

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

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Transcript: Panel 5—Views from the Military

Judge Cardone: Good afternoon, everyone. We're going to start our first afternoon panel. Before we get started, on behalf of the Committee, I want to thank all of you for being here. You guys have . . . we've been hearing from a lot of stakeholders. You guys have no stake in this outcome. There's information that we hope we can hear from you to help us understand some issues that have arisen before us.

We want to let you know, particularly because you have no stake in the outcome, how much we appreciate all of you being here today. This is what we call our "Views from the Military." Before we get started I want to remind everybody, if you have cell phones make sure that they're off, so that they don't go off in the middle. We have with us Brigadier General John Baker; Lieutenant Colonel Todd Fanniff; Colonel Stephen Newman; and Captain Eric Price.

We'll start with Brigadier General John Baker, and what I would ask all of you, since your world is so very different from our world in a lot of ways, if you'd give us . . . I know you've all given us written submissions but, if you could each give us a little bit of an overview of what you do, how you do it and why you do it. Then we'll be asking you some questions. Let me correct myself. It's Brigadier General John Baker; it's Lieutenant Colonel Todd Fanniff from the U.S. Air Force; Colonel Stephen Newman from the U.S. Marines; and Captain Eric Price for the U.S. Navy. All right, Brigadier General.

BGen Baker: Good afternoon, ma'am and fellow panel members. Thanks for inviting us. You say that we have no stake in this outcome, but we do.

Judge Cardone: Can I ask you to get really close to the mic? Okay, thanks.

BGen Baker: We look to—when we talk amongst ourselves—we look to the federal model as the model that we want to get to. Steve and I have known each other for a long time. We've often talked about how we can improve the military justice system. We continually look to the federal system; in our views, it's the model that we want to get to. It's interesting that the model that we want to get to is under review. I'm on the Chief of Defense Counsel for the Military Commissions. I'm also the officer in charge of the Military Commissions Defense Organization. What that basically means is that I supervise the defense counsel that provides defense services to the detainees down in Guantanamo.

We have a hybrid system and Steve—Colonel Newman—has provided a

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really good overview of the military justice system. Our model is a little different, it's not the complete court martial model, nor is it the federal model. They seem to have taken some parts of both and kludged them into a new system. I understand that you're looking at structure and resources. Structure and resources is something that all of us look at all the time. I know that from my vantage point at the Military Commissions, that we feel like our defense teams have been dramatically under resourced.

I'm new at this job, I got here last summer. I spent about six months studying my organization. Studying the resources that we had, studying the counsel that I had assigned, studying the magnitude of the cases that they had to defend, and I came to the conclusion, similar to my predecessors, that we're dramatically under resourced.

The way that we get resources is that we have to go to the Convening Authority. The Convening Authority is a kind of quasi-judicial official, who is in charge of making monetary decisions on resourcing. In the commissions system, I assign counsel to cases. Then I have to get the counsel resources to do their job, I have no budget. I have no . . . I can request an increase . . . as an example, I requested an increase . . . each of my capital cases has one learned counsel. I've requested that they have a second learned counsel. I've requested a substantial increase in the number of paralegals that I provide. The number of attorneys that I have to defend the cases. I make a request to the Convening Authority. The Convening Authority makes a decision on our resourcing requests. The individual trial teams . . . if the Convening Authority were to say no to something, the individual trial teams, could then take that denial and go to the judge for relief.

Again, we really look to your model as one that we want to emulate. There's a couple of things that I'd like to highlight. A little bit different than what Steve talked about, just to give you a couple of differences from our system from yours.

One is that we don't provide indigent defense services. In either the Court-martial's system or the Commission's system, every accused gets an attorney that's assigned by either individual services or, in my case, the Military Commission's Defense Organization.

If that individual hires a civilian attorney either through their own means, or through some sort of pro bono arrangement, the counsel from our organization stays on the case with some limited exceptions. Another big difference between our system and the federal system is that we have no . . . I think I'm going to use the right term . . . we have no imputed disqualification. By that I mean, if we have a case with a conspiracy, with a series of co-conspirators, a single office can represent the same individuals. There are rules of our professional responsibility that have been written to

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allow that.

The supervisory attorneys control the detailing of counsel. As an example, in our capital cases we have learned counsel. Capital teams identify somebody that they want to hire. I ensure that they're qualified and then we go ask the Convening Authority to fund them. Which lawyers go on what cases is our decision, and it doesn't get to the judge to decide which lawyers do what cases. Again, we have this weird . . . weird is not the right word . . . but, a different arrangement where we have somebody who is a quasi-judicial official—the Convening Authority—who makes our resourcing decisions.

Where we see a problem with the role of the Convening Authority is that the Convening Authority is the same person that makes the decision on whether the charges are referred to a Court Martial. While they're a quasi-judicial official, they're also a quasi-prosecution official. I see that as a large flaw in our system.

That's the extent of my prepared remarks, I'll answer any and all questions that you have.

Judge Cardone: Thank you. Lieutenant Colonel. Todd.

Lt. Col. Fanniff: Thank you. Members of this Committee, thank you for this opportunity to speak to you today about our structure in the United States Air Force. As a defense counsel, I'm thankful for this opportunity to discuss this important topic. I am the Chief Senior Defense Counsel for the Eastern and European regions. Essentially I supervise seven senior defense counsels who are all the rank of major. They, in turn, supervise twenty-eight area defense counsels, who are the local counsels at each installation within our regions.

We have twenty-five defense paralegals spread across those installations. We form about a third of the 186 member Air Force Defense team worldwide. They're all professional officers, and non-commissioned officers who are dedicated to providing defense services in a zealous, ethical and professional manner. My team provides services for about 100,000 airmen across our region. This is my third assignment as an Air Force Defense Counsel, I served as an Area Defense Counsel at Ramstein Air Base in Germany for two years. Then I was a Senior Defense Counsel at Langley Air Force Base in Virginia for three years.

Sort of the organization of our service—basically, coming out of the Vietnam era— we decided to reorganize our service and our defense services. At that time, prior to that, we were basically assigning a counsel per case. So the staff Judge Advocate at an installation, supervised all the attorneys on that installation. They would assign one person defense role and the other person the prosecution role, but they were supervising both the

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defense and the prosecution and they would change depending on the case.

Back in the . . . in 1974, we decided to take the defense counsel completely out of the chain of command. Basically for the perception of unlawful command influence on our defense counsel. Mostly because we wear the same uniform, we appear the same as the prosecutors when we're in court, so we wanted our clients to understand that we were going to zealously represent them. There would be no influence from the command structure that they were responsible to. Our defense services are headed by the Chief of Trial Defense Division, who is my boss. It's Colonel Dan Higgins. He's an O6, or Colonel. We have 186 active duty officers and non-commissioned officers divided in five circuits across the world.

Each of these five circuits are headed by a Lieutenant Colonel, like myself, who runs the defense services for those sections. Our Senior Defense Counsel are typically someone who has served at least two base-level assignments and at least spent a year, typically eighteen months to twenty-four months as an Area Defense Counsel. The 21 SDCs across the world are tasked with providing not only the day-to-day supervision of the Area Defense Counsel, but they also are responsible for defending airmen at the most serious cases in trial.

Judge Goldberg: Did you say . . . what was the acronym?

Lt. Col. Fanniff: Senior Defense Counsel.

Judge Goldberg: Oh, okay.

Lt. Col. Fanniff: Like I said, our ADCs are our base level, installation level defense attorneys. They are responsible for their base, but also depending on conflicts may do cases at other installations as well, within their regions. Typically, in order to get an assignment as an Area Defense Counsel, a counsel would have to do at least ten Court Martials before they move over. Our trial defense division falls under the Air Force Judiciary Directorate, acronym of JAJ, and this is also headed by a Colonel.

The Air Force Judiciary Directorate contains five divisions. The trial defense division, the appellate defense division, the government trial and appellate counsel division, our military justice division and our clemency corrections and officer review division.

This includes all the trial and appellate counsel, both defense and prosecutors, and the policy division. The director of the Air Force judiciary is responsible for administrative control on all five divisions. While they exercise administrative control, the judiciary directorate is neutral and does not dictate how the trial division defense attorneys represent their clients.

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That Air Force Judiciary Directorate falls under what we call Air Force Legal Operations Agency, or AFLOA. It's currently headed by a two star, or Major General, who is the only Commander within the United States Air Force JAG Corp.

Again, AFLOA does have administrative control over the trial defense division, but does not dictate how any of the attorneys in the trial defense division represents our clients. Similar to General Baker's remarks, we also have a convening authority that dictates expert expenditures and what not on cases. How we go about it is, the counsel in the case applies to the convening authority for an expert on a particular case and provides justification for their need for the expert. Then if the convening authority denies that expert, we go to the military judge and file a motion order to get the expert approved. If the military judge sees that as appropriate.

Again, I'm grateful to be here today to answer any questions that you have. I am proud of the Air Force's independent defense function. I am proud to serve as an Air Force defense counsel. I appreciate this opportunity to be here today and discuss the structure of the Air Force trial defense division with you.

Judge Cardone: Thank you. Colonel Newman.

Col. Newman: Good afternoon ladies and gentlemen. I am Colonel Stephen C. Newman and I'm honored to have the opportunity to be here and I'm grateful for your invitation.

Thank you for your interest in what we do in the Marine Corps, for the defendants in the Marine Corps. Thank you for what you're doing as a panel. I hope to be able to answer your questions that you may have regarding our structure, how we function in the unique system that we call the UCMJ. I previously provided the Committee with extensive written comments. There are a few key points that I hope weren't lost in the length of that submission.

Specifically I'll take about five minutes to highlight what I think are four critical points. First, why does the Marine Corps have a defense services organization or what we call the DSO. Most obvious answer is because the Marine Corps has a statutory obligation to provide military justice services. That includes both the criminal defense and prosecution element. More importantly, why nest those services—the defense services—within the structure of the DSO? It is to ensure Marines and sailors within our system receive independent, conflict free and vigorous defense services from an attorney sheltered from the influence of command. Over time we learned that the traditional USMC structure simply did not work well when applied to the adversarial process. Having a unified command structure of both trial

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and defense services lead to natural and foreseeable conflict issues, which I hope I highlighted for you in my written submission.

Second, why is the DSO structured the way it is? As you can see from my submission, chapter two of the legal administration manual and the policy memos—many of which were authored by General Baker—the DSO is generally aligned with the rest of the Marine Corps in a model which focuses on centralized command and control, but decentralized execution. In that regard, my most important responsibility and my most powerful tool is that of case assignment, or what we call, detailing.

I am responsible for making sure we get the right attorney on the right case. While that authority is consolidated in me, I exercise that authority in a decentralized fashion. Through my four regional defense counsel, or RDCs. Who themselves, execute it regionally through their senior defense counsels, or SDCs. In fact our most powerful tool, detailing, is exercised at the lowest possible level of leadership, the senior defense counsel. Just as importantly, each region is structured the same, has the same processes in place and generally it looks like the other. This is so that a Marine can move from one coast to another and fall in on the exact same processes as he or she had in the past. Furthermore and importantly, it ensures that everyone knows what the expectations are because they are the same across the globe.

Third, what are our organizational strengths? I've already highlighted what I consider to be our greatest strength, that of detailing authority. Another equally important tool is a mutually supportive culture, not just within the individual branch offices, but organizationally. This is important because we are tasked with taking on an institution which yet retains the power of personnel assignment, resource development and resource allocation. In other words, the power of the purse.

We, in the DSO, support each other in the traditional sense. Through murder boards, case consultation, sharing best practices, etc. But also through non-traditional means. One of those means is technology, specifically Sharepoint. A Microsoft Outlook web-based information and networking software program. It is a wonderful way for the DSO to share information in near-real time. From the perspective of the line attorney, Sharepoint is a case management and consultation tool. From the perspective of me and the CDC, it serves as an organizational supervision tool, for me to exercise command and control over a group of seventy attorneys spread across the United States and Asia. This, at least partially, is how I execute policies and procedures, which I hope helps foster a supportive environment from the top down as well as from the bottom up.

Finally, the supportive environment we've developed in the DSO is well-known across our community. Everything from the way we trained to the

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way we support one another in the courtroom makes the DSO a place where Marines want to work. Working in the DSO has become desirable and is career enhancing.

But, no discussion would be complete without mentioning our weaknesses. There are a number of them. In the interest of time I'll simply say that our greatest weakness is this: we remain resourced in conjunction with the prosecution element. While functionally independent, we remain obligated to the command structure for support and evidence development. We compete for training dollars, personnel assignment and other resources with the prosecution.

This may seem no different than any other system, except that here the persons holding those resources are the same who are responsible to those who bring the charges. The commanders are the convening authority. As a result, there yet remains an unnatural imbalance in resource allocation and evidence development. We have two highly qualified litigation experts. The government has four. They have complex litigation teams with integrated criminal investigators. We have none. The regional law center directors manage the budgets for my regional defense counsel and decide who's assigned to the DSO.

My RDCs have no budget they can call their own. While we are functionally independent for supervisory purpose, we remain constrained by our reliance on the government who retains the power of the purse.

In sum, the DSO does not enjoy complete independence. However, the value in Marines defending Marines far outweighs any other feasible alternative. That does not mean that my organization is satisfied, quite the opposite. We have been attempting to engage in strategic change to address our weaknesses. From the counsel on the ground building the record to my policies and strategic messaging. We are constantly highlighting how are structure can be improved, while preserving our unique culture.

As I said in my written submission, strategic change requires tactical patience. It's hard and it requires commitment. The best approach in generating momentum for strategic change applies to me, as well as to my counsel, build the record.

Once again, thank you for the opportunity to be here and I stand ready to field any questions you may have.

Judge Cardone: Thank you, and Captain Price.

Capt. Price: Good afternoon and on behalf of the Judge Advocate General of the Navy, Vice Admiral James W. Crawford III, and the men and women of the Navy

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JAG Corps, I thank you for the opportunity to testify here today.

I am Captain Eric Price, JAG Corps United States Navy. I currently serve as the Commanding Officer of Defense Service Office North, which is in Washington D.C. It's one of our four defense service offices. We've essentially divided the world into four regions. My area of responsibility covers nineteen U.S. states from Great Lakes, Illinois to the Washington D.C. area and up the east coast, and what we call Europe, Africa and Southwest Asia, with offices in Spain, Italy and Bahrain. That's seven total offices.

Just very briefly on my own background, this is my third tour, as well, as a defense counsel. As you may or may not be familiar, judge advocates, we vary in career paths. Very rarely does one stay a litigator for an entire career. I've been a trial defense counsel, a prosecutor, an appellate defense counsel, a commanding officer of one of the trial prosecution offices, and then a trial and an appellate judge in the Navy, and the deputy chief trial judge of Navy-Marine Corps, as well as on the U.S. Court of Military Commission Review as both a judge and chief judge.

As I mentioned before, we are assigned primary responsibility for defense and other representational legal services in a defined geographic area of responsibility. We represent Sailors, Coast Guards, and on occasion Marines, for courts martial, administrative separation boards and boards of inquiry. In addition, we provide advice on defense related matters such as non-judicial punishment, criminal investigations, inspector general investigations and other adverse administrative actions. In the Navy, both prosecution and defense services are provided by individual commands headed up by a commanding officer, like myself. Each are assigned primary responsibility over a geographical area of responsibility, I've defined mine previously. By way of example, in my area of responsibility there are four separate region legal service offices. The commands that are tasked with essentially providing support to the commanders. They provide both internal command support and prosecution services for the commanders.

As background, the Judge Advocate General of the Navy supervises legal advice and related services throughout the Department of the Navy, except for the advice and services provided by the Department of Navy General Counsel. He also leads 2300 attorneys, enlisted legal men and civilian employees of the worldwide JAG Corps.

I say this because his deputy plays a very unique role that I'm about to define. This sets us a little apart, each of the services structure ourselves a little bit differently. The Deputy Judge Advocate General, who assists the JAG in performance of his duties, also has additional duty as what we call Commander Naval Legal Service Command. The Naval Legal Service

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Command was established in the 1970s, to provide and oversee legal services worldwide, including both prosecution and defense services.

Commander Naval Legal Service Command has performed these duties since. Stated another way, Commander Naval Legal Service Command remains the reporting senior for all of our defense service commanding officers, as well as the commands that head up our prosecution offices. We apex from a shore infrastructure perspective at the Commander Naval Legal Service Command. He's a two star admiral currently. Rear Admiral John Hannink.

Judge Cardone: Can I ask you to pull the microphone a little bit closer?

Capt. Price: Yes ma'am, I'm sorry.

Judge Cardone: That's okay.

Capt. Price: In additionally, since 2013 Commander Naval Legal Service Command has also overseen the Victim's Legal Counsel Program. He actually, oversees essentially the provision of the vast majority of the legal support services provided to the Navy.

The commands that comprise the Naval Legal Service Command include four defense service offices, of which mine is one. Nine region legal service offices and the Naval Justice School. The Naval Justice School is responsible for legal training, development of doctrine in training. I won't discuss that anymore, but they provide those services, with exceptions in the Navy Marine Corps and Coast Guard, as well as our enlisted legal professionals. They also provide training for line commanders, particularly in the Navy and non-legal types who preform legal functions as a part of their duties.

The commands they comprise . . . mostly because I mentioned there are essentially thirteen of our functional commands, and the Commander is assisted in the performance of this function by three chiefs of staff. Again, this is institutionally where we're a little different. We have a Chief of Staff Region Legal Service Office, which I mentioned earlier, oversees the Navy's nine RLSO's, they also supervise all Trial Counsel Assistance Programs. We have what we call a TCAT program, which is consistent with the other services. They oversee the provision of command advice throughout the United States Navy on the shore side of the infrastructure.

Again, the RLSO's are dedicated to providing legal services and solutions in support of military justice and other legal issues involving Navy and upon request Marine commands located within their area of operation. As you can understand, the highest priority is given to fleet and operational units, particularly those deployed or preparing to deploy.

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The second chief of staff . . . as I sit here I realized I should have produced a visual image, it would be much easier to understand . . . is Chief of Staff of Defense Service Office, or COSDSO as we say. The COSDSO oversees the four DSOs and supervises our Defense Counsel Assistance Program. Which is again, our resource center for everything from research, will on occasion try cases and provide administrative and reach back support for our counsel in the field.

Again, the COSDSOs responsibility includes the entire United States Navy and Coast Guard, anyone who's appearing before Court's Martial or any other administrative proceeding is entitled to either representation or advice services under the cognoscentes. Again, the COSDSO, the individual commands provide the actual service.

In addition, the third chief of staff again recently created in 2003, is the Chief of Staff of Navy Victims Legal Counsel. We call it the VLC program. This is unique in the Department of Defense, not our . . . not that we're unique, but the Department of Defense has a very unique victim legal counsel program that many would say is perhaps on the cutting edge of victims services. Particularly currently focused on sexual assault, but victims services anywhere in the country. We have, of course, stories we could tell you about each of our services. I'll just plant that seed, it's a little different.

With respect to a brief history, you've heard us all talk about a time when we brought our lawyers into the chain of command of other lawyers. That essentially was directed by the Secretary of Defense in 1973. All of the services essentially after 1973, '74, and a little bit later, lined up our defense services so they all are supervised by attorneys, prior to that they were not. Since that time, they've been supervised by attorneys. You've heard a thumbnail sketch here of the varying models we use in three of the services that you've heard spoken about here today.

I would only note that in 1976 we created the first model and at that time, very Navy like, we put all of our services in one command, much like a ship at sea. They were called Naval Legal Service Offices. At that time trial counsel, which would be prosecutors, defense counsel, legal assistance attorneys, claims attorneys, and those providing assistance the commands that did not, themselves, have attorneys all worked under the same command structure with the same reporting senior. Often . . . well not often . . . would routinely move between those different positions, so a very unique model in that regard.

In 1988 the Coast Guard and the Navy entered into a memorandum of understanding, with the Navy . . . and the Coast Guard provides attorneys to assist in certain Navy offices. In exchange the Navy provides most Coast

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Guard defense advocacy services nationwide. Currently, we have seven Coast Guard attorneys serving around the Navy's legal offices and defense positions and again, we provide the bulk of the Coast Guards trial defense needs or counsel for the bulk of the trial defense mission.

In 2006, we realigned slightly and we essentially brought our shore base in the Navy legal community . . . all of our shore based infrastructure under the Navy JAGs cognizance. At that time, we then broke out what were called Trial Service Offices, which were primarily . . . this is when we separated the trial or prosecution function from the defense function, from being in the same command, but they're separated, still reporting one step up in the chain of commands to the same commander, but each have separate and distinct commanding officers. Again, we're a little unique in that regard.

In 2007, for a variety of reasons not the least of which is, we recognize that our case-loads were diminishing to some degree. Particularly in the lower level cases, which we have historically used as training grounds. We in the Navy created a thing we call the Military Justice Litigation Career Track as an effort to identify career litigators. Unlike when I came in on active duty, as I mentioned earlier, it was difficult to stay a career litigator. Now we have that as a career path. It's a defined career path. Obviously it's intended to improve and retain our military justice knowledge and advocacy skills. The goal is to combine both courtroom experience and training and education with oversight by access to senior seasoned litigation mentors, to help our Judge Advocates develop the skills needed to become pre imminent trial attorneys.

By September of 2012 we had eight Naval Legal Service Offices, which still provided the defense function and legal assistance function, and nine Trial Service Offices. In 2012 was our last iteration. In that iteration we disestablished the Naval Legal Service Offices and we created a standalone Defense Service Office institution, much . . . similar to the other services, but yet different. Again, that is the command that I have now is the Defense Service Office.

We moved the legal assistance mission to the Region Legal Service Offices. Now our defense office is focused solely on criminal defense and adverse administrative proceedings. Again, this structure was designed to improve the military practice by aligning the right number of litigation specialists and experts with the Navy's court martial caseload. Particularly, in view of increased complexity.

I would note, just a few comments. I probably have a few minor disagreements with some of the comments I've heard from some of my colleagues. One thing I think the Navy does very well, is we allocate our resources, particularly the military justice litigation career track resources.

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They are allocated relatively evenly among prosecution and the defense, spread among these varying commands. I won't say that it's perfect at all times, on occasion it'll be a little out of balance, but that balance could go either way.

In that regard by identifying this one corp of litigators, who are our primary trial defense counsel. We manage them through a career and they move back and forth between defense and trial billets. Not by days or weeks but in the course of what we would call a tour of duty, usually three years, it can be a little bit less. They will also go on to be, presumably if they've established the appropriate credibility and expertise, our future military judges. We're experiencing that our current generation of military judges, the majority are members of this career track and have demonstrated the dividends that can be paid by having focus like this.

One other area where we're a little different than the other services, and this is where we're different from the Federal Public Defender model. We do not independently have access to investigators generally, or to expert resources. Now we do obtain that, and by law we're supposed to have equal access under the uniform code to the government. We generally gain substantial access. I think it's debatable whether it's always equal. I think that's probably a fair debate, but as a matter of law we have access to government experts and with proper motions we can obtain experts from the outside.

The unique aspect of our system, as mentioned earlier, is it's a command centric system. Prior to trial you actually have to ask the commander to fund, or make someone available. Once the trial starts, the trial judge actually has the authority to do that and make experts available. Experts routinely appear in our courts, they just are not part of the defense bar. Sometimes they'll be from other Department of Defense Medical Centers, particularly . . . we have a lot of experts, DNA and otherwise. Or, they'll be outside experts. In addition, we're a little bit unique in the Navy, we have a pilot program and we're, we've just started, called the Defense Legal Service Specialist Program and it's essentially . . . and I don't want to . . . I need to be little bit careful because the Judge Advocate General may be listening. But among their many functions, one of their functions will be to perform defense investigations. In that regard we're trying something a little bit new in the Navy and I believe we're the only service doing that currently.

We've hired a number of folks, eight currently, to work at the GS13 level. For those that know, which most do, the government service model, you recognize that's not an entry level pay grade. We've hired some pretty high quality folks investigators, criminal investigators, defense investigators, that type of person, paralegals with substantial investigative experience. We're working that.

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I guess I would add one other footnote before I close. I did have . . . General Baker mentioned something earlier that frankly hadn't even occurred to me. My last tour, it was only eighteen months, but before reporting to this job I was the Senior Navy rep to what is called the Military Justice Review Group. The Military Justice Review Group did a comprehensive review on the uniform code and the primary reference was, in fact, the United States Code applicable in Article III criminal trials. There's currently a pending massive revision, it's a substantial revision to the Uniform Code pending currently before Congress that actually was a byproduct of that code. That was both enlightening and, as General Baker said, we really learned a lot from both looking at the Article Three model. From working with folks in the Department of Justice, and the Administrative of the Courts.

I think that we learned a lot of things that we could do better, and I think we recognize that we do a lot of things very well. I mention that for whatever that's worth, in case it may prompt a question or a thought. That being said, again, thank you for your time and the opportunity to appear here today.

Judge Cardone: All right, let's start with Mr. [MacBride].

Neil MacBride: Thank you gentlemen for being here and being very helpful. Interesting to hear about your system. Maybe I'll start with you Captain Price, just since you had the floor a minute ago. Just to confirm it sounds like, perhaps unlike Colonel Newman who was describing the command of . . . the chain of command.

Just so we understand, are you saying that the current model in the Navy is to have prosecution and defense reporting up to separate commanding officers, which in turn report to a superior.

Capt. Price: That's correct. Commander Naval Legal Service Command is an echelon two command meaning, one step removed from the Chief of Naval Operations. Subordinated to him are echelon three commands; four of which are DSOs, nine of which are Region Legal Service Offices.

Neil MacBride: Talk a little bit about whether . . . does having one ultimate commander for whom both prosecution and defense roll up, is there a . . . is that perceived as a straight shooter, fair, impartial, command that doesn't lean one way toward defense or prosecution.

Capt. Price: I can say, I'm sure you'd find varying opinions if you talked to different folks, in my experience the answer to that question would be yes. In fact, I think the creation of the Chief of Staff model who run the day . . . when I say run, they're responsible for day-to-day management. Both isolate and insulate the commander from the day to day workings. The commanders that I've dealt with and both as a CO of a region legal services office and a

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Defense Service Office, generally stay out of your daily business. They are not interested in what's going on daily unless it's a heads up that something significant is about to occur. Of course, those are more common from the prosecution side, then you can imagine from the defense side.

That said, with respect to resourcing, we depend on the same structure for resourcing. In the Navy, the administrative and support to the Judge Advocate General is provided within the office of the Judge Advocate General. Again, I regret not presenting an org chart and I will submit one, perhaps afterwards to help clarify this.

The Office of the Judge Advocate General does many significant things. What I'm talking about here is, primarily, what we'll call the operations management function. In that regard, they don't distinguish, when they're supporting, by way of example, a defense office or prosecution office, there's no distinction. We have our budget battle, so to speak, in advance. Budgets are allocated. If, by way of example, there's something like sequestration, as best as I understand it, I wasn't in the position at the time, there's generally a fair share approve. We work . . . there may be some discretionary funding . . . and on individual issues we work to actually advocate for release of those funds.

I think it's fair to say that the commander goes to great lengths to preserve absolute independence with respect to the administrative side of the system.

Secondly, the commanding officers in the traditional Navy model, it's very important I think, to understand the Navy model. A commanding officer, often, in our history would go far from home with limited guidance and carry out the plan of the nation. Sometimes with great success and sometimes there may be challenges raised. But the model continues and persists to this day. So the commander puts great faith and confidence in their commanding officers to actually manage the day-to-day functions.

With respect to advocating for resources that are case specific, that's actually something that we do with the convening authorities. The Commander Naval Service Command has no role or the trial judge.

I would make one additional comment, just a footnote. I made reference to the DLSSs. I would note, that was actually a proposal . . . a propose that changed from the response systems panel for sexual assaults, a joint congressional DOD panel, was a proposed improvement in the Military Justice System. As I say, my understanding is the Navy is the only one that's implemented that to date, but I use those by way of example. We have funding for the individuals within the Navy, but currently if we're going to spend a lot of money for travel and investigation we may be required to go to a commander to obtain funding for that.

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Neil MacBride: Just to clarify, Captain Price, it's the same entity or the same command which is essentially setting budget for both prosecution and defense?

Capt. Price: That's correct. Yes, sir.

Neil MacBride: Okay, and Colonel Newman, could you talk just a little bit more. You mentioned that one of the weaknesses in your review, unlike what Captain Price described, perhaps the defense component rolls up to a prosecutor or somebody who has less independence than what Captain Price described. Could you unpack that for us a little more?

Col. Newman: Yes, sir. It doesn't roll up to a prosecutor. We are structured into four basic regions, both on the government side and on the defense side. We have east, west, pacific, and national capital region. In each of those regions there's what we call a legal services support system, or what we call a L triple S. That L triple S is typically headed by an O6 Colonel. That O6 Colonel is not a commander. That O6 Colonel is not necessarily a prosecutor, but that O6 Colonel is, in my view as a defense counsel, a government agent, so to speak.

That individual is responsible for all functions within that organization, including the budget, personnel assignment, et cetera. When a marine comes out of Naval Justice School as a Lieutenant and he's assigned to LSSS east in Camp Lejeune, North Carolina, they fall in on that organization. That OIC, that officer in charge, will decide if that individual is going to be in defense, in prosecution, in civil law, in review—doing case review—that sort of stuff. Once that person is chopped, to me, into the DSO they get a letter from that OIC saying “you are a defense counsel.”

This is where we're different from the Navy. That letter says you are going to stay a defense counsel for eighteen months, minimum of eighteen months. Sometimes they stay longer, but that eighteen month window is their rotation date. That creates challenges for me because it takes about twelve months to get a guy or gal trained, to the point where they're really effective as a defense counsel. Then if we're going to rotate them at the eighteen month mark, in order to make sure they're not bringing cases with them, we have to cut them off.

I really have them for a short, maybe, four months where they're a truly effective independent operator in the courtroom. All of those are decisions that are based . . . made by the officer in charge of the LSSS. My regional defense counsel also fall in on that structure. If you ask me, I retain operational control over all defense counsel. I define operational control as being defining their day-to-day operations, what they do on a day-to-day basis. I delegate that to the regional defense counsel who then sub-delegate

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that down to the senior defense counsel.

There's roughly ten offices in the Marine Corps that have a senior defense counsel. The administrative support comes from the LSSS. That doesn't typically create a lot of friction. Usually we're able to function pretty well, from time-to-time there will be flare ups. Nothing that has really created . . . at least not since Lee . . . hasn't really created any real major muscle movements at the appellate level. Does that answer your question?

Neil MacBride: Yeah, I think so. Then just a question for General Baker and Lieutenant Colonel Fanniff, so I think for those of us that grew up in the civilian prosecution-defense paradigm, your system seems somewhat strange and unique, so there are any number of questions that come to mind as we're trying to put ourselves as either prosecutors, or defenders, or hypothetical defendants in your system and how they would react to that. A couple questions would be: if you are a defendant in the Air Force or the Marines and you're aware of a system where you recognize a guy or gal who spent eighteen months as a prosecutor and now you realize they're sitting on the other side of the courtroom and they're a defense attorney.

Or you stop to think about the fact that this is all under one roof and further up the chain there may be a commanding officer that's making decisions about how to pick amongst their children. You know, "I'm going to give the defense this much, I'm going to give the prosecution that much," as opposed to our system where we believe that the Justice Department and the Federal Defender programs are separate and distinct. They're friendly but zealous advocates pursuing their own resources and so forth.

I guess the question there is, do you ever sense amongst your clients any sort of an optics issue or fairness issue that the same person may be a prosecutor one month and a defense counsel the second month? Or to the extent your system is not sort of the way Captain Price described it with more or less distinct chains of command, to the extent it's somewhat more muddled or messy, does that ever create fairness issues on the parts of either you or your clients?

BGen Baker: I guess I'll go first. I'm going to answer first, my experience when I had Steve's job.

Judge Cardone: Can I ask you to speak into the microphone?

BGen Baker: Yes . . . and second my current job.

I was concerned about that, substantially. It's pretty hard to walk in and talk to a young Marine who's . . . and you're wearing the same uniform as the guy or gal that sent them there. That's part of the reason why in the 2008,

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'09, '10 time frame, we ended up reorganizing our defense services and really established the model that Colonel Newman talked about.

It's a little bit of, "trust me." When I take a step back and think about in my career when I've been a defense counsel and prosecutor and a judge, I'm a better defense counsel because I was a prosecutor. I was a better prosecutor because I had defense experience. Now in my current job, you think it's hard having your clients to trust you when you're in the same service. In my scenario, we represent the detainees down in Guantanamo.

At virtually every step of the process, my defense counsel has broken their word to their clients. By that, they promised them that the meeting rooms that they meet their clients in aren't bugged. Well they have been. They promised them that the judge is the person that controls the courtroom. We've had incidents where an outside agency has interrupted the proceedings. We tell them that their attorney-client notes and their legal materials won't be touched by the government, but they have been. I am . . . of all the things I've done in my life, this is the job that I'm most proud of.

I lead an organization of people that are absolutely dedicated to their job. It takes a long, long time to build a trust relationship in the commission process. How do you do it? Perseverance. You demonstrate that you're going to be there and fight for your client. A lot of people ask me, how come the commission's process takes so long? We're aware we are in the timeline because there's been repeated government intrusions into the defense function.

We lost fifteen months on a hearing because there was an FBI informant on one of the defense teams. That's hard to gain client trust, but we keep plugging. The way we ultimately do it, is you stand up in court and you advocate the best you can for your client. I'm not sure that answers your question but there was a soapbox I felt like I would stand up on . . .

[Laughing]

Lt. Col. Fanniff: Well, sir, similar to the Navy model, our counsel . . . typically when a JAG comes into the Air Force, they work for their first two years, maybe first two assignments, in the prosecution side. They're not doing solely prosecution work, they're also dealing with civil law, legal assistance, a myriad of other legal issues at the base legal office level. Then once you prove yourself as a litigator in the courtroom, then you get the opportunity ultimately to come over to the defense side.

We'll do a defense tour; a typical tour is eighteen to twenty-four months. I would say the majority is probably twenty-four months, but you know, things happen sometimes where it's only twelve, but in general about twenty-four months. At that area defense counsel level where they are in a separate

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office, and we do our best to show our clients that we don't answer to anyone on that installation. And, we don't. Ultimately their chain of command comes through their senior defense counsel up to my position, and then up to my boss's position. Before it comes back under the Air Force judiciary and ultimately Air Force Legal Operations Agency.

Some clients didn't trust me right away, but I can tell you much like the General said, we show them by fighting for them day in and day out. They see us advocating for them and that's where they understood, ultimately that we were there for them and they were very appreciative of the services that we had provided for them.

Neil MacBride: Just one last question. This is . . . I hate being asked this kind of question when I'm sitting in your side on a panel because it's really just a hypothetical . . . it's really to try and help inform us as we're thinking about in the civilian system, where to house the Federal Defender. Should it be left in the judiciary, should it be pulled out entirely and float in it's own, on an org chart of its own? The question is, if you had a magic wand, if this were Harry Potter world and you could wave a magic wand, would any of you take the defense function and pull it outside the Marine Corps, the Navy, at least that part of the Marine Corps or the Navy where the prosecution also resides? To try and have it just spun out completely in its little box with the dotted line? The CNO, or whoever, as opposed to housed within the same basic organizational component that also includes the prosecution.

So the question is, if you could spin it out and pull it away so that it's completely separate, not even reporting up, Captain Price, to that independent two star at the top, would anybody do that?

BGen Baker: My organization is set up that way.

Neil MacBride: Okay.

BGen Baker: The problem isn't who you report to, it's who owns the purse. Because . . . my folks are dramatically under resourced. I can't give them what they ask for. I have to go ask somebody to get that for them. We have a completely separate independent chain of command. On the defense side, that only goes so far. What an individual counsel is going to do to or what an individual defense team is going to do on an individual case is up to them.

What they really want from us besides, an independent boss, what they really need from me is the ability to give them things, and I can't do that.

Neil MacBride: So you would spin off the funding maybe or the budget?

BGen Baker: I'm going to give you a maybe answer. The reason why I say maybe is the

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one nice thing about our system is that we really never have to say no to anybody. If there's a finite pot of money, I'm going to have to choose between two defense teams to give them 'x'. The defense supervisor would do that.

Under our system, the two defense teams can then go to the convening authority and to the judge, and there's really no separate, all-encompassing budget. Money is put to the problem, there's no one large budget that is managed for all of our cases.

Lt. Col. Fanniff: We've talked about that and again, I think the issue comes with exactly what the General has talked about. I don't have to say 'no' to my counsel and if I did say 'no,' is a judge ever going to side with them when the prosecution is going to point, "Well, your boss said no, so why should the judge now provide this expert or this funding, for you?"

I think that's the area where we think that we cannot separate it out and we need to have that convening authority funding ultimately so our advocates can fight and know that we're behind them, and we're doing everything we can for them. That they don't have to think we're favoring one over the other, or such situations.

I don't see a way that we can fully get out of the system.

Col. Newman: In direct answer to your question, I would say 'yes.' From the Marine Corps perspective, anything we did would first and foremost have to be sensitive to those unique cultural aspects that I pointed out in my written submission.

We have to preserve and protect who we are as Marine officers, first and foremost. That's our mantra. I'm not afraid of . . . John Baker and I have had this conversation for a long time. He's quite correct, budgetary authority is the big piece of the pie. I'm not afraid to be the guy who makes that call, however. That's why they pay us, is to make those decisions. I do believe . . . and I understand and I agree with Captain Price and General Baker in their points that we can go to the Judge to get resources, expert assistance, investigators . . . my concern there has always been that in order for us to do that, we first have to go to the prosecutor.

We have to lay out our case to the prosecutor and say here's why we think we need this witness. Here's why we think he's relevant, necessary and material to the defense. Then the prosecutor is going to say no, of course he's going to say no. Then we have to go to the judge, then we have to lay out our whole case to the judge as to why that witness is relevant, necessary and material to our defense. It could be a fact witness or it could be an expert witness, it doesn't matter. We have to present our case to the judge in front of the prosecution, there's no ex parte hearing and to me that's problematic.

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That's where I come to the point about my concern with evidence development. We have no subpoena power. We don't have the authority to get evidence, we don't have the authority to get witnesses. If I want documentary evidence, if I want a witness I have to go to the prosecutor and ask the prosecutor to get it for me.

To some degree, having that budgetary authority would help us in that regard. Again, that's in a fictional world where there are no limited resources. So long as we continue to live in a resource constrained environment, we've got to find another mechanism to solve that problem. I think one of the things that the Military Justice Review Group brought to the fore was the idea of a Magistrate's program. I hope that we can utilize that Magistrate's program to help us as defense counsel, hold ex parte hearings to help develop that type of evidence that we need to defend our clients without having to lay our case out.

Capt. Price:

Briefly I'd like to re-emphasize something that General Baker said earlier. Institutionally the man train equip component of the mission is true for all. I think it's essentially the same in each of the services. Whatever structure we belong to is responsible for that. The cases themselves, the funding of the cases themselves in a command centric system, as we've discussed, involves the convening authority and ultimately the military judge. I think that bifurcation is critical to this follow-on answer.

To answer your question directly, I like the model where we have independent commands, apexing it at an individual. Obviously it's dependent upon a competent, fair, professional individual occupying that position. That's a significant responsibility, I like it though. We have equal pay, we have similar promotion schemes where folks are advanced—I'm not aware of any statistical anomalies or differences—we have a lot of back and forth now. This is where we may be very different, and I learned this in the MJERG, from that and the Article III, the practice in the states and the federal district courts.

I think most of us probably believe, as General Baker articulated earlier, that you're a better defense counsel having been a prosecutor, you're a better judge having been both, and we haven't even talked about the Staff Judge Advocate who is the in-house counsel. My personal view is it's difficult to be a competent Staff Judge Advocate and advise a commander on military justice. It's most important that you've been a defense counsel previously to understand that side of the equation. I suspect that would be an interesting question that the majority of us probably believe there's tremendous value in that cross pollination.

To maybe answer your last question, that's not uncommon to the military

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model. In that regard, we're not much different from most other communities. That wouldn't be as shocking to military members that they may see you in different places, as it may be on the outside.

To answer your question directly, if I could improve that model in concurring with Colonel Newman, I do . . . I would advocate for some level of independence within the defense bar for investigation, for access to experts. Where you didn't have to actually make a showing to the convening authority or the judge. Obviously that's ripe for problems and challenges. I think we're moving that way in the Navy, partially because the RSP looked at it from the outside. I do believe that's an area where we can improve the quality of our defense services. Obviously, managing that would be a greater challenge.

Neil MacBride: Thanks.

Judge Cardone: All right, Judge Goldberg.

Judge Goldberg: Do you gentlemen ever get tired of people saying to you, "Thank you for your service?"

Thank you for your service.

BGen Baker: Thank you for your support.

Judge Goldberg: I have some experience in the civilian criminal justice system, but no experience in what you folks do. What I know about military prosecution, you could fit into a thimble so, I have some really basic questions. I thought I was following everything until Colonel Newman talked about going to the prosecution for resources, so I need to get that straight in my head for a second.

Why don't we take a really simple, if we can, hypothetical sexual assault case. Prosecution needs a DNA expert. First, really basic question. Does the prosecution have to go to the convening authority to get money to hire a DNA expert?

BGen Baker: In theory, yes. In practice, no.

Judge Goldberg: Could you explain that?

BGen Baker: The rules say that . . . Rule for Courts Martial 703, says "the parties go to the convening authority to approve funding." Having sat in all of the roles in the process, the prosecution is going to get a DNA expert in a sexual assault case.

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Judge Goldberg: Who signs the . . .

BGen Baker: Here's what's even crazier . . .

Judge Goldberg: the paperwork?

BGen Baker: It depends who the DNA expert works for. If the DNA expert is a government employee, the investigators in the Navy Marine Corps, NCIS, is going to send that piece of evidence off-

Judge Goldberg: Let's say it's an outside . . .

BGen Baker: If it's an outside expert then the . . . yes, then the prosecution would go to the convening authority. Then what's even crazier, is the convening authority would approve it and then a different person actually has to write the contract. The convening authority doesn't have contract writing approval. For a lot of our experts, we have an in-house- DNA is a great example. There's a lot of government DNA experts. The investigators are going to already have that done, when the case comes to the defense they're going to want their own. Well, they're going to have to go to the convening authority to get approval for their expert.

Judge Goldberg: Let's just say, I'm tweaking the hypothetical out of reality a little bit, but let's say, before that . . . I think you just said it, the next question is, once the prosecution is brought, the defense says, "Ah, I needed a DNA expert," and the defense attorney then has to go to the convening authority as well to get their own expert, right?

BGen Baker: Right.

Judge Goldberg: The part I missed is, I thought there was . . . Colonel Newman said something about . . . before that step the defense has to go to the prosecution?

BGen Baker: Yes, that request is routed through the trial counsel. In the Commission System, we've essentially done away with . . . we have a lot of ex parte requests. So, I'll let these guys talk about the . . .

Col. Newman: What General Baker says is correct. The way that request would work is I, as a defense counsel, would have to lay out in writing why I think I need that expert. I would have to submit that to the convening authority, through the prosecutor. The individual that we refer to as the trial counsel.

Trial counsel would then chop on that and make a recommendation to the convening authority. It will also go through the convening authority Staff Judge Advocate who will make a recommendation on whether or not it

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should be approved.

Judge Goldberg: Those disputes are ultimately decided if the convening authority says no for whatever reason, just follow my basic, hypothetical, the judge, then decides whether to allocate the resources or not.

Col. Newman: Post referral, yes sir.

Judge Goldberg: Okay.

Col. Newman: Prior to referral we just have to bide our time.

Capt. Price: Referral to us is the formal charging and referral to a Court Martial.

Judge Goldberg: Understood. What is your collective experience, as to whether an understanding of the inherent problems of the defense having to lay out what they want to do, but in my hypothetical understanding, it's really simple. The prosecution is going to know that the defense is going to have to hire a DNA expert, so there's no great revelation there.

In your collective experience, are the judges in your system supportive of defense requests? The prosecution has to ask, as well, maybe you could talk about that, as well. Do they meddle, for lack of a better word, and say, "Oh, well maybe that experts not necessary, or let's save some money, or you know what? This is taxpayer money," or are the judges more differential to your mission?

Col. Newman: It largely depends on the judge, that's the first answer. Secondly, the first thing the judge is going to do, is going to ask . . . we are going to have . . . there's case law out there that talks about us having the ability to meet with an expert that meets our theory of the case.

The first thing the judge is going to do is ask, "Why this guy and not a reasonable government substitute?" A lot of times that's the compromise that is reached, is they give us a reasonable government substitute. Not the person that we want, not the person that fits within our theory of the case, be it DNA, or whatever. We get a reasonable government substitute from the Navy Hospital, or from USACIL the Army Criminal Investigation Lab, or from AFIP, the Armed Forces Institute of Pathology.

We get what the government believes is a reasonable substitute and we work with that.

Judge Goldberg: Do you have any recourse, if the expertise of the expert approved for the prosecution is so superior to the defense expert?

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Col. Newman: Yes, there's recourse . . . there's an Article VI . . . you can do a writ to the appellate courts, but that's going to be denied.

BGen Baker: The other recourse is to litigate the issue and to continue to bring it back to the judge. That's part of a flaw in our system is the delay it takes from defense counsel concept if I need 'X.'

This is really exasperated in the commissions system, where the defense counsel decides that they need a particular expert. If the convening authority doesn't approve that then it has to go to the judge and that can take months. Until somebody authorizes you to do that you can't get that expertise. On the flip side, the prosecution has . . . they have all the law enforcement assets to include reach back to experts that we just don't have.

Capt. Price: I would take a little different view, only . . . I don't think conceptually, and I think it's important to understand there's a statutory basis, I believe Article 46, to provide equal access.

In my experience it's not so much access to the expertise . . . and our judges . . . any judge wants to ensure that they have a sound record when they go forth on appeal. There are a number of cases that have been reversed because of an inadequacy or an inequity with respect to the expertise provided. Particularly when a good record is made as to the importance of an individual expert.

I would agree with Colonel Newman, absolutely. The majority of the litigation and a greater challenge to the defense bar is obtaining, perhaps, their expert—my term, not a legal term, "expert of choice." As opposed to . . . and I'm drawing a blank on the actual language, it's not reasonable substitute. Does anybody remember the . . . there's a term it's escaping me at this point, but someone who's essentially an adequate substitute for that individual, I believe may be the case law phraseology.

This is actually very heavily litigated. I'll use by way of example, a trial just recently in a court with my counsel, they had five experts in a sexual assault case that were in the trial for two weeks, all provided by the government. Again, all of that was a product of very aggressive, very zealous pretrial litigation. The judges essentially ordered their production, not all of them actually, the convening authority ordered the production of two or three. The judge essentially concluded. It does vary by judge no question and it does vary over time.

I think particularly as we get more into complicated cases there's a clear awareness, and I'll use my experience by way of example, that law existed on the books when I was a trial defense counsel in 1989; it was nowhere near as well understood or exercised. This is all post-*Ake* (*Ake v. Oklahoma*), but

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nowhere near as well understood or exercised as it is now by our counsel. I think that's actually true across the services. Our defense counsel assistance programs are really zealous on pushing access to expertise. Candidly there are a number of folks out there that we know about, that we talk to pretty frequently, that said that as a formal matter to get the person paid and produce the trial you have to do exactly as described. Submit the request.

I would add one other thing. One of the MJERG proposals was actually, as addressed here, to one provide judges with pretrial opportunity to rule on things like experts and secondly to look at things like issuance of subpoenas. Potentially, even, and I don't believe this made it into the final legislation, so I wouldn't want to be quoted, some consideration with respect to ex parte communications from the defense bar. Those were examples of where we learned that our system could be improved by looking at the Article III.

Col. Newman: Just to clarify my comment, the judges typically are very receptive to our requests. They . . . we have good judges. My concern is that, I as a defense counsel have to lay out my case in an open forum and describe for the judge why it is that I need that.

BGen Baker: Experts aren't the problem.

Judge Goldberg: Excuse me?

BGen Baker: Experts really isn't the problem. Ask Colonel Newman how he gets a fact witness.

Judge Goldberg: How do you get a fact witness?

Col. Newman: I have to go to the prosecutor. I ask the prosecutor for, you know, I need Lance Corporal Belt Buckle to come in from California. We're in Camp Lejeune, North Carolina. I need to ask Lance Corporal Belt Buckle to come in to testify, to impeach. He's going to say, "It's too expensive."

Judge Goldberg: You know what you folks are doing? You're making the defense attorneys on our panel nervous that we're going to propose something like . . . the defense bar has to go to the prosecution.

I just have one really quick question, one more quick question. Did you . . . did one of you say that when charges are brought automatically it doesn't matter what your financial situation is, you get counsel?

BGen Baker: Yes.

Judge Goldberg: When a civilian counsel comes in, what happens to the military counsel?

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- BGen Baker: The military counsel becomes what's called an associate defense counsel. The military counsel stays on the case. Who within that defense team serves as lead counsel is an issue between the client and the defense team, but the military counsel stays on the case, unless released. We also have the— besides your right to civilian counsel or detailed defense counsel in my case, because I have some civilian employees and some military employees—you also have the right to request an individual counsel that you want. Another military counsel, you could ask for them to come defend you and if they're available they will.
- Col. Newman: Typically when that IMC request is approved, the standard is that the detailed counsel is relieved unless there's a reason to keep him or her on.
- Lt Col Fanniff: Ultimately that decision in the Air Force falls on me and whether I keep that original detail counsel on when the individual military defense counsel is appointed.
- Col. Newman: When we make those decisions we have to be very careful because don't want to give the appearance that we're using that authority as a sword to run up costs. It's a very delicate decision sometimes as to whether or not the IMC is approved or not.
- Judge Cardone: Alright. Judge Walton.
- Judge Walton: General, I feel your pain in reference to the Guantanamo Bay detainee cases because as a district judge in Washington I was assigned the largest number of habeas detainee cases and I issued what I thought was a well-reasoned opinion setting forth what I thought were the basic due process rights they were entitled to. The court of appeals rejected every one of those positions.
- One of the things that you've expressed, which is a concern that we have in the civilian world also, is the lack of resources for defense counsel. What impact do you think what you've indicted regarding the lack of resources has on your ability to provide quality representation to your clients?
- BGen Baker: It absolutely has an adverse impact. I'll just confine this to my current job. I sat down and I made a resource decision based on what I think are the basic requirements to provide an ethical and zealous defense for our clients. I made a conservative view based upon twenty-five years of doing this. The convening authority gets to make a decision whether my assessment was right or not. In my view, if it doesn't approve what we've asked for it's going to absolutely adversely impact our clients. It's hard to describe the scope of the work particularly in discovery and in other areas of our cases.
- I don't have enough people to do that job. When I took over my job I told my folks, in the military we were always told you can do more with less, and you

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suck it up and move on. They need to stop sucking it up and start asking for things, that's . . . we want the process to be fair. We need the resources, right now I don't think we have the resources to make that the system is fair.

Judge Walton: At bottom, I think our major concern, I'm sure it's a major concern of yours, is whether we are wrongfully having people convicted because of lack of resources.

Have there been any documented cases where it's been shown that individuals have been wrongfully convicted and you can attribute that directly to lack of resources?

BGen Baker: I can't say that, there's been so few people convicted in the Commission System, I'll let one of my colleagues answer that question.

Judge Walton: What about in the non-commission system?

Col. Newman: I can't think of any off of the top of my head. There were a series of cases where one of the DNA experts from one of the Army Criminal Investigation Labs had been, for lack of better words, inflating his figures.

All of those cases got review, all of those accused were notified by the Assistant Judge Advocate General of the Navy for Military Justice. I can't think of any particular cases, but I will say and I've been quoted on this before, no one here thinks we have a perfect system. Unless you can guarantee me we have an absolutely perfect system, somebody out there has been wrongfully convicted of something in the military. We just don't know it.

I guarantee you we don't have a perfect system. I've been doing it too long and know better. In direct answer to your first question to General Baker. How does it impact our function as defense counsel? Defense counsel end up having to work as investigators. They have to go out and do those things that investigators would typically do. Defense counsel have to have, when they're conducting witness interviews, need to have what we refer to as a "prover" in the room.

They bring in another lawyer who sits in the room with them. Then when that witness goes south on the stand, you bring the prover up just to take the stand and impeach. It adds a lot to their workload. That being said, my defense counsel are doing exceedingly well. They're performing well above standard. They're getting exceptionally good results, but they're getting exceptionally good results under what I consider to be difficult circumstances.

Judge Walton: I don't know if you can quantify this, but how many individuals are your

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lawyers representing at any given time?

Col. Newman: Jeeze, I had that figure last week. I can get back to you on an exact number if that's okay, I don't want to guess.

Judge Walton: There's no limitation on how many cases they can have at any given time?

Col. Newman: I will say that we try to limit . . . we try to keep their caseload commensurate with their ability to handle cases. In our day when we were line defense counsel, line trial counsel, we were carrying twenty-five, thirty, to forty cases. A lot of them were small time cases though. We don't prosecute the same type of cases today that we did ten, twenty years ago. As General Baker has said on a number of occasions, our litigation in the military, our numbers may be going down, but the nature of the litigation is getting increasingly complex.

I think that's mirrored in the civilian sector as well. Because the litigation is becoming so complex, the defense counsel are finding themselves challenged to play both the representative roll and do the things that a paralegal or an investigator might do.

Judge Walton: Does that, is that complexity the result of any particular thing? The nature of the case or the nature of documents that are now being produced?

Col. Newman: I think it's a function of the wars, quite frankly. I think after September 11, there was a switch that was flipped. Commanders decided that they would rather dispose of low level misconduct as quickly as possible, so they can get their units to the fight. The cases that we used to prosecute, the single spec, —what we call Single Spec 112 Alpha— single spec drug case, wrongful use case, for marijuana or something like that. We would have prosecuted back in 1995. Today you're going to find that guy going to administrative separation board, go through non judicial punishment and be separated, rather than going to prosecution.

A single spec unauthorized absence, where a kid doesn't come back from leave or something like that. Those are cases that are going to be handled administratively, whereas in 1994, 95 we might have prosecuted that case. The nature of the cases are now sexual assault, complex litigation type cases.

Judge Walton: Well, as my colleague said, thank you for your service.

Col. Newman: Thank you, sir.

Judge Cardone: Mr. Cahn.

Reuben Cahn: First thank you for the, these cords are so short, thank you for the extensive

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written comments. They were very helpful. At the end of reading them I thought I understood things, I now know I understand nothing about your system.

While I have some questions, which will probably only increase my ignorance, but let me begin. You mentioned that when you have to go to the judge to ask for resources. That can't be done ex parte, you've got to disclose your entire case to the prosecutor. Is that the same when you go to the convening authority for those resources?

Lt. Col. Fanniff: I can speak for the Air Force. We have to lay out to ultimately the prosecutor that its routed through, exactly why we think we need that expert and exactly what they can provide that we cannot do on our own. I guess the answer is yes, that they will see. Ultimately if I am going to the judge, it may be even more extensive what I'm putting it in front of the judge in order to justify this expert, but they will know what it is I'm looking for from that expert when I make that initial request.

Col. Newman: That's exactly right and when General Baker had my job I was a Staff Judge Advocate at the 2nd Marine Aircraft Wing. One of my common indictments of his defense counsel at the time was that they were too coy as they were making submissions requesting expert assistance. I couldn't tell why they needed it. He would complain to me, "Well, we're not going to lay out our cases for you."

You can see how that's been playing out for years. The submission has to include why you need it and it has to be pretty specific, otherwise the convening authority doesn't have the ability to approve it. He's got to have a reason to approve it.

Reuben Cahn: What discovery obligations are there on the prosecutors with regard to their case?

Capt. Price: We have broad, broad base discovery. One of the material changes in our system that we're all still adjusting to is a change to our preliminary hearing model. We used to have Article 32. It remains the same codal provision, but it used to be a full blown, or could be a full blown hearing with cross examination of complaining witnesses. Some lessening of the rules of evidence, but very comprehensive. A few years back Congress changed that for any number of reasons. I think we're still adjusting is probably a fair statement, but even at this point, the president when implementing the rules, requires the prosecution and even prior to that to turn over any documents that were forwarded with . . . that resulted in the charges.

Prior to trial, our discovery rights are about and this . . . I'll flash back to my MJERG experience . . . we did not find a system that had more favorable

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rules with respect to discovery. The issue was timing. No real discovery right attaches until charges are referred which could be very late in the process obviously.

The thirty-two piece used to be an opportunity to discover a lot about the government's case. Very liberal, I guess is the best way to phrase it. I will say this, and we just had a meeting recently where we learned that some of our services have employed highly qualified experts. Our sense is, on the prosecution side, some of these folks are bringing practices, perhaps from the civilian world, that are less disclosing, if that's a fair statement. We've been . . . each of the services have been wrestling with that in different ways. The rules themselves are very favorable and the judges can . . . I can having been a judge and Judge Baker I'm sure, would say this . . . if you saw the government messing around with their discovery obligations, that would cost the government time. You would not hold that against the accused.

The system is set up to be efficient and one of those efficiencies is the discovery piece, whether everyone complies in every case as well as they should. The rules themselves are, I think very favorable.

Reuben Cahn: And those rules are uniform across the services?

Capt. Price: Yes the uniform code of military justice applies to all of the services.

Reuben Cahn: Okay so . . .

Capt. Price: Including the Coast Guard and the rules for Courts Martial are issued by executive order and they apply to all the services. Having said that, again MJERG experience, it was stunning to me how fundamental things that appear to be the same are done very differently in each of the services. It's difficult for each of us to speak with absolute certainty about what the other services do. The rules themselves are absolutely uniform. There are lower level regulations the services may implement and may expand upon those rights that may vary by service.

Reuben Cahn: One of the questions that we're very interested in, that we've been looking at is the ways in which burdens on obtaining resources dissuade it's people from making the requests in the first place.

You have a more burdensome system in place then we have, for our CJA lawyers go to the judge, they go ex parte, they make the case for the expert or the resources they need, but they don't have to lay anything out to the prosecutor. Of course, nor does the prosecutor lay much out for us.

I'm wondering what your experience is in supervising lower level defense counsel. How do you find that they adapt to your system? Do you think

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when you're reviewing their cases that they're making optimal use of expert resources in their cases, of investigative resources, of any resources they need?

Col. Newman: I believe they are, but under the constraints of the system in which we operate. As Captain Price mentioned we have highly qualified experts. We have hired two in the DSO, these are both thirty year veterans of the San Diego County Public Defender's Office.

We have one at Camp Lejeune and one at Camp Pendleton . . . one on the east coast and one on the west coast. What counsel are doing is relying on those two parties to provide them with a sight picture of what experts they need and why.

That's been very helpful. One of our critical shortfalls, I can't speak for any other services, but I think it's probably the same. Is the inexperience of our counsel. They come in, typically straight out of law school. In the Marine Corps they go through the six month basic school, and then in the Naval Justice School, in the Navy it's a little different.

They have very little experience litigating. In order to address that critical short fall in experience, we hired these HQEs, as we call them. They've been very helpful to us in helping to develop motions and skill sets- training and whatnot for our young counsel.

To the extent that the system will allow. My counsel are utilizing expert witness and expert assistance to the extent that they can. As I've said, they try to be as coy about it as they possibly can until they're required to meet their burden.

Reuben Cahn: Let me ask you, Captain Price. You've got kind of a control group experiment going on because you now have this investigative unit, or Corps, or whatever. I don't remember the acronym you used for it. Are you finding that now that you have that that there's been any change in the way in which your trial counsel are investigating their cases?

Capt. Price: I wish I could speak with knowledge. My two have not reported yet. One reports in later this month—I have one DLSSer reporting to my office in Washington and one reporting in Naples, Italy. I can speak generally. It's still a nascent program. We're talking six months or so since the first folks have been aboard. I think like anything else when you bring in expertise, we recognize now we had some blind spots we maybe didn't understand before.

I agree with Colonel Newman, our counsel do as best they can. We have differing degrees of paralegal support in the service as well, so I won't speak to that. In respect to the Navy model we're actually certifying paralegals.

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We're actually discovering that our paralegals often bring investigative skills that our attorneys don't have. That's not a historical model, I can tell you fifteen years ago that was not true in the Navy JAG Corps. I guess to answer your question, I don't really know, but I think we will get better. I guess that means we haven't been doing it as well as we could have. If that's an answer.

Reuben Cahn: Yeah. That's helpful

BGen Baker: I have investigators in the Commission System. Do they have the exact skillset that we want? No, but that's a conversation for another day. Absolutely, I see my counsel in the Commissions System approach cases with much better expertise, with an investigative plan than the services have. They don't have the investigative resources that I do. Having been involved in a system that has it, if I ever go back, that's going to be one thing I'm going to advocate for.

Reuben Cahn: You actually brought up an interesting point, which is a thread that I saw running through at least your testimony. Your written testimony, that of Colonel Fanniff and Colonel Newman, which was about the evolution of your systems and the advocacy for change coming from within the system.

It seemed to me if I read your testimony correctly, the dissatisfaction within the systems following the Vietnam era lead to changes that took place at various times in your systems. I'm wondering if I could get each of you to talk a little bit about how . . . where did that change come from? Was there a top . . . a recognition at the top tier that filtered down? Is it dissatisfaction that came from the bottom that moved the services? How did those changes come about to a more independent defense function?

Capt. Price: Could I attempt that one first? First of all, probably the biggest change in the code, when it first became uniform was post World War II. The change before that, of course, was post World War I. The Uniform Code was absolutely the biggest change. It went into effect in 1951. The defense bar reporting to lawyers was essentially the Secretary of Defense in '73 directed all of the services to look at creating a bar that reports to other lawyers. Prior to that, in the Navy by way of example, many of our defense practice was actually done by non-lawyers. Very different model. But, I think the '73 Sec Def memo that directed this more independent defense function . . . again, we each did it differently . . . in that regard it was uniform. What we did after that . . . I think we . . . was that a fair statement?

BGen Baker: Yeah. I gave a talk on this for one of Colonel Newman's CLEs. Where change comes from are from the litigants and the people involved in the process. Is it the people at the bottom? Yes. Is it their managers? Yes. Is it the people at the top? Yes. You have to create the record to make the change. That's why this panel . . . this is such an impressive expenditure of resources,

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time, effort and energy by the Office of Courts. This is just incredibly impressive.

Colonel Newman and I effected change in the Marine Corps through persistence and standing on the back of forty years of work of our predecessors. Change comes from those involved in the process.

Lt. Col. Fanniff: I would agree. With the Air Force, they looked at the model at all levels and saw an area where they thought they could improve it. Ultimately it was the two star general who made that decision, but it was the people on the ground feeding up information that ultimately lead to that two star to come to that conclusion.

Col. Newman: Change is hard. It's hard because it . . . not just because it costs money but because it's institutional muscle movement and institutional memory. People like the things the way they are, but change is good.

In our particular case, as General Baker said, we had forty years of a record upon which to rely. I think if you talk to my boss, Major General Ewers, he would tell you the one thing I'm good at is writing strongly worded letters. We've been writing strongly worded letters for forty years, men and women like me. Unfortunately it's only when there's a crisis be it small or large, that those strongly worded letters become important. It's important to write them. I think it's more important to read them and consider them before the crisis hits, because then you're not in a reactive mode, you're in a proactive mode.

Over the past three or four legislative cycles there've been some sixty odd changes to the Uniform Code of Military Justice. It's largely because we're in reaction mode to things we weren't doing well before. That's a long answer to your question, but my response is don't wait for the crisis to occur when you have the opportunity to change now.

Reuben Cahn: Let me ask you to loop into that something else that you spoke about in your written testimony. That was, the dangers of making small piecemeal changes. Could you talk a little bit about what you meant and what problems you've seen arise from that?

Col. Newman: Well, yes sir. What I was trying to get at was there's a tendency to try and execute change within existing authority rather than do the hard thing, which is, to change the authority. Whether that be statutory legislative proposal, or rewriting the regulation. There's a tendency to try and execute that change in small measures and small doses. We did that for forty years. I think that those small changes are what lead to the requirement—some may say it wasn't a requirement, but I think it was—the requirement in the Marine Corps to reorganize our legal services, as we did in 2012.

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It was 2012, right?

That over years of small, kind of, left and right tack changes, we ended up with structure that didn't match our man power. We had people in billets that didn't exist. People in jobs that didn't exist on paper. As a community, we looked over strength, but when you actually looked at the jobs we were doing, we were actually under strength.

It created a mismatch in resource allocation. General Baker can speak much more eloquently to that, having been involved in that process more than I was. That in the end, lead largely to the problems that we had in *United States v. Lee*.

Reuben Cahn: That's the case that you referenced in your written material?

Col. Newman: Yes, sir.

Reuben Cahn: The imbalance in resources.

Col. Newman: Yes, sir. Full disclosure, I was deeply involved in that case because I was the Regional Defense Counsel at the time. It was a matter of, they needed lawyers to go to the fight. They were taking lawyers from the LSSS to go support the operating forces.

We were . . . but what they weren't taking with them was the military justice. The cases were staying back. We still had to represent Marines and they were still prosecuting Marines. We were diminishing resources, increasing demand, so we made the best decisions that we could under those circumstances. The problem was that we weren't properly structured. I'm not sure I answered your question.

Reuben Cahn: Yeah, that helps. I'd ask if any of the others of you, General Baker, Colonel Fanniff, Captain Price, have any thoughts on those sort of system change issues. You've gone through a period of significant change over the last forty years and we're looking at whether or not we should engage in that process right now.

BGen Baker: I think Captain Price . . . Captain Price just spent a year, year and a half looking at our system and proposing article by article with a group of people, proposing change. It wasn't piecemeal, it wasn't . . . it was a slow deliberative process and they only want more time to it.

I guess I'll let Captain Price answer that.

Capt. Price: I'm not sure I can. I'll step back to my organization, first, to the Navy. Clearly change . . . movement from all levels, I think in the Navy JAG Corp,

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and I speak candidly when I say this, we've had some visionary leadership for a number of years that have focused. The Navy has put a big focus on strategic thinking and our leadership has bought into that. Our changes, and as I noted in my comments here earlier, we haven't really changed that much.

The commander remains the commander over the commands that provide the support, prosecution and defense. The other aspects of their responsibilities have shifted back and forth. The structure has largely remained intact and I think that the vision, and I'm not trying to sound . . . this is my personal view . . . I think their vision was to align our organization with the Navy as an organization to best posture us to accomplish our mission.

I'm actually generally satisfied with the solution. I was involved with a couple of the steps and, candidly, at each of the phases was not particularly supportive as these changes were underway.

We had the advantage of an organization that was shifting as well. I think what's important to remember in the military—and we sometimes forget this—go to the MJERG as an example, our Military Justice System is intended to function and not just survive, but function and perform well, both in a time of relative peace and security and in a time of absolute world war with a complete conscript organization. It's this amazing model that is to expand and contract as the demands may require. I think that visionary leadership is critical. I think someone, using my community as an example, the ability to look and see what the challenges would be in the future.

Again, I can't speak knowledgeably, I'm aware of the line up within the Judicial Conference and the Administrative Office of the Courts and the like, but I can't speak knowledgeably. One interesting thing to me, and I don't know who the senior advocate is for the public defender model that exists . . . I think it's important to have a person who literally is responsible for the mission and whatever that mission is subordinated to, understand how it fits together with the other mission to best figure out how to align it.

I know that's not an answer . . .

Reuben Cahn: No, actually that is an answer. That's a helpful answer.

Capt. Price: As an . . . aside, when I was looking at our model one thing that jumped out at me was the chief of staff function within our organization. I've talked about the Commander Naval Legal Service Command and our model. Three chiefs of staff who essentially perform the functional management day in and day out. They take the temperature of the organization, and we're relatively small.

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The Navy defense bar of real litigators is only about fifty-one lawyers. We have ninety folks, thirty of those, a third of them, are new judge advocates who are handling the low lever administrative stuff. Our real core bar is about fifty, plus leadership is about sixty total. It's not that large of an institution. We feed constantly and we're constantly reassessing.

To go to the MJERG piece that General Baker mentioned, I think one challenge with that model was that we were given a reference point. That being the federal-civilian system to look at where we were different. If we were different and it made sense to stay that way, do so. If it didn't at least think about it and look at best practices.

That was really eye opening to have a model to look at. My sense from talking to Arin, is hopefully we've provided you with some comparative models and I hope you recognize, I know we don't necessarily recognize, the distinctions between each of our little models that operate under the same Uniform Code. We have structural differences. I suspect that our organizational leadership would feel that our models suit or meet the mission requirements of their respected organization. Although each of them can be improved.

I don't know if that's a fair statement.

Judge Walton: Can I ask a process question? I understand your concern about saying that there are risks at seeking incremental change. If you philosophically believe that systemic change is needed but you have questions about whether that systematic change is achievable, are you saying that it's better not to even seek the intermediary changes or what do you do?

Col. Newman: I do not believe that you do nothing. Doing nothing is never an option. I believe that you take the change that you can get. This is another conversation that I've had with General Baker over the years. Take the change that you can get and project forward. Take what you can get, and roll with it, and develop it and build it. Keep building the record.

Those are his words, not mine. Build the record.

People have to write, they have to write articles, they have to write memos, they have to speak before panels and build the record.

Judge Walton: Do you articulate ultimately what you believe is necessary, but as an alternative . . .

Col. Newman: Yes, sir. Captain Price is 100% right. There has to be somebody who has the vision for where you want to take this organization. At some point in time someone just has to make a decision.

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BGen Baker: Related to that, well I don't know if any of it is related, but this is what's running through my head. I really challenge you all as you do this to examine your existing practices, the way we've always done things. When Colonel Newman, and I, and Christian Capece is in the back he's going to testify next, grew up in the Marine Corps, it was not uncommon that you would prosecute a case and finish your time as a prosecutor— or usually reverse— you'd finish your time as a defense counsel, you go over to be a prosecutor, and you'd finish up your defense cases. Nobody thought anything about that.

We had a whole bunch of very smart, motivated, intelligent leaders like us. Nobody thought anything about that. Now that we look back, I can't believe that there's certain practices that we did.

So I really challenge you to . . . and this is an opportunity to make substantial change if it's needed. Really this is a wonderful opportunity to examine your system. Set that strategic goal and then try to achieve it.

Judge Cardone: I have a question because I think when we started, I think it was General Baker, but I'm not positive, one of you said, "I can't believe you're thanking us, or wanting to hear from us because we look to the system that you have," so I want to ask each of you what it is about our system, and what it is that you look to, what you see from the outside looking at us that you would like to emulate or that you think is a symbol of the way things are done right, or that you wish you could incorporate.

I'll start with you, General Baker.

BGen Baker: I'll do this from a Commissions perspective. In 2009 the Military Commissions Act was passed. Buried within the Military Commissions Act was a sense of Congress that talked about the way the commission's defense should be resourced.

They suggested that we should be resourced along the federal model. What do we see that when I look out at the federal system, that I probably really don't know as much about as I think that I do, one is a group of incredibly experienced criminal defense attorneys. They have a lot of training and they seem to have access to resources where you don't have to go to the prosecution to get them.

I read a whole bunch of stuff, this was on your website, submissions from Federal Defenders and others that talk about the challenge, absolutely there's a challenge that I didn't know existed. There's got to be a way to provide a defense organization, adequate resources, and trust the supervisors of those defense organizations to provide those resources. No system yet has that, I feel like you guys are closer, but I didn't realize, you've got the judges that

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are making that decision and not the federal defenders.

One word is “professionals”, we look at the federal model as having a wonderful group of professionals.

Judge Cardone: Colonel Fanniff . . .

Lt. Col. Fanniff: I would say, much like the Navy has started with having their own defense investigators, that is something that we’ve looked at the federal system and I think it’s definitely an area of need in our system.

We are relying on our lawyers and our paralegals to do all of the investigations for the cases. Only in the most serious of cases are we getting any kind of investigator appointed by a judge, or a convening authority for that matter.

That is one area where we’re looking to improve and follow your system and how you guys do it.

Judge Cardone: Colonel?

Col. Newman: I agree 100% with what General Baker said, it’s the level of professionalism and experience that you find in the Federal Public Defender’s Office. I think that you opened up this portion of the hearing by suggesting that we don’t really have a dog in the fight because we’re military guys, but that’s only true for me until May 13th.

As of May 13th, I will be the Federal Public Defender for the Northern District of Ohio.

[applause]

Thank you. I do have an interest in this and I’m excited about the opportunity. When I got the job, one of my first comments was, “Finally, I got my investigators.” But, I had to leave the Marine Corps to do it. It’s the level of professionalism, it’s the access to resources, I understand there are challenges in the allocation of resources. I would say that one advantage that I have as the CDC, is the ability to assign cases. That authority vests in me. As I said in my opening remarks, that is the most important responsibility that I have, it’s the most powerful tool that I have, is making sure that the right counsel is assigned to the right case.

There needs to be one party who’s responsible for that.

Judge Cardone: Thank you, and Captain Price.

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Capt. Price: I would say this will sound somewhat uniform for a change, the access to investigators and the consultants, the experts. Those are two things that I think we look at as the gold standard. I don't understand all the limitations that may exist, but at least by model, those appear to be of significant benefit to both, in my view, the defense bar and the interest of justice in the long term.

I understand there to be constraint issues with respect to the resources, but we can do better.

Judge Cardone: Thank you. Any questions back here?

Gentlemen, thank you so much. Thank you for your service, first of all. Thank you so much for being here today. We so much appreciate it and it's been very enlightening because we really are trying to figure out what's the right thing to do and hearing from you, honestly its been very inspirational in a lot of ways. Hearing from you has helped. Thank you so much.

I know some of you indicated you might have some things you want to add to your submissions, feel free once you get back to your office, or if you think of something that you'd like to let us know about. Feel free to give us any information because we really are appreciative of that, so thank you very much.