start talking

7 about an infrastructure. Who's going to be

8 opening the letters; what's the process; what's

9 the data we're going to be collecting; how are we

10 going to analyze it; what are we going to be

11 looking for? So it's the knee jerk. There's no

12 one size fits all for this. Of course, every

13 jurisdiction is different in the United States,

14 but those questions of mission and import and

15 purpose are critical. And once those are

16 decided, then it kind of feeds and makes it

17 easier to make those more micro level decisions.

18   MS. TOKASH: Good morning. In your

19 work in this area, do you come across staffing

20 and funding issues, because you mentioned

21 independence is a critical component to

22 testosterone enanthate type of a function, so I'm

1   curious about that because we here, you know,

2   generally as even civilian prosecution offices

3   do, too, Department of Justice, everyone has

4   funding and staffing issues. Is that something

5   that you see in your work and if so, what are the

6   solutions?

7   MS. BLUESTINE: Yes. We definitely

8   see it in our work. Once of the questions we ask

9   in our survey is do you have enough resources to

10   do your work. And probably about 70 percent of

11   the units will say yes, but 30 percent will say

12   no or maybe that vacillates a little bit. But we

13   do see that as a critical issue. I was down in

14   Chatham County Georgia speaking with the elected

15   prosecutor down there, and she has a unit, but

16   she has no control over her budget. The budget

17   is completely controlled by the county. And so

18   having to make the case to the county in why this

19   is important and why we have to fund this is

20   something prosecutors have to do all around the

21   country, because they don't have the ability to

22   raise their own funds. They don't have the

1   ability to get a -- they can micro manage

2   somewhat, but if you're in a large office like

3   Philadelphia or Los Angeles -- but if you're in a

4   smaller office like Chatham County, you don't

5   have that ability.

6   So yes, we need more resources to be

7   devoted to this, absolutely. And I think that

8   it's an awakening that this is part of the

9   prosecutorial function of looking backward to

10   ensure that our convictions do have integrity and

11   learning from those errors going forward, but it

12   is somewhat of an evolving sense. And it's a

13   little hard to get people who dole out the money

14   in terms of the county commissioners or the state

15   commissioners or city councils or mayors to

16   understand that it's just as important to look

17   backwards as it is to prosecute cases moving

18   forward, because that's the most -- it's at least

19   perceived as the most immediate need. This is an

20   immediate need as well because it's informing the

21   culture.

22   Short answer is no, they don't have

1 the right resources and yes, of course, we should

2 have more. But there are also creative ways of

3 being able to get around that. In Los Angeles,

4 San Francisco, they rely on outside advisory

5 boards to help them with identifying cases,

6 investigating cases, and moving them forward. We

7 can see counties working together so they're

8 sharing resources. So there are ways around that

9 even though there is a very real issue there.

10 MS. TOKASH: And then in terms of

11 staffing because this comes -- the conviction

12 integrity unit attorneys come from the

13 prosecutor's office; did I track that correctly?

14 MS. BLUESTINE: No. And in fact, most

15 of the units are headed by somebody who has

16 defense experience as well, if not solely defense

17 experience, coming in to run the unit. But it's

18 still an outside hire and being brought in.

19 MS. TOKASH: Do you find that like DAs

20 have concern or qualms over having to, you know,

21 quote, give up a prosecutor from their regular

22 unit to go be in an independent conviction

1   integrity unit?

2   MS. BLUESTINE: So it's not so much

3   that part of actually, the giving up, because the

4   -- I haven't seen that happen where there's like

5   a one-to-one binary issue; right? What we do

6   look for though is if a unit has been operating

7   for a while, do people want to be in it, right?

8   Is it something that they want to be a part of,

9   that they want to say, oh, I'm interested in

10   this, I think this is important, I want to do

11   this? Or are they just having to hire from the

12   outside all the time. That goes to that question

13   of just culture that I was talking about before.

14   If the unit is operating proper, then it's not

15   just seen as kind of somebody who's looking

16   everybody's shoulders but somebody who's really

17   trying to improve the culture of the office.

18   But getting back to the resource

19   question, usually what we see is the -- maybe

20   they got a grant from the Justice Assistance or

21   from somewhere else to be able to hire an

22   attorney in or bring in a consultant to talk

1   about how to structure the unit. We're working

2   with several various small offices, I mean like

3   fewer than 10 attorneys, on how to do develop a

4   process as opposed to hiring somebody to do this.

5   How can you develop a process to protect the

6   integrity of the investigation, and that's a

7   slightly view on it, but that's a way to also

8   conserve resources.

9   MS. TOKASH: So it sounds like hiring

10   outside people could be a solution to perhaps an

11   office that's already under-resourced or

12   understaffed?

13   MS. BLUESTINE: That's -- if you have

14   a very small office, like if you have fewer than

15   10 attorneys, for example, in -- which is not

16   uncommon by any means, quite the norm -- it's

17   very difficult for that office to take on an

18   objective view of the case, cause they all know

19   it; right? They've all worked on it. They've

20   all, you know, been enmeshed in it for a while.

21   So bringing in somebody from the outside in that

22   has a very real meaning in terms of avoiding the

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 1    bias issue.  But even without that, it's still

 2    because they're so small and they have so many

 3    different things that everybody is doing, it's

 4    very difficult to take them off of that and put

 5    them on something which doesn't have the

 6    immediacy of a trial coming up or something else.

 7    And these things tend to kind of fall down --

 8              MS. TOKASH:  Yes.

 9              MS. BLUESTINE:  -- on the importance

10    scale.

11              MS. TOKASH:  Thank you.  That's really

12    helpful.

13              SGM MARTINEZ:  Just a follow on

14    question on that.  Is that the reason why the

15    numbers in Harris County are so much larger,

16    because their resources better?

17              MS. BLUESTINE:  Well, and they kind of

18    have corrupt cops.

19              (Laughter.)

20              SGM MARTINEZ:  Yeah.  That's true as

21    well.

22              MS. BLUESTINE:  Yes.
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1   SGM MARTINEZ: I'm from Houston so I

2   realize that.

3   MS. BLUESTINE: Yeah. I didn't want

4   to say that but, you know, it's -- that's kind of

5   why. So Texas is unique in a lot of ways. One

6   is that they keep DNA evidence, unlike other

7   states which dispose of it after a year, they

8   keep it for a long time, seemingly forever.

9   That's why the -- one of the first units we saw

10   was in Dallas County, the only focus of that unit

11   initially was looking at cases involving DNA and

12   retesting DNA to determine whether the correct

13   person was convicted. And that's why the numbers

14   are so high. Harris County, same thing. Travis

15   County is a little bit different. Their DNA lab

16   kind of imploded so, you know, that's a little

17   bit off the table right now.

18   But yes, Harris County does have

19   larger resources. They have, I think, five

20   attorneys who are in that unit if I'm not

21   mistaken, so they are better resourced and

22   they're able to look out. But Harris County also

1   does a lot of collaborative investigations with

2   defense counsel. Defense counsel can bring them

3   a case or a concern about the particular officer

4   or particular system player, and they have the

5   resources to be able to look at it.

6   GENERAL SCHWENK: I wanted to ask

7   about part time people in the conviction

8   integrity unit. What other duties would they

9   have -- would they -- that makes it still

10   independent and not perceived as whatever the

11   other duty is that's independent?

12   MS. BLUESTINE: Right. Well, that's

13   the problem, right? So when I was in

14   Philadelphia, for example, the unit started with

15   a full-time unit head, and then that person was

16   reassigned to also do corruption in Harrisburg

17   investigations, right, so they were essentially -

18   - they were demoted from full-time to part-time.

19   And when I was asked about it, I said, well, it's

20   like now President Biden says, Don't tell me your

21   -- now you show you me your budget and I'll tell

22   you your values; right? So there's that

1 perception if you are only bringing somebody for

2 part-time, if they're doing part-time -- and I'm

3 thinking about particular units -- there's a lot

4 of variety in that. Some are overseeing like

5 small court issues; some are, you know, actually

6 investigating and conducting cases, so each

7 office that does that has a little different use

8 of that. But the problem is, as we were saying

9 before, the cases that are being actively

10 prosecuted are the immediate needs versus looking

11 back 5, 10 years. That can fall down in terms of

12 the importance level. So -- and it's not about

13 independence then because now you don't have

14 somebody who is full-time on this, you know,

15 doing this kind of investigation focused only

16 this. Now they're also being pulled in other

17 directions.

18   There are some units where the

19 directors refused to do any kinds of cases. They

20 well not prosecute cause they don't see

21 themselves as prosecutors. They see themselves

22 as people who are investigating past convictions.

1 That's a minority view but some do have that

2 opinion. Others will say, no, I have to take on

3 a load cause I need to know what the prosecutors

4 go through and understand it in this office. So

5 each office takes a little bit different stand.

6   But as I said, now what we're seeing

7 is -- I'm just kind of thinking through our

8 latest data -- I don't think any of the offices

9 that we surveyed this year has only a part-time.

10 They all have at least one full-time attorney

11 informant he unit. I don't think I answered your

12 question though.

13   GENERAL SCHWENK: Let me ask about

14 standards of review. I don't think I saw a

15 standard of review on any of your slides, and you

16 said things like if it clicks, then --

17   MS. BLUESTINE: Right.

18   GENERAL SCHWENK: -- you take the case

19 and do whatever. Is that intentional to provide

20 flexibility in case assessment, or why is it that

21 it's not well, we'll only open an investigation

22 if it's more likely than not that something's

1   there?

2   MS. BLUESTINE: So --

3   GENERAL SCHWENK: And then there's

4   another standard for saying we're going to toss

5   the case?

6   MS. BLUESTINE: There's definitely

7   different standards, no question. And the first

8   is a much lower bar, let's more in than the

9   second. So the first -- and we've tried to

10   quantify that from talking with units around the

11   country and just really haven't been able to.

12   It's more kind of a gut thing on the first slide,

13   but we are actually trying to get evidence-based

14   data for prosecutors to make decisions on cases

15   to move forward and investigate and not.

16   But for right now I would say it's

17   more that does this case present some of the

18   canonical factors involved in wrongful

19   convictions; was there a potential eye witness

20   error because the police used improper techniques

21   to be able to test their memory; is there a

22   potential for a false confession or bad forensics

1 or incentivized witnesses, things of that nature?

2 So things that have those kinds of factors will

3 kind of move a case usually forward. Is there an

4 alibi, is there a credible alibi of some type?

5 So it's a very, very low bar, I would say, to

6 move forward into investigation.

7 Once an investigation is complete and

8 the office is deciding whether or not they're

9 going to overturn it, there are varying -- there

10 are different standards at that point. Some

11 follow a preponderance of the evidence standard,

12 because that's what's required in court; in a

13 post-conviction matter, is the new evidence

14 enough to change the outcome of the conviction by

15 a preponderance of the evidence.

16 Some use a clear and convincing

17 standard, because they're only looking at actual

18 innocence. So I would say it vacillates between

19 those two in terms of whether we take action.

20 The Brooklyn office, which is Kings

21 County New York, they have a rather fulsome

22 definition of when they'll take action, and it's

1   essentially when they believe, although they

2   don't quantify it, that the conviction lacks

3   integrity such that they can't stand behind it.

4   SGT SHEPPARD: Good morning and thank

5   you for being here. Earlier you talked about the

6   suspect or the accused having a compelling story

7   and the fact that they may not have a prior

8   record, and you also touched on the victim's

9   credibility in terms of has she or he made these

10   types of allegations before and all of those

11   being factors into whether or not you reopen a

12   case. Now does -- when you're talking about the

13   accused not having a prior record, do you mean a

14   prior record in terms of convictions or if you

15   find out that there's been allegations previously

16   that have never gone forward in court, does that

17   -- is that --

18   MS. BLUESTINE: I can't imagine --

19   SGT SHEPPARD: -- accounted for?

20   MS. BLUESTINE: -- that if a

21   prosecutor had knowledge that an individual had

22   prior allegations, they hadn't perceived that

1   they would say yes, let's go ahead on this case;

2   right? So when you're talking about a prior

3   record, you're really looking at just -- looking

4   at the record, at their convictions, like do they

5   have convictions. But it's not that there's a

6   set, you know, checkoff list for anything in

7   terms of, you know, what might be a case that you

8   would move forward in a sexual assault case

9   versus one that you would not. I'm just

10   suggesting that there are kind of like general

11   guidelines that they might follow, but I can't

12   think of a prosecutor's office that if they had

13   credible allegations of -- particularly of a

14   sexual or violent nature that they would say,

15   yeah, let's go ahead and look at this, cause it,

16   you know, could be wrong.

17   SGT SHEPPARD: Okay. And then my

18   second part to that is during the investigation,

19   when you're talking to other people and then you

20   find out other witnesses are saying yes, this is

21   -- or victims, I guess, coming forward saying

22   this has happened to me, but I never reported it

1   or anything; at that point, you guys stop your

2   investigation, or do you guys still continue on?

3   MS. BLUESTINE: Okay. So keep in

4   mind, I don't do the investigation, so I just

5   kind of advise. But that's one of the risks that

6   applicants take when they write to a conviction

7   integrity unit. In fact, that's one of the

8   things that we warn them against. Look, in an

9   investigation, they may find out that you've been

10   involved in other criminal activity that -- or

11   your friends or your family may be involved in

12   criminal activity, so you need to be really

13   certain when you're applying. But if they were

14   to find those kinds of allegations, I can't

15   imagine that wouldn't open up a new investigation

16   for potential criminal conduct.

17   SGT SHEPPARD: Okay.

18   MS. BLUESTINE: It's not unusual where

19   -- I mean the DNA cases, we -- you know, a large

20   percentage of cases that are tested for DNA

21   inculpate the individual who asked for the

22   testing; right? So that's always a warning for

1 people who are applying for a conviction review

2 or a conviction integrity unit; this could make

3 your life worse.

4 SGT SHEPPARD: Okay. Thank you.

5 MS. GOLDBERG: Thank you, again. I

6 wonder if you have any conviction integrity units

7 in particular that you would suggest we look at

8 that are handling sexual violence cases, because

9 as I listen and I can understand it, particularly

10 in cases where there is physical evidence, you

11 know, the sort of classic -- you know, the

12 classic Innocence Project kind of case, at least

13 as I understand it, those -- you know, they fall

14 into a different category from cases that really

15 depend on the testimony of the victim and the

16 defendant. So I think it would because it does

17 seem, from what you've said -- well, let me back

18 up.

19 I was thinking about wanting to ask

20 you really what particular risks do you see in

21 having conviction integrity units that include

22 sexual violence cases as part of their focus?

1   And there are all of the general challenges that

2   I think you've described, right, the clarity of

3   the mission; the infrastructure; the match/the

4   mission to be sufficiently resourced and so

5   forth. You know, what are the risks? I think we

6   would want to understand that more specifically

7   from the experience of conviction integrity --

8   MS. BLUESTINE: Sure.

9   MS. GOLDBERG: -- units that are

10   working on this but also from your sense.

11   MS. BLUESTINE: Sure. And I think

12   there -- I do think there are a few and I'm very

13   happy to provide the Committee with a list of

14   those outside of a public forum. And in terms of

15   the risks, then you're certainly talking about

16   cases that in a lot -- there's no objective

17   ground truth. We just -- or very little and, you

18   know, again, this isn't about being a thirteenth

19   time re-weighing the evidence. This is about is

20   there new evidence; is there evidence that wasn't

21   considered that should have been considered at

22   the time of the trial.

1   So in a case that is involving, you

2   know, a conviction from, you know, a jury or from

3   a judge who believed the victim beyond a

4   reasonable doubt that this assault occurred and

5   there's nothing else to be investigated or done,

6   I don't think any conviction integrity unit that

7   we've worked with would take that case on. But

8   if there's additional evidence that was kept out

9   at a trial or wasn't presented or wasn't, you

10   know, turned over to the defense that should have

11   been turned over, that could raise some of those

12   levels of conviction.

13   So what are the risks? The risk is

14   that there is no investigation that can be done,

15   and so no reason to take on and try to overturn

16   that conviction cause there's no reason to

17   question the integrity of that conviction. It is

18   -- is it possible the jury got it wrong? Of

19   course, but that's not the CIU's job at that

20   point. The job is to look for new evidence or do

21   an investigation beyond what the jury or the fact

22   finder heard.

1   MS. GOLDBERG: So in that sense, is it

2   -- if there's not new evidence and the challenge

3   is the defendant comes in and says, you know, the

4   judge, you know, excluded this evidence and that

5   evidence and this evidence that, you know, we

6   wanted to have the jury hear so it is -- you

7   know, it's, in effect, like an appeal --

8   MS. BLUESTINE: Yes.

9   MS. GOLDBERG: But it's just sort of

10   a re-litigation of the decisions that the judge

11   made and that might have been reviewed by the

12   appellate court?

13   MS. BLUESTINE: I can't think of any

14   case that would really fall into that category,

15   frankly, where there's a defense -- like any of

16   the cases that I know of that went through a

17   conviction integrity analysis as opposed to

18   through the process where that came up where we

19   tried, we had this evidence, we didn't put it up,

20   the judge didn't allow it, and that case gets

21   reviewed because that would be a legal ground for

22   the -- to re-look at it. And that's usually onto

1   something that the DA would consider enough to

2   kind of trigger.

3   But if there was information that, you

4   know, wasn't because of ineffectiveness or some

5   other reasons it was never, you know, presented

6   to the court, it was never presented and still

7   exists and can be testified to its accuracy and

8   reliability, that might be a different question.

9   Ineffectiveness is a very leading factor in

10   wrongful convictions, of course, and many that

11   have to do with failure to present good alibi

12   evidence or failure to even try to counter the

13   issues that were going on. But that's, I would

14   say most units would put that as a very low

15   priority if it was all on defense counsel as

16   opposed to something that was within their own

17   files that they would help.

18   MS. GOLDBERG: And part -- thank you.

19   That's illuminating. Part of why I'm asking is

20   many, not all of the accounts that we've heard

21   but many of them have -- you know, the concern

22   has been that a defendant had wanted the jury to

1   hear or the panel to hear information, the judge

2   decided that that information couldn't go in, and

3   the view that was presented to us was, you know,

4   that was deeply unfair and led to a --

5   MS. BLUESTINE: Yes.

6   MS. ORJI: -- you know, an unfair and

7   inaccurate outcome.

8   MS. BLUESTINE: There may be other

9   avenues to be able to address that particular

10 issue, and I would say that if the DA had

11 independent concerns about that, you know, then

12 that's up to the DA to be able to do that

13 investigation, and that's part of what a CIU is

14 about. A CIU can say we disagree with this --

15 with the judge, but they're still bound by it, of

16 course, by law of the case. They don't have a

17 choice in terms of being able to go back into

18 court and relitigate that. But from a fairness

19 concern or from an issue of do we have faith in

20 the integrity of this conviction, that might have

21 a different view down the line. But again, you

22 have to be able to still get into court with that

1 would this have changed the outcome if it was

2 excluded, then that's not something generally

3 that can be used, at least in the civilian

4 system. I can't come back in and say, well,

5 judge, you excluded this but you really should

6 have included it and if you had, this would have

7 changed. That's what the appeals process is for.

8 But that's not something that gets addressed on

9 the CIU side.

10 MS. GOLDBERG: Thank you. That's

11 helpful. And do CIU teams -- is it typical that

12 they would brief the prosecutor's office to do

13 that kind of education of what went wrong in a

14 case after --

15 MS. BLUESTINE: We're seeing it more

16 and more and it's encouraged. We certainly

17 encourage that because it is such an important

18 part of -- I mean what's the point -- I mean not

19 what's the point -- it's obviously important to

20 the individuals involved to be able to rectify a

21 wrongful conviction, bit if you're not taking the

22 time to learn from that error, then you're really

1 missing huge opportunities for learning in the

2 system. So yes, those kinds of sentinel event

3 reviews or root cause analyses should be done in

4 almost every case. They're difficult and they're

5 hard and they're emotional, but they still should

6 be -- we should look at them deeply because then

7 we're finding the cracks in the -- or the holes

8 in the Swiss cheese, if you will, that kind of

9 allows an error to go all the way through, and

10 we're trying to prevent those from happening

11 again.

12   (Off-microphone comment.)

13   MS. BLUESTINE: So we've done that in

14 many jurisdictions around the country as kind of

15 the convener of those reviews, and we have helped

16 other jurisdictions do it on their own, because

17 it's not just about having the Quattrone Center

18 come in. We want people to learn to do it on

19 their own, of course, and to be able to do it

20 themselves. And -- but it's -- it really is

21 borrowing from the health industry and from the

22 medical industry and the transportation industry

1   that engages in these kind of root cause analyses

2   after some kind of sentinel event. We're trying

3   to move that into the criminal legal system to be

4   able to have the same impact there. Slow but we

5   are seeing more interest in that around the

6   country.

7   MS. BASHFORD: Just very quick.

8   Having been in the unenviable position of

9   convicting a completely innocent main, which was

10   not found out for 13 years that he had served of

11   his 40-year sentence, every year when the new

12   rookies would come into my former office, I, as

13   one of the most senior attorneys in the office,

14   along with a couple other people, would do almost

15   like a "Scared Strait," like this is what goes --

16   can go wrong and this is what went wrong in each

17   of these cases, to try to make them, you know,

18   think once, think twice.

19   MS. BLUESTINE: Right. And those are

20   critically important trainings. That's one of

21   the things we look for. Has the CIU impacted the

22   training that's going on for the newbies for the,

1 you know, ones who are just coming in and for the

2 rest of the office; are they -- did -- are they

3 brining in exonerees to tell their stories, to

4 say this is what happened to me, this is how it

5 went, are we changing that culture of

6 understanding.

7   We were working with one prosecutor in

8 Montgomery County, Kevin Steel. One of the first

9 things he tells his DAs is he'll say, "Who do you

10 represent," and they'll say, "Well, we represent

11 the victims." He said, "Yes. But you also

12 represent the defendant," right? "You are the

13 representative of the community." And to have

14 that as the kind of underlying mission of the

15 office is obviously very critical. And that's

16 one of the things we look for and we're seeing

17 more and more of that CIUs and CRUs are having

18 that impact on the training initially.

19   And I think we don't acknowledge

20 enough the toll that it takes on prosecutors when

21 they're involved in a wrongful conviction. It's

22 a horrible thing and it's horrible for the

 1   prosecutors. It's horrible for the police. It's

 2   horrible for everybody who was involved, and it's

 3   part of that learning from trauma that is trying

 4   to, you know, rectify that as well. So I

 5   appreciate your service on that. Thank you.

 6   GENERAL SCHWENK: Going to the end,

 7   assume that we would want a statute if we

 8   recommended this and Congress, because they

 9   created the military justice system can do

10   anything, so whoever is the final decision-maker,

11   the CIU head comes, briefs them, convinces them,

12   they say yes, we need to get this overturned, is

13   there a best practice in your mind for what

14   should happen then?

15   MS. BLUESTINE: You mean after the

16   decision has been made?

17   GENERAL SCHWENK: Yes. The decision's

18   been made and --

19   MS. BLUESTINE: It's a little bit

20   limited and --

21   GENERAL SCHWENK: -- I assume they

22   have to go to court in most cases.

1   MS. BLUESTINE: Yes. And of course,

2   in the criminal system, the judge, obviously, has

3   the -- always has a say unlike the civil system

4   where the parties can come to an agreement and

5   the settlement, it just disappears off the

6   judge's docket. That's not the case in the

7   criminal system. The judge has a role. WE have

8   a role for judicial review, and that's an

9   important role that has to be honored. So if I

10   had druthers, I would give the power to the

11   prosecutor to be able to go in to say, Judge, we

12   have lack -- we either have lost faith in the

13   conviction -- in the integrity of this

14   conviction. We believe we didn't properly gone -

15   - gotten or we believe this person is actually

16   innocent, and we give them that power under a

17   manifest and justice standard to be able to go in

18   and ask for relief, whether that's reversing the

19   conviction, adjusting the conviction to the

20   correct level of culpability, or adjusting the

21   sentence.

22   In the United States, in the civilian

1 system, the prosecutors don't have that power,

2 and I think three states, they do. Otherwise,

3 they're reliant upon the defense coming into

4 court and filing a petition. Both -- they can

5 agree to that and then hopefully, that case goes

6 forward in that way. So I would say that number

7 one, that it should be a manifest and justice

8 standard that is going in, that the prosecutor

9 should have the power and that they should have

10 flexibility in what they can ask for.

11 CHAIR SMITH: All right. Any

12 additional questions? Yeah, I think that's the

13 mouse. I don't think that's a question. Is that

14 a question? Someone raising their hand? I

15 don't; think so. Okay. All right. As you can

16 see, this is a subject that we are deeply

17 interested in, so thank you so much for your time

18 this morning. We really appreciate it.

19 MS. BLUESTINE: Thank you and thank

20 you for having me. It's been an honor.

21 CHAIR SMITH: All right. We're going

22 to take a 10-minute break until -- what time is

1 that -- 11:05?

2   MS. PETERS: Yes, 11:05. And while we

3 move to break, an administrative note. Our hosts

4 have asked us to remind everyone in the public

5 here today that outside food is not allowed in

6 this lovely facility that is hosting us, and I

7 also just want to note, Ms. O'Connor has not yet

8 joined us. I want to correct the record. I said

9 that this morning, but we will see you in 10

10 minutes. Thanks.

11   (Whereupon, the above-entitled matter

12 went off the record at 10:54 a.m. and resumed at

13 11:09 p.m.)

14   CHAIR SMITH: All right. Thank you.

15 I know we're missing a few people, but we want to

16 stay on track.

17   MS. PETERS: Hi. Members, welcome

18 back from our break. We have our staff team

19 here, led by Ms. Kate Tagert. I'm going to turn

20 it over to them for a presentation on the

21 demographics of military panel members who sit at

22 sex assault courts-martial that were contested

1   for multiple years running. There's an extensive

2   data presentation and analysis and a cohesive

3   sort of wrapping up of the assessments coming

4   your way here. Over to you, Kate.

5   MS. TAGERT: Okay. Good morning,

6   Sergeant Major Martinez, Sergeant Sheppard,

7   welcome. We're glad to have you, and good

8   morning.

9   So the Case Review Subcommittee has

10   completed its study on the demographics of

11   military panels, and today we're going to be

12   speaking with you over two sessions about the

13   results, the take-aways from the Case Review

14   Subcommittee, receiving your feedback and,

15   hopefully, after lunch, voting on potential

16   findings and recommendations for the DAC-IPAD's

17   pending report, which we hope to have for your

18   review in about a few days.

19   In the read ahead packet at 4A, there

20   is an in-depth description of the background, the

21   case law, the methodology for the study, and

22   we're been over that in previous meetings. And

1   I'm just channeling Judge Grimm's statement to us

2   where he said, "Get to the point."

3   So we are not going to be going over

4   that methodology today, but it is going to be in

5   the report, of course, as well as in your read

6   ahead materials if you need a little primer on

7   it. But I do want to focus on just what the

8   original research questions were and why the DAC-

9   IPAD chose to undertake this multi-year study.

10   The first, and perhaps the most

11   obvious was that there was actually no

12   information about what the race, ethnicity, and

13   gender were of military panels, at least that we

14   could find publicly. And despite that there was

15   no data, over the last couple years, there's been

16   a lot of discussion on the detailing of panel

17   members as well as what they look like at trial.

18   The DAC-IPAD heard from several servicemembers,

19   as well as Committee members themselves, who have

20   a lot of experience with court-martials that the

21   perception was that the members on courts-martial

22   were predominantly White.

1   Additionally, there has been a host of

2   appellate decisions on this issue within the last

3   five years, most notably, the United States v.

4   Jeter, which overturned Crawford, which basically

5   said that convening authorities can no longer

6   take race and ethnicity under consideration for

7   inclusionary purposes. So just it's important to

8   note for this presentation that these cases were

9   all done pre Jeter, so there was potentially the

10 consideration of these cases.

11   And further, the DAC-IPAD has just

12 recently released a report which encourages the

13 full randomization of the selection of panel

14 members to promote the perception in fairness and

15 panel selection. So that's kind of the world

16 that we're sitting in and why the DAC-IPAD chose

17 to do this study.

18   So the research questions and this

19 study obviously is going to -- a lot more

20 questions will be asked, but I do want to focus

21 on what these research questions were so that

22 we're kind of looking at this data in that lens.

1   As the Case Review Subcommittee members will

2   later talk about, we're not necessarily putting

3   judgment on any of this data because it is just

4   the data, but we are going to be talking about

5   what it potentially means, but we don't actually

6   know what it means, if that makes sense.

7   So the questions were: were convening

8   authorities detailing minority and female

9   servicemembers to courts-martial and after

10   excusals, what did minority and gender

11   representation on panels look like. In addition

12   to studying the race and ethnicity of panel

13   members, the DAC-IPAD was also interested in

14   studying the gender makeup of panels. And the

15   Committee has heard from victim counsel, and I

16   think it was Ryan Guilds that spoke the most

17   about this subject. He said that women were

18   being excused at higher rates than men because of

19   past sexual assault experiences as well as their

20   involvement in command-led programs. They're

21   called different things across the services but

22   basically sexually assault coordinators. And due

1   to those experiences, that they were being

2   excused under the liberal grant mandate for

3   implied biases purposes.

4   The DAC-IPAD has also heard testimony

5   from retired military judges that due to the

6   military's liberal grant mandate, that judges

7   must excuse panel members for implied bias when

8   finding the decision to be a close call or face

9   appellate review with a standard that was

10   recently referred to as vague and questionable by

11   a dissenting CAF judge in a recent case which

12   overturned a sexual assault conviction on an

13   implied bias issue. That case is also located in

14   your materials at Tab 4B.

15   The format of this presentation allows

16   for the results of the study to be explained

17   followed by the Case Review Subcommittee

18   takeaways and findings and an opportunity for you

19   to provide feedback. The team up here is really

20   hoping that this can be a conversation. I think

21   in the past, we've kind of thrown data at you,

22   and we want this to be a more holistic

1 experience, so we're going to be talking about

2 data. Then we're going to be talking about

3 takeaways and potentially deliberations from you

4 kind of on the spot. So we encourage you to

5 interrupt or ask as many questions as possible

6 while we're going through this this morning.

7 So first, we're going to be discussing

8 the race and ethnicity of military members who

9 are detailed to courts-martial by convening

10 authorities. The second thing we're going to be

11 looking at is what the likelihood of empanelment

12 is based on whether or not you're a minority

13 panel member or not. And finally, we are going

14 to review the race and ethnicity of those members

15 empaneled.

16 For both the detailing and empanelment

17 information, we will be describing the minority

18 representation in each service. We will then

19 rinse and repeat for gender on those three

20 subjects.

21 So the results of the study are

22 complex and despite having attempt to make it as

1   simple as possible for today, the reality is we

2   are trying to distill over 150 pages of data and

3   analysis into PowerPoint slides, so we do

4   understand there's going to be a lot of

5   questions. We've all had the opportunity to

6   think about this data now for a long time, so we

7   would just like to, if you have questions, for

8   you all to ask them during the presentation

9   itself. And having said that, I'm going to pass

10   it to Bill.

11   MR. WELLS: Thanks, Kate. So the

12   first thing we want to talk about is the approach

13   to measurement and how we created our categories

14   for racial and ethnic minority servicemembers,

15   and we're really focused on comparing White, non-

16   Hispanic servicemembers to racial and ethnic

17   minority servicemembers.

18   So we created gross categories. So

19   really, we're looking at two groups of

20   servicemembers detailed and empaneled, and that

21   was because of the core question that was asked

22   but then also because of the complex nature of

1   the data that we received from the services

2   really prohibited, in any useful way, creating

3   finer categories that would allow for different

4   kinds of comparisons between White non-Hispanic

5   servicemembers and other racial and ethnic

6   categories.

7   So it's a pretty gross comparison of

8   two groups. So that's what you're going to see

9   throughout the presentation is we're comparing

10   White, not-Hispanic servicemembers to racial and

11   ethnic minority servicemembers, and that category

12   is big and broad.

13   And the data that were provided to us,

14   as I indicated -- you'll see it in some of our

15   service specific reports -- were very

16   complicated. And distilling that data down into

17   something that would have been useful and

18   feasible would have been extremely challenging,

19   and the Navy was a very good example. I believe

20   we had close to 70 different categories when you

21   combined race and ethnicity that we obtained from

22   the Navy, so there was a feasible challenge as

1   well.

2   Also want to point out in terms of

3   measurement, the nature of missing data that we

4   have, and we have quite a bit of missing data.

5   And this is very common in civilian studies of

6   juries. This is not unique to the military.

7   This is a very common feature of these kinds of

8   analyses. And you see the Air Force is missing

9   nearly 25 percent data on race and ethnicity for

10   details, and then a little bit greater on

11   empaneled members.

12   There's no easy way to deal with

13   missing data in social science research,

14   especially when it comes to demographic

15   characteristics. This is something that

16   researchers across many fields, public health,

17   criminal justice deal with.

18   So our approach was to exclude those

19   cases with missing data from the results that we

20   have. We could have taken two approaches. We

21   could have excluded the cases, which is the

22   approach that we took. The other approach is we

1 could have included all of the cases in the

2 denominator of calculating percentages, and

3 that's what some civilian jury researchers do.

4 They include all the cases in the denominator

5 when you calculate a percentage. Here's why we

6 didn't do that.

7   When you take that approach, it

8 maximizes your estimates of under-representation.

9 Okay. So it maximizes the estimates of under-

10 representation. So interpreted that to be not a

11 conservative approach but a very liberal approach

12 to seeing these estimates. It also creates

13 problems for interpreting your results so for

14 instance, if we did that with our Navy data, you

15 would see that White not Hispanic servicemembers

16 are under-represented on juries and racial and

17 ethnic minority servicemembers are under-

18 represented on juries. Everybody's under-

19 represented when you take that kind of approach.

20 So we wanted to produce something that took a

21 what we believed was a more reasonable approach

22 rather than generating those extreme estimates of

1   under-representation. So in all the analyses

2   that you're going to see from here moving

3   forward, the individuals for which we were

4   missing data on gender, race, and ethnicity are

5   all excluded. So I'm going to turn it back over

6   to Kate then.

7   GENERAL SCHWENK: Did you have any

8   reason to believe that the missing data was

9   skewed particularly one way or the other? Or do

10   you think it's just random missing data and,

11   therefore, probably equally distributed wherever

12   it is?

13   MR. WELLS: Great question. I'm glad

14   you asked. Can I be a researcher for a second

15   and explain something to you? This is really

16   interesting. So let me start the quick answer is

17   no, we don't. In the civilian world, however, we

18   know that when potential jurors are filling out

19   surveys and they are reporting on their race and

20   ethnicity, the belief is that Hispanic civilians

21   are under-represented. They're over-represented

22   on missing data because there's a survey effect.

1   If you ask somebody about their race on a survey

2   first and then ask them about their ethnicity

3   second, they're likely to leave that blank. If

4   you ask about ethnicity first and then race

5   second, they're more likely to fill out the

6   ethnicity question. So the researchers that

7   study civilian jury representation believe that

8   Hispanic civilians are under-represented in those

9   data. We have no reason to believe that it's

10 distributed in any particular way that would bias

11 those results. That doesn't mean that it doesn't

12 exist. We just don't know about it.

13   GENERAL SCHWENK: We didn't get our

14 ethnic, our racial data from self-identified jury

15 questionnaires, right? We got it from the

16 personnel departments?

17   MR. WELLS: That's correct.

18   GENERAL SCHWENK: Okay.

19   MS. TAGERT: Yeah. So we can't speak

20 to why the services have unknown race and

21 ethnicity data for some of their personnel. We

22 did hear from the Army, however, that if someone

1   were to change their last name, so presumably get

2   married, change their last name, they wouldn't

3   necessarily be able to find that person any

4   longer in their system. So there may be glitches

5   like that but again, we just -- that was one

6   example that we received from the Army. But for

7   the other services, we don't know why people are

8   listed as unknown.

9   GENERAL SCHWENK: Looking at the

10 future and comparison studies back to this one, I

11 don't know what the OMB categories are or are

12 not, but by just going into the two categories,

13 White, non-Hispanic, and everybody else, is that

14 likely to make it easier for valid comparisons to

15 be made in the future regardless of how complex

16 or uncomplex race and ethnicity becomes?

17   MR. WELLS: General Schwenk, is your

18 question about the completeness of the data being

19 better in the future?

20   GENERAL SCHWENK: Comparing data in

21 the future to now, let's assume they change their

22 categories --

1   MR. WELLS: Okay.

2   GENERAL SCHWENK: -- and it's equally

3   messed up in a different way four years from now,

4   because we lumped them together, it would seem to

5   me you would just do the White, non-Hispanic,

6   which obviously would probably be available in the

7   future, and then everybody else, so it would make

8   comparisons easier it would seem to me but I don't

9   know, so I asked.

10   MR. WELLS: Yeah. If we use those

11   same categorizations into the future, then we

12   could draw those comparisons. I think the caveat

13   I would say is, if the data are more complete in

14   the future, that would give us a better

15   understanding of what's happening at that point

16   in time and then retrospective comparisons might

17   not necessarily be valid.

18   MS. TAGERT: So, similar to the issues

19   that Dr. Wells just addressed for our study,

20   actually last month GAO, Government

21   Accountability Office, issued a report which

22   found that the services differ in how they

1   capture, analyze, and present data on racial and

2   ethnic disparities in the military's justice

3   system. This study is located on the DAC-IPAD's

4   website under the Case Review Subcommittee's

5   reading materials, if you're interested.

6   But, essentially, the report, which

7   actually discusses the DAC-IPAD's project here --

8   because the services did not provide them

9   information on the race and ethnicity of panel

10   selection -- ultimately concludes that the data

11   limitations hindered DOD's visibility on

12   potential racial and ethnical disparities within

13   the military justice system.

14   Obviously, the DAC-IPAD has made

15   similar findings in the past. And the staff just

16   presents these issues to you in the sense that if

17   you don't want to necessarily make findings on

18   the data because you're concerned about the

19   missing data -- especially from the Air Force --

20   that you may want to describe these as

21   observations, as opposed to findings. We just

22   put that out there for your contemplation later.

1   And again, we're going to be

2   discussing these findings in more detail when we

3   actually do the deliberations. But we just want

4   to introduce them to you as we're going through

5   the research, so that they're not just kind of in

6   your face without any sort of context.

7   So, this is potentially what the

8   finding would look like when we're discussing the

9   GAO report, and potentially, the DAC-IPAD

10   concurring with that recent finding.

11   MR. WELLS: So, before we jump into

12   the results on details and panels, we did want to

13   present the data that we have on acquittals and

14   convictions, because this is an issue of ongoing

15   discussion among the Committee.

16   So, that's what this first table

17   shows. It shows, within each of the services,

18   the percentage of those accused who were

19   acquitted and found guilty on a 120 charge. And

20   you see that the acquittal rates range from

21   there, 58.9 percent up to 75 percent in the Air

22   Force.

1   DR. SPOHN: Bill, what is the dates of

2   these data?

3   MR. WELLS: These are all cases closed

4   in FY21 and FY22, except for the Air Force. We

5   were only able to obtain data for FY21 from the

6   Air Force. The FY22 data haven't come in yet.

7   And then we're going to amend the reports for the

8   Air Force when that data become available.

9   GENERAL SCHWENK: Is this contested

10   cases, or does this include guilty pleas?

11   MS. TAGERT: This data only includes

12   contested cases with the panel for those

13   Article 120s that you see on the screen for

14   Fiscal Year 21 and 22.

15   And when we're looking at this

16   conviction data, keep in mind that this was not a

17   case review project or a data project that we

18   were really focusing on the convictions.

19   So, there may be non-sex assault

20   offenses that there was a conviction, but this is

21   only on the sexual assault.

22   If the government got one charge and

1   it was a conviction, we counted it as a guilty

2   finding, and then a straight acquittal on any

3   offense that was sexual assault-related would be

4   a full acquittal, according to our data.

5   MS. GOLDBERG: This isn't the point of

6   this slide, but just to say it out loud, so, for

7   two years there are -- I'm not a fact person, I'm

8   a lawyer. But there are about 200 cases in all,

9   except for the Air Force is one year, across all

10 of the services. Is that correct?

11   MS. TAGERT: Yes, only for contested

12 cases through, in front of panels. So, there

13 would be judge-alone cases, as well as guilty

14 findings, which we did not obviously focus on for

15 this.

16   MS. GOLDBERG: Okay. Yep. Thanks.

17   MS. TAGERT: So, as we said, the

18 conviction rates here for the sexual assault

19 cases, the vast majority of them resulted in a

20 full acquittal on the sexual assault offense, and

21 then we go into this a little bit more in our

22 feature report.

1   But just for your situational

2   awareness, most of the accused were enlisted, and

3   for the most part they chose an enlisted panel.

4   There were very few enlisted accused

5   who selected an officer panel. Out of the 250

6   accused that were enlisted, only fifteen chose to

7   be tried in front of an all-officer panel.

8   So, when we're talking about this

9   data, we're talking about very few officer cases.

10   There were only 35 cases, or about thirteen

11   percent, that involved an all-officer panel.

12   MR. WELLS: Okay. So, now we're going

13   to get into the sort of heart of what we set to

14   do, which is to look at the representation of

15   racial and ethnic minority servicemembers on

16   details, and then panels.

17   So, we're going to go through details,

18   then we're going to go have a look at the people

19   who are impaneled and look at the features of

20   panels, and then look at the reasons why people

21   were excluded.

22   So, in this first slide, the top table

1   shows the percentage of details that were

2   comprised of our two groups of servicemembers --

3   racial and ethnic minority servicemembers and

4   White, not-Hispanic, servicemembers.

5   In the bottom table, that shows the

6   representation of the demographic groups in the

7   particular service.

8   So, in that bottom panel, you would

9   see that 54 percent of the Army is comprised of

10   White, not-Hispanic servicemembers, and

11   46 percent racial and ethnic minority

12   servicemembers.

13   So, the comparison that we made here

14   was the bottom row in the top table, to the

15   bottom row in the bottom table.

16   So, we would compare 45.3 percent in

17   the Army detail, to 46 percent in the Army

18   overall.

19   So, across these four services, we see

20   that in the Army, the Air Force, and the Marine

21   Corps, the representation of racial and ethnic

22   minority servicemembers on details, is very

1   similar to the representation in the services.

2   So, for instance, in the Air Force,

3   37.1 percent of details are racial and ethnic

4   minority servicemembers, and then 39.4 percent,

5   they comprise the overall Air Force.

6   So, the difference we see is in the

7   Navy. We see that racial and ethnic minority

8   servicemembers are underrepresented on details,

9   compared to their representation in the Navy

10   overall.

11   MR. KRAMER: Sorry, is that what that

12   asterisk is for?

13   MR. WELLS: Yes, sir.

14   MR. KRAMER: Okay.

15   MR. WELLS: Yeah. That's to help you

16   and to help me. That is the difference that is

17   statistically significant. Yeah.

18   MS. GOLDBERG: And the Marine Corps

19   difference is not.

20   MR. WELLS: The Marine Corps

21   difference is not. And you're going to see in a

22   couple of the comparisons that we make, the

1   differences in the Marine Corps seems like, to

2   the naked eye, the difference would seem to be

3   statistically significant.

4   The limitation with that is we have

5   relatively small sample size and it's hard to

6   detect those effects with smaller sample sizes,

7   just because of the variation that you see in a

8   small sample. Yeah.

9   SGT. SHEPPARD: To make it

10   statistically significant, is it a percentage of

11   five percent or more? I was kind of reading

12   ahead and it seems to be if it's less than five,

13   it's not statistically significant.

14   MR. WELLS: Correct, that was the

15   threshold that we used. And in all of these

16   tests we used a two-tailed significance. So, we

17   weren't predicting that there would be over or

18   underrepresentation. We looked at either.

19   SGT. SHEPPARD: Okay.

20   MR. WELLS: Yeah.

21   SGT. SHEPPARD: Thank you.

22   MS. TAGERT: So, if you're not a

1   numbers person, this is a narrative description

2   of the data that Dr. Wells just presented, which

3   basically discusses that in the Army, for the

4   most part, the servicemembers that were detailed

5   to courts-martial were almost identical to their

6   representation to the Army as a whole.

7   In the Air Force and the Marine Corps,

8   minorities were slightly lower than the

9   representation across their service, and then of

10   course in the Navy, the difference is

11   statistically significant, and that minorities

12   were impaneled at a lower percent than their

13   representation in the service. Sorry, detailed.

14   Thank you.

15   And in the report we will also, on top

16   of this narrative finding, also have bullet

17   points that show the percentages, as well as the

18   representation in the service.

19   Because of all the different numbers,

20   in the case review we felt that was an effective

21   way to present this kind of information. So,

22   that was our first observation or finding,

1   depending on what you ultimately decide.

2   MR. WELLS: Okay. So, the next

3   decision point we wanted to look at after the

4   detailing was the rate of impanelment.

5   So, we started with the individuals

6   who were detailed, and then we wanted to

7   understand from that detail, who was impaneled

8   and who was not impaneled.

9   And that's what these next four tables

10   are going to show. So, we have four tables, one

11   for the Army, one for the Air Force, one for the

12   Navy, and one for the Marine Corps.

13   And what you're going to see in this

14   first slide is the rate of impanelment for White,

15   not-Hispanic, detailed servicemembers, is very

16   similar to the rate of impanelment for racial and

17   ethnic minority detailed servicemembers.

18   So, if you look across that first row

19   in the Army table, you'll see that 48.7 percent of

20   White, non-Hispanic, servicemembers were

21   impaneled, and 48.6 percent of racial and ethnic

22   minority servicemembers who had been detailed

1   were impaneled. Almost identical percentages.

2   So, there's no difference there.

3   So, the rate of impanelment for our

4   two demographic groups of servicemembers is

5   nearly identical in the Army. In the Air Force

6   it's not identical, but it's fairly similar,

7   41.4 percent compared to 47.2 percent.

8   So, racial and ethnic minority

9   servicemembers are slightly more likely to be

10   impaneled than White, not-Hispanic members in the

11   Air Force, but that difference is not

12   statistically significant.

13   The next two tables show very similar

14   patterns. In the Navy, we see that White, not-

15   Hispanic servicemembers are impaneled at a rate

16   of 43.6 percent and racial and ethnic minority

17   servicemembers are impaneled at a rate of

18   45.3 percent. Very similar percentages and rates

19   there.

20   And then for the Marine Corps, same

21   thing. White, not-Hispanic servicemembers are

22   impaneled at a slightly higher rate than racial

1   and ethnic minority servicemembers, but that

2   difference is not statistically significant.

3   So, the overall pattern here is that

4   among those servicemembers who are detailed, the

5   rates of impanelment across our two demographic

6   groups are fairly similar.

7   MR. KRAMER: Sorry, I may have missed

8   it, I apologize. Does this include enlisted and

9   officer panels? Or mixed?

10   MR. WELLS: It includes everybody

11   aggregated together.

12   MR. KRAMER: Okay. I'm sorry, was

13   there any breakdown to try to find an all-officer

14   panel if the statistics were significantly

15   different?

16   MR. WELLS: We did not look at that.

17   I'm not sure we could actually do anything with

18   that at this point because those numbers of all-

19   officer panels are so low, I'm not sure we could

20   draw any sound conclusions from that.

21   CHAIR SMITH: So, you only looked at

22   enlisted trials, no? You looked at officer

1 trials as well? I guess my question is, we know

2 that as we go up the ranks, there are fewer and

3 fewer minorities and women.

4   So, did you look at officers who were

5 charged, and then look at their panels, or no?

6   MS. TAGERT: So, all of the data

7 includes officer panels. But the breakdown of

8 all-officer panels was thirteen percent.

9   And out of the 240 accused, they were

10 enlisted, and for the most part they selected

11 enlisted panel. So, yes, it does include the

12 officer panels as well.

13   (Off-microphone comment.)

14   MS. TAGERT: Yes, but I can look in

15 the report, but there were very few officers

16 tried. I think the Air Force had the highest

17 rate. Go ahead, Nalini.

18   MS. GUPTA: There were only 20

19 officers who were accused, out of the 260.

20   CHAIR SMITH: And you didn't look at

21 those separately, right? I'm just making sure I

22 understand. Okay, thank you.

1   MS. TAGERT: All right, so on the

2   screen again, we're talking about a narrative

3   finding based on the data, which basically

4   delineates that if you were in the Air Force or

5   the Navy, you were more likely to be impaneled

6   than a White, not-Hispanic member.

7   In the Army, it was dead-even, and in

8   the Marine Corps you were less likely to be

9   impaneled. If you were a minority, however, that

10   was not statistically significant.

11   MR. WELLS: So, with this next stage

12   of the analysis, what we wanted to do was break

13   off that group of individuals who are impaneled,

14   so we could get an understanding of the

15   characteristics of the panels themselves.

16   With the previous tables, it wasn't

17   real easy to get a picture of that. So, that's

18   what this table shows.

19   This shows the representation of

20   White, not-Hispanic servicemembers on panels, and

21   the representation of racial and ethnic minority

22   servicemembers on panels.

1   And then in the bottom part of that

2   table, we again present the representation in the

3   services.

4   So, the comparison we made was the

5   bottom row in the top table, to the bottom row in

6   the bottom table. And you see that the

7   percentages are fairly close, with the exception

8   of the Navy, which is what we saw in the details

9   as well.

10   So, if we take the Navy as an example,

11   we see that 44.3 percent of the impaneled members

12   belong to racial and ethnic minority

13   servicemembers, and then in the Navy overall,

14   53.4 percent of the Navy was comprised of racial

15   and ethnic minority servicemembers.

16   MR. KRAMER: Is there any anecdotal

17   evidence of why the Navy is so different than the

18   other three?

19   MR. WELLS: No. This was very much a

20   descriptive study, and we all felt this as well.

21   Like, what's going on here? What explains this?

22   And we just don't have the data information to be

1   able to do that at this point, as much as we

2   would like to.

3   MS. TAGERT: Again, this would be the

4   narrative representation of what Bill just

5   explained, that the representation of racial or

6   ethnic minorities on panels in the Army and the

7   Air Force was similar to their representation in

8   the respective services, but for the Navy and the

9   Marine Corps the representation was lower panels.

10   And for the Navy, this was a statistically

11   significant difference. And this was one of the

12   case reviews of --

13   MS. GOLDBERG: Sorry, just a question

14   again, not being a stats person. When the

15   potential finding notes the lower representation,

16   which makes sense to me descriptively, and then

17   we would see it's not statistically significant,

18   maybe this is just sort of a thought for us and

19   the group rather than a comment on this

20   particularly, but I think when we mention that

21   something is lower and we also see it's not

22   statistically significant, sort of what should

1   somebody take from the fact that we are stating

2   that it's lower? And it may be just be useful

3   for us to provide whatever caveats are needed

4   around that, if any.

5   MR. WELLS: I'm sure Dr. Spohn could

6   weigh in on this as well. This is where

7   judgment's required. And we don't want to overly

8   rely on a test of statistical significance.

9   If you see a difference and it appears

10 meaningful, then it's meaningful. And in fact,

11 there's been some movement even among some folks

12 in the American Statistical Association, to move

13 away from a strict reliance on tests of

14 statistical significance, and look at confidence

15 intervals, as it were.

16   Now, that informs test of statistical

17 significance. But it's a broader set of data and

18 information that you can use to draw conclusions.

19   (Off-microphone comment.)

20   DR. SPOHN: And that would be

21 particularly true given that you have the

22 universe of cases, correct? Not a sample.

1   DR. MARKOWITZ: And if I can just add,

2   so, we're looking at all ethnic and racial

3   minorities, compared to the services at-large.

4   But we have no idea if, say, the

5   number of Hispanic servicemembers are

6   representative of the number who are impaneled,

7   or who are selected. Right?

8   We have no idea whether or not there's

9   parity among the individual ethnic or racial

10   breakdown, right? Like, we have no idea from

11   your examination of this. You're just looking at

12   the total -- like, just sort of like the total

13   bucket, right? If I'm making myself -- which I

14   don't think I am -- very clear. Not very

15   articulate in this.

16   But, like, we're just looking at,

17   like, the entirety of racial and ethnic

18   minorities, right? We can't say for sure whether

19   or not, like, all Asian-Pacific Islander

20   servicemembers are representative on panels. We

21   can't make that distinction, correct?

22   MR. WELLS: That's correct. Yeah, we

1   can't drill down to that level.

2   DR. MARKOWITZ: Is it we can't right

3   now? I mean, you haven't done that yet? Or we

4   actually can't with the data we have?

5   MR. WELLS: It would be very

6   challenging with the data we have. I would say

7   it's almost not viable with the data that we have

8   received from the services on the racial and

9   ethnic categories that are used for

10   servicemembers.

11   We certainly would have an even more

12   challenging time doing that for the details and

13   panels, and then comparing it to the services

14   overall.

15   MS. TAGERT: So, the graph on your

16   screen shows, in blue, the percentages of

17   minorities that were detailed, and then the

18   orange shows impaneled.

19   And this seems like an obvious point

20   but I think it's worth taking a look at, which is

21   essentially that the detailing of members is a

22   crucial determinant of whether or not a panel

1 will be representative.

2 As you can see, the representation

3 essentially stayed the same based on the fact

4 that the rates of impanelment between minority

5 and White panel members were similar.

6 But as you can see in the Navy, even

7 though as a minority you were more likely to be

8 impaneled, they could never really make up for

9 that under-detailing -- I don't want to describe

10 it as under-detailing -- but the detailing was

11 very important for the race and ethnicity here.

12 And you're going to see in the gender

13 how this changes from detail to impanelment if

14 you are not as likely to be impaneled.

15 So, I just thought that was an

16 important point because, of course, we are in a

17 system right now that has a lot of changes to

18 panel selection, which includes the fact that by

19 the end of the year there has to be changes to

20 the randomization to the fullest extent possible.

21 And again, these cases were decided

22 before United States vs. Jeter, and the DAC-IPAD

1   heard from convening authorities that said that

2   they did indeed take race and ethnicity into

3   account when detailing members.

4   However, we don't know if this is --

5   the representation of minorities on panels are as

6   a result of that, or because the Article 25

7   criteria itself is driving a representative

8   panel.

9   So, again, this is a good, like,

10 frozen-in-time moment for the services. However,

11 we don't know what's going to happen as time

12 continues on. But they can certainly use this

13 study, if they want to, as a baseline.

14   MR. WELLS: So, now we're shifting

15 gears a little bit. And what we've done for

16 these sets of results is pulled out the

17 servicemembers who are not impaneled. So, these

18 are people who were detailed, but then they were

19 excused.

20   And we wanted to know whether or not

21 there were differences across our two demographic

22 groups in terms of the reasons used to excuse

1 those groups.

2 So, we have a table for each of the

3 services to show this. We tried to present this

4 in a more concise way, but it just didn't work

5 out that way. And we wanted you all to have the

6 complete information. So, we present one table

7 for each service.

8 But I'll cut to the chase. And we

9 don't see reasons being used differentially across

10 White, not-Hispanic servicemembers, and racial and

11 ethnic minority servicemembers.

12 So, I think the first thing to note is

13 in the far-right column. You see that for-cause

14 challenges are used most often to excuse members

15 65.6 percent of the time. And then we see that

16 distributed evenly across both of the two

17 demographic groups.

18 So, the way to read this table is 65.8

19 percent of the White, not-Hispanic servicemembers

20 who were excused, were excused for a for-cause

21 challenge. Okay?

22 And then 65.5 percent of the racial

1   and ethnic minority servicemembers who were

2   excused, were excused because of a for-cause

3   challenge. And then that's very close to the

4   same total when you combine everybody together.

5   Move on to the Air Force, very similar

6   pattern. Nearly identical percentages in the for-

7   cause challenges for the White, not-Hispanic

8   servicemembers, and racial and ethnic minority

9   servicemembers. And then very similar

10   percentages in the other reasons for excusal as

11   well.

12   MS. GOLDBERG: Can you just remind us,

13   or at least me, what the randomization excuse is?

14   MR. WELLS: I'm going to need to turn

15   over to Kate to explain that.

16   MS. TAGERT: Yes, so, the

17   randomization for these cases was once you get

18   through -- so, let's say 25 people walked into

19   the courtroom that were detailed. They would go

20   through their for-cause challenges.

21   And then if they were trying to get to

22   eight for their panel, if there was an excess

1   amount, all the panel members are given a number,

2   and then the ones that are not needed are

3   excused, and then they're going to apply their

4   peremptory challenges to that number, if that

5   makes sense.

6   (Off-microphone comment.)

7   MS. TAGERT: The remaining members.

8   So, that's the process.

9   GENERAL SCHWENK: So, if 25 walked in

10   detailed and ten were challenged for cause, we'd

11   be down to fifteen. The judge wants eight, so he

12   hands out numbers -- one to fifteen, I guess --

13   and takes one to eight and they stick around, and

14   nine through fifteen go about their duties

15   pending recall? Is that how it works? No?

16   (Off-microphone comment.)

17   MS. TAGERT: And maybe it does. We

18   have it right in the report.

19   MR. LIBRETTO: After challenges for

20   cause, before peremptories, if it's an enlisted

21   panel, you assign the enlisted requirement first,

22   and then you start going in to the rest.

1   MS. GOLDBERG: So, assuming the number

2   drops with peremptories, are people who are

3   randomized out pulled back in? Is that how it

4   works?

5   MS. TAGERT: No, that's not my

6   understanding. But, potentially, Judge Libretto

7   wants to speak on that.

8   MS. GOLDBERG: If you had the number

9   you need before your peremptory challenges, then

10   your number drops after peremptories. So then,

11   how do you make up for who's missing at that

12   point?

13   MR. LIBRETTO: If you drop below the

14   required after the peremptories?

15   MS. GOLDBERG: I mean, maybe we don't

16   need to sort of sort this. I don't want to take

17   the group's time on this. It's not coming

18   together for me, but I'm happy to discuss it

19   later.

20   MS. TAGERT: So, without seeing it,

21   it's kind of confusing. But in the report we'll

22   make sure to flush that out so that it makes

1   sense.

2   MS. BASHFORD: It's also not like the

3   civil, where you get ten to fifteen to twenty. I

4   think you get one peremptory per side.

5   MS. TAGERT: Yes, there's only one

6   peremptory per side in the military.

7   MR. WELLS: Okay, so we see very

8   similar percentages in the Air Force across the

9   two demographic groups in terms of use of for-

10   cause and peremptory.

11   The Navy, we don't find a

12   statistically significant difference here, but

13   there is a difference. So, you can see that for-

14   cause challenges are used more often when an

15   excused member is a racial or ethnic minority

16   servicemember -- 65.3 percent of the time,

17   compared to 58.9 percent of the time.

18   And then when you look at the

19   peremptory challenges, we see that among the

20   excused members who were White, not Hispanic,

21   there's a greater percent that were excused with

22   a peremptory challenge.

1   So, we see they're 18.2 percent

2   compared to 12.9 percent. So, across these four

3   tables, this is where we see a difference.

4   And in the Marine Corps, the

5   percentages are very similar -- 58.9 percent

6   White, not-Hispanic excused with a for-cause

7   challenge, compared to 57.5 percent for racial

8   and ethnic minority servicemembers.

9   And then with the peremptories, 15.6

10   versus 16.5. And then the other categories are

11   very similar as well.

12   MS. TAGERT: Just for some context,

13   one of the reasons that the Case Review

14   Subcommittee wanted to examine this issue, was

15   because this is somewhat of a hot topic in the

16   civilian world right now, because there's been a

17   number of studies across state and federal juries

18   which have shown that peremptory challenges have

19   been used to exclude minority members at

20   significantly higher rates than White members.

21

22   And in response, some states, like the

1   State of Arizona, have even gone ahead and barred

2   peremptory challenges altogether. But other

3   states haven't gone so far, but have altered the

4   Batson rules, as well as their own court rules,

5   when trying to make sure that they're policing

6   discriminatory jury selection.

7   But for the military, for these cases

8   involving sexual assault offenses for Fiscal Year

9   '21 and '22, we did not find that peremptory

10   challenges were being used disproportionately.

11   MR. WELLS: Okay, these next sets of

12   analyses take a slightly different approach. So,

13   the question we asked is whether or not the

14   composition of the panels differed by the race of

15   the accused servicemember.

16   Okay, so, we look at the composition

17   of the panels by the race of the accused

18   servicemember. And we're going to do this for

19   each of the four services.

20   But before we get into that analysis,

21   we show the demographic characteristic of the

22   accused in each of the services.

1   And it's also important to note the

2   relatively small numbers of cases in the Navy and

3   the Marine Corps.

4   So, we're talking about twelve accused

5   members who are White, not Hispanic, and sixteen

6   in the Marine Corps who were White, not Hispanic.

7   And what that means is just use a

8   little caution in interpreting the patterns that

9   we see here. Because that's a relatively small

10   number of cases.

11   So, my next tables are going to show

12   the breakdown and I'll walk you through what

13   these percentages mean, because it's a little bit

14   different approach here.

15   So, what we did was we took a look at

16   each of the panels and we measured the racial and

17   ethnic demographic characteristic of each person

18   on the panel, and then computed a percent of the

19   panel that belonged to each of the demographic

20   groups.

21   So, the way to read that top table is

22   that's the average percent of the panel that was

1 comprised of White, not-Hispanic servicemembers.

2 So, 59.6 percent. So, that's the average, or the

3 typical panel in the Army, is nearly 60 percent

4 White, not-Hispanic.

5 When the accused member is White,

6 not-Hispanic, the typical panel is comprised of a

7 greater percentage of White, not-Hispanic

8 servicemembers, compared to when that accused

9 person is a racial and ethnic minority

10 servicemember who's been accused.

11 I don't have it flagged up here, but

12 this different is statistically significant, 59.6

13 compared to 51 percent.

14 And when we move down and we look at

15 the Air Force, we see a similar pattern, but we

16 don't find a statistically significant difference

17 here.

18 DR. MARKOWITZ: Can you walk me

19 through the standard deviation there? I'm trying

20 to figure out -- my brain's just not computing

21 that.

22 MR. WELLS: Yeah, it's relatively

1   large. And that standard deviation is also a

2   percentage. Right?

3   So, if you look at the left cell

4   there, the standard deviation is 20.4 percent.

5   That's the typical amount by which a panel

6   differs from the mean. It differs by 20 percent.

7   So, it's a big standard deviation.

8   And what that means is across those

9   124 panels, there's a diverse set of

10   representation of the demographic groups on those

11   panels.

12   And in a minute when we get to showing

13   the bar charts, you'll see how that looks

14   visually. And I find that visual representation

15   pretty good.

16   DR. MARKOWITZ: Okay, I'll hold out

17   then. Thanks.

18   MR. WELLS: Yeah, yeah. Okay. So, a

19   little more complicated analysis that we present

20   here. But we see some differences that a typical

21   panel has a greater percentage of White, not-

22   Hispanic servicemembers when the accused is a

1 White, not-Hispanic servicemember, in the Army

2 and in the Air Force.

3 When we move on and look at the Navy,

4 we see that the representation is about the same

5 across racial and ethnic demographic

6 characteristics of the accused.

7 So, 52.2 percent of the typical panel

8 is comprised of White, not-Hispanic

9 servicemembers when the accused is White, not-

10 Hispanic servicemember, and when the accused is a

11 racial and ethnic minority servicemember,

12 52.7 percent. Nearly identical percentages

13 there.

14 The Marine Corps, these patterns flip

15 what we saw in the Army and in the Air Force.

16 We see here that when the accused is

17 a racial or ethnic minority servicemember,

18 there's a greater representation of White, not-

19 Hispanic servicemembers on those panels, compared

20 to when the accused is a White, not-Hispanic

21 servicemember. And we see that with the

22 54.1 percent versus the 65.7 percent.

1   MS. GOLDBERG: Thank you. And if

2   anybody has questions on these charts, I want to

3   defer to them. I have a question that is just on

4   a chart we noted and moved past quickly, which is

5   the chart on page 24, I think, about the race and

6   ethnicity of the accused. Sorry, slide 24.

7   Sorry about that.

8   And I guess I just looked at that,

9   then I tried to compare that to the slide on

10   page 12 that showed the percentage of

11   servicemembers who are racial and ethnic

12   minorities.

13   And I don't know if you have a slide.

14   Is there a slide coming up on this? There's a

15   tremendous disparity where sort of, just say in

16   the Army there are 46 percent, if I'm reading the

17   chart right from earlier, of active duty

18   servicemembers of racial and ethnic minorities,

19   but racial and ethnic minorities constitute

20   nearly 60 percent of those accused.

21   And you see that across sort of nearly

22   40 percent, versus over 50 percent in the Air

1   Force, 53 percent of racial or ethnic minority

2   servicemembers in the Navy, versus 72 percent

3   accused, and 43 versus 59.

4   So, I maybe that's not where we're

5   going with this, but it struck me as

6   statistically significant without being a

7   statistician.

8   So, I just wanted to note that as

9   something that we might want to come back to at

10   some point. But it looked like, Jenn, you had

11   some insight.

12   MS. LONG: Not insight, but I was

13   going to say we talked about though how the

14   ethnicity of the victim isn't collected in this.

15   And I think to do anything, we want to get

16   everything together to understand --

17   MS. GOLDBERG: Agree.

18   MS. LONG: -- which I don't even know

19   is possible, based on everything we learned about

20   the data retrospectively.

21   MS. TAGERT: Yeah, so we certainly

22   don't want to ignore the fact that the accused

1 minority members are overrepresented, but also

2 this particular study did not focus on that.

3 So, we do talk about this in the

4 report, but we don't have -- we only looked at

5 the cases here at a contested level. We're not

6 looking at the number of investigations and

7 comparing it against the race and ethnicity.

8 So, we don't want to make any

9 conclusions about this data. But we definitely

10 discuss it, as well as the many reports that have

11 come out recently that have said that minorities,

12 at the investigative level, are

13 overrepresentative, as well as for non-judicial

14 punishment. So, we kind of go over all that

15 literature.

16 So, yeah, we don't want to ignore it,

17 but we also, there's so much data that we've

18 collected. So, it's hard to kind of figure out

19 what -- the focus here is trying to be on the

20 panels.

21 But there's definitely going to be

22 further studies that come out of this.

1   MS. GOLDBERG: Really helpful. Thank

2   you.

3   MR. WELLS: Before we move on and Kate

4   talks about the conclusions or findings to be

5   discussed here, just really quickly want to

6   reiterate that in the Navy and the Marine Corps,

7   with the accused White, not-Hispanic servicemember

8   categories, there's small numbers of cases there.

9   So, in the Navy it's twelve, and then

10   in the Marine Corps it's sixteen. So, we're

11   talking about a small number of panels there that

12   generated that 52.2 percent and 54.1 percent

13   statistics.

14   MS. TAGERT: Narrative of what Bill

15   just went over, which was essentially that except

16   for the Marine Corps, panels did have a greater

17   representation of minority members when the

18   servicemember was a minority.

19   And before we go on to these charts

20   that are going to give you an idea of what the

21   courtroom looks like from a demographic

22

1 perspective when you walk in, one of the Case

2 Review Subcommittee's takeaways is that we don't

3 really want to discount the perception of

4 servicemembers, Committee members, because when

5 we're talking about the representation of

6 minorities on panels, again, we're talking about

7 eight people on a jury or a panel.

8 And if you walk in and you're a

9 minority, and we're talking about 40 percent,

10 38 percent, that may only be two or three people.

11 And whether or not -- that's just one

12 of the things that -- this data is complex,

13 because although we're saying that potentially

14 for the most -- three out of four services do

15 have minority representation, the perception that

16 potentially panels are all-white is certainly

17 there, as well as the fact that there are going

18 to be -- as you'll see on the slides next --

19 panels that are all-white.

20 So, if you're only trying, as Judge

21 Smith pointed out, 200 cases a year, whatever the

22 total amount was there, that's a percentage that

1   maybe feels high for the services and minority

2   members that are tried.

3   So, I just want to keep that in mind

4   when we're talking about this throughout the day.

5   MR. WELLS: I'm going to switch gears

6   a little bit now and start to again talk about

7   panels -- the details and the panels. What these

8   details look like, and then what the panels look

9   like, in terms of demographic characteristics.

10   So, just to remind everybody, so, the

11 first sets of analyses grouped everybody together

12 who were detailed or impaneled. We didn't look

13 at the specific detail that they were a part of,

14 or the specific panel that they were a part of.

15 We could do that, and that's what we've done with

16 these next sets of slides.

17   So, these next slides are going to

18 show the representation of the demographic

19 characteristics on these details, and then the

20 panels, service by service, to give you a sense

21 about these distributions of demographic

22 characteristics across the cases.

1   The Army is a little more difficult to

2   discern, because we have 124 cases, which is

3   larger than the other services. But the blue

4   chart shows the percent of detailed members who

5   are White, not-Hispanic servicemembers, and the

6   red bar shows the percent of those details that

7   are comprised of racial and ethnic minority

8   servicemembers. And you can see how it flows

9   over time.

10   The average detail here is

11   55.6 percent White, not Hispanic, and

12   44.4 percent racial and ethnic minority

13   servicemembers. Okay, so that's the average in

14   this set of cases.

15   And then you can look at the panels

16   for the Army, and you can go back and forth and

17   you can see the distribution and how it changes

18   when you go from detail to panel, and the numbers

19   are very similar.

20   So, the average panel is 55.3 percent

21   White, not-Hispanic, and the average detail was

22   55.6 percent. So, very similar.

1   MS. TAGERT: And Bill, do you just

2   want to explain the significance of the

3   similarities and what happens? Like, that

4   there's opportunity that this could be different?

5   That the data would have been different?

6   MR. WELLS: Yeah, the reason why we

7   looked at the particular details and panels is

8   because we wanted to understand whether there

9   were unusual concentrations on particular details

10   and panels, that would signal to you all as a

11   committee, we need to figure out what's going on,

12   on some of these details, or some of these

13   panels, where we see very large percentages of

14   racial and ethnic minorities on these details and

15   panels, and then other panels where it's very

16   low.

17   But what we see when we look at the

18   charts is it's pretty even. There's no really

19   unusual pattern of concentration here with regard

20   to race and ethnicity.

21   When we get to gender, you're going to

22   see a little bit of a different story there. But

1   for this, we wanted to see if there were some

2   really stark patterns that jumped out. And we

3   don't really see that.

4   I'll move to the Air Force. These are

5   the details. The typical detail in the Air Force

6   was comprised of 59.7 percent White, not-Hispanic,

7   and then when you go to the panel, the typical

8   panel is 56.6 percent White, not-Hispanic

9   servicemembers. I'm sorry, I jumped ahead.

10   With regard to the Air Force,

11   63.1 percent White, not-Hispanic, and on the

12   panel, 59.7 percent. So, we see the difference

13   between the detail, the distribution, and the

14   panel, are fairly similar.

15   In terms of the Navy, the typical

16   detail is 56.6 percent White, not-Hispanic, and

17   then when you jump ahead to the panels in the

18   Navy -- so, here's the detail, here's the

19   panel -- the typical panel is 54.3 percent White,

20   not-Hispanic. So, a little bit lower than the

21   detail, but fairly close.

22   Then, the distribution of details in

1   the Marine Corps, the typical detail is

2   59.9 percent White, not-Hispanic, which is very

3   similar to the typical panel in the Marine Corps,

4   60.9 percent.

5   So, the average in the Marine Corps,

6   59.9, versus 60.9, when we compare the detail to

7   the panel.

8   MS. TAGERT: So, this is just kind of

9   a completion of the data finding, which would be

10   that in sexual assault offenses the patterns of

11   results are the same, whether or not they're

12   looked at in the aggregate or in an individual

13   basis. So, that was the takeaway there, which

14   the reason that we wanted to look at this

15   especially, was there was always the question

16   coming up, well, what if there are certain

17   convening authorities where we would have seen

18   different results.

19   So, we found that in these cases the

20   pattern of results are similar.

21   MR. WELLS: Okay, so that's the sort

22   of model of the analyses that we ran. And now,

1 we're going to apply the same thing to the

2 question about gender.

3   So, back to the beginning then. We

4 looked at the representation of male and female

5 servicemembers on details across each of the

6 services. And we used a very similar comparison.

7   So, in this first slide, the top table

8 shows the representation of men and women on

9 details, and the bottom table shows the

10 representation of men and women in the particular

11 services.

12   When we looked at the Army and the Air

13 Force, we see some differences there. We see

14 that women are overrepresented on details,

15 compared to their representation in the services.

16   So, in the Army, it's a comparison of

17 21.2 percent, to 15.6 percent. So, women are

18 detailed at a higher rate than the representation

19 in the Army.

20   For the Air Force, similar pattern,

21 but the difference is 31 percent versus

22 21.5 percent. So, again, women are

1   overrepresented on details, compared to the

2   representation in the services.

3   In the Navy, we see that flip-flop a

4   little bit. We see that women make up sixteen

5   percent of those detailed to a courts-martial in

6   the Navy. In the Navy, they represent

7   20.7 percent of the overall service.

8   And then in the Marine Corps, we see

9   very similar percentages there.

10   MS. BASHFORD: Do we think, Kate, that

11   Jeter will be extended to apply to gender as

12   well?

13   MS. TAGERT: I think it will, but I

14   haven't really thought too deeply on it. But,

15   yes.

16   MS. BASHFORD: Because the overage for

17   the Army and the Air Force was statistically

18   significant.

19   DR. SPOHN: So, we're doing some

20   research like this in Arizona, in the wake of the

21   banning of the peremptory challenges.

22   And when we compare the percent of

1   racial and ethnic minorities in the population to

2   those on panels, or selected for juries, and so

3   on, we have to exclude people in the population

4   who are under the age of eighteen.

5   We can't really exclude people who

6   have felony convictions, because we don't know

7   that data. But we have to exclude people who are

8   under the age of eighteen.

9   Are there any servicemembers who are

10   not eligible for jury duty?

11   MS. TAGERT: I'd have to consult the

12   RCM, but generally, only because there would be

13   some type of bias, like they know the accused.

14   But we can look that up in the break. But --

15   (Off-microphone comment.)

16   MS. TAGERT: Yeah, so, it varies,

17   because of the way that the military is

18   structured. But, yes, for the most part we don't

19   have the issue that someone has a felony, because

20   they hopefully aren't still in the service. But,

21   yes, we can provide on the break the exact why

22   you would be excluded. But it does vary on the

1   rank.

2   MR. KRAMER: So, my question earlier

3   about the Navy, could it be that at any given

4   time there's -- I don't know how many. There's

5   obviously some percentage of Navy personnel on

6   ships. Is there a way to take that into account?

7   MS. TAGERT: So, we've discussed that

8   internally. Like, oh, people are on ships. But

9   again, we have no idea whether or not that is a

10   problem.

11   MR. WELLS: Yeah, and I should have

12   mentioned this at the beginning. I mean,

13   ideally, we wanted to compare these details on

14   panels and the demographic characteristics of

15   those details and panels, to the installations,

16   or location from which they were selected.

17   In terms of the data, we just couldn't

18   do that. So, the next best option was to compare

19   it to the overall representation in the services.

20   MS. GOLDBERG: And wouldn't it have to

21   be that people would be disproportionately likely

22   to be on a ship based on race, or not be on a

1   ship, for that to carry over?

2   MS. TAGERT: So, again, this is just

3   an overview in the Air Force and the Army. If

4   you are a woman, you were detailed to courts-

5   martial at a greater percent than your overall

6   representation, for the Marine Corps it was

7   basically an even split, and for the Navy women

8   were detailed to courts-martial at a lower

9   percent than their representation in service.

10   MR. WELLS: Okay, so, the next slides

11   show the rates of impanelment by gender. So, we

12   have four tables here. We have one for each of

13   the services.

14   And again, we looked at, among all

15   those members who were detailed, who was

16   impaneled and who was not. And we see a similar

17   pattern across all of the four services, that

18   female servicemembers have a lower likelihood of

19   being selected to be on a panel than male

20   servicemembers.

21   In all four of these tables there is

22   a statistically significant difference. There's

1   a statistically significant relationship. Again,

2   but the question earlier from Ms. Goldberg was

3   about the difference between a meaningful

4   difference and statistically significant

5   difference.

6   So, again, that's up to you all to

7   liberate and decide. But we see pretty

8   substantial differences here. So, I'll give you

9   an example of how to interpret these results.

10   So, in the Army, 51.6 percent of all

11   the men detailed were impaneled. For women,

12   among all the women detailed, 37.8 percent of

13   them were detailed. So, we see a difference of

14   51.6 compared to 37.8.

15   Then, when you go down to the Air

16   Force, you see a difference of 48.1 percent

17   impaneled males, 33.1 percent of detailed females

18   were impaneled.

19   Similar patterns when we see the

20   differences across men and women in the Navy, and

21   then differences between men and women in the

22   Marine Corps.

1   A greater chance of being impaneled

2   for men who were detailed, than women who were

3   detailed, in the Navy, and a greater chance of

4   being impaneled for men, compared to women, in

5   the Marine Corps.

6   MS. TAGERT: So, this is the finding

7   on the rate of impanelment for women. I've left

8   the percentages in, just because it's so

9   different than what we saw with race and

10   ethnicity, as far as the likelihood of being

11   impaneled.

12   The DAC-IPAD has heard anecdotally

13   from a lot of people that said that this was

14   happening.

15   And I think that the two years of data that we

16   have here shows that it absolutely is happening.

17   And the fact that across the services,

18   that this was statistically significant was -- I

19   don't know if I was surprised, but it was

20   significant when reviewing this, for me.

21   MR. WELLS: Okay, so the next step we

22   took then was to look at only the people who were

1 selected to be on a panel. And we looked at the

2 gender representation of those members who were

3 impaneled, and compared that representation to

4 the services overall.

5   And we see that in the Army and in the

6 Air Force, the representation of women on panels

7 is greater than their representation in the

8 services.

9   Those differences, 16.4 percent for

10 instance, compared to 15.6 percent in the Army.

11 So, again, we look at the bottom row on the top

12 table, and the bottom row on the bottom table,

13 and compared those percentages.

14   Those differences are not

15 statistically significant. But the

16 representation of women on panels is greater than

17 the representation in the services, for the Army

18 and the Air Force.

19   In the Navy, we do see a statistically

20 significant difference there. So, in the Navy,

21 among the people who are impaneled, 9.2 percent

22 were women, and in the Navy overall, 20.7 percent

1   of the armed service active duty personnel are

2   women.

3   In the Marine Corps, that difference

4   of 6.7 percent and 9.4 percent, it approaches

5   statistical significance, so, it gets close to

6   that five percent, but doesn't quite reach it.

7   It's .06. So, it's six percent.

8   So, again, back to your question,

9   Ms. Goldberg, about relying on that test and that

10   precise number, also requires judgment in looking

11   at the substantive meaning of that difference

12   that we see.

13   MS. TAGERT: Again, this is the

14   narrative finding. And the representation on

15   women on panels in the Army and the Air Force was

16   greater still, even though they're less likely to

17   be impaneled, they were still represented on

18   panels.

19   And then in the Navy and Marine Corps,

20   the representation of women was less than the

21   representation in their respective service.

22   MR. WELLS: Okay, so next sets of

1 analyses, we looked at the people who were not

2 impaneled. So, we looked at the people who were

3 detailed, but then they were not selected to be

4 on panels.

5 And then we asked the question, why

6 were those people excused? And we compared men

7 and women. In the Army, we see very similar

8 percentages of excusal reason for men and women.

9 So, for male servicemembers who were

10 not impaneled, 65.6 were excused because of a

11 for-cause challenge, and 65.6 percent of women

12 were excused because of a for-cause challenge.

13 So, very equal distributions across all of those

14 reasons in the Army.

15 When we get to the Air Force, again,

16 we don't see a statistically significant

17 relationship here. And the use of for-cause

18 challenges and peremptory challenges are fairly

19 similar. Females are a little bit more likely to

20 be excused because of a for-cause challenge and a

21 peremptory challenge than men.

22 But look at the difference in

1   randomization -- 16.7 percent of men who had been

2   excused were excused through randomization, and

3   that same percentage for women is 8.1 percent.

4   Sometimes randomization fails. But we

5   don't know what's going on here, but want to

6   point out that difference.

7   When we get to the Navy, we see

8   similar uses of for-cause challenges. So, among

9   men who were excused, 61.9 percent of them were

10   excused because of a for-cause challenge, and

11   among women who were excused, 61.7 percent of

12   those servicemembers were also excused because of

13   a for-cause challenge.

14   And we see a slight difference in

15   peremptory challenges among the male members who

16   were excused. A greater percent were excused for

17   a peremptory challenge -- 16.7 percent -- than

18   females who were excused.

19   MS. GOLDBERG: Just a quick question.

20   You were just talking through the Navy? Because

21   I just wanted to ask, any other category, it was

22   nearly double for women, as compared to men, and

156

1 | wonder if you had any insight.

2 | MR. WELLS: Maybe Kate can speak to
3 | this, but in the data we looked at, we didn't
4 | unpack those other reasons.

5 | MS. TAGERT: Yeah, so. the other
6 | category was not necessarily a reason for for-
7 | cause. It was more like that person has been
8 | detailed, but that person is not here today, or
9 | things of that nature.

10 | So, that's why it's other. There were
11 | things that came up -- like, there was still
12 | COVID going around. So, potentially, someone got
13 | COVID. It was just kind of random. But it's an
14 | array of reasons as to why other.

15 | Yes, we also sought child care issues
16 | that came up where women said, I can't be here
17 | because I've got to pick my kids up at 5:00. And
18 | court-martials unfortunately can sometimes go to
19 | like 11:00 p.m. in the military. So, it's a fun
20 | fact.

21 | MS. GUPTA: I think I also saw a
22 | couple of pregnancy cases where the member was

1   pregnant.

2   MR. WELLS: And then the last table

3   here is for the Marine Corps. And we do see a

4   differential pattern result here.

5   So, among all of the female

6   servicemembers who were detailed but then excused

7   from serving on a panel, 76.6 percent were

8   excused with a for-cause challenge. And that's

9   substantially greater than the 54.1 percent of

10   men who had been excused.

11   DR. SPOHN: So, Bill, just to clarify,

12   the for-cause does not include the hardship

13   excuses, correct? And that would be the

14   pregnancy, the child care, the --

15   MS. TAGERT: That's correct.

16   DR. SPOHN: -- I'm sick, whatever.

17   So, these are people who were determined that

18   they could not be unbiased in this particular

19   case.

20   MS. TAGERT: Correct.

21   DR. SPOHN: Okay.

22   MS. TAGERT: Narrative form again,

1   challenges for cause were used against men and

2   women at the same rate in the Army, Air Force,

3   and Navy, except in the Marine Corps, where women

4   were excused more than men because of challenges

5   for cause.

6   Again, we wanted to look at whether or

7   not peremptory challenges were being used against

8   a certain category of people at a greater rate.

9   We didn't find that here for women versus men.

10   MS. GOLDBERG: Can I just add one

11   quick thought on the narrative?

12   MS. TAGERT: Yes.

13   MS. GOLDBERG: I mean this, first of

14   all, I should say, like, this is an incredible

15   analysis. It's incredibly interesting. We've

16   been talking about these issues since I've been a

17   part of DAC-IPAD. And to see the data laid out

18   and explained so clearly is, is a privilege.

19   So, thank you.

20   In that sentence that says,

21   "Challenges for cause were used," it might be

22   useful to clarify, like, were used to remove a

1   member, because there were challenges, I assume

2   some of the challenges for cause were actually

3   rejected by the court?

4   And so we just, I think, just want to

5   be sure it's very clear that these were the basis

6   for the removal from a panel or the non-

7   empaneled, or something, rather than that they

8   were made, which would be a presumably higher

9   number.

10   MS. TAGERT: So, and, Bill, correct me

11   if I'm wrong, but these findings relate to people

12   that are not empaneled. Sorry.

13   MS. GOLDBERG: I guess, sorry, what I

14   meant, what I meant was I think some of -- there

15   were, it's, maybe it's just more of a wording

16   point. Like, there are challenges for cause that

17   are made but rejected.

18   And so, and maybe to your point it

19   doesn't matter in this framing. I just, I just

20   wanted to avoid people reading this and thinking

21   that everybody who was challenged for cause was

22   then removed.

1   MS. TAGERT: Yeah, we can definitely

2   make that clarification, though, in the rec -- in

3   the findings, for sure.

4   MR. WELLS: And I'll just, just say

5   one more thing about the date, too.

6   It was really important to recognize

7   that we looked at these reasons for being excused

8   among only the people who had been excused. We

9   didn't look at the breakdown across everybody.

10   So, we didn't create categories that said you

11   were empaneled, you were excused for cause, you

12   were excused for peremptory.

13   We just wanted to look at the people

14   who had been excused to understand why they had

15   been excused.

16   MS. BASHFORD: Just a quick thing on

17   that Potential Finding 13. The heading says

18   peremptory challenges. But you talk about cause

19   and peremptory in the same, in that same finding.

20   MS. TAGERT: Yeah, we can up -- we'll

21   update that.

22   Again, so this is if you can recall

1   the last slide that looked like this when we were

2   talking about race and ethnicity, you can really

3   see the difference here of women being -- the

4   importance of the detail.

5   So, here in the Air Force, in the

6   Army, women were detailed at a greater percent

7   than their overall representation. And they were

8   able to still be panel members at the rate that

9   they are represented in the service, even though

10   they were more likely to not be empaneled.

11   So, the higher the rates of women that

12   were on the detail, the better. They were

13   represented on those panels. And you can really

14   see the differences in the Navy and the Marine

15   Corps to what it looked like when they were

16   detailed by the convening authority as to what

17   the panels looked like.

18   And Bill's going to go through --

19   well, I guess we need to, before we go -- we have

20   another hour after this. I don't know, Judge

21   Smith, if you want to break for lunch now and

22   then we can go into the individual data for

1   gender because that may take a while.

2   Or do you just want to finish up with

3   the data portion of this?

4   MS. PETERS: Yeah, it's up to you,

5   Judge Smith, that time.

6   CHAIR SMITH: Is everyone ready to

7   break for lunch? Yeah?

8   Okay, let's break for lunch.

9   So, are we coming back at 1:30 or

10   1:40?

11   MS. PETERS: 1:30.

12   CHAIR SMITH: Okay. See everyone at

13   1:30.

14   (Whereupon, at 12:29 p.m., the above-

15   entitled matter went off the record and

16   reconvened at 1:30 p.m.)

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

2   (1:30 p.m.)

3   CHAIR SMITH: I think we're ready to

4   resume. Okay.

5   MS. TAGERT: Do we have to open again

6   or no, are we good?

7   Okay. All right, so we are -- and I

8   apologize because I can't remember if we reviewed

9   this slide before we broke, but just to center us

10   again.

11   We're talking about the detail versus

12   empanelment of women on military courts-martial

13   for sexual assault. And as you can see here, due

14   to the fact that they are less likely to be

15   seated, even if they're over represented on

16   details, they'll be reduced in number on the

17   actual panel.

18   So, two of the Case Review

19   Subcommittee's takeaways on this was that, again,

20   I want to focus on the original research question

21   because we were trying to determine what the

22   demographic make-up of panels were. So, when we

1   crafted our research questions as well as the way

2   that we were going to analyze the information, we

3   did not record when we were looking at the

4   courts-martial as to what the specific reasons

5   were why particular members were not empaneled.

6   So, we don't have any answers for you

7   as to whether or not that women were being kicked

8   off at higher rates because of the liberal grant

9   mandate or because they had been victims of

10   sexual assault themselves. We just can't answer

11   those questions.

12   However, we do have testimony from the

13   military judges and victim's counsel that suggest

14   that potentially the liberal grant mandate is

15   driving women getting excused at higher rates

16   based on the fact that if it's a close call

17   judges don't want to be overturned, which makes

18   sense.

19   So, I say that in the sense that when

20   we get into the deliberations and we're thinking

21   about other studies we may want to conduct,

22   perhaps that may be one.

1   But the majority of victims in these

2   cases were women. I don't think we actually had

3   any male victims. So, this is just want -- we're

4   going to go into the individual courts-martial

5   data, as we did for race and ethnicity, so you

6   can see what the actual court-martial would have

7   looked like upon entering the courtroom.

8   MR. WELLS: Okay. So, now we've got

9   the analysis shows the details and the panels in

10   terms of the demographic composition male and

11   female for each of the services. So, just like

12   we did with race and ethnicity, we have a series

13   of charts that, that show the representation of

14   men and women on each of the particular details,

15   and then on each of the particular panels.

16   And, again, what I'll talk about is

17   the average percent, so across all the details

18   the average percent of those details that were

19   women, average percent that were men.

20   And then with, same thing with the

21   panels. On average, the panel was X percent men

22   or X percent women. So, we'll walk through

1 those.

2   So, we begin with the Army details.

3 And you'll see the blue bar shows the percent of

4 that detail that's comprised of male

5 servicemembers. And then the red shows the

6 percent of detailed individuals who are female

7 servicemembers.

8   So, on average, 20 percent of the

9 detail is comprised of female servicemembers,

10 20.6 percent exactly. And then 79.4 percent men.

11   When -- and you see the shift when we

12 move ahead to looking at the panels. So, there

13 are 124 panels that we were able to look at.

14 With the Army, 48 of those were all men. Okay,

15 so 48 of the panels were comprised of all male

16 servicemembers.

17   The average panel is 16.1 percent

18 female. 16.1 percent female, 83.9 percent male.

19   MS. GOLDBERG: Just quick, do the

20 numbers translation is that 16.1, that's going to

21 be about 1 out of -- panel members, there are 8

22 members of a panel?

1   MR. WELLS: Yes.

2   MS. GOLDBERG: So, you're talking

3   basically about 1 woman on a panel on average, is

4   that where the 16 percent lands, 1 to 2?

5   MR. WELLS: The average panel size in

6   the Army was, yes, 7.7 to 1 member. That's the

7   average, so round that up to 8. So --

8   MS. GOLDBERG: So, typically, when,

9   you know, just, I mean just to translate this

10   into some of these real life experiences, it's

11   usually going to be 1 or 0 women on a panel?

12   MR. WELLS: Correct. Yeah, that's the

13   typical. Yes.

14   MS. GOLDBERG: Thank you.

15   MR. WELLS: Sure. Sorry about that.

16   MS. GOLDBERG: No sorry. I just want

17   to be sure I understand.

18   MR. WELLS: Yes.

19   Next, Air Force. Again, these are the

20   details.

21   The average detail, so the typical

22   detail is 31 percent female servicemembers, 31

1 percent.

2 Then when we move ahead to the panels

3 we see that average percent change to 24 percent.

4 So, it goes from 31 percent to 24 percent. And

5 we saw that when we looked at the aggregated data

6 as well. Very similar pattern. And we see that

7 across all of these services.

8 The patterns overall are the same

9 whether we look at detail and panel specific

10 composition or everybody aggregated together, the

11 patterns are the same. And Kate mentioned that

12 earlier.

13 In the Air Force then, we have 49

14 panels. And 9 of those were comprised of all

15 men.

16 Moving on to the Navy we see 4 all

17 male details. The typical detail is 16.2 percent

18 female, 16.2.

19 And then when we go to the panels,

20 that typical percentage or the average percentage

21 drops to 8.9 percent. Again, just like with the

22 aggregated numbers, the patterns here are very

1   similar.

2   So, it goes from 16.2 percent of the

3   detail to 18.9 percent of the panel.

4   And in the Navy we had 48 panels. 22

5   of those were all male. I guess, so 48 panels,

6   22 are all male panels.

7   Last, details in the Marine Corps.

8   The typical detail was 10.5 percent female

9   servicemembers. So, on average 10.5 percent of

10   the detail was comprised of female

11   servicemembers.

12   And here we see 6 all male details.

13   And then when we look at the panels in

14   the Marine Corps, the average panel goes from

15   10.5 to 6.2 percent female. So, the typical

16   panel is 6.2 percent female.

17   And here we see 27 of the 29 are all

18   male panels in the Marine Corps. So, here you

19   can see the shift as you go from the detail to

20   the panels.

21   And, again, these patterns reflect

22   all, across all the services the patterns reflect

1   the lower chances of female servicemembers who

2   are detailed actually being selected to serve on

3   a panel.

4   MS. TAGERT: This is just repeating

5   the finding that we had regarding the aggregate

6   data versus the individual characteristics of the

7   court -- each courts-martial. And they're the

8   same. So, there was no difference.

9   So, that ends the formal presentation

10   of the data, or at least the greatest hits of the

11   data because, again, there's over 100 pages of

12   data that Bill has put together, as well as a 55-

13   page report of analysis on the data. That will

14   be sent to you soon.

15   So, with that, I guess I want to, what

16   I want to do is open up the floor to receive just

17   any feedback that you have on the top of your

18   head about the data, the issues that we're

19   talking about before we talk about specific

20   findings.

21   Or, if you prefer, we can go through

22   specific findings and go from there. But I'll

1   just open it up for the members.

2   MR. KRAMER: Can I just say what an

3   amazing job you've done? I can only imagine how

4   difficult it was to get these numbers, never mind

5   put them together.

6   So, thank you very much.

7   MS. TAGERT: Yeah. With that being

8   said, I just want to also thank the Case Review

9   Subcommittee members for always giving us the

10   time, as well as just supporting us in getting

11   these types of data findings. Because, as you

12   said, it's, it's hard to figure out.

13   And, also, to everyone sitting at

14   these tables, too. We've had a lot of, you know,

15   ups and downs getting this information to you.

16   So, I appreciate you all.

17   MR. WELLS: Let me just add, too, what

18   you got today was a lot of me talking and

19   presenting results. But Stacy and Kate did a lot

20   of work to get their hands on the raw documents.

21   And they had to listen to a lot of audio

22   transcripts. I don't know how many total. Stacy

1   probably knows.

2   So, this, all of this stuff wasn't

3   written down. She had to listen. And when she

4   heard names being mentioned she would have to

5   write them down and record all of this

6   information. So, what you got was the end.

7   But what it got even to just get the

8   data in usable format was, was the bigger lift.

9   It really was.

10   MS. BASHFORD: You saw the acquittal

11   rates. And acquittals aren't transcribed, so

12   they had to listen to the tapes of the voir dire,

13   which was a huge lift, and took hours, and hours,

14   and hours, and hours. Hopefully, transcribing

15   the names accurately then, again, checking with

16   them against the details. It's truly a labor.

17   MS. TAGERT: Labor of love.

18   GENERAL SCHWENK: So, Kate, in worst

19   experiences in your life, how does this rank

20   compared to the FY 17 penetrative sex offense?

21   MS. TAGERT: Stacy and I will be

22   discussing that over drinks.

1   (Laughter.)

2   DR. SPOHN: So, one thing Bill and I

3   talked about at the break is that, you know,

4   admittedly they are a slave to the way that race

5   and ethnicity were measured.

6   And, you know, it's unfortunate that

7   they weren't able to break out Blacks, and

8   Hispanics, and other race individuals. Because I

9   think the research, at least in the civilian

10   legal system, has tended to focus on racial

11   discrimination against African Americans in jury

12   selection.

13   And so, I'm just wondering if the fact

14   that you had to lump the racial and ethnic groups

15   together might be masking some differences that

16   would emerge were you able to do a more fine-

17   grained analysis.

18   And you had some thoughts about that.

19   MR. WELLS: Yeah. And we talked about

20   this, I know, Nalini, Kate and I a little bit at

21   lunch about this idea of breaking them out. And

22   just a couple of quick things.

1   I think something like -- I think we

2   could get into these data and really look at how

3   they were provided to us and kind of work through

4   them and see what we can code and what we can't

5   code into some finer categories.

6   I don't think -- I know, I can be very

7   boring and long-winded. I'm a professor. I've

8   been doing it a long time.

9   It's going to take some time. It will

10   take a while for us to get around to do that.

11   And I'm not sure we're going to be able to do

12   that for this report.

13   Then the other thing we talked about

14   that I forgot to mention early on, because I

15   buried this deep in my memory for good reason,

16   when we, when we first started to do this project

17   it was almost a year ago to the month that we

18   were talking with the Army about providing us the

19   race and demographic data. And, and it was a big

20   challenge for us to understand what they were

21   telling us.

22   Like, the words they were saying made

1   no sense to us at all. And then the spreadsheets

2   made even less sense to us.

3   So, at the time, we didn't know if

4   we'd be able to do anything. We didn't think we

5   were even going to be able to get these data.

6   So, we said, okay, what's the simplest thing we

7   can do?

8   And that was our starting point. And

9   now that we're through this process, I think we

10   can go back and make an attempt to try to make a

11   comparison like that, Dr. Spohn, of looking at

12   Black servicemembers, Hispanic servicemembers,

13   and then White not-Hispanic servicemembers as a

14   way to look at that comparison.

15   But it's going to take some time and

16   it's going to take some going through the data

17   and making some real decisions about how do we

18   code this individual, how do we code these people

19   that, say, Hispanic multi-race? Are they in the

20   analysis or out of the analysis?

21   And for, like I said, the example I

22   gave for the Navy is they were particularly messy

1   in how they provided us the data. So, I think we

2   could probably start to explore that, but it's

3   not going to be clean and it's not going to be

4   easy and quick.

5   CHAIR SMITH: So, two points.

6   In the report perhaps it would be

7   important to mention the fact that although this

8   data doesn't show, you know, a discriminatory

9   effect so much on Black members of service, you

10 know, in civilian context we know that that

11 exists. So, that would be, I think it's

12 important to say, and the reason why that data

13 isn't readily available and that everybody's kind

14 of lumped together and why.

15   And then my second question is, based

16 on this, this request by the DAC-IPAD and the

17 GAO, seemingly almost doing like a preemptive

18 strike of some sort about the lack of data

19 collection, have any of the services changed the

20 way they collect data or are we still in this not

21 collecting this information?

22   MS. TAGERT: So, I don't know. We

1 just see what we get. And it's confusing. And

2 it has been for many years.

3 So, I don't know the answer to that

4 question. And I don't, I don't know if the

5 services know the answer to that question yet,

6 so.

7 And, of course, OMB is now, they have

8 new race and ethnicity standards, so they're

9 going to have to work through that as well within

10 the next five years. So, I can't speak for the

11 services on it.

12 CHAIR SMITH: Have we in the past --

13 I can't recall, I'm sorry -- but has the DAC-IPAD

14 in the past suggested that this type of data

15 should be kept?

16 MS. TAGERT: Yes.

17 MS. GUPTA: Yes.

18 So, we issued a report in 2020, I

19 think it was December 2020, on racial and ethnic

20 data. And I don't remember how many

21 recommendations there were, but it was to collect

22 for all participants in courts-martial, so

1   accused victim, panel members, judges, et cetera,

2   et cetera, the race and ethnicity according to

3   certain standards.

4   So, that's a 4-year-old

5   recommendation.

6   CHAIR SMITH: So, that should be

7   reiterated.

8   MS. TAGERT: Yes. And one of our

9   recommendations that we'll see reiterates --

10   SGM MARTINEZ: Just for clarification,

11   so the data that you're referring to is just

12   those details and the panel; right? Because I

13   know the Army and the other services we do have a

14   yearly demographic breakdown that is for filing.

15   I could get that easily -- well, not easily, but

16   I know how to get that. That breaks down, you

17   know, into Hispanics, Asians, you know, Blacks,

18   Whites, whatever.

19   So, you don't have any issues with

20   that data; correct?

21   MR. WELLS: We did have some issues

22   with that data. And Kate will be able to talk

1   about that.

2   But we wanted to, we wanted to be able

3   to understand the combined race and ethnicity of

4   the servicemembers in our database so we could

5   understand whether somebody was a White not

6   Hispanic individual or a White Hispanic

7   individual, or Black not Hispanic individual,

8   Black Hispanic so we could categorize people

9   appropriate according to the demographic.

10   And the Army produced a report that

11   you can go on the web and get, and it broke down

12   those numbers pretty clearly.

13   For the other three services, Kate had

14   to make multiple requests to get those data. And

15   they finally came through to Kate and Stacy in an

16   email.

17   But she can talk more about that

18   process that was used. It wasn't easy.

19   MS. TAGERT: Yeah. So, the report,

20   the DOD Demographics Report, as you said, comes

21   out annually. And it breaks down race, but it

22   would then, but it breaks down race and ethnicity

1   separately.

2   And so, if you are categorized as

3   White but you're Hispanic, your Hispanic

4   ethnicity kind of falls off. And that data does

5   not combine race and ethnicity, which was

6   suspicious to us because we knew that there were

7   problems within the services trying to capture

8   that information.

9   So, we had to reach back out to DMDC

10   and say, what did the services provide you?

11   Which they actually were able to do. But they

12   don't report out on that data. We never figured

13   out why. But we were able to get it through what

14   the services provided DOD.

15   And I think they don't combine it

16   together maybe because the services do it

17   differently, but I'm not positive on that.

18   SGM MARTINEZ: Okay. I fully

19   understand because I'm Hispanic Other. That's

20   how I, you know, I'm not White or whatever. So,

21   that's how I just, you know, that's how I

22   categorize myself for 30-something years because

1   there was no other categories kind of where I

2   could fit in.

3   So, that's the reason why I ask. I

4   know it's out there, I just wasn't sure. I

5   thought there were difficulties to that.

6   The other question I had in reference

7   to some of the data unknowns that you mentioned

8   earlier, is that because some of the special

9   units that don't provide that information like,

10   for instance, JSOC or, you know, the dark side of

11   the military? You know, there are some special

12   categorized units that just doesn't share.

13   MS. TAGERT: Yeah, so I, I don't know.

14   I don't know why there are unknown race and

15   ethnicity in the services. Is it, say, result of

16   servicemembers not wanting to identify their race

17   and ethnicity, or whether or not the spelling of

18   the names were wrong on the detailing order?

19   Because, again, we're relying on the source

20   documents.

21   So, if there was a misspelling on that

22   document, when personnel gets it they wouldn't be

1   able to find that person either. So, the

2   unknowns are either that the services don't know

3   or there was something going on in the

4   translation from those court documents to

5   personnel.

6   MS. GOLDBERG: First, I just want to

7   reiterate the thank you, profound thank you to

8   you for compiling this data. This is the first

9   ever data. And even though there's a lot more to

10   learn, I think especially in data collection

11   there's always a lot more to learn. So, it's,

12   you know, to mark the moment with appreciation as

13   other colleagues have shared.

14   I think I have three categories of

15   comments and thoughts for the future.

16   I mean, first is, I hate to do this

17   but I think it's very important to get the

18   services' reactions to this data. In particular,

19   I think, on the race and ethnicity data where

20   the, if I'm remembering correctly, the Navy was

21   so out of step with others. I think it would be

22   important to hear their understanding of why they

1   look so different.

2   Second, I would say to relate under

3   that category of asking and sharing, I think if I

4   were the General Counsel of the Defense

5   Department I would want to see this data to --

6   not because it necessarily reached conclusions,

7   but it does inform analysis and future questions

8   that OGC may want to ask the DAC-IPAD to

9   investigate.

10   And certainly with respect to the data

11 on gender, hearing from all of the services about

12 how they understand why they have over

13 represented women in the detailing, and why they

14 understand that, you know, there's sort of under

15 representation in the empaneling or the sort of

16 drastic drop off of women in the empaneling.

17   And I know we've heard about that and

18 talked about it anecdotally with -- on many

19 panels. And this is an issue that's always

20 piqued my interest. But I think it would be

21 useful to have some official response that isn't

22 one person or another speaker's sort of

1   impressionistic response to our question.

2   That's one set of points.

3   The second is just to agree

4   wholeheartedly with Judge Smith's point that we

5   should reiterate things, re-update the earlier

6   data request.

7   And I know we also talked about, I

8   don't know if this was in those earlier requests,

9   but the idea in these cases of tracking the race

10 of victims and making sure that we can align this

11 with race of victims, race of accused, and

12 looking at outcomes to see if there are

13 disparities in that with respect to race.

14   And then the last point, I think it's

15 to the, to the bigger picture question of why do

16 we care about this data at all, and I think other

17 than it's sort of inherent interest?

18   But, but I think at least for me part

19 of it goes back to this question of trust that we

20 have heard from a range of speakers who have come

21 in at the end of the meetings. And, you know, if

22 a panel looks not representative, and

1   particularly if I'm whoever I am, and the panel

2   appears to have nobody that looks like me in

3   whatever dimensions are relevant or feel

4   important to me, that can lead to a lack of

5   trust.

6   We know that, you know, that's

7   obviously well, sort of well expressed in some,

8   in these meetings. I think that's fairly well

9   documented.

10   I think it would also be useful to

11   know if, if the composition of panels affect or

12   is correlated with outcome. Even if we know that

13   to be, even if we know there is no correlation to

14   outcome it doesn't mean that the first point, the

15   experiential point isn't true and important in

16   terms of assessing trust. But the two,

17   obviously, would be valuable to know.

18   And I know that I hesitate even to say

19   the, make the outcome point, because I know that

20   that would be an enormous amount of -- or I would

21   guess it would be an enormous amount of

22   additional data collection. But at least in a

1   going forward way when we ask the services to

2   track this data, I think tracking the outcomes

3   will be very important for us.

4   So, I'll stop there for now. Thank

5   you.

6   MR. CASSARA: So, this may be more of

7   a subjective answer. But with the passing of

8   Jeter and with the move toward randomization, how

9   much of, how much of this is overcome by events?

10 You know, I mean I hate to say, you know, like

11 your three years' worth of work may not matter.

12   But from a legal perspective isn't the

13 entire playing field changing to where I -- you

14 know, I don't know. I'd just, I would like your

15 thoughts on it, especially you, Kate, because

16 you're smart.

17   Not that the rest of you aren't.

18   (Laughter.)

19   MR. CASSARA: You know, you all are

20 very smart.

21   MS. TAGERT: So, we wrestled with that

22 question. Obviously the study we kicked off

1 before Jeter was decided. And the study was

2 related to the fact that we did this appellate

3 study that OGC had assigned to us to suss out

4 what was going on in the appellate world.

5 So, yes, I do believe that this has

6 been overcome by events. But the importance for

7 this data going forward is that it is a baseline

8 of the old system.

9 So, whatever happens with

10 randomization, this would be a look back in time

11 to see whether or not convening authorities were

12 taking race and ethnicity into account in a way

13 that was different than what's happening in

14 randomization. Because, quite frankly,

15 randomization should produce similar convening

16 orders based on the representation of the

17 service.

18 Now, people can debate that. But

19 until we can see what happens, these panels were,

20 some, other than the Navy, were representative of

21 the minority representation in that service. So,

22 the jury is out on that.

1   MS. BASHFORD: I just want to jump in

2   for a second on that because, yes, the seascape

3   is changing, but sometimes the best of intentions

4   lead to bad results. And so, we need the

5   baseline to see if the changes improved

6   representation or make it actually less.

7   MS. GOLDBERG: You can go ahead and

8   respond on that.

9   MS. TAGERT: Yeah. You know, one

10   thing that we, that we have struggled with is,

11   like, the data based on what the minority

12   representation looks like is tangential to the

13   question of whether or not the perception of

14   panels not being diverse, like it's almost on two

15   different tracks because the Article 25 criteria

16   is a different issue than what these panels look

17   like.

18   And I, because a lot of us are

19   attorneys I think we kind of, like, think as

20   attorneys when the reality is I don't know if

21   randomization is going to produce accused walking

22   in saying, oh yeah, this is a lot more fair, just

1   based on the demographics of the services,

2   whether or not the old system produced the

3   perception that the panels weren't fair. If that

4   makes sense.

5   MS. LONG: So, I think, thank you for

6   making that point. That was one about actual and

7   perceived. Just keeping in mind all of these

8   numbers, whatever the actual results are, just

9   keep on going back to that.

10   And then just to compliment something

11   that Suzanne was saying, again, on the numbers

12   and the data, and even outcomes, they always tell

13   us the what. And we should note that when it

14   diverges from a mean or from what we would want

15   to see. But it doesn't tell us why.

16   And even people's response to a

17   question is so anecdotal. So, I know that there

18   are many processes. In fact, Martha Bluestein in

19   one of the processes they use, we use it on

20   attrition, too, in terms of roundtabling because

21   it just gives you a, a way of maybe looking at

22   what other things could have influenced the

1 outcome, if we really want to know why.

2   And I think that goes a long way

3 towards transparency traps and to fixing whatever

4 the issues are.

5   So, that, you could put that on the

6 next iteration of what maybe we could research,

7 if people thought that that was useful.

8   MS. GOLDBERG: Can I just add one

9 point to follow up on the exchange you were just

10 having, Mindy?

11   The detailing is going to happen with

12 randomization. But the data on empaneling is

13 still very relevant, don't you think, for how we

14 think about the disparities questions that we've

15 been looking into. Right?

16   Because there are, there's still going

17 to be the question of what happens between, you

18 know, when you have the venire, and then who

19 winds up on the panel.

20   And then just related to the

21 empaneling point, I think in both, I mean, the

22 differences are more stark by gender. But, you

1   know, they're notable by race also. Sort of that

2   set of panels where there's just no diversity;

3   right? Diverse meaning there's, you know, all-

4   White panel, all male panel, which is a different

5   look even from a panel that has one woman or one

6   person of color on it.

7   So, I think, I think, you know, there

8   is I think except in -- no, I'm not -- I think in

9   almost every chart there was one point at which

10   the chart reached a solid line for, for one of

11   the colors. And, obviously, seeing it

12   differently on the, on the gender charts which I

13   think probably has a lot to do with how people

14   feel when they walk into the room.

15   But do you, I mean, do you see that

16   datapoint as being not overtaken by this?

17   MS. TAGERT: Yes. But again I think

18   it goes back to the details being so important

19   that it will have an impact potentially on the

20   panels.

21   MS. GOLDBERG: And the prediction at

22   least on the gender side where women were

1   overpopulated on the detail is that we will see

2   even fewer women on panels, right, if they're

3   randomized?

4   I mean, that, or I mean, again, I'm

5   not the staff expert, but I think that would be a

6   reasonable projection from the change; right?

7   MS. TAGERT: If it's a pure

8   randomization, meaning that Article 25 criteria

9   is not applied before the randomization.

10   MS. GOLDBERG: Although Article 25

11 criteria wouldn't sort of play, sort of affect,

12 sort of play out differently for men and women

13 than expected.

14   MS. TAGERT: Well, I'm talking about

15 the over representation, though. Because, but

16 again I don't know what the random -- like, I

17 don't know how the randomization is going to

18 totally be because it hasn't been decided yet.

19   Janet, can you, has that -- is there

20 going to be pure randomization or we don't know

21 yet?

22   Yeah. So, again, sorry, and I don't

1   mean -- if it's pre-decisional that's what I'm

2   saying. Like, we don't know what that's going to

3   look like. So, the services may still apply

4   Article 25 criteria and randomize those people.

5   So, it's still a subject detail.

6   MS. MANSFIELD: Article 25 still

7   exists.

8   MS. TAGERT: Right. So, okay, so

9   yeah, so there's going to be still subjectivity.

10   Sorry, are we on the same page? I

11   don't know if everyone's on the same page on

12   that.

13   CHAIR SMITH: But we don't know

14   whether or not the Article 25 subjective

15   questions are going to occur before or after

16   randomization. Is that still pre-decisional?

17   Right?

18   CHAIR SMITH: Yeah, I don't know.

19   (Audio interference.)

20   CHAIR SMITH: So, does that kind of

21   semi-defeat the randomization then?

22   MS. MANSFIELD: Yes.

1   CHAIR SMITH: Okay. Gotcha.

2   MS. GOLDBERG: I thought that the

3   whole idea of randomization was that it was

4   taking the convening authority's role out of

5   deciding who goes over for consideration.

6   MS. TAGERT: So, that was the DAC-

7   IPAD's recommendation. But, correct, so --

8   MS. MANSFIELD: It's up to Congress to

9   amend Article 25.

10   MS. GOLDBERG: So, where is the

11   randomization going to be, have an impact? What

12   is -- I mean, where would it, what would it

13   possibly be?

14   MS. TAGERT: So, my understanding is

15   the randomization happens post-Article 25

16   criteria selecting the details. But there's

17   going to be a larger pool of personnel that are

18   included in that initial draw, so.

19   MS. BASHFORD: Kate, did you want to

20   move to the findings and recommendations today?

21   MS. TAGERT: Yes.

22   I just wanted to as far as Ms.

1   Goldberg's comments regarding to get the

2   services' reactions, is that something that you

3   all would want to do before we issue this report?

4   Because I do want to be careful in putting in,

5   trying to figure out the why on some issues but

6   not others, because I think that will complicate

7   kind of what this report should be.

8   MS. GOLDBERG: I, just speaking for

9   myself, I do think there is value in issuing the

10   report and getting it out the door and not having

11   it have to wait for what is, as you point out,

12   kind of a different discussion and analysis.

13   I, you know, I think there's, you

14   know, it's something, presumably, this

15   information now is available to the services

16   because of today's meeting. So, they can do what

17   they would like with it, and think about it.

18   MS. TAGERT: Okay, yeah.

19   MS. GOLDBERG: So, we'll maybe want

20   to, we'll want to think about particularly on

21   some of its disparities. But I am not suggesting

22   that this report should also include additional

1   analysis and inputs. I think that reporting on

2   the data is valuable in itself.

3   MS. TAGERT: Okay, great.

4   Yeah, I just wanted to clarify that,

5   yeah.

6   MS. GOLDBERG: Absolutely.

7   CHAIR SMITH: So, we could still

8   request the response because it's a good idea.

9   And see, you know, what their why is, if they

10   have a why. And then somehow have a supplemental

11   something to our report. Right?

12   MS. TAGERT: Yes. And I'm going to

13   let Nalini kind of discuss the road ahead on

14   those issues.

15   MS. GUPTA: Okay. So, the staff has

16   drafted a report. And we're taking notes on all

17   your, all the input you've heard. And we're

18   going to go over the findings and recommendations

19   next. You've already had a preview of them, but

20   your global comments we have taken note.

21   Our goal is within the next couple

22   days, I won't give a specific date, but within

1   the next couple days is to get you this report,

2   this draft report. And it has been reviewed by

3   the Case Review Subcommittee already and they

4   have input, their feedback.

5   We are hoping to hold a virtual

6   meeting to vote on this on the 27th. And I know,

7   and I believe Meghan will send out a poll after

8   this meeting to see everyone's availability,

9   understanding it's summer and everyone's on

10 vacation at different times. But we're hoping to

11 have a one, one hour, maybe one-and-a-half hours,

12 depending on how today goes, vote on a report.

13   So, the schedule would be if, if we

14 can get this report out let's say on Friday, we

15 would give you about a week-and-a-half to provide

16 comments. It's 60 pages. It's quite dense.

17 But, of course, you've already heard the material

18 today.

19   Afterwards, and especially for the new

20 members who haven't gone through this process

21 yet, you, you will just provide feedback directly

22 to the staff. You cannot share with the entire

1   panel because it is a FACA and everything has to

2   be in the public purview if it concerns

3   deliberations.

4   The staff will compile everyone's

5   feedback, and track changes, and give you back

6   the report for you all to vote on on the 27th.

7   So, that is our goal. Of course it is

8   depending on how the next hour goes. And how,

9   how you all feel about the potential findings and

10   recommendations that will come, that you've

11   already seen and are going to continue to

12   deliberate on.

13   And another thing for you to consider,

14   and obviously this has already come up a lot, as

15   Kate mentioned, we have included recommendations

16   for future studies, what they should look like.

17   But to the extent you want to continue to add,

18   you know, some of the things we have already

19   talked about, if you want to have formal

20   recommendations that there should be future

21   studies, we can add those and include them in the

22   version that goes to you on Friday.

1   MS. TAGERT: Yes. So, for those of

2   you who have done findings and recommendations,

3   this can be somewhat tedious because we're going

4   to go through them all because we have to have a

5   vote.

6   So, just I'm sorry if we're really

7   boring right now, but it's what we're going to

8   do.

9   Sir?

10   GENERAL SCHWENK: The thing is, you've

11 been boring.

12   (Laughter.)

13   GENERAL SCHWENK: But you're all very

14 smart.

15   CHAIR SMITH: Can you just run through

16 it again? Because at the start you said we might

17 want to say findings -- I mean, we want to say

18 observations over findings.

19   Can you just kind of? I think that

20 would be helpful for everyone, or unless everyone

21 thinks we just want to say findings. I don't

22 know, but I wanted to kind of toss that back out

1 there.

2 MS. TAGERT: So, some of the findings

3 or observations are we have more confidence in

4 certain findings. So, for instance, and Bill may

5 disagree with me, I find the gender data, I have

6 confidence in that because that there's less

7 missing data on gender than there are -- than

8 there is race and ethnicity.

9 So, when we get to those different

10 findings I think it's a different discussion on

11 the confidence. But we can either have that, if

12 we all want to discuss that now or as those

13 recommendations come up for any findings, discuss

14 whether or not that particular one should be an

15 observation or a finding.

16 Is that okay?

17 CHAIR SMITH: Yes.

18 MS. TAGERT: Okay. So, Potential

19 Finding 1, we are 100 percent confident in this

20 finding because we have the entry of judgment.

21 So, again, we're talking about

22 conviction rates for contested courts-martial

1   that took place covering Article 120, 120(b),

2   120(c), and the vast majority of them resulted in

3   an acquittal on the sexual assault offense.

4   Is everyone okay with that finding?

5   CHAIR SMITH: Does the missing Air

6   Force data impact that at all, or it's so minor

7   it wouldn't, it doesn't impact it?

8   MS. TAGERT: So, we'll footnote for

9   the Air Force.

10   We could find out what the conviction

11   rates are.

12   Well, I guess we couldn't do that. I

13   don't know, with just not having fiscal year 22.

14   We could put a footnote that on the vast majority

15   of Air Force fiscal year 21, but for the other

16   services it was fiscal year 21 and 22. But

17   that's going to be a problem for the Air Force

18   throughout this.

19   GENERAL SCHWENK: Yeah. So, why don't

20   we just say it up front and then say we're going

21   to say FY 21 and 22, because we have three out

22   of four for both years. But recognize when you

1   say that we mean for the Air Force only FY 21.

2   And then if we say it up front, we

3   said it.

4   MS. TAGERT: Ms. Long, are you good

5   with that?

6   MS. LONG: I am.

7   MS. TAGERT: Yeah, okay.

8   Okay, so Finding 1, yea or if there

9   are any nays, I guess we can discuss making that

10   a finding in the report. Okay.

11   JUDGE O'CONNOR: I'm a yea. I don't

12   know if you want me to put my hand up or just

13   kind of shout out periodically.

14   CHAIR SMITH: Maybe just shout if

15   you're a nay or you have something you want to

16   say in addition.

17   Does that work for everyone?

18   MS. TAGERT: Yes.

19   CHAIR SMITH: Okay. All right.

20   MS. TAGERT: Okay. So, potential

21   recommendation one, in the report we kind of talk

22   about -- again, this is all data that is before

203

1   the standup of the OSTC as well as the DAC-IPAD

2   recent recommendation to the new standard that we

3   discussed earlier.

4   But this is kind of just we want the

5   services to measure and report the prosecution

6   and conviction rates of sexual assault offenses

7   for both contested and uncontested cases to

8   determine the effect of the changes in law and

9   policy on adjudication outcomes.

10   And, you know, this recommendation is

11   probably obviously going to be followed by the

12   services, but we still would like to put it out

13   there.

14   MS. GUPTA: I'll just add the last

15   sentence says that they should also compare the

16   prosecution and conviction rates for sexual

17   assault offenses with other cases to see if

18   there's a particular issue with sexual offenses.

19   GENERAL SCHWENK: In the past we've

20   talked about judge alone versus panels. Is there

21   any thought about discussing that in this finding

22   -- recommendation?

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1   MS. TAGERT: Nalini, in the

2   performance measures I don't know if it's broken

3   down by judge alone.

4   MS. GUPTA: I believe it is. But we

5   can also make that clarification in this

6   recommendation.

7   MS. TAGERT: Yeah. Because that, it

8   always comes up, well, the judge alone or panel.

9   And sometimes there's no answer to that. So,

10   yes.

11   Okay. Is everyone okay with potential

12   recommendation one?

13   Okay. Again, we have high confidence

14   in this finding because it came from the entry of

15   judgment where the majority of these cases

16   involved an enlisted accused. And the enlisted

17   accused rarely selected an all officer panel.

18   All right. So, this is, this is when

19   we start talking about some of the data

20   limitations that we've discussed, I think, today

21   a lot regarding the fact that GAO recently came

22   out and said that essentially these data

1 deficiencies are impacting the way that DOD can

2 understand potential racial disparities in the

3 military justice system.

4 The DAC-IPAD said that before. And

5 this is basically a concurrence with the recent

6 GAO finding that looked at the issues with the

7 data holistically across a lot of different

8 criminal law aspects, at the investigation level

9 even. So, to give credence to that finding I

10 think the DAC-IPAD should weigh in and concur

11 with GAO based on the results that you heard

12 today.

13 MS. GOLDBERG: I just have two quick

14 thoughts.

15 I'm sorry, I just put a Lifesaver in

16 my mouth. Bad timing.

17 One, I wonder if we should say race

18 and ethnic disparities? And, two -- or

19 disparities based on race and ethnicity.

20 And, two, I think, I'm just thinking

21 out loud and I guess I wonder if we wind up

22 changing other references that are currently

1   listed as "finding" to "observations" then I

2   think it would be useful to treat this as an

3   observation as well so that it doesn't sort of

4   cast particular -- raise, raise some kind of

5   special questions about the observations that

6   we're making.

7   So, I think consistency in whatever

8   we, we ultimately do in terms of defining

9   observation distinction is probably useful

10 throughout this section.

11   MS. TAGERT: Okay. Everyone agree

12 with that as far as potentially all the findings

13 being observations?

14   MS. GOLDBERG: I wasn't thinking that

15 that that be where we come out. I was just

16 pointing out that this one, if we change others,

17 my thought was even if we describe this as a

18 finding it should probably be just used -- we

19 should use the same legal for this as we do for

20 the more kind of data crunching findings or

21 observations we share.

22   MS. TAGERT: Okay.

1   MS. BASHFORD: I think that

2   observations has a lot less weight than a

3   finding. Otherwise it's just kind of, you know,

4   this stuff is all going on and we just happened

5   to notice it, as opposed to we looked at it and

6   this is what we found.

7   MS. GOLDBERG: I also happen to agree

8   with that. I'm uncomfortable with finding. I

9   just was kind of infusing that in case we had a

10   broader conversation.

11   CHAIR SMITH: So, maybe referring to

12   everything as findings but with caveats on the

13   ones that we're less confident about because of

14   the lack of data, we could include that in the

15   finding explanation.

16   MS. TAGERT: Yes, absolutely.

17   And I think that, I think we've done

18   a good job in talking about that in the report

19   and the why.

20   So, yes, I think if you all are

21   comfortable with findings, not to worry, because

22   any of the issues that we discuss today is really

1   well laid out in the report.

2   Sir?

3   GENERAL SCHWENK: I was just going to

4   say I would prefer not to address it in each

5   finding but, instead, do it up front. Put down a

6   paragraph about the data limitations and then say

7   our findings are based on the data we do have,

8   recognizing the limitations on our ability to get

9   data.

10   MS. TAGERT: Okay.

11   GENERAL SCHWENK: And that way our

12   findings are -- comes from the data. Unless you

13   have a finding like this one where there's a real

14   finding, we find there's a problem with data

15   collection and data we, you know.

16   MS. TAGERT: Okay. That's easy.

17   Thank you. And I apologize. These findings and

18   recommendations are also in your material and

19   your "day of" materials in the black folder. So,

20   if you do better looking at it in front of you,

21   just you have that as a --

22   Yeah, so, just to let you know in

1   case. And, again, this is a good opportunity if

2   you all have suggestions for wordsmithing this as

3   well.

4   So, studies have shown you've got to

5   hear things a couple times before it clicks. So,

6   again, this is just the findings that we also had

7   in the previous of the data where we talk about

8   kind of the overview of the results on the

9   representation of minorities on details.

10   So, again, this should be nothing new.

11   Basically it explains what the representation of

12   details are against the service representation.

13   And --

14   CHAIR SMITH: I don't think we did

15   Recommendation 2.

16   MS. TAGERT: Oh, sorry.

17   CHAIR SMITH: Because I just wanted to

18   just -- I read it ahead and I wanted to add

19   "judge." Even though we're talking about panels,

20   I think we should be asking them to also have

21   race and ethnicity information on judges, unless

22   you think it's going to muddy the waters.

1   But that would just be my suggestion.

2   GENERAL SCHWENK: I think Nalini said

3   earlier that our previous recommendation was much

4   broader. And since we reference the previous

5   recommendation in here and we'll probably drop a

6   footnote C, recommendation whatever, maybe they

7   should just track it. Because I think it was

8   trial counsel, defense counsel, judge.

9   MS. TAGERT: Okay.

10   GENERAL SCHWENK: You know, members,

11   accused, you know, et cetera. Yeah, so.

12   MS. BASHFORD: And on that

13   recommendation we're saying victim. Are

14   recommending that they track civilian victims'

15   race and ethnicity? I'm not quite sure how

16   they're going to do that.

17   MS. TAGERT: I don't know what the

18   services' ability is to track civilian race and

19   ethnicity. I mean, I assume that because this is

20   -- I think this is already a requirement. But

21   I'm not sure whether or not they are able to

22   consistently. But we can certainly make a

1   recommendation.

2   MS. GOLDBERG: And I, I would think

3   that there could be a way at least to offer the

4   victim an optional survey to start to gather that

5   information. And, obviously, gender as well.

6   CHAIR SMITH: I mean, it's usually on

7   police reports anyway. I mean, I haven't looked

8   at a military police report, but they love to put

9   that kind of stuff on reports.

10   MR. KRAMER: Do we have any idea how

11   many civilian, the percentage of civilian

12   compared to military?

13   MS. TAGERT: So, when we did the case

14   review study, and I can't remember the exact

15   numbers, but I think that it was evenly split,

16   victims, civilian vs. servicemember. But I'd

17   have to cross check those numbers.

18   And I'm sure that information must be

19   in many some of the SACRA reports.

20   Okay, so Potential Finding 3 and

21   Potential Recommendation 2, are there any nays,

22   modifications other than what we've heard?

1   Okay. All right, so, sorry to have

2   skipped ahead. Essentially this is a narrative

3   of the information that Bill previously provided

4   that if you're a reader and you don't like

5   numbers you can look at Potential Finding 4. But

6   it will also have these bullets at the end of the

7   narrative so that if you are a numbers person you

8   will be able to look at the exact numbers.

9   DR. MARKOWITZ: Can, can we include

10 the caveat, though, that this really is lumping

11 all, like, to be very clear we don't know if the

12 ethnic breakdown, ethnic and racial breakdown

13 mirrors between the panels and the actual general

14 population of the services, if they actually

15 mirror one another as we were talking about

16 earlier?

17   Are we able to include a caveat that

18 says that while the general sort of, you know,

19 racial and ethnic breakdown between the two is,

20 is fairly evenly distributed, we actually don't

21 know if within those categories there is an, you

22 know, even distribution among racial and ethnic

1   populations or not?

2   MS. TAGERT: Yes. I think in the

3   methodology section we kind of talk about the

4   issues. But we can add a whole paragraph based

5   on your comments today to say we weren't able to

6   do this. We think it's important and potentially

7   you all, we could do this again in the future and

8   really try to figure out that nugget of how to,

9   like Bill said, code it.

10   But, yes, we can put kind of like a

11 caveat that we said before, this applies.

12   GENERAL SCHWENK: Yeah, I think that's

13 a good point that, you know, we don't know Black,

14 we don't know --

15   MS. TAGERT: Right.

16   GENERAL SCHWENK: -- you know, Pacific

17 Islanders. And we tried and we failed, based on

18 the data we got. And, therefore, see

19 Recommendation X where we say collect better

20 data.

21   MS. TAGERT: I think we just want to

22 make it really clear we're not treating all race

1   and ethnicities as a monolith here, and we're

2   just assuming, like, everybody in one bucket and

3   any representation is fine representation.

4   And so, I just think it's important to

5   make sure that we've, we've got their

6   representation.

7   MS. LONG: Can I also go in the school

8   of General Schwenk about in that beginning is it

9   too 101 to just remind people what the definition

10   of statistically significant is, and meaningful,

11   if you don't do that in the report, which I can't

12   remember if we do?

13   MS. TAGERT: Yeah. So we, Nalini and

14   I, discussed this at lunch. We're adding a

15   definition based on Bill's guidance.

16   MS. GOLDBERG: I think on that, also,

17   I think we talked about this when we were first -

18   - when we had that discussion earlier, including

19   making the point that, you know, everything

20   doesn't rise and fall on statistical

21   significance, on that sort of confidence integral

22   point that you were making before.

1   I think that is, you know, really

2   important for people to have to make sense of the

3   numbers. So they don't write off the information

4   that is not deemed statistically significant.

5   GENERAL SCHWENK: I think that's why

6   Jen mentioned meaningful, because that's what

7   Bill said earlier.

8   MS. LONG: Yes.

9   GENERAL SCHWENK: Is there's a --

10   there may be a distinction. And whatever Carla

11   says is meaningful works for me.

12   MS. TAGERT: All right. So, adding

13   that caveat to the report, are people -- are

14   there any nays on this finding, or wordsmithing?

15   There can also be wordsmithing once you have the

16   report as well.

17   Okay. Hearing no objection, again,

18   these are the percentages that accompany that

19   narrative just in case people understand

20   information in different ways.

21   GENERAL SCHWENK: Yeah, that's my

22   fault. Because when we had the subcommittee

1   meeting I said this is a great paragraph for

2   those who like great non-number paragraphs. But

3   do something. And I think this is a nice

4   solution.

5   MS. TAGERT: Okay. Potential Finding

6   5, we're talking about the rate of empanelment.

7   And this is how I like to think of it as the

8   likelihood of being empaneled.

9   So, we're talking about the Air Force

10 and Navy racial and ethnic minority

11 servicemembers were more likely to be empaneled.

12 In the Army it was evenly split. And in the

13 Marine Corps, servicemembers were less likely to

14 be empaneled than White, non-Hispanic

15 servicemembers.

16   And these are the accompanying

17 percentages where we also explain whether or not

18 that was statistically significant.

19   Are there any nays for this particular

20 finding?

21   Okay. Moving on to Potential Finding

22 6, we're talking about the representation of

1   minorities on panels.

2   The representation in the Army and Air

3   Force was similar.

4   In the Navy and the Marine Corps the

5   representation of minorities was lower than their

6   representation in their respective services, with

7   the accompanying numbers.

8   Are people -- any nays on Finding 6?

9   Okay. Potential Finding 7, this is

10   when we looked at peremptory challenges for those

11   members that were not empaneled. And the data

12   said that that was not disproportionately used to

13   exclude minority members in three of the four

14   services, with the, I think it was the Marine

15   Corps that differed on that.

16   Look and see here.

17   GENERAL SCHWENK: We don't have

18   statistically significant sentences.

19   MS. TAGERT: That's true. We can --

20   well, no, for the percent, for the bullets we do.

21   I don't know if you want to add that in the

22   narrative as well.

1   So, we're on 7. Sorry.

2   MS. GUPTA: We will add the

3   statistical significance for each of those

4   bullets.

5   MS. TAGERT: Yes. Yeah, we struggled

6   with keeping these all very consistent.

7   All right. Are there any nays for

8   Finding 7 on peremptories? Okay.

9   Potential Finding 8, again we're

10   dealing with the representation of minorities on

11   a panel when the accused was a minority. This

12   was an area based on the small amount of cases

13   that Bill discussed that, you know, it was a very

14   small amount of cases. And in the report we do

15   address the confidence level on this based on the

16   numbers themselves. Any nays on this particular

17   finding? Okay.

18   Moving on to potential Finding 9 on

19   the pattern of results. That's just explaining

20   that whether or not you aggregate this data or

21   you look at it at an individual level from the

22   average. It was very similar, thank goodness,

1 because otherwise this would be a much longer

2 presentation. So that's just kind of saying that

3 there was no issues there. Are there any nays on

4 potential Finding 9?

5   Okay. Moving on to potential

6 Recommendation 3 on future study. So this was

7 sort of an overall takeaway based on kind of the

8 discussions that we've had in the past.

9   Like Mr. Cassara said, you know, this

10 is -- we're now in a different, a completely

11 different landscape. But this can be further

12 defined and further kind of what the things that

13 we talked about earlier, what your future studies

14 may want to look like on panel selection based on

15 Jeter as well as the not random randomization.

16   PARTICIPANT: Are you suggesting that

17 the Department of Defense do this or --

18   MS. TAGERT: So that's a point for

19 deliberation of whether or not you believe the

20 Department of Defense should do it or potentially

21 the DAC-IPAD if you want to use your resources to

22 look at this again.

1   MS. GUPTA: Yes. My suggestion though

2   we don't know if the DAC-IPAD will be renewed.

3   So it might be a good idea to punt it to the

4   Department of Defense until we have that

5   information.

6   GENERAL SCHWENK: Also if anybody

7   approves this recommendation, they might take

8   gathering data more seriously knowing that they

9   have to pony up a report and compare it to this

10   one in the next five years.

11   MS. GOLDBERG: You know, I often think

12   like why not both or just say, you know, either

13   the Department of Defense or the DAC-IPAD would

14   give a little bit more wiggle room. I mean,

15   there's a downside though, right, which is, you

16   know, that the collective action problem.

17   But it sounds like I hear what you are

18   thinking is best and the safest route is to put

19   DOD here. And then DOD obviously could send it

20   over to DAC-IPAD if it so chooses, right? And we

21   could indicate to the General Counsel that should

22   the DAC-IPAD still be in existence, the DAC-IPAD,

1   together with the Department of Defense, or the

2   Department of Defense -- that the DAC-IPAD would

3   be available and would be happy to participate

4   with DOD. Something like that.

5   MS. TAGERT: Yes. We because we can

6   be tasked by DOD. So we can maybe structure

7   something along those lines.

8   MS. BASHFORD: The last sentence of

9   that seems very watered down, every attempt

10   should be made. Like that just sounds like,

11   yeah, if you feel like it. I mean, why don't we

12   just say the race and ethnicity of all

13   servicemembers included for the study should be

14   determined?

15   MS. TAGERT: Yeah. I mean, we could

16   say that. I guess I put in every attempt in the

17   sense that like if your personnel office does not

18   have the race and ethnicity, like, figure that

19   out. Like, it shouldn't just be oh, we don't

20   have that because it's not in our system.

21   It's, like, if you really want to look

22   at this issue, maybe you can -- I mean, I feel

1 like the military knows a lot about people. They

2 could figure that out if it's not in their

3 personnel systems. I think that's what I meant

4 by that. Like, every attempt other than just

5 looking in your data base.

6   GENERAL SCHWENK: But they will read

7 it to mean they can call the personnel center get

8 a no and hang up. I made every attempt.

9   MS. TAGERT: Yeah.

10   GENERAL SCHWENK: Better to write it

11 --

12   (Simultaneous speaking.)

13   MS. TAGERT: We could say every, yes.

14   MS. GOLDBERG: Could we say -- I mean,

15 maybe this is -- maybe we can't do this, but like

16 the services should provide --

17   MS. TAGERT: Yeah, we could do that.

18   MS. GOLDEBERG: -- this information

19 for purposes of this study?

20   MS. TAGERT: Yeah, we could do that.

21 It's the last sentence.

22   MS. GOLDEBERG: And they're on notice

1   that it is their responsibility and not say the

2   responsibility of the DAC-IPAD to listen to all

3   of their hearings or --

4   MS. TAGERT: All right. So with that

5   change --

6   MS. GUPTA: I have another point on

7   that. So this might be a good place for Dr.

8   Spohn and everyone else who weighed in on how we

9   say here because we want to use our study as the

10   baseline, we should do it using the same

11   methodology. But perhaps a complementary

12   recommendation or within the same should be --

13   within the same recommendation should be that the

14   Department of Defense also break out in finer

15   subgroups the racial and ethnic groups rather

16   than aggregating them like it was done for this

17   study.

18   PARTICIPANT: That services should use

19   a consistent definition for measuring race and

20   ethnicity. And do the analysis based on the

21   classifications that are used consistency across

22   the services.

1   MS. GUPTA: So we'll add that

2   language, and you will see it in the version that

3   goes out to you.

4   MS. BASHFORD: We do want one that

5   uses the same methodology though, right?

6   Otherwise, having a baseline is meaningless if

7   you then do your next study using different

8   definitions.

9   MS. GUPTA: I think it would have to

10   be they do both. They do an aggregate to do the

11   baseline, compare against the baseline, and they

12   have more finer categories.

13   MS. TAGERT: Okay. So with those

14   changes, are there any nays for potential

15   Recommendation 3 for future study? Okay.

16   All right. So now we're moving on to

17   the gender analysis. And, again, we are going to

18   look at the narratives in the Army and the Air

19   Force. There was overrepresentation of women as

20   compared to their respective service

21   representation in the Marine Corps. It was

22   slightly higher than their overall representation

1   in the Navy. It was lower than their

2   representation in services. And all these

3   differences were statistically significant other

4   than the Marine Corps.

5   And these are the percentages. Where

6   we have used the language of statistically

7   significant, we will make sure that all of the

8   findings are consistent. Are there any nays on

9   this particular finding?

10   All right. Moving on to potential

11 Finding 11 on the rate of impanelment for women.

12 This is whether or not you are more likely as a

13 male or a woman to be impaneled. And we are only

14 talking about people that were not impaneled,

15 right? No, sorry. This was just the rate of

16 impanelment.

17   So this particular one was a lot --

18 the narrative was a lot shorter because they are

19 all the same. So we have the bullets with it.

20 Is everyone -- are there any nays on potential

21 Finding 11?

22   All right. Moving on to potential

1 Finding 12. The representation of women on

2 panels in the Army and the Air Force was greater

3 than their overall service representation. And

4 in the Navy and the Marine Corps, the

5 representation of women impaneled was less than

6 the representation in their respective services.

7 And these were the percentages that

8 accompanied that narrative. Are there any nays

9 on Finding 12?

10 MS. LONG: It's not a nay. I just --

11 this is the slide I had a note on your note that

12 you didn't unpack the other. Is there anything

13 that needs to be said in a recommendation or

14 finding related to this? Is there a

15 recommendation related to this or is it just the

16 finding?

17 MS. TAGERT: Just the finding.

18 MS. LONG: Is it out of our lane to

19 recommend -- I can't remember -- and I apologize.

20 Is other on any of these other -- was other

21 looked at on any of the other reviews? On all of

22 them? Okay. Then forget it. I thought it was

1   just on this one.

2   Because the child care -- the

3   different things that came up, I was interested

4   if there should be a recommendation about

5   barriers. But that might be really out of

6   mission or -- so I do not have a nay.

7   MS. TAGERT: Yeah.

8   MS. LONG: That's my --

9   MS. TAGERT: I think when we're done

10   with the findings and recommendations, we could

11   discuss the future studies that we may want to

12   conduct. All right. Finding 12, no nays.

13   For potential Finding 13, we are

14   talking about the use of peremptory challenges.

15   Someone earlier remarked that we are going to

16   change the parentheses to include challenges for

17   cause because we discussed challenges for cause

18   in this narrative. So we will do that.

19   MS. GUPTA: And we will also clarify,

20   Ms. Goldberg, your point about making sure this

21   is clear that it's not just challenges for cause

22   but that were actually granted.

1   MS. GOLDBERG: Yes. Thank you.

2   Perfect.

3   MS. TAGERT: And these were the

4   percentages that accompanied the narrative. Are

5   there any nays for this particular finding?

6   Okay.

7   MS. GOLDBERG: It could be excused

8   language. Sorry. I think just to go back to

9   your point, I think the excused language here

10   captures that point that we were just talking

11   about.

12   MS. GUPTA: Right. It will just be in

13   the paragraph. Perfect.

14   MS. TAGERT: Potential Finding 14,

15   again it's a rinse and repeat that the aggregate

16   data and the individual is data yielded the same

17   results so there weren't really any outlier cases

18   that were impacting the aggregate.

19   And, again, here we are with another

20   potential recommendation on future study to

21   address the gender of panel members, detailed and

22   impaneled on all courts-martial. And we can make

1   the same edits regarding every attempt to should.

2   Is everyone okay with that recommendation? Okay.

3   Hearing no nays.

4   Okay. So that's the formal votes on

5   the findings and the recommendations. But do you

6   all have things that you want to add in the

7   report to potentially look at later, deliberate

8   on different studies?

9   GENERAL SCHWENK: I want to circle

10   back to going to the services for their input. I

11   think in the report we ought to say that we have

12   sent a request or are sending a request to the

13   services for any comments they may have on this

14   report, in particular regarding the gender

15   numbers since they are statistically significant

16   to many of us, I'm sure, worrisome.

17   MS. BASHFORD: I actually kind of

18   disagree with that because if we put it in the

19   report that we're going to ask them or we are

20   asking them, then I think a reader might say, so

21   what's the answer and why didn't we give the

22   answer? Yes, we should ask them. I just

1 | wouldn't put that in the report.

2 | MR. KRAMER: I thought we had always

3 | heard that -- I don't know if statistically or

4 | anecdotally, that women were excused for cause at

5 | a far higher rate because they had been the

6 | victim or knew somebody who had been the victim

7 | of a sexual assault and that those challenges for

8 | cause were being granted almost routinely.

9 | MS. TAGERT: Are you discussing kind

10 | of the fact that the challenges were evenly

11 | disbursed between men and women yet women because

12 | -- Bill, you are going to have to explain that.

13 | I think that is what Mr. Kramer is asking.

14 | MR. WELLS: Yeah, I'm not sure if that

15 | was the question. I'm not sure either.

16 | GENERAL SCHWENK: No, I think you're

17 | right. I mean, that's what we heard.

18 | PARTICIPANT: That's what we've always

19 | heard.

20 | (Simultaneous speaking.)

21 | GENERAL SCHWENK: But it's anecdotal

22 | from different witnesses trying to grapple with

1 the fact that there are more challenges for cause

2 against women than men. Now our data supports

3 it. And we are going to ask the services whether

4 we put it in the report or not. And we will see

5 what they say.

6   They may say the same thing. They may

7 have other explanation and then we can decide

8 what to do once we get their input.

9   MR. KRAMER: But I guess that does get

10 into what Ms. Long said, too, but are there other

11 barriers that might lead to challenges for if

12 there is child care like you said.

13   MS. LONG: Would that go for cause

14 though or would that go for -- would that be the

15 other? I think they said they counted that as an

16 other.

17   MR. KRAMER: So if somebody said I

18 can't do it because I'm a primary caretaker,

19 would that be a challenge for cause or for other?

20   MS. TAGERT: Yeah, so that would not

21 be a challenge for cause. But there will be a

22 discussion of whether or not that person can be

1   excused on that basis.

2   Now there were cases against anecdotal

3   because I didn't read all the cases where someone

4   would say, you know, I'm pregnant, and I've got

5   all these appointments and this and that. And,

6   you know, there would be an objection that --

7   there would be -- the challenge was not that that

8   person is biased, but that they would be like

9   preoccupied thinking about those appointments and

10   that type of thing.

11   MS. BASHFORD: Our Finding 13 shows

12   that challenges for cause were used against men

13   and women at the same rate in Army, Air Force and

14   Navy but not in the Marine Corps. More women

15   were excused than men because of cause. So only

16   in the Marine Corps. And then across all the

17   services, it says peremptories were used against

18   men and women in similar proportions. So it just

19   seems like there's just one outlier there.

20   MS. GOLDBERG: So the strange thing

21   about that is women are overrepresented in the

22   pool and underrepresented on the panel. So there

1 is something that -- they are following up in

2 some way in every service, which I am not going

3 to attempt to explain why, looking at the numbers

4 right now. But I think you could explain that

5 better than I could. But that -- you know,

6 whatever the drop off is would not be explained

7 by disparities for cause, but it is explained by

8 something.

9 MS. TAGERT: Yeah, do you want to --

10 so this is something that blew my mind because I

11 could never really wrap around that they are

12 being challenged at the same like --

13 (Simultaneous speaking.)

14 MS. TAGERT: I'm going to let Bill

15 explain that because I will butcher it.

16 MR. WELLS: Right. I have a really

17 hard time explaining it. I've been out of the

18 classroom too long, clearly. So the tables that

19 look at the reasons why people were excused is

20 only looking at the people who have already been

21 excused and then looking at the distribution of

22 reasons across those.

1   So those can be even even though one

2   group is excused more often than the other for

3   instance. That distribution can still be even

4   then. And I know I have a hard time putting this

5   like analogies to help someone understand this.

6   I've tried a bunch.

7   Here is one I've tried. Yeah, let me

8   give the analogy first because maybe it will make

9   sense. Take a baseball analogy. I like sports.

10   I like baseball. If you understand baseball.

11   Someone could have a really high batting average

12   and a really low batting average, in other words

13   they get hits more or less often. But the

14   distribution of the kinds of hits they get could

15   be the same, right?

16   (Simultaneous speaking.)

17   MR. WELLS: Absolutely not. No way.

18   MS. LONG: Could you give us some

19   examples like from a jury? Could you use an

20   example from the data, like, fake numbers, but

21   like could you give us that? Sorry.

22   MR. WELLS: Yeah, it wouldn't be from

1   one jury. It would be from a group.

2   MS. LONG: Okay.

3   MR. WELLS: So let's say we have a

4   group of details. And from those details, 75

5   percent of men get impaneled and then 25 percent

6   of the panel are women and then you've got groups

7   that have been excluded.

8   When you look at just the group that

9   has been excluded, the reasons why -- you are

10   beginning with a blank slate. Those reasons

11   could be used in equal percentages even though

12   the numbers are different. So I'm trying to --

13   I'm struggling to go back to the example of the

14   jury and the numbers there. But because you are

15   beginning with a blank slate, then those

16   percentages can still be equal.

17   MS. LONG: So if your numbers are --

18   so if you had eight men and four women. I know

19   these are panels of eight.

20   MR. WELLS: Yeah.

21   MS. LONG: But I think of -- Did I do

22   that wrong? Like 12 and 4 -- 12 is 4 --

1   GENERAL SCHWENK: Nine is three.

2   MS. LONG: -- to make it easier. But

3   can you kind of tell us, is it how they are

4   getting there? And if people understand this.

5   But I'm like is it how they are coming in and

6   then at nine and threes are being challenged for

7   the same kind of reason?

8   MR. WELLS: Correct, correct, correct.

9   So three men would have been excused for cause.

10   One woman would have been excused for caused.

11   That's 33 percent.

12   MS. LONG: Okay.

13   MS. GOLDBERG: I guess the hard thing

14   in some ways to understand, at least for somebody

15   like me, is women are being disproportionately

16   dropped, excused, whatever. But men are making

17   it onto the panel in disproportionately greater

18   numbers relative -- well, you start out with more

19   women and you wind up with fewer women compared

20   to the percentage of men -- the number of men you

21   start out with versus the men who land on the

22   panel. So if --

1   MS. BASHFORD: The percentage of men

2   versus percentage of women --

3   MS. GOLDBERG: Yeah. And so I think

4   -- I guess what I would say, you know, maybe what

5   is useful is to just figure out if you can

6   explain that in a paragraph. Maybe that's

7   impossible. But I think it is -- I think it can

8   get lost for people when it looks like, oh, well,

9   everybody, women and men are being excused for

10   cause at the same rate. But something is going

11   on that leads the panel -- that results in the

12   panels not looking like the pools.

13   MS. BASHFORD: I'm not sure we're

14   saying they're being excused at the same rate.

15   We're saying when they're being excused the

16   percentages of for cause and the percentage for

17   peremptory are the same as for men, right?

18   MS. TARGET: Yes. So that's the only

19   way I understand it how Ms. Bashford explained

20   it.

21   MS. BASHFORD: I'm not sure that's

22   right.

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1   MS. GOLDBERG: I think the nugget

2 that's still -- the question is why don't the

3 panels look -- sort of reflect the proportion of

4 the pools, right?

5   So if you have a 10 percent -- 100

6 percent pool venire and you have 70 men and 30

7 women and let's say you had a 10 percent panel,

8 like why would it be seven men and three women on

9 average? And it's significantly not. So that is

10 just the piece that, you know?

11   CHAIR SMITH: I agree there needs to

12 be a paragraph. Go ahead and figure that out for

13 us. And I'll wait it out at the end.

14   MS. GOLDBERG: Can I go also back to

15 your question about what else we might want to

16 put in here. And I don't know -- I will be

17 interested if you think this is appropriate for

18 this or not this report.

19   But I think it is important to

20 understand in a next step what the outcomes look

21 like and whether the outcomes look different

22 depending on the composition of the panel. And

1   we know it's multifactorial so maybe the panel,

2   plus the judge plus the race or gender of the

3   parties or the accused and the victims.

4   MS. BASHFORD: What about the facts.

5   MS. GOLDBERG: What's that?

6   MS. BASHFORD: What about the facts.

7   MS. GOLDBERG: No, and the facts, but

8   the facts I don't think we can -- I think when

9   we're looking -- I mean, unless we assume that

10   facts differ based on race and sex, I think all I

11   was suggesting is that if we are -- if we don't

12   think that facts are going to be different based

13   on race and sex, then thinking about what impact

14   different compositions might have on outcomes.

15   Maybe their numbers are not big enough to measure

16   that, but that's a different question.

17   MS. BASHFORD: The facts of the case

18   make a huge difference in outcome. It doesn't

19   matter about race and gender.

20   MS. GOLDBERG: No, I take your point.

21   MS. BASHFORD: If we try to pull it

22   all into race and gender, we are missing a huge

1   piece of this, which is --

2   MS. GOLDBERG: Yeah.

3   MS. BASHFORD: -- you know, is this a

4   case with three eyewitnesses and DNA or is this

5   somebody? I mean, it's just -- it's very -- I

6   don't think you can boil it down to outcomes that

7   easily.

8   MS. LONG: And that's what I was

9   saying about the why. Like you really can't make

10   any judgment about the outcomes until you look at

11   characteristics and compare them in an objective

12   way or roundtable them and think about it, I

13   mean, because of exactly what Martha just talked

14   about.

15   DR. SPOHN: But there is some research

16   using mock juries showing that racially diverse

17   juries make different decisions than all-white

18   juries. That they are more likely to talk about

19   racial issues and that the outcomes may be

20   different just based on the composition of the

21   jury.

22   So, I mean, I don't -- maybe that's

1 what you are trying to get at.

2 MS. GOLDBERG: I've seen that data on

3 the civil of juries. I've seen there is some

4 data on judges. So I do think that every case is

5 different. And maybe the issue in these cases

6 was the numbers are so small but that it would be

7 hard to kind of get meaningful data that

8 considers outcome so.

9 MS. LONG: You actually could --

10 MS. GOLDBERG: But I guess -- or

11 sorry.

12 MS. LONG: I mean, you could hear.

13 You are only talking about 200 cases. I'm not

14 trying to be -- but I'm like if you really want

15 to know if the research on mock jurors, what's

16 actually happening, you could do it because you

17 have a small universe of cases, and you could

18 figure out the outcomes and the characteristics.

19 I just feel like that is the only way you are

20 really going to know unless you want to just try

21 to slap the national unto what we have.

22 MS. GOLDBERG: And another thing just

1   -- again, this may get too complicated for this,

2   but, you know, going back to the question of why

3   do we care about this at all? And we care about

4   it because of perception. And we care about it

5   because of effect on decision-making, you know?

6   So I guess the question is what more

7   do we need to learn about each of those to think

8   about what kinds of recommendations we might to

9   make or the services might want to think about as

10   they are assessing the trust gap that they are

11   experiencing.

12   And, I suppose, you know, sort of to

13   take that further, I mean, part of that may not

14   be susceptible to a procedural fix and then that

15   gets to questions of what else can be done. But

16   that's more than maybe needs to go into this

17   report.

18   MS. TAGERT: Yeah. So that's my

19   inclination just because those issues are complex

20   and complicated. And, again, Bill and I always

21   come back to our original research questions. If

22   we want to discuss outcomes and race and

1   ethnicity, that's got to be its own report for

2   many different reasons. And here we were just

3   trying to figure out what these panels look like

4   and whether or not -- we were trying to assess

5   Article 25 pre-Jeter stuff. So that's what I

6   would say on that.

7   MS. BASHFORD: I do think one thing

8   that some group of this committee could look at

9   though is the expansive use of the challenge for

10   cause particularly in light of -- I don't know

11   how to say it -- Keago case, where a sexual

12   assault conviction was overturned because the

13   judge allowed on -- now I can't remember if it's

14   man or a woman -- with prior experience in the

15   sexual assault realm presumably they said they

16   could be fair. But that said that led to the

17   appearance of implied bias, so not actual bias

18   but implied bias.

19   So if that's going to be the standard,

20   and if you haven't read it, there is a really

21   great dissent on that, I don't know how you can

22   fix some of the gender problems because who is

1   going to put somebody with that experience, even

2   though they say they can be fair on a jury if it

3   just means it's a do over two or three years down

4   the road.

5   CHAIR SMITH: That's the liberal

6   mandate issue, right? So not to cut people off,

7   but I'm cutting people off. And Sergeant

8   Sheppard has one tiny question she said.

9   SGT. SHEPPARD: Super not complex at

10   all. For potential Finding Number 8, I just

11   noticed for consistency throughout the report

12   that there is no statistical information provided

13   afterwards, like, how you guys broke it down for

14   most other findings. I'm a numbers person so I

15   was kind of looking for those. I didn't know if

16   it would be appropriate to add those in or if

17   this is something that it could slide.

18   MS. TAGERT: The report will add them

19   both in.

20   SGT. SHEPPARD: Okay. See, you're

21   welcome, super easy, not complex.

22   CHAIR SMITH: All right. Thank you

1   again. Very comprehensive.

2   Okay. So we are ready to move on to

3   Special Projects Subcommittee update. Sorry.

4   Did I steal your thunder?

5   MS. PETERS: Not at all. I think at

6   the moment, I am going to get Ms. Tokash on the

7   line. She is going to dial in. And while I do

8   that, maybe the Policy Subcommittee can give

9   their update with the understanding that 3:15 is

10   a hard start time for our public commenters. And

11   so we have time after that public comment to wrap

12   up any unfinished business.

13   CHAIR SMITH: All right. So we are

14   going to go to Policy Subcommittee update.

15   MS. SAUNDERS: Good morning. Okay.

16   So the Policy Subcommittee update, you know, you

17   have all been listening for two public meetings

18   now on what we are doing, which is the study of

19   Article 6b, enforcement rights, and 513,

20   psychotherapist patient privilege.

21   So the one thing that you haven't

22   really seen is in the subcommittee meeting

1 yesterday morning, we did hear from a panel of

2 victim's counsel primarily on the Article 6b

3 issues but also a little bit on 513.

4   And so we are just going to continue

5 to study this with the idea of perhaps front

6 loading the Article 6b issues is what we are

7 contemplating for potential recommendations

8 coming up. Coming to a theater near you.

9   So anything to add, General Schwenk?

10   GENERAL SCHWENK: No. The reason 6b

11 precedes 513 is for us it seems easier for us to

12 come to a conclusion on 6b and much harder to

13 even understand 513 much less come to any

14 conclusion so.

15 `   MS. SAUNDERS: It does seem the more

16 we delve into it, the more complex it becomes.

17 So we are going to try to untie that knot, and

18 we'll see how that goes.

19   So that's all we have. Any questions

20 on policy? Thank you.

21   CHAIR SMITH: Okay. I think Ms.

22 Tokash might be connecting.

1   MS. PETERS: Chair Smith, in the

2   interest of continuity, I know Chair Tokash of

3   the Special Projects Subcommittee wanted to give

4   an update today. Ms. Terry Gallagher and I were

5   in the support staff for that session. I see

6   Meghan on the line so she may be dialing in. So

7   I was going to briefly connect. Hello.

8   MS. TOKASH: Yes, hi.

9   MS. PETERS: Okay. Meghan Tokash is

10   here ready for the update. Thank you, Meghan.

11   MS. TOKASH: Thank you. And I'm so

12   sorry that I had to craft my travel around

13   missing the last part of the meeting. So I

14   apologize to my colleagues and staff for having

15   to jet out so excuse that.

16   So thank you. Just as Meghan said, we

17   had a Special Projects Subcommittee meeting

18   yesterday morning. And, obviously, we heard from

19   the DOD General Counsel this morning in an

20   administrative closed session. We all heard what

21   she said. But we also know from her May 2022

22   memo that she would like to be advised of OSTC

1   and related issues as they come out.

2   So to that end, this full committee

3   has completed 12 site visits, and there are five

4   remaining, including one tomorrow at Andrews Air

5   Force Base, one in July at Norfolk and then three

6   later this year in September at three different

7   installations in Korea, Okinawa in September.

8   So by completion of the site visits,

9   it is pretty great that all Committee members

10   will have attended at least one site visit.

11   And so far we have heard several good

12   things coming from the field, but we have also

13   heard several concerning things coming from

14   military justice stakeholders. And we have not

15   examined or studied at all those concerning

16   things on the micro level. We have only heard

17   them from practitioners in the field.

18   So the Special Projects Subcommittee

19   is revising a very high level letter that we

20   would like to send to the General Counsel

21   flagging some of these preliminary concerns and

22   the letter will provide that very important

1   context that this is just preliminary, and this

2   is just some initial feedback that we are

3   receiving from site visits, nothing more.

4   So flagging these issues now, I

5   believe, should adhere to three general

6   principals. One that we want to keep the General

7   Counsel apprised on an ongoing basis and not

8   always wait months or years to get a study or

9   report out. And when concerns or issues are not

10 fully fleshed out or studied, we will provide

11 that context for her.

12   So in this letter, we say just that.

13 We have not had the opportunity to study these

14 issues on a micro level.

15   The second principal is we want the

16 OSTC mission and the counterpart trial defense

17 offices to succeed.

18   Three, we want to provide the General

19 Counsel, SecDef and Congress sound advice. So

20 that is why this particular letter is high level

21 in nature, right? We are not trying to make

22 recommendations based on larger information that

1   we don't have because we haven't had the benefit

2   of a study.

3   So with those three principles in

4   mind, the letter that the Special Projects

5   Subcommittee is reviewing and revising flags

6   preliminary concerns, and it also mentions some

7   good things that we have heard from the site

8   visits too because we want to make sure that it's

9   not all gloom and doom. We have heard some great

10   feedback as well.

11   Because the site visits have been non-

12   attribution, some of the examples used are just

13   very high level in general, and they center in

14   large part around funding and staffing concerns.

15   And so the last thing I will say is

16   with respect to timeline. We know some of these

17   preliminary concerns right now. And I believe we

18   should flag them for the General Counsel. So

19   this week the Special Projects Subcommittee will

20   finalize a letter, and we will then, as a

21   subcommittee, take a vote to send it to the full

22   Committee.

1   And if we have the time or are able

2   to, the intend would be to either tag onto that

3   June 27th meeting or at least try to get a Survey

4   Monkey out to get another standalone full

5   Committee meeting that would not take very long,

6   but just for the full Committee to be able to

7   vote on the letter to send to the CG.

8   And obviously, I believe it was Meghan

9   Peters who described kind of the process for

10   revisions, which would go through the staff due

11   to the concerns about deliberations.

12   So those are the updates right now for

13   Special Projects Subcommittee. And we will keep

14   you posted.

15   CHAIR SMITH: Okay. Thank you for

16   that. We look forward to seeing the letter. Do

17   you want to discuss the letter, the idea of the

18   letter or we are going to just wait and see?

19   MS. PETERS: I think the subcommittee

20   is still considering that and drafting so more to

21   follow.

22   CHAIR SMITH: Are we ready for -- oh,

1   are we taking a break or are we just moving on to

2   public comment?

3   MS. PETERS: I think a five minute

4   break would be appropriate, and we will bring the

5   public commenters.

6   (Whereupon, the above-entitled matter

7   went off the record at 3:06 p.m. and resumed at

8   3:15 p.m.)

9   MR. YOB: Okay. Welcome back,

10   everybody. We are going to start the public

11   comment session for this meeting. And before we

12   do, just a couple of introductory remarks.

13   All the people who are providing

14   public comments, we let them know that the

15   Committee cannot and does not address specific

16   cases or specific issues. But we do welcome any

17   comments that are germane to the policy work that

18   this Committee does and helps to inform that

19   work.

20   All comments are limited to five

21   minutes so that we can maximize the number of

22   people who can speak. The opinions that are

1　provided are those of the speakers alone and do

2　not reflect necessarily the opinions of the

3　Committee itself or anybody else.

4　　　　　　The public comments that are given are

5　published as part of the transcript of this

6　meeting so they will be publicly available on our

7　website at some point concluding this meeting.

8　　　　　　So with that said, I want to welcome

9　our first person doing a public comment. That's

10　Trish Allman, Trisha Allman. And Trisha has come

11　from Texas to provide this comment, and we will

12　turn the floor over to you, Trish, if you could

13　just turn on your mic.

14　　　　　　MS. ALLMAN: Thank you. Good

15　afternoon. My name is Trisha Allman. My husband

16　is retired United States Air Force Sergeant Aaron

17　Allman II. Imagine you send your son, brother,

18　husband or loved one to the military and possibly

19　off to war. They were asked to leave everything

20　behind so they could protect us from terrorists

21　around the world. They went from honorably

22　serving their country to being accused of alleged

1   crimes that if convicted could sentence them to

2   130 years in prison.

3   But what if I said these allegations,

4   if convicted, was based on hearsay and the

5   evidence didn't show an actual violent crime or

6   even a crime that had been committed? What would

7   you think? This couldn't possibly happen, right?

8   This was the story of my husband in

9   2014. Aaron Allman II, a third generation airman

10 and highly decorated war hero. He was one of the

11 most sought after, top tier combat photographers

12 of his time.

13   He had a stellar award winning career

14 with no history of infractions. He served in

15 Iraq and Afghanistan and other combat zones

16 around the world. He spent over 250 days a year

17 on average in the field for over a decade

18 fighting terrorism and capturing the most

19 horrific images of war. And in a split second,

20 it was all taken from him.

21   He was put in the same class as

22 rapists, murderers and the worst kind of violent

1 criminals. In fact, when the claims were made,

2 it was recommended not to go to court-martial by

3 legal base command for lack of evidence, yet it

4 went to trial anyway and if convicted, he was

5 facing life in prison for alleged crimes that

6 were supposedly sexual in nature.

7 Please understand these allegations

8 against him were based on things like a tap on

9 someone's shoulder to excuse himself as he passed

10 them in the hallway, to touch them briefly on the

11 leg to get through the bleachers so he could

12 balance himself when exiting.

13 It's not what you think of when you

14 hear I was sexually assaulted. The claims were

15 exaggerated like when one of the witnesses

16 claimed he kissed her on the mouth. She

17 backtracked and said he leaned in, and I quote,

18 "I thought he was going to kiss me."

19 Ultimately, their testimony was found

20 to be incredible, and Aaron was found not guilty

21 of sexual assault.

22 Why was he even charged with sexual

1   assault you may ask? Because accusers felt he

2   made those touches for sexual gratification.

3   This was a key requirement to be able to charge

4   him with sexual assault. At this point, they

5   reduced the charge and found him guilty of a

6   maltreatment of a subordinate, a misdemeanor

7   equivalent for his alleged actions. And the

8   judge made sure that they struck from the record

9   anything sexual in nature from even those two

10   minor charges.

11   Overall, Aaron was found guilty of one

12   felony, making a false official statement and

13   spent 30 days of his life in jail and lost a

14   stripe. But even that felony was overturned

15   several months later. Sadly, the damage was done

16   and it is where our nightmare began.

17   Nearly 10 years later, we are still

18   subjected to the fallout of this witch hunt.

19   Aaron was labeled a convicted felon and a sexual

20   predator in a divorce proceeding around that

21   time, quoting false testimony and charges from

22   the court-martial.

1   We were not allowed to set the record

2   straight. And we went on to spend five more

3   years dealing with vexatious litigation. Sadly,

4   that cost him nearly eight years or not being

5   allowed to see his youngest son. In fact, this

6   will be the first Father's Day that we get to

7   spend with him, and he is 10 years old.

8   After years or trying to prove his

9   innocence, we are still only allowed to see him

10   four times a year. I must be present and

11   supervise the visit. And his child cannot stay

12   overnight with us because Aaron could be

13   dangerous, all based on the label convicted felon

14   and sexual predator.

15   The impact of these labels will never

16   really go away. Even though Aaron was found not

17   guilty, the felony was overturned. He retired

18   honorably after 21 years of service to his

19   country and was free to go on with his life so we

20   thought.

21   But to add insult to injury, we had to

22   file bankruptcy in 2018. We lost everything,

1 including two homes. I have personally spent so

2 much time fighting legal and financial battles

3 over the last eight years that I haven't been

4 able to recover my own career not to mention the

5 fallout to our children, not just today but in

6 the future.

7   A young lady our middle son started

8 dating his junior year in high school was not

9 allowed to our home. Apparently, her mother

10 found articles and documents online. And despite

11 the verdict and actual evidence, she felt her

12 daughter wasn't safe.

13   Now our children are forever attached

14 potentially to these labels by association. All

15 from false testimony still in public record as

16 fact.

17   What is wrong with the system?

18 Stacking victims and charges with little to no

19 evidence or based on hearsay. Coaching victims

20 on how to word their testimony to get a

21 conviction, the pretrial judgment, confinement

22 and penalties that they face before they are even

1   found guilty.

2   No accountability for accusers who lie

3   or exaggerate or fabricate stories and providing

4   incentives to move to an assignment of choice

5   and/or victim's pay even when the case doesn't

6   prove they are even a victim.

7   What could make this right? Nothing

8   will restore the emotional trauma of false

9   accusations to one's character, certainly not

10   Aaron's. That is permanent and why we must get

11   this right. We need his honor, dignity and name

12   restored so he can leave a legacy his children

13   deserve. We want his stripe back. He lost that

14   stripe and a promotion that was due to the

15   punishment for the felony that was dismissed.

16   Financial restitution for back pay of

17   that stripe, it doesn't even begin to scratch the

18   surface of our financial losses over the last 10

19   years, but that stripe is worth a quarter of a

20   million in lifetime of his retirement that was

21   taken from him.

22   Accountability for making false

1   accusations, we don't have a justice system at

2   all if one side can lie and cause a lifetime of

3   destruction with no consequences. We drove 24

4   hours. We have only five minutes that we are

5   ending. This is just a little bit of what we go

6   through still to this day.

7   We must get this right. We owe it to

8   the men and women of our Armed Service that put

9   everything on the line. Thank you.

10   MR. YOB: Thank you, Ms. Allman. I

11   appreciate your comments. In person, we also

12   have Ms. Jamie Boehlein, who I believe will also

13   speak with Mr. Ryan Guilds, who you remember from

14   speaking with us yesterday.

15   MS. BOEHLEIN: Hello. My name is

16   Jamie Boehlein. And I am here to speak to you

17   today about the injustices I have seen firsthand

18   as a survivor in the military sexual assault

19   legal system.

20   Initially, I thought that I was

21   unqualified to speak here today. I am only 23

22   years old. I don't have a law degree. And I

1   can't explain every nuance that goes into

2   changing policy. However, I believe I can

3   provide something more powerful, my qualification

4   being that I lived through the policies.

5   I am a civilian, and I was assaulted

6   on a military base by an active duty sailor. I

7   reported this to the NCIS, having no prior

8   experience with the military sexual assault legal

9   system, forced to do this on my own after being

10 turned from five SAPR Offices.

11   After reporting, my investigation

12 continued for seven months before concluding and

13 moving to trial counsel. Once in trial counsel,

14 my prosecutor directed me on how to choose to

15 move forward with my case. A list of items,

16 basically a yes or no checklist with an

17 understanding -- without any understanding of the

18 degree in which each choice would impact my case.

19 How could I have known what to do when I had zero

20 resources provided to me?

21   My case then proceeded to sit in trial

22 counsel for nine months. Eventually, I was

1   informed that my case would not be prosecuted

2   through a court-martial but instead told that it

3   would move forward through an administration

4   separation board.

5   When provided this information, next

6   steps were not addressed. That is the way the

7   military treats its victims. I was not informed

8   about the process. And I had no clarification on

9   my role in the hearing. I did not know whether

10 or not I would be asked to testify. I did not

11 know if that was my right. I did not know if I

12 would be subject to cross-examination.

13   I speak about this lack of

14 communication because it was a common theme once

15 I entered the administrative side of things.

16 This process was nothing but complicated and

17 infuriating as a victim who had to independently

18 navigate the system.

19   For 18 months, I fought on my own

20 behalf primarily because I was under the

21 assumption of most that victims should not need

22 lawyers. However, in the military you do, as I

1 learned. I decided that making decisions alone

2 was no longer an option for me.

3   Through my own research, I found

4 Protect Our Defenders, a nonprofit who offers

5 victims of sexual assault legal counsel. Upon

6 speaking with them, they suggested I file for

7 victim legal counsel through the military. Yet,

8 as I attempted, I was immediately rejected due to

9 my civilian status.

10   I am fortunate enough that Protect Our

11 Defenders connected me to Ryan Guilds for legal

12 representation shortly after. Ryan was the first

13 person to attempt to explain the AdSep process to

14 me. But truthfully, he could not. He said every

15 branch handles these differently. It varies even

16 base to base. There are no regulations on

17 evidence. There are no rules when it comes to

18 testifying. The victim practically has no

19 rights.

20   I hoped it would not be as bad as I

21 expected. However, in my first meeting with the

22 new prosecutor about the AdSep Board, when asked

1   if I could testify, the prosecutor told me, and I

2   would quote, he would not give me a stage to

3   preach on and he would not have me testify

4   because the board members are very busy, and he

5   did not want to waste their time.

6   This shows how the military treats its

7   victims. It silences them.

8   I was appalled by his behavior and

9   sent a two page letter to every DOD email I had

10   access to since the beginning of the separation

11   process. Because of this, I was assigned a new

12   prosecutor with over 10 years of experience in

13   prosecuting sexual assault. She took the time to

14   hear my story and immediately asked me to

15   testify. The experience changed drastically in a

16   positive way, but I had to fight tooth and nail

17   to get there.

18   A few months later, the administrative

19   hearing finally took place. I was notified

20   shortly afterwards that the board believed with

21   the preponderance of evidence that all three

22   assaults I testified to were true and therefore

1   my abuser would be given a general discharge.

2   When I was asked why he was not given

3   an other than honorable discharge, I was told

4   that because of his high work ethic in the Navy

5   he was not considered. But at what point is

6   worth ethic able to negate the effects of rape?

7   If he had murdered someone, would the military

8   say at least he was a hard worker?

9   An OTH can be given because of a DUI

10 or drug use yet on the account of three sexual

11 assaults can be given a general discharge with

12 the only words written minor misconduct on his

13 papers. There is no uniformity in that. There

14 are no standards of punishment in that.

15   Ultimately, I am here today to ensure

16 that victims are informed of resources that are

17 available to them. I am here today to ensure

18 that the lack of uniformity in AdSep boards

19 drastically affects victims. And I am here today

20 to ensure that a rapist's work ethic does not

21 discount rape.

22   Thank you.

1   MR. YOB: Thank you, Ms. Boehlein.

2   Mr. Guilds, would you like to make a comment as

3   well?

4   MR. GUILDS: Yes, thank you. So I am

5   appearing on behalf of Protect Our Defenders. I

6   think everyone has heard of that name a few

7   times, a preeminent victims' rights organization

8   for military-connected survivors.

9   Two things I was asked to convey on

10   behalf of Protect Our Defenders. Number one, as

11   Jamie has alluded to and as she has described in

12   terms of her experience, Protect Our Defenders is

13   seeing more and more AdSeps in lieu of

14   prosecution, which I don't think is an unexpected

15   result in the new system. That's what I

16   anticipated would happen. I make no judgments on

17   that.

18   But having now experienced and

19   represented survivors through the AdSep process,

20   it's a disaster for everyone, candidly for the

21   recorders who are new and understaffed, for those

22   who are the target of separation and certainly

1   the victims who are a necessary participant in

2   the process.

3   We believe that the DAC-IPAD is

4   uniquely qualified to analyze and review the

5   information, the evidence, the timing and the

6   direction to provide potential recommendations to

7   Congress to create a uniform system that will

8   respect the rights of targets of separation as

9   well as enhance the rights of victims. And so we

10   would ask the DAC-IPAD and its very capable staff

11   to perhaps put that on the list of things to do.

12   Separately and just very quickly I

13   don't think it will come as a surprise based upon

14   my testimony yesterday that protect our defenders

15   is deeply concerned about this notion of a

16   conviction integrity unit. I have experience

17   working in conviction integrity units in capital

18   cases. I believe that they have a role to play

19   in our system. They are not designed for 120

20   offenses.

21   The same reason that it is difficult

22   to get a prosecution to prove beyond a reasonable

1   doubt a 120 offense is the same reason that

2   conviction integrity units are only going to

3   serve to re-victimize victims and not achieve the

4   justice of those who claim to be wrongfully

5   accused.

6   And make no mistake. I respect all of

7   the people who have come in here and given

8   testimony and provided information to inform and

9   tell the Committee about their concerns about the

10 wrongfully convicted. I and Protect Our

11 Defenders want no one to be wrongfully convicted.

12 But a conviction integrity unit is not going to

13 fix that problem and the existing appellate

14 structure that is in place in the military is

15 more than adequate to protect accused's rights.

16   And with that said, I appreciate, once

17 again, everyone's time. I will get off my

18 soapbox.

19   MR. YOB: Thank you very much. I

20 appreciate the comments. Those conclude the

21 comments from the people who are in person. We

22 have three other individuals who I believe are

1   going to give virtual comments. Is Mr. Roger

2   Ramirez online with us?

3   MR. RAMIREZ: Yes, sir, I'm here. Can

4   you hear me?

5   MR. YOB: Yes, we can. Mr. Ramirez,

6   I would let you -- ask you please to go ahead

7   with your comment. But, again, please observe

8   that we have a five minute limit for comments.

9   MR. RAMIREZ: Yes. And first of all,

10   thank you for having me here. My name is Roger

11   Ramirez. I proudly served in the Marine Corps

12   during the Gulf War and later in the Army,

13   completing three tours in Afghanistan as part of

14   Operation Enduring Freedom.

15   Despite my dedication and service to

16   my country, I was wrongfully accused by my ex-

17   wife of sexual assault during my five year

18   marriage.

19   Today I will outline the circumstances

20   that led to my wrongful conviction, the profound

21   impact to my life, to my family and the request

22   of an unbiased review of my case.

1   Throughout our five year marriage, we

2   were actively involved in counseling, actively

3   involved in counseling. We were there because

4   she refused to seek anger management counseling

5   and physically assaulted me. I was embarrassed

6   to admit that I, an infantry soldier, who has

7   seen combat many times, was being physically

8   abused.

9   In 2012, I was at my breaking point.

10   So I sought help through Army One Source and

11   began to speak up about my physical abuse I was

12   enduring. Despite my efforts to seek assistance,

13   I never received that help. This occurred while

14   we were stationed at Fort Bragg, North Carolina.

15   While I was reassigned in Fort Bliss,

16   I informed my ex-wife that I wanted a divorce.

17   Six months later, she showed up, unannounced and

18   asked for more time to prepare as she would lose

19   her Army benefits, including health and dental

20   insurance. I agreed to help and delay it up to

21   six months.

22   Shortly after I filed for divorce, I

1   was accused of sexual assault and domestic

2   violence. The Family Advocacy Program, FAP,

3   conducted a thorough investigation into the

4   claims and concluded on December 16, 2014 that

5   there was no evidence to support the accusation

6   of sexual assault or domestic violence.

7   Following the FAP investigation, my

8   ex-wife began changing her story, continually

9   altering her accusations in an attempt to

10   strengthen her case against me. Despite these

11   changes, her claims remained unsubstantiated and

12   inconsistent.

13   The civilian authorities also

14   conducted an independent investigation and found

15   no evidence to support the accusation of sexual

16   assault or domestic violence and dropped all

17   charges against me.

18   Additional accusations, my ex-wife

19   accused me of shoving her, causing her to fall

20   against the table and break her ribs. I did not

21   touch her. I did not touch her. There was no

22   police report, fall. And she never went to the

1   hospital. When asked about her broken ribs, she

2   claimed that she didn't go to the hospital

3   because she knew that they were broken. There

4   was nothing she could do.

5   Despite the serious accusation, she

6   was seen walking normally with no indication of

7   pain in front of multiple witnesses. The judge

8   immediately dismissed this claim.

9   During my ordeal I encouraged -- or

10   excuse me, during my ordeal I encountered

11   significant bias and prejudgment from both

12   military and civilian legal professionals.

13   Before even discussing my case in detail, a

14   military attorney told me that prison is not that

15   bad. When seeking assistance from civilian

16   attorneys, I was repeatedly informed that I would

17   eventually go to prison regardless of the

18   evidence or lack thereof against me.

19   Several attorneys explicitly stated

20   that no matter how much I paid them, avoiding a

21   prison sentence wasn't possible. I was told that

22   based on pressure from the President and members

1 of Congress, that the military needed to show

2 results on sexual assaults so I had no chance at

3 trial. I was not allowed to submit the results

4 of the FAP or civilian investigation on my

5 defense at court-martial.

6 Someone please tell me why a military

7 judge would throw this out? Please tell me why

8 an accuser could come after me not just once, but

9 twice, but three times until she got the outcome

10 that she wanted? Someone please tell me how is

11 this fair and just and supportive of good order

12 and discipline?

13 I have never been arrested, had any

14 problems with the police before this court-

15 martial or have any negative encounters. I

16 wanted to testify in my defense, but my military

17 lawyer told me that the burden of proof was on

18 the government, that it would make no difference

19 in my case.

20 During the initial proceedings in my

21 case, several key witnesses were not questioned.

22 Thirdly, and the focus of their testimony was

1   averted away from the critical issues at hand,

2   specifically the false accusations made against

3   me as an essential part of the re-investigation I

4   am requesting to reexamine these witnesses under

5   proper questioning conditions.

6   I respectfully ask that these

7   witnesses are given an opportunity to speak the

8   truth. This will not only aid and establish my

9   innocence but also bring into light any

10   inconsistencies overlooked, details in the

11   initial trial. The wrongful conviction has had a

12   devastating impact on my life and my family.

13   I have been separated from my loved

14   ones and endured the stigma of being labeled

15   criminal and faced significant emotional and

16   psychological distress. I am a registered sex

17   offender. People don't want to talk to me or

18   even hire me. The financial burden of legal fees

19   and lost income has further compounded the

20   hardships on my family.

21   I care for my senior parents and can

22   only offer zero financial help for them. My

1 reputation built over the years of dedicated

2 service to my country has been irreparably

3 damaged.

4   My hope is that this panel will

5 recommend an independent group of legal experts,

6 outside of military jurisdiction to review these

7 cases and take action. The reinvestigation is

8 crucial not only for my personal justice but also

9 to restore my reputation and facilitate my

10 reintegration into the civilian life, which had

11 been severely hindered by this conviction.

12   MR. YOB: Mr. Ramirez, I am going to

13 have to ask you to conclude your comments. You

14 are over time.

15   MR. RAMIREZ: Okay. And I would just

16 like to say thank you for giving me an

17 opportunity to speak, and this is the only way we

18 get fairness. Thank you.

19   MR. YOB: Thank you. We appreciate

20 your comments, Mr. Ramirez. Is Mr. Samule Fye,

21 if I'm saying that correctly, are you online?

22   MR. FYE: I am, yes.

1   MR. YOB: Okay. Are you prepared to

2   make a comment, Mr. Fye?

3   MR. FYE: Yes, I am.

4   MR. YOB: Okay. Whenever you are

5   ready.

6   MR. FYE: Okay. Hi, my name is Samule

7   Fye. I was a staff sergeant in the United States

8   Army. In May of 2019, I fled from an abusive

9   relationship, leaving the home that I owned with

10 just my children and the clothes on my back.

11 This leaving was overdue was my then wife had

12 become increasingly more violent.

13   Her relentless abuse was emotional,

14 physical and sexual in nature. The daily

15 mistreatment had slowly worn me down from a

16 special operations team sergeant to a shell of a

17 man who could barely tell reality from the harsh

18 fiction that she had created.

19   My leaving turned out to be the

20 ultimate betrayal for her, however, and my then

21 wife put every effort into drawing me back under

22 her control. When terms of endearment did not

1 work, she began to threaten me with the tools she

2 knew she had at her disposal. The tools that the

3 United States Army had provided her to destroy

4 me.

5   Naively believing that the Army would

6 support me, I did not take her threats seriously.

7 Eventually, I hired a lawyer to attempt to divide

8 our marital property, most notably the house

9 which I had paid for entirely.

10   After numerous attempts to resolve the

11 issue outside the courtroom, my lawyer and I sued

12 my then wife for the house that I owned in which

13 she was living. I filed the suit on a Friday in

14 January. She told the Army on Monday, which was

15 the next business day, that I had sexually

16 assaulted her two years prior to the filing.

17   What followed was a nearly two year

18 ordeal that included interviews with my then wife

19 in which the narrative and the details of our

20 life changed with each telling. She was allowed

21 to alter dates and details freely as she was

22 presented with conflicting evidence, including

1   the date of the assault itself.

2   During my Article 32 hearing, the

3   primary hearing officer determined that no

4   probable cause existed to support the charge of

5   sexual assault. The chain of command, however,

6   decided to proceed anyway for reasons that we

7   will never know.

8   Almost two years after her accusations

9   were made with the house issue long resolved, we

10   proceeded to a court-martial. At this point, I

11   was still under the impression that due process

12   would save the day. The timing of the

13   accusations strongly suggested fabrication and

14   almost two years of investigation had failed to

15   turn up a single piece of corroborating evidence

16   to support her claims.

17   I also possessed what I foolishly

18   thought would be my salvation. Over the course

19   of our brief marriage, I had meticulously

20   documented her abuse at the behest of a lawyer.

21   I possessed hours of recordings of my then wife

22   abusing me physically, emotionally and sexually

1 as well as her directed abusive behavior at my

2 children.

3   In one, my then wife loudly orders me

4 to murder my son's mother to prove my love for

5 her while hidden. As it turned out, the panel

6 would hear none of these recordings.

7   The trial itself was so farcical that

8 I could not possibly begin to summarize it under

9 an hour. The prosecution withheld evidence and

10 at times outright lied. My then wife was so out

11 of control on the stand that the judge threatened

12 to not allow her to testify.

13   The highlight though was the

14 revelation that the prosecution had failed to

15 turn over nearly three gigabytes of information

16 in discovery and had lied on official documents

17 regarding that discovery.

18   This led to a 41-day recess in the

19 trial that sunk the momentum my defense team had

20 gained. The panel returned to a case they barely

21 remembered to make their decision. I was found

22 guilty and sentenced to three years of

1 confinement for sexual assault and domestic

2 violence.

3 I spent this time separated from my

4 children and my elderly parents. While

5 incarcerated, my new marriage dissolved. I lost

6 essentially everything. Meanwhile, my accuser

7 received benefits and pay. I left prison three

8 months ago with nothing. At the age of 49, I am

9 forced to live with my father. I do not have a

10 car, and I am only one week into a warehouse job

11 that I was lucky to get.

12 While my case is still under appeal,

13 it could eventually be overturned, I am currently

14 a registered sex offender and convicted felon and

15 have to live as such.

16 I am subjected to monitoring and have

17 had to submit to humiliating polygraph testing.

18 Worse than any of this, however, is that I

19 endured relentless abuse for a woman that I --

20 from a woman I loved that I now have to deal with

21 this trauma alone, worse than alone, in fact,

22 because society has deemed me the abuser.

1   The Army never supported me or my

2   family during this entire ordeal. All of the

3   support was given to my accuser.

4   It is hard enough for a man to come

5   forward when he is being abused. By showing men

6   that there is no support and possible

7   repercussions for extricating themselves from

8   mistreatment, reporting in the future will

9   essentially be unheard of.

10   Of a completely different concern,

11   military recruitment numbers will continue their

12   downward trajectory as young men are less willing

13   to submit themselves to the risks of

14   incarceration. Real threats to our safety as a

15   nation exist when our recruitment goals are not

16   met.

17   It is time to act now before more

18   families are hurt. It is time to stand up, speak

19   up and change the system that has destroyed so

20   many lives.

21   Thank you for letting me speak today.

22   MR. YOB: Mr. Fye, thank you for your

1   comment. We may have one more. I'm not sure.

2   Is Mr. Robert Armendariz on the line?

3   MR. ARMENDARIZ: Yes. Can you hear

4   me?

5   MR. YOB: Yes, I can hear you. Are

6   you prepared to make a comment?

7   MR. ARMENDARIZ: Yes, sir, I am.

8   MR. YOB: Okay. If you could please

9   confine it to five minutes, you can start

10   whenever you are ready.

11   MR. ARMENDARIZ: Thank you, sir. Good

12   afternoon, Board members. I am Master Sergeant

13   Robert Armendariz, United States Marine Corps,

14   retired. I also was deployed to Panama, Persian

15   Gulf, Iraq and Afghanistan, multiple tours. But

16   on July 2017, I was court-martialed and convicted

17   of Article 120. I was convicted with DNA

18   evidence that was inconclusive and a penetration

19   exam that was negative.

20   I was sentenced to 18 months

21   confinement. My youngest son was only two months

22   old when I went into confinement. My wife's

1 military ID card expired that same month. When

2 my wife went to my old command of MWSS 373,

3 Station Miramar, and spoke with the XO Major

4 Graham if they can help her get a new ID card

5 because she needed it for her and our son's

6 follow-up doctor's appointments, his response to

7 my wife was we are no longer responsible for you.

8   How can a man, more or less a Marine,

9 look at a woman with a newborn baby in her arms

10 and answer her like that? I will tell you what

11 kind, a coward. How is this a band of brothers

12 or how can you say Marines, we take care of our

13 own? Well, that's a lie that I can say I lived.

14   After being released from confinement,

15 my wife had already depleted our savings, maxed

16 out our credit cards, and our cars were taken

17 back and repossessed. I had to register as a sex

18 offender with the county.

19   In June of 2022, the Navy Marine Court

20 of Criminal Appeals set aside my charges, my

21 charge 2 and its specifications for factual

22 insufficiency and dismissed it with prejudice.

1 Charge 1 was set aside because the court found a

2 military judge did not disclose to the parties a

3 fact that raised an appearance of bias which

4 prejudiced the accused, which is me.

5   I ask you, how can servicemembers have

6 a fair trial when you are getting convicted with

7 inconclusive DNA evidence and a biased military

8 judge?

9   In February of 2023, I had to take a

10 leave of absence from my civilian job that I now

11 had because I was recalled back to active duty.

12 I was supposed to have all my rights, privileges

13 and property restored. It seems that at a click

14 of a button, the Marine Corps can take your life

15 away, but to restore all that you've lost, it

16 seems that everyone from the top down is

17 clueless.

18   It really seemed that I had no support

19 from anyone. I was back on active duty for three

20 weeks and the command was only worried ab out was

21 for me to turn in my retirement papers rather

22 than fixing my pay, removing all adverse material

1　from my material record, giving me a chance to be

2　looked at for a promotion and getting my uniforms

3　back because I was wearing my son's uniform.

4　　　　　Most Marines are given 14 months to

5　outprocess for retirement. I was given six. Six

6　months is not enough time to fix your pay, back

7　pay, service record, make sure all your service

8　dates are restored and corrected to include 150

9　days of leave that I could not take.

10　　　　　As I was trying to get five years of

11　back pay restored, I received an email from a

12　Major Schultz, a finance officer from

13　Headquarters Marine Corps and DFAS. They were

14　demanding that I turn over my W-2s from my

15　civilian employment while I was on appellate

16　leave because they were going to deduct my

17　civilian pay from my back pay, which I questioned

18　and asked do they deduct pay from Marines that

19　are working in civilian jobs after they do their

20　Marine jobs? I was told that if I didn't provide

21　them my pay would be stopped, and I would be

22　court-martialed. To this day, no one has

1 answered as to why $247 was deducted from my back

2 pay.

3   I had to go on my own to the Board of

4 Corrections of Naval Records because I had no

5 support from my command.

6   In June of 2023, I received from DCMR

7 the ruling in my favor that Headquarters Marine

8 Corps is to make all the corrections to my record

9 that I had requested and for the Marine Corps to

10 hold a promotion board for me. I was told that I

11 would hear from Headquarters Marine Corps in 60

12 days from the date of the letter which was June.

13   I didn't hear anything from anyone

14 until December 29 of 2023 stating that I would

15 not be considered for promotion. How does 60

16 days turn into six months? It seems that there

17 is just no end. Who is going to pay me the

18 $55,000 that I had to spend on attorneys? Who is

19 going to fix my credit? I will never get back

20 the time that my family and I had to suffer.

21   Not one senior officer or enlisted

22 from the Marine Corps has apologized for what my

1 family and I had to endure. Why would anyone

2 want to join an institution like this, one that

3 will try you with inconclusive DNA evidence and

4 biased military judge?

5 I did get to retire. However, I have

6 58 days of leave that I could not use or sell

7 back. I got terminated from my civilian job

8 because I had to take a military leave of

9 absence.

10 MR. YOB: Mr. Armendariz, could your

11 conclude your comments, please?

12 MR. ARMENDARIZ: Thank you for your

13 time.

14 MR. YOB: Thank you very much for your

15 comments. That concludes the public comment

16 portion of the meeting. I think I will turn it

17 back over to Ms. Peters.

18 MS. PETERS: All right, Chair Smith

19 and members, just a few notes to wrap up the

20 robust discussions that we've had over the last

21 two days.

22 I just want to make a note that on day

1   one we did hear from a couple different panel

2   sessions where the members had asked for some

3   data from the appellate sections in the military

4   branches. And we may follow-up with them after

5   this meeting and request that data to fee into

6   future discussions.

7   Additionally on the heels of the

8   unanimous approval of the findings and

9   recommendations, on the panel selection data

10   presentation and analysis that you received

11   today, we recommend that we follow this meeting

12   with another one hour virtual public meeting in

13   two weeks because in between now and then you

14   will receive the narrative report that again lays

15   the framework for the data and the analysis you

16   received today. So it's just a more in-depth

17   narrative explanation for everything that you

18   heard today.

19   So we would like to proceed after this

20   meeting with a survey of the members'

21   availability on June 27 or as soon as possible

22   around that date or as close as possible to that

1   date. And we would conduct final deliberations

2   and vote on the panel selection data report that

3   you will be receiving here in a few days. So we

4   can do that.

5   If there are any issues or questions

6   around that, just contact the staff. We need a

7   quorum of nine members and then we can move out

8   and conclude that project.

9   Is there anything Ms. Bashford or

10   anybody wants to add on that or any other

11   comments in general?

12   CHAIR SMITH: So other than to say

13   thank you to everyone, thank you to the staff, I

14   believe this is Eleanor Magers Vuono's last

15   meeting with the DAC-IPAD. She is leaving to go

16   be staff for MJRP. And then I don't think

17   anybody else is going. Are we losing anybody

18   else? Oh, yes, Mike Libretto, who I don't know

19   if he's still here. So thank you to both of them

20   for their service. We appreciate you, and we're

21   sad to see you go.

22   MS. PETERS: Absolutely. Thank you,

1   ma'am.

2   The other point of discussion, and I

3   was just reminded that you all have been engaging

4   in site visits. And it has come to our attention

5   that if you go to one academy, you may be

6   interested in going to another academy in the

7   fall, maybe the Naval Academy.

8   So you all are -- already have three

9   or four site visits on the calendar through

10   September. This would be probably following that

11   September meeting so we are talking about

12   October, November time frame. But more

13   importantly is what you do not when you do it.

14   So is there any discussion or questions around

15   certainly the value of another academy site

16   visit, most likely the Naval Academy?

17   MS. BASHFORD: Since we only visited

18   one academy, if we don't visit more than one, I

19   don't think we can use anything we found out from

20   conversations because they would obviously be

21   attributable to those people.

22   MS. PETERS: Thank you. I see a lot

1 of general agreement. So unless there is any

2 opposition, the staff will move out with planning

3 and coordinating an additional site visit to the

4 U.S. Naval Academy.

5 MS. GOLDBERG: I think that's great.

6 And I also think it's great to do this as far

7 into the fall as we can since students, I think,

8 go back to school sort of -- I don't know when

9 they go back or if they ever get a summer break.

10 But the idea of getting them sort of not right in

11 the beginning of their semester is also useful.

12 MS. PETERS: We'll make sure they are

13 there when you arrive.

14 MR. CASSARA: And, Meghan, September

15 is virtual, correct?

16 MS. PETERS: Correct. Our next

17 meeting is September 17 and 18. That is entirely

18 a virtual meeting.

19 The staff has no further business.

20 Chair, over to you.

21 CHAIR SMITH: I think that concludes

22 our meeting. Oh, no?

1   MR. YOB: I just want to make one

2   quick comment because I think it is worth saying

3   one more time, thanks to Eleanor. I don't know

4   if we gave her a proper send off. I mean, I

5   worked with her at MJR. I worked with her here.

6   She has contributed so much in front of you and

7   behind the scenes that you don't know. So

8   thanks, again, Eleanor, we really appreciate it.

9   CHAIR SMITH: All right.

10   MR. SPRANCE: Today's meeting is

11   closed. Thank you.

12   (Whereupon, the above-entitled matter

13   went off the record at 3:54 p.m.)

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