

Military-Justice_Judge-Margaret-Ryan

THOMAS NACHBAR: Judge Ryan, thank you so much for being with us today and taking the time to come out. We know that travel in these days is particularly difficult and I think students are particularly hungry to —

MARGARET RYAN: For Chick-fil-A?

THOMAS NACHBAR: —see people. What's that?

MARGARET RYAN: For Chick-fil-A?

THOMAS NACHBAR: Right. Well, and our students are anxious to see people coming from outside of Charlottesville in with the kind of experience that you have, and so we really appreciate your willingness to come down today.

MARGARET RYAN: Thank you so much for the invitation Your Dean is a longtime friend of mine we clerked at the same time at the Supreme Court chief clerked for Justice Breyer when I clerked for Justice Thomas, and we were remarking on the fact that our clerk years remains very close despite the fact that we might have differences of opinion about different areas of law and that we suggested that we should write an op Ed for the rest of the country that if we can do it, so can you. So you guys are very fortunate to have the Dean that you have.

THOMAS NACHBAR: Well, it's one of the things I think we really pride ourselves on at UVA, is that we do bring together people from a variety of different backgrounds with a lot of different understandings, and we host those kinds of conversations all the time. It's really what we think is part of our identity here, and so we're so glad to have you.

I was told that there would be a fire to be by the side of — so there's no fire but still, I really just wanted to have to structure this as much as an informal conversation as we can. I do want to be a little bit formal at the beginning, which is to issue a disclaimer about my presence here. I am clearly here in my professorial capacity, and not my capacity as a Reserve Judge Advocate in the United States Army, although I am incredibly proud of that service. I do want to make it clear that I'm here as a civilian.

MARGARET RYAN: And you're not responsible for any of my answers.

THOMAS NACHBAR: So, I think it's pretty clear that I'm not really responsible for anything. No one would put me in a position of responsibility if they could help it and certainly, I'm not responsible for your answers. And hopefully, not even for my own. We'll see.

So I really wanted to ask you — I wanted to start by asking you, you're an officer — you were an officer of Marines before you went to law school, and I was wondering if you could tell our students a little bit about that shift — in about how you went from being a line marine officer to becoming a Judge Advocate, and what that was like.

MARGARET RYAN: Sure. I was very fortunate. The jobs that I had in the Marine Corps — people sometimes think that the Marine Corps because it's the Marine Corps is anti-female or something like that. And if it is, I'm not a good living testament to that because I had every opportunity. I was a platoon commander, I chose my military occupational specialty to maximize my chances of being an actual leader of Marines, because there are some jobs that you're more likely to be able to have platoons and companies than others, and the communications field was one of those. And so I was able to be a company commander — I'm sorry, a platoon commander, an S3 officer, or company commander.

And then there came a point in time where I thought, I'm going to end up being a staff officer for the rest of my life, because the next natural progression would have been to be a communications officer for a division, or something like that. And most of those things were infantry or artillery, which at the time, women were not allowed to serve in those capacities. And my battalion commander, by happenstance, was a JAG — he was a lawyer — and he said, you know Meg, why don't you apply for this law education program? And I'd actually wanted to — thought about going to law school after college, but I didn't really like most of the people that were going to law school, and I hate public speaking, so why am I here? And so I just thought, I couldn't be a lawyer. I thought, I can't be a lawyer if I'm not going to be F. Lee Bailey, and so — but when he presented this to me later in time, I was like well, that sounds like an interesting opportunity. And so that's how I ended up going to law school — it was like oh, I love the Marine Corps but I don't necessarily want to be basically on a staff for the rest of my life. And so that was how that worked out.

THOMAS NACHBAR: And so you took advantage of the funded legal education program?

MARGARET RYAN: Yes.

THOMAS NACHBAR: Could you talk about that a little bit, and what that was like, and what it was like coming back to the Marines as a Judge Advocate?

MARGARET RYAN: Sure. So all services, I think to one degree or another, have a thing called law education program, which is if you are an active duty person in one military occupational specialty or another, you can apply for this law education program and depending on whether you get funded or unfunded, you have a commitment to pay back a certain amount of time. And you basically go to law school — that's your job. Your J-O — as Justice Thomas would say, it's your J-O-B. And so I obviously finished first in my class because I took my job very seriously, which is I'm — this is my job the Marine Corps has assigned me to go to Notre Dame Law School.

And it was actually great, going back into the field as a lawyer. Guess what — who thinks that military people like their lawyers? Does anyone think that the commanders want a lawyer to tell them that they can't do something that they want to do? The answer is they don't particularly — do you guys — you guys agree, right? Do they like us telling them what to do? They don't like us telling them what to do at all, and it's somewhat helpful, in fact I think very helpful if you come from the law education program because guess what — you have ribbons on your chest, your uniform is squared away, you hopefully are a good officer, and so they take you a little bit more seriously. Though I did have the colonel from HMX-1 tell me that if I came back one more time, he was going to throw me down the stairs. But that was — things happen, right? But you still — so I think there is some benefit to having that experience as a lawyer in the military, because they don't really like you to begin with, and it gives you a little bit more gravitas.

THOMAS NACHBAR: Was it —

MARGARET RYAN: Do you guys agree? Generally, yeah. But people would say — they were like, how can I be a good lawyer in the military? And I was like, be a good officer. Be a good officer — you have to be a good officer first, and then I think that everything else flows from there.

THOMAS NACHBAR: And did it feel differently being on a staff? So you had been in line positions and in a couple of different command positions, and then you came back and you were going to be a staff officer, right? And you were going to work on a staff — did you feel differently about that, or do you feel like law school prepared you for that in any particular way?

MARGARET RYAN: So I was — until I was aide-de-camp to the commandant I wasn't really on a staff so much — I was never a Staff Judge Advocate, I was a trial counsel. And so I worked on my own cases and communicated with the convening authorities, if that makes sense. So different commanders, they had their problem children that committed crimes, and I prosecuted their cases for them. And so I worked with the commanders and with my staff, or with the junior trial counsel. So the bad part of coming back as a FLEP person is that I was a senior captain and I had never practiced law in my life. But because I was a senior captain, all of a sudden I was supervising people that had more experience than I did, so that was a little awkward. But it just is the way that the military is, and I just had to get up to speed more quickly than I might have otherwise.

THOMAS NACHBAR: And so were there are a lot of Military Justice opportunities at Notre Dame? Did you get to focus on that at all in law school or did you really have to pick that up after you came back in?

MARGARET RYAN: At the time that I went to Notre Dame Law School, you were required to take criminal law and criminal procedure, and I took whatever advanced criminal law courses that there were, but there wasn't really a military law class at the time. One of the two classes — two of the three classes that I teach at Notre Dame are focused on military law. One is just a class in military law, which is basically, how do you practice law in the military based on Judge Maggs' — former Judge Maggs' book that he wrote with Lisa Schenck. Another one that I teach with Judge Hardy, who's replaced me on the court, is one on constitutional issues in the military justice system. But there were no courses like that when I was at Notre Dame.

THOMAS NACHBAR: And so I talk to students probably — every year I talk to a few students who are thinking about service and the Judge Advocate General's Corps — in one service or the other. Is there anything that you could say to them about the path to becoming a Judge Advocate?

MARGARET RYAN: Well first of all, I'd like to say I think it's a great opportunity to serve in the military. It's a great opportunity to serve your country and I think it's also a really useful career path for people that have any interest in litigation in particular. You will get more opportunities to do more early on than you ever will at any law firm — and do you guys agree with me? Yeah, yeah. Absolutely. My first case that I did was a contested rape case — it was a contested general court-martial case with members, which is with a jury. There is no — and I think it got reversed on appeal 10 years later, because I was like, and this person — I probably did bad argument. But you get a lot of chances to do things while working with some really great people.

In terms of the path to Judge Advocate — you guys are fortunate to have the Judge Advocate General School right here next to you, and I'm sure that people would be happy to talk to you. My experience is you need to have people that are able and willing to write you good letters of recommendation. You need to be physically fit in order to pass all of the things that you need to get into the military. Need to not have a criminal record, which hopefully you don't if you're at the University of Virginia Law School. And in timing, which is you have to pay attention to deadlines, which is they have very specific timing deadlines to get your applications in, and they take those things pretty seriously. So it's just a matter of organizing yourself and being prepared to understand it. You are going to be in the military, and part of being in the military is being physically fit.

THOMAS NACHBAR: Yeah, no — I think that's really helpful. I think sometimes people tend to pay a little bit more attention to the — whether the substantive demands, of legal demands, and don't think as much about —

MARGARET RYAN: You're going to be an officer. You're going to be an officer, and so being an officer has certain responsibilities. Oh, and don't say anything weird at your interview. So for example — no, so for example, and this is a true story — one of my students at Harvard was like, I applied for the Judge Advocate Corps and I was turned down. And I was like, well that seems odd.

But then I go around the class here, because they have classes of 600 — their 1L class is 600 — and so they don't know each other the way that you guys might know each other, the way that I knew people in my law school class. And so the first class, I go around the room and say, say who you are, or where you went to undergrad, and something interesting about yourself. Two, three interesting things about yourself, and I start out, and they're not very interesting so I won't repeat them here. But he said his interesting things were I'm a vegan, I'm a minimalist, and something else.

And so I said, did you tell them that at your Judge Advocate interview? And he's like, well yes. I was like, those are the kinds of things you need to tell your fiancée, like if you're getting married. I'm a vegan and a minimalist and I don't believe in owning more than 50 things. But do you guys disagree? That would just look weird. They don't — it's information they don't need to know. You're not lying, but it's just like, that you don't need to know. So don't say anything weird at your interview.

THOMAS NACHBAR: A matter of what you're going to emphasize — maybe diet isn't the most important thing to emphasize, or —

MARGARET RYAN: And so what's very interesting, because everyone is like, what do you do about a pair of socks? So a pair of socks counts as one item if you're a minimalist.

THOMAS NACHBAR: Yeah, I think that probably makes sense.

MARGARET RYAN: Yeah, I don't know.

THOMAS NACHBAR: I feel that way about —

MARGARET RYAN: I'm a textualist, so I would say no, it counts as two.

THOMAS NACHBAR: I feel that way about a bedroom set.

MARGARET RYAN: About what?

THOMAS NACHBAR: A bedroom set, I think is probably —

MARGARET RYAN: A bedroom set is one item? Yeah, I don't think he would agree with you on that, at all.

THOMAS NACHBAR: I guess I'd make a bad one. So in '99 you resigned from the Marines and you started the transition to civilian practice by clerking, which I think — that itself I want to ask you about. Is that common among your colleagues in the JAG Corps, that they would leave the JAG Corps and go clerk? Because it's a little bit later than — most students clerk, so I actually just wanted to ask you a little bit about that.

MARGARET RYAN: Sure. Well a couple of things, which is part of the reason I left the Marine Corps, is that they wouldn't let me do what I wanted to do when I wanted to do it. So when I left law school I would have been a normal person to go clerk, because I was first in my class, I was on law review — those are the kinds of people that usually are interested in clerking, and usually are able to get clerkships. And the Marine Corps said absolutely not — you can't. And I was like OK, I'm signed up — I can't, but I wanted to

— I wanted to clerk, and so when — my husband practices in a very niche field of law, he's an ERISA attorney.

There aren't a lot of places for ERISA attorneys to practice in the places that the Marine Corps has bases, and so when General Krulak was retiring, it was a perfect opportunity for me to say well, I can't imagine a Marine Corps without you, so I will leave, too. But it was mostly because I didn't want to have — my husband would have, but what was he going to do in these different places?

And so we decided I was going to get out of the Marine Corps and I said, well, I would like to clerk, and he said great — and I didn't know anything about it, and so I sat, I remember, at the Pentagon on days when I wasn't the main aide, reading cases. I'm like oh, who do I want to clerk — this person seems interesting, and this person seems interesting, this person seems crazy. And so came up with a very short list of people to apply to that were in the D.C. area, because I didn't want to inconvenience myself by having to go someplace else. And it ended up being a great transition between being in the military and being in private practice.

THOMAS NACHBAR: Have you seen a lot of other Judge Advocates make that transition from the military to private practice and if so, could you talk about that, and what you see? Because I think that is something that people think about if they're — whether they're going to serve for four or six years, or if they're going to make a career out of the military, whether they're going to make that transition to private practice.

MARGARET RYAN: Well, I think that very few people that go into any aspect of the military — it's not like everyone retires from the military. I left after 13 years, which I think is somewhat unusual because people, they're at someplace and they're like well, I started this so I might as well stay till I retire. And I was in a different position and just said, well, that's silly. I want to get on with the rest of my life and do different things. But I never planned on staying. You don't have to stay, and most people don't stay, but they come, they get experience. They may decide to stay but if they don't, I think you are positioned to do anything you want to do. I think your position to apply to be a law clerk, I think your position to apply to be at a US Attorney's office, I think your position to apply to be at a law firm.

Because guess what — people see US Marine Corps or United States Army or US Air Force on your resume, and they're like oh, this is a person that's going to be squared away and on time and not complain and work hard. And guess what? Guess what people value most in law associates? People that will get their work done and not complain. And when I was your age, that's what most people were like. It's not quite as common these days — no offense to you guys. But people complain a lot more and they want to work a lot less, but they want to get paid a lot. So it's a very bizarre metric. It's true.

THOMAS NACHBAR: It all sounds right to me.

MARGARET RYAN: So you really — it does make you — it makes your resume stick out, and I think you do learn a lot of valuable skills both about people and about the law in any Judge Advocate Corps.

THOMAS NACHBAR: Do you see — I guess what I'm wondering is, do you see a particular path? Because this is one of the things people will come to me, and they'll be thinking about going into the JAG Corps, and they'll be thinking well, they want to do a period of military service but then they want to be able to move back into practice. And I try to talk to them about it and I see a lot of them moving to government practice, some of them move into private practice. And I guess I was wondering, especially given your time in private practice, if you've seen a particular path that people follow, or if it really is a little bit more general than that.

MARGARET RYAN: I think it's as individual as individuals are. I think that it — you're not pigeonholed into doing anything in particular. I think that you can go into private practice, I think you go into government work. It's easier if you have a security clearance to get a job in the government — you also have a veteran's preference for federal government employment — I think for the rest of your life. Do you guys — that's correct, right? I'm not making this up? So they're like — I'm like — you're a little bit out of my wheelhouse. But you're not pigeonholed — you can still do whatever you want. You can pick up whatever you thought you might have wanted to do when you left law school — some other path that you might have taken but for being in the GI Corps, and you can just continue on — but with having that experience and credential behind you, which I think is helpful.

THOMAS NACHBAR: When you were in practice, was there a particular area that you worked in more?

MARGARET RYAN: I was a litigator, and what you do as a litigator is you take whatever case that your client has, and whether you're being a plaintiffs — whether you're defending them or whether you were going after someone that they want to go after — and the issues are as varied as your clients. And so you become an area expert for the moment on a particular area or a particular issue. I once knew more about lead paint than probably anyone, almost in the world. I'm joking, but no — because we were defending our client against the state of Rhode Island, where they were suing based on a theory of public nuisance, which was ridiculous. But it was based on lead paint and so I learned everything in the world about lead paint and lead paint experts, and everything like that, and what you could and couldn't do to keep things that had lead paint in them safe or not safe. And then the case was done and I flushed all that out of my brain and moved on to the next thing that we worked on.

THOMAS NACHBAR: Yeah, that's what litigation is like.

MARGARET RYAN: That's what litigation is like, which is different than what my husband does, which is he is an area expert in ERISA, and a particular area of ERISA, so he knows everything about it. You could call him at 2 o'clock in the morning and ask him about something and he knows it, always, because he's an area expert. So it's very different — being in litigation or appellate practice is different than being a tax lawyer, for example, or a labor lawyer.

THOMAS NACHBAR: Right, right. So other than your ability to get the job done and not complain, are there particular skills that you think you brought for being a Judge Advocate into practice that were particularly helpful?

MARGARET RYAN: Probably the same thing that helped me in law school, which is just discipline — being used to working hard and sometimes being tired, and still having to just get things done. And I think that that's an incredible — it's not like it's my personal attribute, but it's a good attribute to have as a law student and as a lawyer.

THOMAS NACHBAR: I do want to ask you about the CAAF, and I was wondering maybe if you could talk to us a little bit about the CAAF and how it's structured. I know it's a little for one of the things about being in law school, we read lots and lots of court decisions and we talk about Article III judges, and especially for the 1L's who maybe don't know the distinction between Article I and Article III, a little bit about how the CAAF works and how it relates to the military justice system?

MARGARET RYAN: Sure. So when he's talking about the CAAF, he's talking about the United States Court of Appeals for the Armed Forces, which is the court that I served on in which Douglas Maggs' father serves on, in which one of my very first law clerks replaced me on the court it serves on there, as well. How many of you are 1L's? OK, so a bunch of you.

There's no reason that you would know this, but Article III of the Constitution sets forth the United States Supreme Court and such other courts as they decide will be constituted. And there's certain things that the judges get to have — you guys know about separation of powers, right? You know that much just from like, whatever. And so one of the ways that the founders decided that they were going to protect the courts, which is that whatever else that the judges were going to have — life tenure and an inability to change their salary. Why do you suppose that they did that latter thing?

All right, it's basically like, we can't fire you and we can't starve you out, so all right, fine. We can't fire you, but we will starve you out by saying now get paid zero. So those two things were to allow the judiciary to be independent. So lifetime tenure and you can't change your salary.

Then there's this other variety of courts — which people can debate whether it's constitutional or not — I'm going to be mum on my view on that since I get an annuity for the rest of my life. So it would be bad for me to say that my court is unconstitutional.

THOMAS NACHBAR: Awkward, yeah.

MARGARET RYAN: Right — could be bad. But there's a variety of courts that are not Article III courts — they're Article I courts and the judges for those courts are still nominated by the president and confirmed by the Senate but it's for a term of years, so not for life, which I actually think is the best thing of all, which is not for life — it's 15 years. And so basically, that's a kind of court that my court is, and they tend to be specialized courts.

So for example, the United States Tax Court is an Article I court. My court is an Article I — the Court of International Trade, I think, is an Article I court. And all those instances, usually you have some background either in criminal law — for my court, for years the people that were nominated for my court did not have a military background. I think now, of the four judges that are on the court now, three of them have some military background. Obviously, I had had some military background.

Judge Hardy had the background of having clerked for me on that court and having taught military law and constitutional issues in the military justice system at Notre Dame and at Harvard. So that was his military background, and I actually think it's great to have someone that doesn't have a military background, because why? The purpose of the United States Court of Appeals of the Armed Forces is to provide civilian oversight in the military justice system. So it's a court that has five judges that are appointed from civilian life, and it used to be that if you had retired from the military that you could not serve on the court. And I think that would still be a good idea, but I don't get to make the laws, I just get to read them — and so the Congress changed that rule.

Provides civilian oversight means what? It means that you go in the military — you have a trial. You did something bad, who here wants to be the person — Douglas. Douglas smuggled 23 grams of cocaine into Iraq and he's now being court-martialed. He's being defended by an excellent defense counsel, so he's only going to get eight months. He's only going to get eight months instead of 48 months that the government wanted him to get. And so he has his trial and then he complains because he got this great deal, but now he's mad. He's mad because he's like, I shouldn't have had this happen because that evidence that they used against me should have been suppressed. There should have been a motion to suppress it — it should have been suppressed, and I'm upset about that. And so his case is going to get reviewed by the Court of Criminal Appeals for the — what service do you want to be in? Army. So for the

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THOMAS NACHBAR: Good choice.

MARGARET RYAN: — by the Court of Appeals for the armed forces, but they have appellate lawyers. So the military people, they get free lawyers at trial and they get free lawyers on appeal, both at the intermediate level of appeal, which is court of Court of Appeals for the — sorry — Army Court of Criminal Appeals. You would think I'd be able to get this right after all these years. And so those poor people like that defense — that appellate defense counsel is going to do what — they're going to, even if he doesn't know to complain, they're going to read that entire record of trial, looking for things to complain about. So he doesn't know to complain, but they're going to read that whole thing and then they are going to find something to complain about. Am I right? And then they're going to file an appeal with the Army Court of Criminal Appeals saying we complain about x. Well, the Army Court of Criminal Appeals doesn't just have to rest on, he complained about x. They, too, are going to look at that whole entire case and say, is there anything in here that gives me pause, either legally or factually? Because they have this very unique ability that they can read the entire record and say you know — understanding that the people below saw the witnesses and looked at the evidence, I'm not convinced that this person is guilty. I don't know how long they'll keep that right, but they still — you say it's a right, but it's also a burden. It's a lot of work. But everywhere along this system they've got two people — they got the appellate defense counsel and they have the whole court martial — the whole ACA panel scouring this thing, looking for any problems that might have arisen. So they have done their job, which is a very hard job, and I always say that it's a harder job than I had, for sure. And then they make their decision, like the evidence should have been suppressed, it shouldn't have been suppressed. The appellate defense council still not happy, right? ACA said nope, no reason to suppress this here. They can then appeal to my court, and we have discretionary review, for the most part — death penalty cases we have to review.

If the Judge Advocate General of a service certifies an issue, we have to at least look at the issue. We don't have to answer necessarily because they — well, the Air Force was notorious for this. You guys remember that? Every time the government lost at the Air Force Court of Criminal Appeals, they would certify the issue to us, and I got really tired of it really quickly because it's not supposed to be an extra way for the prosecution to complain.

But anyway, it comes up to us, we have discretionary review. Two of the five judges have to vote to grant the case, and if we vote to grant the case then it comes up to us, and then once we've granted it or taken any action on it, our cases are reviewable by the Supreme Court. If we deny the petition — if we deny — we don't think that there's anything — there's nothing to see here, and so we just deny it — it's dead. And that's one of the things I think that people criticize the military justice system for the most — which is that if we deny petitions, that they're dead in the water. So those people cannot file a petition for certiorari in the Supreme Court.

My response to that is go to Congress, get them to change that rule. I have no — that's up to them. Anecdotally, I will say this, having clerked at the Supreme Court and having looked at the petitions in my court, if we don't find any there there, the Supreme Court is not going to find any there there. Does that make sense — which is, it's not like we are trying to protect the government or anyone else by denying a petition, and if we can't find a reason to grant a particular issue, there's no way the Supreme Court. And that's — but again, that's just anecdotal, which is the lowest form of evidence, but it's just practical — as a practical matter, I think it's true.

Does that make sense to you? Do you agree? Yeah, which is — the Supreme Court does not do fact-bound error correction — CAAF sometimes does. Which is, we see the case, the legal issue is not an

interesting one, but we think that someone got something wrong based on a factual issue. The Supreme Court doesn't grant those sorts of cases, and CAAF does.

THOMAS NACHBAR: So I guess that goes to my next question, which is how is CAAF different from other courts of appeals, or how is service on the CAAF different from other courts of appeals? Is it — do you think it's the posture that you have towards cases, or is it the fact that you've, through service on CAAF, wind up specializing in a particular area of law? What is it, do you think, that really makes it the most different?

MARGARET RYAN: I think the most unique thing about CAAF is what I just mentioned, which is that we have discretionary review, and the other courts have a — circuit courts of appeal, they don't have discretionary review, they have jurisdictional aspects about whether they can hear a case or not, and time limits that they take very seriously, which is CAAF now takes time limits more seriously — thank you, judge Ryan.

Because while I came from an Article III background — I practiced in Article III courts, I clerked on Article III courts, and so I was like, there are time limits there for a reason, and they should matter. So the discretionary review is one thing, and the other thing is the limited jurisdiction, which is my court has jurisdiction to do what? Review, basically, the decisions of the Courts of Criminal Appeals, period. And what do they get to review? Court martials — not things related to the military that aren't court martials, just court martials. The findings and sentences approved by the convening authority.

So what kind of cases does that mean that we get to see? It's a very limited category of cases, it's all criminal cases that were prosecuted in the military justice system, period. And guess what? When you read the news and they say that the military doesn't care about prosecuting sex offenses, if they didn't prosecute sex offenses, I don't know what else they've been doing, because that was a steady diet of mine for 14 years, was reading cases that involved sex offenses and child sexual abuse and child pornography.

So do I miss my job? I loved my colleagues and I loved my work, but I do not miss a steady diet of those petitions, because it's all criminal law. And guess what? I'm not just — for the record, I'm not a libertarian. I am conservative but I am not a libertarian, and so some things I think are objectively bad, and the things that I just mentioned are objectively bad. And so having to read cases and petitions about objectively bad things — and I did my petitions in the morning — do you guys agree, 15 years of that is enough?

So that's the way with limited jurisdiction, limited subject matter, which is the nature of an Article I court and the fact that we have discretionary review. And then we sit — all five of us sit on every case, because people ask that sometimes, which is, how do you guys do this? Because the Circuit Court of Appeals — they have panels of three judges that hear different cases — all five of us sit on every case. Right now, actually four judges are sitting in every case and a senior judge is sitting in because they have not nominated a successor for Chief Judge Stucky. And I understand that Senator Hawley has said that he won't — that he's not going to vote on anyone for the Department of Defense until General Milley and the SecDef resign, or something like that.

So Senator Hawley — this is actually not the military, it's civilian oversight of the military justice system, and it's disruptive. It's disruptive to have senior judges sit in. Can you guys imagine why that would be? Any of you? So I right now I'm slated to sit on a case in January, and that notice will go out, so the people will kind of know what's happening. But the reality is, you have your colleagues and you have things like a certain kind of collegiality, a certain understanding of how things are going to work, and then all of a

sudden you jet in a different person for every hearing, like this week it was Judge [? Urman. ?] Next month it's going to be Judge Crawford, then January it's going to be Judge Ryan, and it's just different. It's just — it's not — I think it's disruptive and it's not fair to the council. And also, in terms of the petitions — it takes two votes to grant a petition. If there's five people that are going to vote whether you're going to grant a petition — I'm not a mathematician, but I think that the chances you're going to get two votes are higher if there's five judges than if there's four judges. As a matter of math, doesn't that work? I think? Yes? Yes?

You know, particularly like — unless it was something I thought was really stupid, like if someone said well, will someone give me another vote? I'd be like yeah, I'll give you another vote. It's not like we're overworked, and so no, this is a matter of, I would do that just as a matter of process. If I thought it was a really bad idea, then I would fight like hell to have it not get granted, because I was like, this is just going to be a waste of time. But I don't know how different people do, and so it is disruptive to not have a person nominated and confirmed.

THOMAS NACHBAR: How many cases a year does CAAF usually hear?

MARGARET RYAN: I don't know. I don't know. Not as many as would seem reasonable, but you can't just grant every piece of junk that comes in, because what happens if you grant a case, and the law is well-settled, and there's no relief available? Nothing good happens, which is, for one thing, the appellant's counsel is going, I have to stand up here and argue what? Because they're like, why did CAAF grant this case? And then it also raises hope like, well, they granted this. Maybe — the client is like maybe I'm going to have this great win, and it's like no, we were just bored. Sorry, just joking.

No, and it's like — the other bad thing is, we don't really do — there's a thing called a per curiam opinion, which is a very short dash thing — per curiam opinion, which is you just say, we've reviewed this blah, blah, blah — this case said x, the opinion below was affirmed. We don't usually do that and so what happens — and no offense to men, but it's — I call it every dog must pee on the log. Which is, now you've granted this thing and people have argued, and the opinion has been assigned to some judge or another, and they feel like well, we did all this, we need to say something. And we don't want to just repeat what we said before, because then it would seem really stupid, and so then if you write this thing but you want to change it a little bit, and then uncertainty gets built into the law, because last time you said happy, and this time you said glad. and then people are like, oh, well glad must mean something different than happy. Now it's the glad standard, not the happy standard. And so I personally think that it's not a good idea to grant cases where the law is well settled unless you plan on changing it. For that reason, which is that people feel like they need to say something, anything different, and then people think now it's the glad standard, not the happy standard. That was a very good example. But it's true, and so one chance would be like, well then do per curiam opinions, which would do what I just said, but they're like well, that's crazy talk. But anyway, I digress. I'm very good at digressing.

THOMAS NACHBAR: No, it's a really — I think it's a really interesting problem that you have. In part, because you do have discretionary review and you have review of facts and law. And so I think it is easy to get into cases where you'd wind up just reiterating —

MARGARET RYAN: Just to be clear, we look at the facts but we don't have the ability to reverse things based on factual sufficiency. We can only decide questions of law, which is when I said that when if the Judge Advocate General certifies things, we have to look at it. Doesn't mean we have to answer, because if they ask us to do something which is basically invading the fact-finding province of the Courts of

Criminal Appeal, we just say that's not our job. At least we're supposed to say that's not our job. I think we did pretty good on that.

THOMAS NACHBAR: You have. It just seems like there's opportunity to act at a much more detailed level for you all, and avoiding that, I think is — that's going to be a challenge. And so it's good to hear that you think about that and you worry about avoiding those situations. It seems like at their core, military legal practice and civilian legal practice might be similar in a lot of ways, but there are some notable differences, certainly in the way offices are run or things like that. Do you see on the CAAF a difference between military council and civilian counsel, or do you see practice that looks pretty similar?

MARGARET RYAN: In terms of the council that appear before us?

THOMAS NACHBAR: Yeah.

MARGARET RYAN: There's a small cadre of civilians that practice in front of my court, or that take cases up to the Supreme Court, and I always joke — there's a person named Steve Vladek, and just to annoy him I call him Steve Vladek the great, both because he thinks he's great and because he's incredibly tall, like he's like a foot and a half taller than me. I'm exaggerating, but he's pretty tall, don't you think? Yeah. So there's a small group, and Professor Vladek — I'm joking, he actually is a very excellent counsel, but I do like to tease him because it makes him uncomfortable — that's what's teasing is for, right? He tends to do more of the work up at the Supreme Court level, if that makes sense, just because he is familiar with Supreme Court practice.

Though a member of your faculty, Professor Bamzai — is that how you say his name — actually filed a really interesting amicus brief which ended up being the whole point of a Supreme Court case. But in terms of whether they're better, the worst are ones that they're not familiar with the military, and it's just some person that they hired that's not in the cadre that I just talked about. So it's some civilian that really isn't familiar with the military justice system at all, and they come and argue, and of course they're somewhat of a disadvantage because they don't know the language and they don't know the rules, and they don't understand what our court is like, and so they potentially snatch defeat from the jaws of victory, if that makes sense.

The military council, overall, I find to be excellent. There was one poor Navy appellate defense counsel once, that — she just didn't — remember, I always said I didn't want to go to law school because I don't like public speaking — she didn't like public speaking and she almost passed out every time she argued, but it wasn't her fault because she didn't ask to be an appellate defense counsel, the Navy assigned her to that job. So I was actually fairly kind to her because I was like, she didn't ask to be here.

She didn't ask to be here. And especially there was a case — United States versus [? PAC. ?] And I'll never forget, there was Supreme Court precedent directly on point that meant she lost. And I tried to argue that we shouldn't grant the case, they insisted that we grant the case, and then we took it to Project Outreach. So we're at the University of Indiana with a crowd of like, I'm exaggerating — but like 500 million people sitting there, and she gets up to argue and Judge Effron had not transformed the courtroom — the thing into a federal courthouse yet, and so she started to talk and he said something, and then like it all went downhill from there. But they're very good, and the cadre of civilian lawyers at practice in the court, I think, are also good. But I don't really see a difference in quality between the two.

THOMAS NACHBAR: Does it wind up being an issue for judges who don't have a military background, or do they just come up to speed pretty quickly?

MARGARET RYAN: It's like being a litigator, which is you just get up to speed, which is you have no choice so you just get up to speed. I don't think — so I'll take Judge Hardy as an example. Did it help him to have taught those classes with me in terms of the substance of the work? I think it helped him tremendously in getting confirmed, I think it helped him in getting nominated and I think it helped him in getting confirmed, but I don't think that it's necessary or that it has particularly been helpful.

My law clerks when I was at the court — I think I had maybe two, maybe three law clerks in all the time that I was there that had any military background, and what I did during the summer was, I usually do all my petitions on my own, initially, and I don't send them to the clerks unless I have a question — a particular legal question about this point or that point or another point. Otherwise, I just would just motor through and do them.

But in the summer, what I would do to get my clerks up to speed with the lingo, is I would — it was because I don't like to make-work. Does that make sense? You guys know what make-work is? You make up work for people to do just to keep them busy. I didn't like people doing that to me, so I don't do it — guess what — if you don't like people doing it to you, you probably shouldn't do it to other people.

But there was a purpose in the summer of having them go through the petitions, and the reason was this — that that's how they learned the rules, that's how they learn the language, and that's all that they really needed in terms of that. Because people would say, do your clerks need to have military background?

No, absolutely not. But I did — I will confess — and they all know this because they then trained the next clerks — they do now know that I didn't really need them to send me a memo on what I should do in a case, that I was just really doing it for their benefit. Does that make sense?

But yeah. And the judges do the same thing. They just — you just have to learn it. And it's not that hard. Do you guys agree? It's not that hard? The military has this thing, it's called the Manual for Court-Martial — it's the most beautiful book known in the world, and they have rules of evidence that put the Federalist evidence to shame. Why? Because it's supposed to be this book that you can take, and you're a commander in the field or you're a trial counsel in Afghanistan and you want to know, can I do this? Is this search going to be good, is it search not going to be good? There's no rules like that in the Federal Rules of Evidence, there's just the Constitution.

The military rules of evidence have this whole thing laid out. You want to do a search, this is what you must do. You want to do an inspection, this is how you can do it. And so it's this beautiful book that has everything all in one place, and it's so — you just take this book home with you and you read it, and it has rules, it has statutes — don't you guys think? It's great. If you want to know what this current state of the Fourth Amendment — of the law is under the Fourth Amendment, go look at the military rules of evidence and it will tell you. It's true. Do you disagree?

THOMAS NACHBAR: No, I don't disagree. You've got me thinking about something else, which is something to talk a little bit about. I don't know about the differences or about aspects of the military justice system, so — because there is a different approach. And I guess I'm wondering if you could — and I don't think a lot of people have visibility to it — if you could tell somebody something about the military justice system, you could tell civilians who really had no exposure to it, one thing about the military justice system, what would you tell them?

MARGARET RYAN: One thing? I think it's incredibly fair. I'm not the person that coined this phrase, but people have said this before and I think it's true, which is, if you were innocent, you would want to be tried in the military justice system and if you were guilty, you would rather be tried in a civilian court. Because

the members — it's called a jury. It's not a jury but it serves the same function. The members that are going to hear your case have a certain rank, they have a certain level of education, and they are going to listen to the instructions, and they're going to follow the instructions.

And so when they are instructed on the standard of proof beyond a reasonable doubt, they're going to listen to it. And so they're going to take their job seriously, because it's what they're — just like going to law school was my job, their job for that period of time, however unhappy they are about being there, is to follow the instructions that the judge gives them. But they're not going to be fooled by tomfoolery, like when you see TV lawyers — little tricks, whatever. It's not going to impress them at all. So if you're guilty, asked for federal district court where you might have more naive people listening to your lawyer's nonsense, but they're not going to — but if you're guilty — but if you're innocent, they might not listen to the instructions and they might fall for the prosecutor's nonsense.

So that would be my overarching thing, which is I think that the military justice system is incredibly fair. In terms of differences. one thing I talked about is the review to the Supreme Court. That gets people upset. And as I said, I understand that in the abstract. As a practical matter, I think they're getting upset about nothing. Optically, would it look better if everyone could do it? Yes, so what did I say? Go to your congressmen, get them to change the law. They're actually more responsive to changing laws about the military justice system than they are for anything else, don't you think? So I think that could be.

The other thing that people don't like — and again, I completely understand this — which is that in the military, I mentioned that instead of a jury, you have members. So where do the members come from? They come from the command. Who gets to decide whether something is going to a court-martial? The command. So the person who selects the people — the commander. So the person who is deciding that someone's going to a court-martial and decide what charges are going to get referred to a court-martial, also gets to pick the people that are going to sit on the court-martial. So people don't like that, and I think that is where the biggest opportunity for monkey business, so to speak, exists.

But again, it's set forth in statute, the Supreme Court said years ago in dicta — in dicta — and it doesn't make any sense, because there is a specific provision in the Fifth Amendment that excepts the land and naval forces from the requirement of having a grand jury — it's specifically excepted. So then you go to the Sixth Amendment, which talks about your right to a jury, which is different than a grand jury — and there is no such language.

So under normal — have you guys done statutory interpretation at all? OK, so under normal rules of statutory interpretation, if you have something in one part of the statute that says, except in the land and naval forces, and then in the next thing it's another rule, but it doesn't have that language — under normal rules of statutory structure you would say, well then that means that this rule does apply — that this right does apply. But the Supreme Court in dicta in some case said that it didn't, and Dwight Sullivan, who's a wonderful man, has his views as to why it doesn't apply, that they forgot. And my rule would have been, that the founders forgot to except the land and naval forces from the jury requirement. To which my response is well, that's their problem. They should fix it. Then they should fix it. And if a statute, that's what I would say — then they should fix it.

But it's been that way for a long time and so right now in the military, you don't get a jury of your peers, you get members that are selected by the person that decided to send you to a court-martial. And do you have to have a unanimous verdict? The answer is, you don't. You don't have to have a unanimous verdict, and so people don't like that, and I can understand why they don't like that. I didn't write the

Constitution — I'm not that old, and I didn't write the statutes that basically set up this system, but I think that that is something that gives people pause — do you guys agree that's something that gives people pause?

They're making efforts, I think, to change some of the commanders' role with respect to court-martials. Do I think that's a good idea or a bad idea? I will not — I'm not going to go there, because why, I'm sitting as a senior judge and so I'm still working in the system. But my response to all of it is, there's a very simple solution, which is get Congress to change the rules. I think that there are methods that they can make things more simple. You could take some of the commanders out of it, which is instead of saying get to pick everybody, you could be like sir, here's 100 people that are available. Now let's roll a drum and pick eight. So you could remove the commander's personal decision from the process a little bit more than it is, but again, that's not my wheelhouse.

THOMAS NACHBAR: I could ask you lots of questions about that kind of stuff, but I want to take —

MARGARET RYAN: Isn't it an interesting thing about the Fifth and Sixth Amendment? Especially in light of the Supreme Court just recently decided that a state that didn't have a unanimous jury requirement — they said nope, can't do that. You can't do that. You have to have a unanimous verdict. So in our federal constitutional system, states or separate sovereigns — and so they — who ranks higher? The military justice system or a state? I would argue at least, that it's the state. We're just a part of the federal system, so does it make a lot of sense to say well states, you must have unanimous verdicts but military court-martials — not so much. And I don't — do know why that was ever the rule? Why they made that rule? Yeah, I don't know why they ever made the rule. I have a student that's writing a paper on it, so I will know the answer by this time in January.

THOMAS NACHBAR: Well, we'll have to have you back.

MARGARET RYAN: Yeah, and I don't —

THOMAS NACHBAR: So I do want to leave some time for questions from the audience but before I do, I want to take advantage of the fact that we have someone who's seen so many advocates — and in particular so many appellate advocates — about whether, if you had a piece of advice that you could give to people who are going to appear before the CAAF, what would you say to that?

MARGARET RYAN: Candor. I think it's not just the CAAF, I think it's anywhere — I think it's whether you are drafting a complaint like whether you are drafting a complaint or writing a motion for summary judgment or arguing a CAAF, it's a duty of candor — you need to know the law and the facts and you can't — can I say — I won't — you can't BS. You can't BS. You have to be honest with the court about the facts and about the law.

And if you're not, you should assume that they actually do know the facts, or they should know the facts, and they should know the law, and that they are going to be very unhappy with you for trying to be deceptive about either. Because I think the only time I ever got angry on a bench — and I try to never get angry towards the appellate defense counsel, because why? They didn't ask to be there, we made them be there by granting their case, and so they just have to get up and make some argument, however ludicrous it might seem — they have to argue something.

The government — in my view, and we'll see if anyone disagrees — the government, in my view has a different duty. They have a duty to try and do justice and so when they come and make ridiculous, specious arguments and misrepresent the law or misrepresent the facts, that makes me very angry. And particularly if they tell me that a case that I wrote said something, and I know it didn't say that. And I

remember this with Colonel Bruce from the Air Force Appellate shop. And I said really, Colonel Bruce? Can you tell me — point to me exactly where an opinion that says that? And of course he could not, and then he also told us that we were bound by the Supreme Court's denial of certiorari in a particular case, that that was binding precedent.

Just so you guys know, when the Supreme Court denies certiorari or when we deny cert — when we deny a petition that has no precedent — you guys are learning about precedent in legal writing or legal research? So a denial of a petition or denial of a petition for certiorari or denial before a court has no precedential value whatsoever. It just means that we denied it. We were cranky that day. We were in a denying frame of mind. It just means nothing. The only thing that has precedential value then is the Army Court of Criminal Appeals' decision has precedential value in the army.

THOMAS NACHBAR: All right, I could keep going but I do want to open it up for questions from the audience to try.

MARGARET RYAN: Are they going to ask me about the Space Corps?

THOMAS NACHBAR: We had not gone over that with them.

MARGARET RYAN: OK.

THOMAS NACHBAR: But we could.

MARGARET RYAN: No, it's just this new thing that I think the last administration came up with. It's like it's a new branch called the Space Corps, and I have no idea — I want to have the Groundhog Corps for under the ground. Is it really a thing? How many people are in it?

AUDIENCE: [INAUDIBLE]?

THOMAS NACHBAR: It is a sister service.

AUDIENCE: [INAUDIBLE].

MARGARET RYAN: So who's going to do the Court of Criminal Appeals?

AUDIENCE: [INAUDIBLE].

MARGARET RYAN: Maybe because they're all in space and so they can't commit any crimes. Because the problem with the military is a lot of the people that come in, the demographic of your average military service has a bunch of 18 to 24-year-old guys. And no offense to those of you who are in that demographic, but they do really dumb things, and they do them in a very obvious manner so that they get caught.

THOMAS NACHBAR: In fairness, Ma'am, older men also do dumb things.

MARGARET RYAN: Well, and women do dumb things, too. I know a lot of people that did bad things in my court that I saw also did. But there's a lot of just — drinks were had, mistakes were made. I'll just leave it like that. And that's a lot of the things. So if you're in the Space Corps and you were in a spaceship, there'd be a lot less opportunity to get in trouble, I guess, than if you were a young enlisted Marine on Okinawa, Japan that left base and went and drank in town.

THOMAS NACHBAR: Yeah, more opportunity.

MARGARET RYAN: Yeah, more opportunity. And it is the Marine Corps. I mean the Marine Corps — it is the Marine Corps. Our criminals are the dumbest criminals. I am a marine, so I can say that, right?

THOMAS NACHBAR: Yeah. I think that's a pretty high distinction. There might be competition — I've seen dumb criminals from all services, I would say. But I'll take your word for it.

MARGARET RYAN: Yeah, well, I had the one where the guy was seen — he was in the PX, he and his buddy had just come up with this brilliant scheme that they were going to break in — it's basically a store

where you buy lots of things, but you can only go there and buy things if you're in the military. And so he and his buddy go and they break into the PX, and they have oodles and oodles of stuff and the police come up like wrr, wrr, wrr. Did they leave? No, they went into the ceiling. How did they think this was going to end? Which leaves the question, why did they think they were going to be able to get away with robbing the PX to begin with? I have no idea.

THOMAS NACHBAR: Yeah, lots of bad ideas hatched in barracks.

MARGARET RYAN: Though the Jones case was, I think, an army case where the mastermind criminals stole like \$300,000 and they threw it over the fence because they were like, we'll get through customs and then we'll go back and get it. And it's like, what's the problem with that? Once you go through customs, you've gone through customs. And so if you want to go back and get it, guess what? You're going to have to go through customs again. Yeah. That was the Jones case, which is pretty funny — the article 31 case. Yeah, where they were not brilliant, and they also tried to engage as a co-conspirator — they were military police by the way — and they tried to engage their other military police augmentee as, hey, do you want to go rob this thing with us? Yeah, so it did not end well.

THOMAS NACHBAR: So usually, approaching a police officer is probably not the best way to form a criminal conspiracy?

MARGARET RYAN: No. Yeah, no — not so much, yeah.

THOMAS NACHBAR: But we are out of time. So I'd love to talk to you about this and more, but thank you so much for coming down and taking so much time.

MARGARET RYAN: Yeah, thank you guys so much for coming and listening.