

MILITARY JUSTICE REVIEW PANEL (MJRP)

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OPEN MEETING

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TUESDAY
JANUARY 17, 2023

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The Military Justice Review Panel met in Salon I at the Ritz-Carlton Pentagon City, 1250 South Hayes Street, Arlington, Virginia, at 10:20 a.m. EST, Elizabeth Hillman, Panel Chair, presiding.

PRESENT

Dr. Elizabeth Hillman, Chair
Capt(R) Benes Aldana
Capt(R) Steven Barney
Col(R) Kirsten Brunson
MajGen(R) John Ewers
BG(R) Richard Gross
Col(R) Will A. Gunn*
Judge Bruce Kasold*
MG(R) Robert Kenny
Col(R) Lawrence Morris
Col(R) Tara Osborn
Judge James Redford
Capt(R) Bryan Schroder
Judge Jeri K. Somers

DAC-IPAD STAFF

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

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Stacy Boggess, Senior Paralegal

Ms. Audrey B. Critchley, Staff Attorney*

Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney

Mr. Chuck Mason, Staff Attorney

Ms. Meghan Peters, Attorney-Advisor*

Ms. Stayce Rozell, Senior Paralegal

Ms. Kate Tagert, Staff Attorney*

Ms. Eleanor Magers Vuono, Staff Attorney

***Participating virtually**

OGC, DoD

Brigadier General (Retired) Richard Gross

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

(10:19 a.m.)

COL BOVARNICK: For the panel members, as you take your seats, I just want to remind you in your book, everyone's file is at Tab 4 and again, some sample questions are at Tab 5. And we are going to hand it over to Mr. Chuck Mason

here in a second, but there will be quick introductions and this session is for the panel to engage in a full hour with the presenters that we've brought in. So with that, I'll hand it off to Mr. Chuck Mason.

MR. MASON: Chair Hillman, I'd like to introduce the members of the panel. What I'm going to do is just quickly give you an introduction of who the individuals are. Then we're going to go and ask each member to give you a brief background and they do not have opening statements prepared. Just provide a little bit of information about themselves, and then we'll turn it over for questions.

First, virtually, we have Captain

1 Hamon from the Navy, Colonel Kennebeck from the
2 Army, Colonel Dennis from the Air Force, Colonel
3 Gannon from the Marine Corps, and then Captain
4 Scott from the Coast Guard.

5 And with that, Captain Hamon, if you'd
6 give a brief introduction and then Colonel
7 Kennebeck will follow from there.

8 CAPT HAMON: Good morning, panel and
9 audience. This is Captain Phil Hamon. Hopefully,
10 you can hear me okay. I didn't do a test.

11 Just a quick background on me. I
12 started -- I'm currently the Assistant for
13 Prosecution Services for the Navy, which is as a
14 result of a comprehensive review, it was a new
15 position created to standardize and improve our
16 prosecution services across Naval Legal Service
17 Command.

18 My background, briefly, is I started
19 as a surface warfare officer and then I
20 transitioned to the JAG Corps through the Law
21 Education Program. In my JAG Corps career, I
22 began as defense counsel. I was defense counsel

1 for about three years and then went on to be a
2 command judge advocate for an aircraft carrier
3 for the USS Theodore Roosevelt.

4 I then did back to back senior trial
5 counsel tours, first in RLSO Naval District
6 Washington in D.C. as a senior trial counsel and
7 then as the senior trial counsel in the Southeast
8 in Jacksonville.

9 After that, I went on to a SJA role to
10 serve as the Deputy Force JAG for a commander,
11 Navy Surface Force in the Pacific. After that, I
12 came back into another senior trial counsel tour
13 at RLSO, at Region Legal Service Office Southwest
14 in San Diego, and now I am in the position as
15 Assistant for Prosecution Services. Thank you.

16 CHAIR HILLMAN: Thank you, Captain
17 Hamon. Good to have you with us.

18 COL KENNEBECK: Good morning, Dr.
19 Hillman, panel members, my name is Chris
20 Kennebeck. I have 30 years of service, now 25 as
21 a judge advocate. I prosecuted cases as a trial
22 counsel, as a special assistant U.S. attorney. I

1 was a senior defense counsel and a chief of
2 justice helping manage cases get to the convening
3 authority, and served as a deputy staff judge
4 advocate and a staff judge advocate twice and
5 served in the criminal law policy at OT JAG where
6 I'm in that job again. So this will be my second
7 gig in that tour.

8 So lots -- pretty much primarily
9 prosecution, or prosecution-related duties in my
10 career. Over.

11 CHAIR HILLMAN: Thank you, Colonel
12 Kennebeck.

13 COL DENNIS: Good morning. Colonel
14 Naomi Dennis. I have served for 19 years as a
15 judge advocate. In that time, I have served as a
16 trial counsel, a defense counsel, both of those
17 multiple times in a senior counsel position.
18 I've also served as a deputy staff judge advocate
19 and staff judge advocate advising convening
20 authorities at various levels, along with being
21 an appellate military judge.

22 I currently serve as the Air Force

1 chief prosecutor. I am chief of the Division for
2 Appellate and Trial Operations, so all of our
3 appellate counsel and our most senior trial
4 counsel, along with our special trial counsel,
5 currently work in my division. Happy to be here.

6 CHAIR HILLMAN: Thanks, Colonel
7 Dennis.

8 COL GANNON: Nick Gannon, chief trial
9 counsel of the Marine Corps. I've been on active
10 duty as a judge advocate for approximately 22-ish
11 years, the vast majority of which has been in
12 criminal litigation as a defense attorney, a
13 prosecutor, or I was also the director of the
14 Department of the Navy's Appellate Government
15 Division. Thank you.

16 CHAIR HILLMAN: Thanks, Colonel
17 Gannon.

18 CAPT SCOTT: Good morning. My name is
19 Anita Scott. I am currently serving as the chief
20 of military justice of the Coast Guard. I've
21 been a JAG for about 23 years. Prior to that, I
22 was a small boat driver. During my JAG career, I

1 served as a TC, DC, military judge, appellate
2 judge, and two time SJA, the second time was five
3 years to a Two Star. And I currently just took
4 over as the chair of the JSD and the Coast
5 Guard's voting member. Thank you.

6 CHAIR HILLMAN: Thank you, Captain
7 Scott.

8 So our idea here is to have a back and
9 forth. You have the set of questions here. I'm
10 just going to start out with the first question
11 which is the first question on your list here
12 that we sent ahead of time and I'd love for each
13 of you to weigh in, and especially focus on the
14 things that your colleagues don't say that you
15 think we really -- you want to make sure that we
16 know. Feel free to foot stomp on the things they
17 say that you want to reinforce, but we'd love to
18 hear as much as we can based on the incredible
19 experience that you bring to us.

20 So the first question is from your
21 perspective, did the 2014 changes to the Article
22 32 limit its usefulness in the military justice

1 system, and if so, how?

2 COL DENNIS: Colonel Dennis here. I
3 wouldn't say it limited it, I would say it
4 certainly changed it, you know. There has been a
5 lot of conversation around using the Article 32
6 as a discovery tool.

7 It has certainly changed the way that
8 victims were questioned, you know, at a
9 preliminary hearing and some of the access that
10 all the counsel, trial and defense counsel, had
11 to a victim beforehand.

12 But it did allow a lot of the same
13 discovery, in many ways it allowed the
14 opportunity to perfect the charges, so the
15 preliminary hearing officer still had that
16 capability that an investigative officer had
17 previously.

18 COL KENNEBECK: I'll go next. I think
19 I would give the law school answer, which is it
20 depends. If your intent is for it to determine
21 whether there is probable cause it's perfectly
22 useful.

1 If your intent is to assess
2 credibility, give an assessment about
3 prosecutability of a case, or to serve the
4 purposes of being a discovery tool, which was one
5 of the stated purposes, then I don't think it's
6 quite as useful.

7 That really comes back to what is its
8 purpose. In my opinion I think the Article 32
9 makes us parallel with other jurisdictions in
10 that we must assess whether there is probable
11 cause before we move forward toward the trial.

12 You must at least meet that hurdle.
13 That is similar to whether it's a grand jury,
14 whether it's a preliminary hearing in a civilian
15 jurisdiction, so it makes us consistent.

16 Whether it is tweaked or adjusted or
17 edited in such a way to give the preliminary
18 hearing officer more authority or to authorize
19 the defense to call witnesses, that really comes
20 back to what intent are we trying to satisfy.

21 Right now it satisfies congressional
22 intent of determining whether there is probable

1 cause.

2 COL GANNON: I tend to agree with the
3 field that the current practice with respect to
4 the Article 32 preliminary hearing has limited
5 utility.

6 Typically what is done in practice in
7 the field is what we call a Paper 32. Normally
8 the trial counsel will put on paper evidence, not
9 necessarily offer witness testimony, and as such,
10 frankly, at least in my experience of this issue,
11 the preliminary hearing officer is just simply
12 not equipped with the totality of the nature of
13 the case, whether it be strengths and weaknesses
14 of witnesses, affect, demeanor, et cetera, things
15 that happen in a more contested environment.

16 And so my position is, or my belief,
17 my individual belief, is that it has, I agree
18 with kind of the preamble here, it has very
19 limited utility as it is currently.

20 CAPT SCOTT: Echoing the sentiments,
21 you know, given its purpose and scope it meets
22 the bill (phonetic) currently.

1 However, without an appraisal of the
2 evidence, specifically witness testimony, I have
3 served as a PHO, or hearing officer, in the post-
4 14 world as well as the pre-14 and my reports are
5 different because I am answering different
6 questions.

7 Specifically, I noted, I was surprised
8 the first time that government counsel stood up
9 and their presentation of evidence was limited to
10 going through the charges spec-by-spec and then
11 relaying to me where in the minute markers from
12 audio that was from recorded interviews I would
13 find the PC for that particular stated element of
14 the offense and then at the conclusion of that
15 they sat down.

16 So very similar to, you know, a
17 modified version of just a paper evolution.

18 Thanks.

19 CHAIR HILLMAN: Captain Hamon.

20 CAPT HAMON: Yes. Yes, ma'am. I
21 concur with the above answers from the panel. I
22 think that it does depend on what the underlying

1 purpose of the 32 is and if it is to just
2 establish probable cause and to be a check on the
3 prosecution or perhaps the convening authority
4 then I think it functions fine with the changes
5 and before.

6 I don't -- I think thought that beyond
7 that I think there was fairly limited utility
8 from a purely prosecution perspective before the
9 change and after the change.

10 I think that the change probably
11 increased the utility and to decrease some of the
12 utility for the defense, but I don't think that -
13 - I think the utility of establishing probable
14 cause as serving as a check is, it functions.

15 With the one caveat, and this is kind
16 of alluding to what Colonel Gannon mentioned, is
17 that it really depends on the preliminary hearing
18 officer and the qualifications and experience of
19 that officer and their control of that hearing.

20 MEMBER BRUNSON: If the Article 32 is
21 going to be limited specifically to simply
22 determine probable cause, Part A, do you believe

1 that we need an Article 32 to do that or could it
2 be done in some other fashion without the other
3 hearing?

4 And then, B, if we continue with the
5 Article 32 with that being the purpose do you
6 envision any situation, you know, I harken back
7 to, you know, as old people say the good old
8 days, when you could actually have a case
9 dismissed after the 32?

10 Do you see that happening the way
11 Article 32s are being handled today?

12 COL KENNEBECK: So I will say as a
13 Staff Judge Advocate I have seen cases be
14 dismissed after even the Paper 32.

15 So even with its reduced, you know,
16 effectiveness, not being a discovery tool, if the
17 preliminary hearing officer conducts a hearing,
18 which I'll get to A first, your first question,
19 does it have to be the way it is today, well what
20 is its purpose.

21 I think it's good to have another
22 party, an impartial person, take a look at the

1 evidence. You're not having the prosecutor
2 decide whether we have sufficient evidence to go
3 to trial or defense, you have a third party.

4 I think that is useful in and of
5 itself. Whether that attorney is a trained
6 Judge, a Trial Judge or some other entity, I
7 think that is a good quality check to determine
8 do you have, what type of evidence do you have,
9 and does it at least meet the threshold of
10 probable cause.

11 And then to go beyond that, I think
12 that some of those reports that you get from a
13 preliminary hearing officer have convinced me and
14 the convening authority that the case probably
15 shouldn't be referred.

16 So I do think it serves its purpose.
17 It's not the old school Article 32 that a lot of
18 us come to know and love. That was a discovery
19 tool that did force the government to perfect its
20 case.

21 If we go back to that I do think there
22 are two things I would be concerned about. One

1 is the timing of the 32 and, you know, how much
2 does the government need to work before it's
3 ready for the 32, because it's clearly more than
4 just probable cause.

5 Number two, who is going to testify.
6 Are we going to make the victims, and I know this
7 is a sex assault-oriented comment and not just
8 broadly across the UCMJ, but are we going to make
9 victims take the stand.

10 Maybe there is a hybrid in the middle
11 there. I will leave it there and comment further
12 after I hear other comments.

13 COL DENNIS: I agree with Colonel
14 Kennebeck insofar as the Article 32 being useful
15 as an objective check on the system, you know.

16 There is certainly an argument that
17 you could make to special trial counsel when OSTC
18 is at full operational capability to do that, but
19 I think we would lose something by not having an
20 objective party, an independent party, check the
21 system for probable cause.

22 But along with that we have to

1 remember that, you know, a PHO can make other
2 recommendations as well, you know.

3 Probable cause obviously is their
4 finding if there is probable cause, but the
5 convening authority can say, hey, can you also
6 check, you know, some other things for me.

7 Can you check whether there is
8 sufficient evidence, what do recommend as far as
9 referral goes, and give the convening authority
10 some more information.

11 I have seen cases, like my colleagues
12 here I have seen cases where charges have been
13 dismissed prior to referral based on a PHO's
14 recommendation.

15 Like there is probable cause in this
16 case, however, it's unlikely you will attain and
17 sustain a conviction for the following reasons
18 based on my review of the case, and the convening
19 authority decided, was persuaded to drop the
20 charges at that point.

21 So I have seen that happen even in the
22 current post-14 context.

1 COL GANNON: So just a quick response
2 to the first question, the need, is it still
3 needed. I agree with my colleagues that there is
4 utility in terms of having some function to the
5 32 that looks at probable cause. I think it
6 would be enhanced.

7 I think Captain Hamon alluded to this
8 a moment ago. I think the utility of the PHO's
9 analysis would be enhanced considerably if we had
10 a much more experienced requirement for the PHO
11 and that would increase the utility of the 32,
12 because naturally you're going to get, you know,
13 a more experienced eye looking at the evidence
14 and perhaps, even if the 32 was to remain
15 substantially similar to its construct today
16 wherein we're not typically calling witnesses,
17 defense can't compel discovery practice, et
18 cetera.

19 The PHO is not normally calling or
20 forcing the government to bring witnesses to
21 testify. Having that more experienced eye,
22 perhaps, you know, a Military Judge in some cases

1 doing that.

2 I know in our practice on our very,
3 very serious cases on occasion we have used
4 Military Judges as our 32 officers. That has
5 been tremendously, in my belief tremendously
6 helpful to the probable cause determination, so I
7 think the need is still there.

8 And then to the second part of the
9 question, should there be a mechanism by which
10 there is sort of a compelled dismissal of a
11 charge by a PHO, from my perspective the answer
12 to that respectfully is, no, there should not be.

13 Even after the OSTC stands up those
14 cases that are not covered offenses and remain
15 general crimes practices, that's what we are
16 referring to in the Marine Corps as just general
17 crimes and more military-specific offenses, my
18 position is very, very firmly that the convening
19 authority should have the ultimate say on that
20 case the PHO's recommendation should be just
21 that, a recommendation.

22 CAPT SCOTT: I'm more or less in large

1 agreement with my colleagues, but as we sort of
2 turn the corner and start speculating on what the
3 new process is going to look like come 27 December
4 that generates the new series of questions about,
5 you know, is it needed.

6 So to answer Question 1, was it
7 needed, is it needed, arguably yes based on some
8 stats that, you know, we are still pushing stuff
9 in that didn't meet the PC threshold.

10 However, you know, if your STCs and
11 your OSTCs/chief prosecutor are, you know,
12 operating at the level that is intended for this
13 whole new construct, that starts to beg the
14 question then does a hearing officer really need
15 to be there to assess PC or is there a better
16 utility for this process that would be more
17 helpful to them in their new roles.

18 And I don't have a firm answer on that
19 yet, but we are certainly toying with ideas, as
20 you are.

21 CAPT HAMON: I think I would just add
22 that I do think that the main function is that

1 check establishing PC and determining PC and I do
2 think, and I know we'll come to this later, that
3 there is utility in having that determination be
4 binding with the caveat though that it depends on
5 the qualifications of the preliminary hearing
6 officer.

7 However, I think that if you expand
8 the scope of the opinion of a 32 officer and you
9 get to the likelihood of success at trial and
10 other commentary and the evidence, it's very hard
11 to do that, to partially open the aperture of
12 what that PHO considers without entirely opening
13 the aperture.

14 So you get these -- And I think it was
15 alluded to earlier on the comments, you get these
16 opinions from preliminary hearing officers that
17 might not see all the nuances of the witnesses or
18 see all the potential evidence out there.

19 That's fine, that's a nature of the
20 hearing if you don't make it an investigative
21 tool or a discovery tool or you don't have the
22 ability to compel witnesses.

1 So I guess in short I think that, yes,
2 probable cause needs to be the focus, but I think
3 it's very hard to deliver more than an opinion on
4 likely success without opening the aperture I
5 think more than we should.

6 MEMBER BARNEY: My name is Steve
7 Barney and I had an opportunity to see a lot of
8 these changes from the prior situation and then
9 the changes in 2014, which were driven by
10 concerns about how victims were being handled at
11 Article 32 investigations.

12 Here is my question, because I'd like
13 you to actually focus if you would on this
14 question.

15 Now that you have seen some of the
16 other changes that have happened in the Article
17 32 process does the Article 32 process still
18 require that victims, and I'm talking about in
19 sexual assault crimes primarily, be allowed to
20 refuse to or not be required to testify against
21 their will at an Article 32?

22 In other words, have the other

1 protections that we have put in place adequately
2 addressed the concerns that were there for the
3 2014 changes so that we could now have more
4 involvement from those victims, to hear from
5 them, and would that be helpful to the process?

6 COL GANNON: Sir, good morning. No,
7 I don't believe that a victim should be
8 compelled, especially in a covered offense or a
9 sexual assault case.

10 My position on that is for a couple of
11 reasons. The primary reason is the amount. It's
12 not just that -- I agree with sort of the premise
13 of your question, hey, there are other
14 protections in place, we're not doing these broad
15 swaths of discovery and cross examination, what
16 did you have for breakfast this morning, which
17 shoe did you put on first. We're not doing that.

18 The rules theoretically could prevent
19 that and a PHO could reign that in. Even
20 conceding that control that the PHO could
21 exercise, the preliminary hearing officer could
22 exercise, from the government's perspective the

1 amount of preparation that would be required to
2 offer testimony, even in a PC environment,
3 probable cause environment, the amount of
4 preparation that would be required to prepare
5 that victim to testify, assuming there would be
6 some sort of confrontation aspect to that
7 testimonial event, that level of preparation is
8 enormous.

9 The amount of work we put into getting
10 a victim prepared to testify is really critical
11 to ensuring that the testimony remains consistent
12 and accurate and a true reflection of what took
13 place.

14 So in most cases, sir, there is a
15 pretty lengthy witness interview that is done in
16 our experience, in the Naval Services, by NCIS.
17 Other law enforcement agencies, I'm sure, do the
18 same.

19 And generally speaking that has become
20 more and more comprehensive in terms of the
21 events in question and I think that has some
22 utility at the 32.

1 Assuming there would be a significant
2 confrontation aspect, I believe that putting a
3 victim through that process twice, assuming they
4 testify, obviously, at trial down the line, and
5 they could be testifying at 39A sessions, motions
6 hearings, et cetera, I think it's an unnecessary
7 burden on the victim in terms of just
8 retraumatization and then, like I said earlier,
9 sir, just the amount of preparation that would be
10 required to make that effective. Thank you.

11 MEMBER REDFORD: I have a question.

12 CHAIR HILLMAN: I think we have one
13 more response to this.

14 MEMBER REDFORD: Okay.

15 CHAIR HILLMAN: Colonel Dennis, do you
16 want to weigh in briefly and then we'll go to
17 Judge Redford?

18 COL DENNIS: I would just supplement
19 the likelihood of victims falling out depending
20 on the nature of that investigation would be
21 significant and I think it would undermine
22 government interest.

1 CAPT SCOTT: You know, understanding
2 though that we could, you know, that was all
3 presumptive of there being a confrontational
4 aspect, but if the PHO, if the question asking if
5 any victim is limited to a PHO it could change
6 the answer.

7 MEMBER REDFORD: Are any of you aware
8 of any State in the Union which provides a victim
9 the right to refuse to testify in a criminal
10 sexual conduct case in a preliminary hearing
11 setting?

12 COL KENNEBECK: I'm looking over at my
13 highly qualified expert who is sitting in the
14 audience over here. I think in Maryland victims
15 do not have to testify.

16 I am confident that if we looked at
17 States you would find States that do not require
18 a victim of sexual assault to get up and give
19 testimony about that offense.

20 I agree wholeheartedly that we would
21 lose victims. Just the thought of coming into a
22 room like this and having to tell people, a

1 person, no matter what the control measures are
2 in place, that story about that thing that
3 happened to that person is something that I think
4 would deter victims from even wanting to move
5 forward.

6 COL GANNON: And I would just add, and
7 I am not an expert on civilian practice, but I
8 would add that in many context, and I believe in
9 the federal context, the defense doesn't come to
10 those proceedings and so there would not be an
11 opportunity for any confrontation whatsoever.

12 So perhaps they may be, "they" a
13 victim, may be compelled to testify, but it would
14 be very limited I would think in terms of just
15 the most basic aspects of the crime and there
16 would be no confrontation in many circumstances,
17 sir.

18 MEMBER REDFORD: Right. Thank you.
19 Yes, I understand. In the federal grand jury
20 system the only people present are the attorney
21 for the government, the witness, and the 17 to 23
22 members of the, citizens of the District that

1 constitute the grand jury.

2 But in the State systems, I am not
3 familiar with Maryland, but I spoke with a State
4 prosecutor I know before this meeting and they
5 were not aware of any State in the Union that had
6 such a provision, that a complaining witness
7 would not, had the right to veto their presence
8 at a preliminary hearing situation.

9 But Maryland does apparently, so I
10 look forward to finding out what other States do.

11 COL KENNEBECK: Well I hate to make
12 that my testimony. I think that's the case.

13 (Laughter.)

14 COL KENNEBECK: This might be a topic
15 worth assessing and researching.

16 MEMBER REDFORD: And it may be
17 irrelevant, but --

18 COL KENNEBECK: I would like to add a
19 comment. Some of our answers started to deviate
20 into who is the PHO, the preliminary hearing
21 officer and I think that's probably worthy of
22 discussion.

1 I think there are probably people who
2 don't serve well as PHOs because they are young,
3 maybe they are new in the service, one, two,
4 three years as an attorney.

5 I will say our practice in the Army,
6 at least for the last five, six, seven years, has
7 been to pick Majors who have typically about ten
8 years of service, each of whom, many of whom,
9 have done prosecution and defense, but some have
10 not, but these are more seasoned attorneys.

11 Now what they are not is specially
12 trained. So what I think we get into is this
13 situation where when you are trying, especially
14 sex offenses, and I know that this body is not
15 just tasked to look at sexual offenses, but that
16 seems to be the controlling narrative with regard
17 to 32s here in some ways, in the sex offenses
18 specialized training is useful.

19 We use a lot more experts than we ever
20 did in these types of cases in particular and
21 typically that's because there is two people who
22 were a witness to the crime and nobody else and

1 their recollection is often distorted by alcohol.

2 So you are stuck in this situation
3 where you believe a crime may have been committed
4 and you don't have the best evidence in the world
5 to prove it.

6 Every time you make that victim give
7 a statement, whether it's to the MCIO or at the
8 preliminary hearing, the details may not exactly
9 match, which is perfect fodder for cross
10 examination even if the offense did occur at
11 trial.

12 So for all of these reasons I think
13 that if you are going to take a look at who is
14 the PHO, the preliminary hearing officer, maybe
15 specialized training would be warranted as
16 opposed to a Judge or a Magistrate, because if
17 it's a Judge that becomes a resource constraint
18 quickly, especially for the Army.

19 Then, finally, if you are going to
20 give that PHO the authority to say no PC and then
21 actually stop the case from proceeding then you
22 are usurping the authority of the STC, of the

1 Special Trial Counsel, who has been tasked by
2 Congress to be the only entity that can refer
3 covered offenses.

4 So you have these specialized, trained
5 prosecutors who have assessed a case, decided
6 that it should move forward, you take it front of
7 a Major who is not specially trained who is the
8 PHO who says, no, no PC here, and now you
9 basically blockaded, in my mind, with someone who
10 is not as much of an expert about cases that are
11 very difficult to try and prove. Over.

12 COL DENNIS: Just following up on the
13 two topics. These are other questions that are
14 on the list, but dealing with whether the PHO's
15 recommendation should be binding, that was the
16 last part that Colonel Kennebeck touched on.

17 I agree that it would be usurping the
18 authority given to the convening authority or the
19 STC who is specially trained and certified to
20 make the decisions about whether to refer certain
21 cases.

22 And for other crimes, for general

1 crimes, the convening authority retains the
2 authority to make that decision, that disposition
3 decision.

4 So certainly the PHO's recommendation
5 should be a significant factor in the decision
6 that is made by the appropriate referral
7 authority, but it should not be binding, I agree
8 with that.

9 With respect to Colonel Kennebeck's
10 recommendation on the qualifications of the PHO,
11 certainly that has played in the Air Force as
12 well a big part in the quality of the preliminary
13 hearing, is what type of experience does the PHO
14 have.

15 It is our practice to try to use
16 Military Judges in our most serious cases,
17 including penetrative sexual assault, but it is a
18 resource constraint.

19 You know, it's challenging to always
20 get, whether it's a Military Judge or somebody
21 else who is exceptionally qualified, it can be
22 difficult.

1 We aim for Majors as well, people with
2 experience in military justice, but it is a
3 challenge, and so normalizing what the minimum
4 training requirements would be would certainly
5 help the quality of the preliminary hearing.

6 MEMBER OSBORN: As a follow-up to that
7 question, where are the Majors that you are
8 talking about coming from?

9 Are you bringing them from other
10 installations to serve as the PHO or are they
11 coming from your SJA Office?

12 COL DENNIS: At least in the Air
13 Force, typically they do not come from the same
14 office just because they lack objectivity that we
15 want in a PHO, so we bring them from either a
16 numbered Air Force, like a superior office or
17 another legal office, so typically they have to
18 travel in for the hearing.

19 MEMBER OSBORN: Is that the same for
20 the other Services?

21 COL KENNEBECK: We don't bring them
22 from outside, but we choose PHOs who know nothing

1 about the case.

2 Typically the Brigade Judge Advocates,
3 that's a Unit of about 4,500 soldiers, there is
4 plenty of business in that Unit, they know
5 nothing about the Brigade, so we can grab that
6 Brigade Judge Advocate to serve as a PHO in a
7 different Brigade on the same installation and
8 there is no connection.

9 So we have enough distance, I think,
10 between who is serving as this neutral
11 preliminary hearing officer. Over.

12 MEMBER BRUNSON: So, I'm sorry, but it
13 sounds like, if I am correct, so the process of
14 selecting a PHO is not normalized or
15 standardized.

16 So by installation who is making the
17 decision on who the PHO for -- And I am curious
18 as to all the Services, who makes that decision
19 and, sorry for my ignorance, who appoints the
20 PHO, who decides whether they come from someplace
21 local or that you are going outside or that
22 you're using a Military Judge or a Magistrate?

1 COL KENNEBECK: In the Army it's
2 typically the SJA. So the Brigade Commander of
3 the soldier, of the offending, of the accused, is
4 the one who appoints the preliminary hearing
5 officer in writing.

6 But that is from a list of names
7 provided and managed by the OSJA and typically
8 we'll give a few options to a Brigade, usually
9 just a name because it's pretty efficient.

10 But we have already done the math of
11 someone who couldn't potentially be involved in
12 the case, wouldn't know anything about the case,
13 and typically from a Unit that's distant.

14 As far as the qualifications, it's
15 laid out in the RCM and I believe it's an
16 attorney when practicable. We previously used to
17 use line unit officers to do these Article 32s,
18 so I think we've already ramped it up by making
19 sure we have attorneys and in common practice for
20 us it's field grade attorneys.

21 COL DENNIS: So for the Air Force,
22 obviously we're smaller than the Army so our

1 installations are smaller and our legal office
2 that is servicing those installations is smaller.

3 It is typically the Installation
4 Commander, the Special Courts Martial Convening
5 Authority, that appoints the PHO, but the
6 administrative lift, like, hey, there is a list
7 circulating of really qualified PHOs that all the
8 SJAs agree on, let's pull from that, are you
9 available, you know, all of the hunting down of
10 who is available and qualified to serve as a PHO
11 that is done by the Staff Judge Advocate and
12 their personnel and then recommendations are made
13 to the convening authority who ultimately makes
14 the decision.

15 MEMBER BARNEY: Just to clarify,
16 Colonel, are you saying there is like at an
17 installation level or a region level a list of
18 people who are qualified to be PHOs that is used?

19 COL DENNIS: So in practice, yes.

20 MEMBER BARNEY: Okay.

21 COL DENNIS: In the Air Force there
22 is, you know, within each Command, so, you know,

1 you take any Air Force Major Command, there are
2 typically, they will have a list of people within
3 that Command who, you know, SJAs have used before
4 and said, hey, this is a good PHO, you know, they
5 have the requisite qualifications, and they share
6 that.

7 So it's more of a peer-to-peer
8 collaboration because everybody is in the same
9 plight. It's not a formalized process, to answer
10 your question.

11 MEMBER BARNEY: Thank you for the
12 clarification.

13 COL GANNON: So for the Marine Corps
14 in June of 2020 we reorganized the supervisory
15 structure for the trial counsel. I directly
16 supervise all 90 prosecutors in the Marine Corps.

17 I write their fitness reports or I
18 write fitness reports of their supervisors. We
19 are organized now very similar to the way the
20 Marine Corps Defense Service Organization is
21 organized.

22 Why is that relevant? We would never

1 draw a PHO from that body of officers. We would
2 always go adjacent to that. We have kind of top-
3 down supervisory construct now, and so we will go
4 to adjacent Commands for qualified preliminary
5 hearing officers.

6 That could be on the same base that
7 the case is taking place, it could be bringing a
8 reservist. We have a number, particularly in the
9 more populated areas.

10 Southern California, the National
11 Capital Region, where we have a large
12 concentration of reservists, we will tap into
13 that pool and bring those folks on, you know,
14 that otherwise qualify, but generally speaking we
15 don't have sort of a list that is circulating.

16 We have folks that are available in
17 adjacent Commands outside of the TSO, the Trial
18 Services Organization, and as long as they are
19 qualified under the governing directive that's
20 whom we utilize.

21 CAPT SCOTT: For the Coast Guard kind
22 of similar but a little bit, we sort of take a

1 little bit of a left turn.

2 The Staff Judge Advocate to the
3 convening authority will look for a hearing
4 officer based on the nature and gravity of the
5 offense and pretty much will just, you know,
6 figure out the target level based on seniority
7 and experience and reach directly out to that
8 person for availability.

9 If that does not work they will expand
10 the scope and once in a while you'll see does
11 anybody know anybody who might be available
12 around this date range.

13 CAPT HAMON: For the Navy we have
14 established the standard that the primary source
15 for preliminary hearing officers is a Reserve
16 Preliminary Hearing Unit trained to just service
17 PHOs.

18 They are O-5 and O-6s predominantly.
19 I think there may be some O-4s, but they are
20 predominantly O-5s and O-6s, so that's one
21 primary source.

22 The other is that we have two military

1 magistrates on the east and west coast. They are
2 O-5 Military Judges that sort of serve to support
3 the opposite coast, the opposite side of the
4 country for cases that come up.

5 Those are the two primary sources. We
6 also occasionally, as some of the other panel
7 members alluded to, if the -- usually if the
8 prosecutor or SJA deems that a Military Judge, a
9 sitting Judge, is necessary for a particular case
10 there are those specific requests.

11 So when we send -- our process is
12 there is a standard form and a standard email
13 distro that goes to the Preliminary Hearing Unit,
14 the Military Magistrates, and the Chief Trial
15 Judge requesting PHO services and we can
16 specifically say we want a sitting Judge for this
17 case and it will be assigned.

18 If those sources don't work there are
19 other there are other independent SJAs we could
20 tap locally, similarly to some of the other
21 Services.

22 MEMBER MORRIS: Regarding the

1 independence in all of the PHOs, how are they
2 evaluated and have you had to make any
3 adjustments to, you know, the potential creep of
4 influence into them depending on what their
5 supervisory chain might be.

6 COL KENNEBECK: In the Army typically
7 the PHO will be supervised in some capacity by
8 the SJA, sometimes not, but they are fulfilling
9 other roles.

10 There are non-prosecution roles, so
11 administrative law, or Brigade Judge Advocate, so
12 a non-prosecution function. I have not seen or
13 heard of a preliminary hearing officer's opinion
14 being impacted by the fact that they are rated by
15 the SJA.

16 I have seen PHOs speak with candor and
17 they are not afraid to write what they think
18 about a case, regardless of whether that is a
19 non-pros, a recommendation on that case. Over.

20 COL DENNIS: Our PHOs are rated by
21 whoever their Staff Judge Advocate is, or
22 supervisor is. Typically it is not the same SJA

1 because they come from a different installation.

2 Sometimes we use reservists and they
3 may be reservists assigned to the installation,
4 but like Colonel Kennebeck, I have not seen nor
5 heard of anyone being influenced by, you know,
6 any kind of pressure, you know.

7 Our JAGs are quite honest in their
8 opinions and quite fearless, even when it's much
9 to my chagrin. They do -- You know, we have seen
10 very honest answers and assessments of cases in
11 preliminary hearing reports.

12 COL GANNON: I would concur with
13 everything that has been said and only add that
14 in my experience I am not even confident that the
15 supervisor of the PHO is ever even really made
16 aware of the PHO's recommendation.

17 They are so focused to the convening
18 authority in the case and they go on such a
19 different route in terms of the analysis of that
20 work product that the boss of PHO, at least in my
21 experience, probably is not even aware of the
22 content of that document.

1 CAPT SCOTT: Similar to what Colonel
2 Gannon just said, you know, if you are asked to
3 be a PHO you typically request permission from
4 your supervisor for the time off, but otherwise
5 they have absolutely no knowledge of your role in
6 it unless they happen to get some sort of
7 feedback, you know, at some point during the
8 marking period, but typically even that would be
9 unusual.

10 CAPT HAMON: And I concur also with
11 all the answers in the panel, I have not seen any
12 conflict issues really arise.

13 MEMBER REDFORD: Looking at whether or
14 not the PHO's recommendation is binding, and some
15 changes, assume for a moment that they are not
16 binding.

17 What, if anything, would be your
18 respective positions that if a case were bound
19 over by the convening authority or in the future
20 the Senior Trial Counsel, should there be an RCM
21 remedy of seeking a motion to quash?

22 For example, after the general Courts

1 Martial is constituted should that be thought of
2 or looked into? It happens. I'll just say in my
3 experience, and many States have that capacity.

4 What are your thoughts, if any, on
5 that issue?

6 COL KENNEBECK: Go ahead. I'll follow
7 you.

8 COL DENNIS: Yes, we were just kind of
9 thinking about it. I mean there are mechanisms
10 in place already for a prosecutor or defense
11 counsel to request that a case be dismissed,
12 whether it, you know, be like a 917 or,
13 obviously, that's a different kind of mechanism
14 because it's at the end of the government's case
15 in chief, but motions to dismiss for any number
16 of reasons could happen, including the lack of a
17 fair and impartial Article 32 hearing or an
18 officer -- If they feel that the process wasn't
19 honored or followed in some way an accused
20 servicemember already has the ability to do that.

21 I am not sure if that answers your
22 question.

1 MEMBER REDFORD: No, that's helpful.

2 COL DENNIS: Okay.

3 MEMBER REDFORD: But if the statute
4 says you can refer it over a finding of no
5 probable cause or recommendation of non-referral,
6 there is by definition no statutory defect, so it
7 would be a remedy without a remedy.

8 COL DENNIS: Right. I mean so if I
9 understand your question correctly, we would
10 exist in a construct like we do now where the
11 PHO's recommendation isn't binding, but an
12 accused servicemember would have the ability to
13 say that it should be dismissed because it should
14 have been binding?

15 MEMBER REDFORD: Not because it should
16 have been binding, but because there is just
17 absolutely no probable cause to sustain a
18 conviction.

19 COL DENNIS: Right. And that could
20 certainly be a motion to dismiss. If they
21 believe that the analysis was flawed in some way
22 and that there was --

1 MEMBER REDFORD: Could that be made
2 before proofs are offered?

3 COL DENNIS: I'm sorry?

4 MEMBER REDFORD: Could it be made
5 before the actual trial is convened?

6 COL DENNIS: Certainly.

7 MEMBER REDFORD: Okay.

8 COL DENNIS: An accused servicemember
9 could file that motion at any time.

10 MEMBER REDFORD: All right. Thank
11 you.

12 COL KENNEBECK: I struggle to think of
13 the rule that would be applicable. I'm sure it's
14 in the 900s. I just can't think of what it would
15 be.

16 I have to believe there is a motion
17 that could be filed before merits to dismiss
18 charges. I just can't articulate what the rule
19 is off the cuff.

20 MEMBER REDFORD: Thank you.

21 COL GANNON: I believe that the unique
22 nature of the Military Justice System

1 necessitates that they are not, that the
2 Commander have the ultimate responsibility and
3 authority to refer a case because they have the
4 statutory obligation to maintain good order and
5 discipline.

6 So I would be, you know, respectfully
7 intellectually opposed to the ability to -- The
8 way I kind of see the construct of your question,
9 sir, is that PHO says no PC, case referred
10 anyways, now RCM to dismiss basically.

11 MEMBER REDFORD: Yes. And your
12 position is shouldn't have it?

13 COL GANNON: Sir, yes, sir.

14 MEMBER REDFORD: Okay.

15 CAPT SCOTT: Respectfully, I think we
16 are looping back to purpose and scope of the
17 hearing again, which is if, you know, so post-14
18 rules versus, you know, once you've got LSTCs and
19 OSTCs in place, if you are having a hearing and
20 not getting a probable cause determination out of
21 that and you've had a second bite at the apple
22 to, you know, bring new evidence, because let's

1 say something went sideways on the day of the
2 hearing, if you still haven't been there then we
3 are still utilizing the 32 for a PC determination
4 and not for any sort of appraisal, you know, and
5 that starts to get into -- If we're still talking
6 about PC, that's one place, but if the STCs are
7 looking for an appraisal of can this charge or
8 will this evidence obtain and sustain a
9 conviction, we're back to what do we want this
10 hearing for, you know, this level of this level,
11 and if we want it for this level than binding I
12 respectfully disagree with.

13 Binding would be something to think
14 about.

15 CAPT HAMON: I would just add that if
16 the purpose is a check on the prosecutor, that's
17 one of the purposes, then there is a current
18 binding check right now with the 34 advice before
19 referral as long as Commanders are making the
20 decision.

21 I think the challenge is you want one
22 system for both the OSTC and the General Crimes

1 System and the OSTC won't have that added binding
2 PC determination by the SJA.

3 CHAIR HILLMAN: Thank you. We're
4 going to go to Judge Osborn. I will just flag we
5 have a member on the virtual screen with us, too.
6 Judge Kasold, if you have a question we'll come
7 to you after Colonel Osborn.

8 MEMBER OSBORN: Thank you, Dr.
9 Hillman. Just to circle back to the
10 qualifications of the PHO, are any of you aware
11 of any instances where exceptional circumstances
12 made it impracticable to appoint a Judge Advocate
13 and that a Commissioned Line Officer or a non-
14 Judge Advocate was appointed instead and if so
15 what were those exceptional circumstances and in
16 your opinion do you think that flexibility should
17 be retained?

18 COL KENNEBECK: Off the cuff I am not
19 aware of any. I haven't purposefully looked at
20 this, but we have a decent number of Judge
21 Advocates, even when we are deployed, where we
22 have the ability to use a Judge Advocate as the

1 PHO.

2 So I don't think we have, I just can't
3 speak with certainty.

4 COL DENNIS: Similarly, I cannot
5 recall a time in my career where we did not use a
6 Judge Advocate to serve as either the
7 investigating officer or preliminary hearing
8 officer.

9 MEMBER OSBORN: And that includes
10 deployed situations?

11 COL DENNIS: And that includes
12 deployed situations, yes, ma'am.

13 MEMBER OSBORN: Thank you.

14 COL GANNON: Yes, ma'am, same for the
15 Marine Corps. Even when we have incidents
16 involving significant accusations of battlefield
17 misconduct overseas we have generally sent those
18 cases home and utilized Judge Advocates for the
19 preliminary hearings.

20 I am not aware of any instances where
21 due to -- I am aware from many years ago where we
22 have used Line Officers, certainly, but not due

1 to extraordinary circumstances. This would be
2 pre-rules change.

3 The second part of your question, I
4 absolutely do believe that that flexibility
5 should be maintained in the system that in
6 extraordinary circumstances, a war of national
7 survival, absolutely to maintain good order and
8 discipline the Military Justice System should
9 have the flexibility to apply whoever is
10 available that is statutorily qualified, yes,
11 ma'am. That capability should remain, ma'am.

12 MEMBER OSBORN: Thank you.

13 CAPT SCOTT: Ma'am, I have never seen
14 it and wouldn't advocate for it.

15 CAPT HAMON: And I've never seen it
16 either. I'd add that the ability to have
17 preliminary hearing officers appear remotely also
18 has made it even more attainable no matter where
19 or what.

20 CHAIR HILLMAN: Judge Kasold, do you
21 have any questions for the experts here?

22 MEMBER KASOLD: No. Thank you.

1 CHAIR HILLMAN: Okay. Thank you.
2 Then we'll go to Captain Schroder.

3 MEMBER SCHRODER: I want to go back to
4 this kind of line of questions about situations
5 where the PHO might not find PC but the case gets
6 referred anyway.

7 I am trying to get a feel for that.
8 How often does that happen, and I am not
9 necessarily looking for data, but you probably
10 have some idea, I suspect, and what are the
11 scenarios where that happens?

12 (Laughter.)

13 COL DENNIS: It does happen. One
14 thing I will, you know, ask the Committee, the
15 Panel, to consider here is is there are a number
16 of reasons why it would happen.

17 One is the straining piece that we
18 have talking about and the level of experience in
19 preliminary hearing officers. It does play a
20 role in, you know, whether a convening authority
21 follows their advice.

22 If it's a junior person, if it's a

1 person who may be more experienced but maybe
2 lacks experience, experience as a Judge Advocate
3 but lacks experience in military justice
4 specifically, sometimes, you know, their advice
5 is given less weight.

6 Their finding is given less weight
7 than it would be if it was a Military Judge or if
8 it was a person who has, you know, who is a Major
9 who had experience in a senior counsel position
10 as a defense counsel or a trial counsel. That's
11 a factor.

12 The other thing that's a factor is the
13 way the case develops. So, you know, evidence
14 continues to be collected, interviews happen with
15 various witnesses, interviews with the victim, in
16 particular, could happen after the Article 32
17 hearing, and so that is a factor as well, but I
18 would say that those two things are, at least in
19 my experience.

20 I believe the latest date I have is it
21 was just shy of 70 percent, around 66 percent for
22 the Air Force in terms of when a preliminary

1 hearing officer's advice wasn't followed.

2 That could be in either direction, not
3 necessarily, you know, referral over a non-PC
4 recommendation.

5 MEMBER SCHRODER: When you say -- Let
6 me understand the numbers. That the PHO finds no
7 PC but yet over half, 66, 70 percent of the time
8 that's occurred anyway?

9 COL DENNIS: No. No. What I mean is
10 the other way.

11 MEMBER SCHRODER: Oh.

12 COL DENNIS: So 66 percent of the time
13 is consistent.

14 MEMBER SCHRODER: Okay.

15 COL DENNIS: So the PHO, the convening
16 authority makes the decision consistent with the
17 PHO's advice.

18 MEMBER SCHRODER: Okay.

19 COL KENNEBECK: So there is some data
20 I think that the DAC-IPAD found. I think it's a
21 bit dated. It's before 2019 when MJA really
22 kicked in.

1 I think it might be useful if you
2 wanted to go down this road to take a look at
3 some more recent data.

4 In the Army in that particular year
5 looked as though we went the other way, 66
6 percent of the time we disagreed with the PHO.

7 In my experience I have had -- A
8 couple anecdotes then I would say is if you have
9 a preliminary hearing officer who hears one
10 inconsistency from the victim or two and just
11 says, okay, the victim's credibility is out, I'm
12 done.

13 That can be an interpretation of
14 reasonable. I mean that's what probable cause
15 is, reasonable belief, and that counters the
16 reasonable belief a crime has been committed.

17 In situations like that, especially
18 like that, when counterintuitive behavior play a
19 factor in what the victim does or says can
20 sometimes impact a preliminary hearing officer's
21 opinion as to whether there is PC.

22 In my mind that goes to specialized

1 training, lack of specialized training, not
2 whether the person is a Judge, but life and
3 experience in these types of cases.

4 In those case, you know, which is
5 rare, we would go to trial despite the fact the
6 PHO recommended no PC.

7 COL GANNON: I don't think it's a very
8 common event in my experience where there would
9 be a finding of no PC and then --- it certainly
10 happens, I don't want my statement to be
11 misunderstood. It certainly does happen, but
12 it's not very common.

13 Probable cause is such an incredibly
14 low standard. And going back to my first comment
15 about the utility of the 32 as it currently
16 exists, typically the prosecutor is going to put
17 on the interrogation of the accused, the
18 statement of the victim.

19 The statement of the victim says the
20 light was red. The accused invokes there's
21 probable cause if the light was red, generally
22 speaking. So in my experience it would be a

1 pretty rare thing, but I'm not going to say
2 definitively that it doesn't happen, sir.

3 CAPT SCOTT: Echoing Colonel Gannon's
4 sentiment about PC, PC is met with an accusation
5 by most hearing officers. And so if there's an
6 accusation, the rest of the evidence that might
7 be helpful to a referral authority's decision
8 making, you know, it's not weighed the same way.
9 So if we're only looking at a minimal threshold,
10 that's one thing.

11 Additionally then there's, of course,
12 your convening authorities and whether or not, as
13 individuals, they feel any pressure to put
14 something forward when a victim wants to.

15 CAPT HAMON: Just I would add from the
16 Navy's perspective, I think it does happen,
17 although it is rare. I agree with Colonel Gannon
18 on that.

19 I think it's more common than if
20 those, you know, we'll find a PC will recommend
21 against court martial, and then we would still
22 proceed. It's more common to be disagreement on

1 that front, on that second question, but not as
2 common for the no PC.

3 And where we would disagree, I think
4 it comes back to training. I think if there's a
5 disagreement, typically the perspective would be
6 that the PHO misapplied the standard of probable
7 cause and probably made it a stricter standard
8 than its supposed to be.

9 MEMBER SCHRODER: But I guess, I'm
10 sorry, I wanted to kind of follow-up a little
11 bit, what I'm trying to get a handle on, and
12 that's really helpful, is this a problem that
13 needs to be solved? And I'm not sure it really
14 is. And I guess I'm not asking it, that's not a
15 question exactly.

16 So I'm just kind of throwing that out
17 there for our consideration. I don't think I
18 want to put you all on the spot and ask you that
19 question. But if anybody feels like they'd like
20 to comment, that's fine.

21 (Laughter.)

22 COL KENNEBECK: Thanks. I'll go back

1 to the beginning and say it depends on what you
2 want. If this really is intended to assess is
3 there probable cause by an objective party, I
4 think it fulfills that purpose.

5 If it's intended to dig deeper and
6 access credibility, and become a discovery tool,
7 then we need to change the rules back. I hear
8 the concern about cases that don't have PC making
9 it to referral and to trial.

10 I don't think that's what's happening
11 here. You have cases that are just difficult to
12 prove and only one or two witnesses. And you
13 move forward, you know, in those different cases
14 when the evidence suggests you should.

15 Our acquittal rate is a little bit
16 higher, but that's because we have a statute that
17 is very broad. And we aggressively investigate
18 and prosecute these cases as we've been asked to
19 do. And I still think we have a lot of folks who
20 are probably victims who don't get the
21 satisfaction of walking out of a courtroom after
22 a conviction. These are difficult cases.

1 So I do think that the purpose of the
2 32 is fulfilled. And in the vast majority of the
3 offenses, if you access across the spectrum of
4 the Uniform Code of Military Justice, I think
5 Article 32 fulfills its purpose perfectly.

6 It's just these bandwidth of cases
7 where you see this anomaly. And that has
8 something more to do with the types of evidence
9 that we have and the breadth of the statute over
10 it.

11 COL DENNIS: I would just add that,
12 you know, the conversation around Article 32 is
13 in the utility, as we opened up the conversation,
14 has been whether it's limited in some way. And
15 it's always in comparison to the pre-14 system,
16 and they're just different.

17 You know, at the end of the day, we
18 are trying to balance making sure that a victim's
19 rights are protected and that an accused has a
20 fair trial and gets the benefit of due process.
21 And we can achieve both of those things, I think.

22 The Article 32 process certainly, you

1 know, this panel can evaluate whether there is
2 room for improvement, for example, with the
3 qualification standards for the preliminary
4 hearing officer. But it does meet the purpose of
5 probably cause. And I do believe that it meets
6 the purpose of balancing the needs of the victims
7 and due process rights to the accused.

8 MEMBER BRUNSON: Okay. I'm going to
9 create a scenario for you. All right, let's
10 assume that all of our PHOs are properly, by
11 whatever definition you want to use, trained,
12 experienced, qualified, okay. This is a military
13 judge with 50 years of trial experience, okay.
14 That is your PHO.

15 And of course we're talking about
16 sexual assault trials, because those are the ones
17 that we have trouble with. I'm trying to make
18 the perfect PHO.

19 (Laughter.)

20 MEMBER BRUNSON: So we have the
21 perfect PHO, right. So here's my question under
22 that scenario. If the preliminary hearing

1 officer -- if the purpose of an Article 32
2 investigation is to determine whether or not
3 probable cause exists, and we have a trained and
4 experienced PHO who finds that probable cause
5 does not exist, why then, or should, the
6 convening authority be able to overrule that?

7 So my scenario is perfect PHO, purpose
8 of the Article 32 is to determine probable cause.
9 So if the convening authority is able to say I
10 don't care what the PHO says, the SJA told me
11 there is probable cause, so I'm going forward,
12 then it looks like we're pitting the PHO against
13 the SJA. And then why are we doing it anyway,
14 why have the 32?

15 So that's the situation I give you,
16 go.

17 COL KENNEBECK: I think that, because
18 what the second order effect of that outcome is
19 that the Government will be inclined to perfect
20 its case more before the Article 32, which takes
21 more time. It's going to have second and third
22 order effects that impact the flow of justice,

1 number one.

2 MEMBER BRUNSON: We're talking
3 probable cause, really low standards.

4 COL KENNEBECK: Yes, but no is no
5 then. And I guess you'd have a second bite at
6 the apple, because there's no, you know, double
7 jeopardy doesn't attach. However, I do think
8 that you're going to see then a preliminary
9 hearing that is more akin to what we used to do.
10 And it will be more bandwidth spent on it.

11 And second, then I still ask the
12 question are you going to make victims testify?
13 And if you do that, then how many cases are we
14 going to lose? I mean, I'll acknowledge the fact
15 that the premise that I grew up, military justice
16 was I'd rather have nine guilty go free than one
17 innocent be convicted. And I still believe that
18 to be true.

19 But we have other public policy.
20 We've learned a lot about victim behavior and how
21 this evidence looks in the last 20 years, you
22 know. And I think that that also is a

1 counterweight to that notion.

2 I don't want to unnecessarily send an
3 accused to a trial because the Article 32's not
4 robust enough. I don't like that. But on the
5 flip side, I think that in cases, especially this
6 type of cases, you need to have that flexibility
7 where the evidence, what it looks like at the day
8 of the 32 isn't what it's going to look like at
9 trial.

10 And that's because the case continues
11 to develop, that's because you are going to be
12 able to put witnesses on to help shape the
13 perception of credibility of that victim in a
14 way that you can't do with the 32 over.

15 MEMBER BRUNSON: And I do believe ---

16 COL KENNEBECK: Of the cases that are
17 docketed in February and March, there are 60
18 general courts-martial throughout the world that
19 we've been made aware of. Fifty-three of them
20 have Article 120. So it's not a narrow
21 bandwidth. This is almost all the cases that
22 appear to be going to trial, just an observation.

1 COL DENNIS: In the scenario that you
2 painted, I think it would be unlikely for the
3 convening authority not to follow the advice of
4 the PHO's recommendation absent a change in the
5 evidence.

6 Like I said, sometimes, you know,
7 sometimes there are 413 witnesses that come to
8 light. The case continues to be perfected by the
9 trial counsel. In fact, most of the effort is in
10 between the referral of the case and the actual
11 trial.

12 Because there are months in between
13 that referral decision being made and the actual
14 trial date. And the closer that we get to it,
15 the more it's taking a prosecutor's decision or
16 time in preparation.

17 So, like Colonel Kennebeck said, the
18 case looks very different from the time that the
19 Article 32 evidence is presented by the
20 Government representative and the time that we
21 actually get to trial. And so I do believe that
22 that could be a factor. But it's still unlikely.

1 MEMBER BRUNSON: And I think that's,
2 I'm sorry, I think that's part of my concern is,
3 if the purpose is to find probable cause, or to
4 determine that probable cause exists, and it
5 doesn't, then should it be going to trial? If
6 you don't have probable cause at the time, then
7 what's the problem with waiting until you can
8 demonstrate probable cause to proceed? So that's
9 kind of really what I'm getting at.

10 You know, if there were a grand jury
11 investigation, and they say there's nothing here,
12 you don't go to trial anyway. So the purpose of
13 the question is really looking at why are we
14 doing the 32. And if the convening authority can
15 go forward anyway, then I go back to then why are
16 we doing the 32.

17 COL GANNON: Yes, ma'am. The probable
18 cause standard is so low and so nebulous, and I
19 know we all agree it's a very low standard, but
20 it's also a very nebulous standard.

21 Even a military judge with 50 years of
22 experience could look at a case where, in many of

1 these prosecutions, the evidentiary body consists
2 of a statement of the victim and perhaps a
3 statement of the accused. So it's a very limited
4 evidentiary set.

5 And so two rational, logic-based life
6 forms could look at that statement of that victim
7 and say I've got a problem with this or I've got
8 a problem with that. I find no PC. Where
9 another person could say look, that accusation
10 seems to me to be credible.

11 The problem we have, ma'am, with your
12 scenario is that reasonable minds can differ
13 based on the evidentiary body we see typically
14 with these cases. And so that flexibility, at
15 least in Nick Gannon's world, that flexibility
16 going back to the statutory obligation that a
17 commander has to maintain good order and
18 discipline in his or her unit, that flexibility
19 is key to maintain in our system, given the
20 nature of finding probable cause kind of the way
21 I just described it, ma'am.

22 CAPT SCOTT: I think if you're

1 genuinely questioning whether PC exists, we're
2 operating in a different part of the spectrum of
3 evidence, and you should be at that point. But
4 if I keep talking, I'm going to sound like I
5 belong on the defense panel.

6 (Laughter.)

7 CAPT HAMON: Well, I would just add,
8 I kind of share your risk on that. I feel that
9 the problem -- I understand that the probable
10 cause standard is nebulous, and I agree. But it
11 is very low.

12 From my perspective, if you take that
13 assumption of the 50-year PHO that absolutely
14 understands probable cause, I think that you
15 shouldn't be able to proceed without it.

16 But I do think the Government should
17 be able to keep coming back with more evidence.
18 So if there's more evidence, then it's not a
19 permanent wall. If the Government doesn't have
20 probable cause, they can't proceed. But if they
21 come back and have it, they can, similar to a
22 grand jury.

1 CHAIR HILLMAN: Thank you, last
2 question for this group from Colonel Gunn.

3 MEMBER GUNN: I'm intrigued by
4 something here in -- the appropriate balance
5 between an accused' rights, as well as the
6 victim's rights. But I am thinking back to my
7 days as an SJA. And it seems that there's a
8 phenomenon where, under our system, I'm not aware
9 of any downside to a convening authority letting
10 a case go to trial.

11 And I say that from a political
12 standpoint. And what I mean by that is that,
13 especially when you're talking about sexual
14 assault, you have a situation where you're not
15 going to get criticized, or you're not going to
16 get criticized much, if at all, in the press or
17 elsewhere, by taking a problematic case to court.
18 But you will get criticized by making the
19 opposite decision regardless of the
20 recommendation of a preliminary hearing officer.

21 And I make that observation just from
22 the standpoint of what I've seen in practice and

1 what I've seen in the media in the years since I
2 left the military. And so I welcome you all to
3 tell me otherwise that I'm wrong with respect to
4 that. But I'm thinking that's the fundamental
5 challenge that we face.

6 COL KENNEBECK: I still don't think
7 we'd take cases, any of us here, I mean, people
8 who work for us that didn't have PC to referral.
9 I think that what it really comes back to are
10 these are tough cases, and the reasonable minds
11 differ.

12 I mean, I definitely hear what you're
13 saying and agree, but there are convening
14 authorities out there do think about I better try
15 this case. This case just doesn't -- it needs to
16 be tried, I think. Even though the PHO said I
17 don't have PC here and I shouldn't go forward, I
18 really want to try it.

19 I would be the SJA in the room to say,
20 sir, here are the downsides of that, here is what
21 the weight of the evidence is from my assessment,
22 and from my prosecution team assessment. And I

1 would be loath to take a case to referral that I
2 didn't believe a crime had been committed.

3 So I do think that this goes back to
4 what are we doing the 32 for. And probable
5 cause, there's a great distance from PC to beyond
6 a reasonable doubt, because there's that broad
7 space, and because PC is this nebulous theory
8 that people with reasonable minds can differ,
9 that's why have this little bit of disparity.

10 But I don't believe that the system is
11 so impacted by policy that we are still not
12 accessing whether we have PC not. We just try
13 tough cases. And that has resulted in more
14 acquittals. That's my view.

15 COL DENNIS: I definitely concur with
16 that. You know, certainly there are going to be
17 people who consider factors outside of Article
18 33, and Article 34, and Article 32, the guidance
19 that they've been given by their SJA or the
20 recommendation they've been by the PHO, including
21 political pressures. That's a real phenomenon.

22 In my experience, however, I haven't

1 seen a convening authority be solely persuaded by
2 that. They have looked very closely at the
3 evidence. And this relates somewhat to the
4 conversation we've been having about the utility
5 of the PHO even when it's no PC. Like, if their
6 recommendation is no PC, they still conduct an
7 analysis. They conduct an analysis, and they say
8 why they found no PC. And they're an independent
9 party.

10 And so if there's a situation where
11 the convening authority, you know, another
12 reasonable mind, is looking at PHO's analysis and
13 saying I disagree with your analysis, those two
14 different perspectives are paired together and
15 evaluated for the convening authority to
16 ultimately make a recommendation and take that
17 case.

18 So that's a value that they have, the
19 value that they have in looking at the case
20 differently. Hey, maybe that's how one of the
21 panel members are going to look at this case.
22 And maybe we need to introduce some more evidence

1 to get after that concern.

2 But the person who's making the
3 decision on whether to refer the case should be
4 required to, as they are, look at the evidence
5 and the PHO's recommendation as a factor,
6 notwithstanding any particular political
7 pressure.

8 But certainly to answer your
9 fundamental question, those things exist, and it
10 would, you know, certainly be something for us to
11 consider as we move forward and as you move
12 forward in evaluating the utility of the Article
13 32 process.

14 COL GANNON: I have not found that to
15 be the case, sir. I found that the commander's
16 that I've had the opportunity to work with, and
17 give legal advice to, or be a part of a
18 prosecution team, providing legal advice to their
19 legal advisor, they agonize over these decisions,
20 they take them incredibly seriously.

21 I've not seen undue influence
22 manifestly obvious in my practice throughout the

1 entirety of my career. I just don't see that as
2 a factor in terms of making a -- driving a
3 commander to a bad decision based on anything
4 other than -- what they really rely at the end of
5 the day is the advice of their legal advisor.

6 When it comes to the closed door
7 environment, sir, you've been an SJA, that closed
8 door environment, one on one, me to the boss,
9 hey, sir, here's what I think, and generally
10 speaking that carries the day.

11 MEMBER GUNN: As I understand the
12 model rules of professional responsibility from
13 the American Bar Association, legal advisors,
14 attorneys are entitled to take other factors into
15 consideration in advising their clients. And
16 that includes political considerations.

17 So whether it originates with the
18 convening authority, or whether it originates
19 with that legal advisor, the factor is still
20 there. And that's what I'm grappling with as I
21 thing about Article 32 and how it exists today.

22 COL GANNON: Sir, yes, sir. And if I

1 just may offer this, I just have not met,
2 assuming arguendo that it would be appropriate
3 under the model rules to consider a political
4 aspect or a political outcome for the boss in the
5 decision and they make, in their independence and
6 unfettered discretion as a military justice
7 decision maker, I just haven't seen it.

8 I just haven't seen it ever factored,
9 discussed, be a component of the decision making
10 process. It truly boils down, in my experience,
11 to that relationship with the SJA, the nature and
12 state of the evidence, and the recommendations
13 that come from the process.

14 CAPT SCOTT: Sir, I think all those
15 factors that you just brought up have to be
16 balanced against the fundamental fairness of the
17 process. The goal is not a conviction, it's
18 justice.

19 And at a forum where there's unlimited
20 punitive exposure, again, I'm sounding like I
21 belong on the next panel, weighing that against
22 the conversations that I've overheard and the

1 actions that, you know, we've seen taken,
2 particularly over the last decade but, you know,
3 they change.

4 So at this point in history where are
5 we at? How subject to those influences are our
6 current convening authorities versus in prior
7 iterations. And I think that should be thought
8 about. Thanks.

9 CHAIR HILLMAN: Captain Hamon, I'll
10 ask you to be brief, as you wrap up our question
11 and our time with this group.

12 CAPT HAMON: Oh, no. Well, I don't
13 think I have anything to add. So I could be very
14 brief on that. I have nothing to add to that
15 response, that question.

16 CHAIR HILLMAN: Thanks, Captain Hamon.
17 In which case, General Kenny's going to wrap for
18 us.

19 MEMBER KENNY: I just want to go back,
20 I probably missed it. When we talked about the
21 67 percent, or whatever the number was, where
22 there was a difference between what the convening

1 authority did and what the PHO recommended, do we
2 have a break down, it's two questions, do we have
3 a breakdown in the statistics of the number of
4 times where the PHO said no probable cause with
5 the convening authority for the case anyway,
6 what's that statistic?

7 And the next question I have to follow
8 on is that statistic, whatever it is, is that
9 based on, when we say 67 percent where there was
10 a difference between what the PHO recommended and
11 what the convening authority did, is that based
12 upon specifications brought after 32, or is that
13 based upon the 32?

14 In other words, if I brought four
15 specifications in for 32 and only one of them
16 wasn't recommended by the PHO, and then there was
17 a change to one of those specifications? But my
18 more important question, I wasn't going to ask
19 that last part until we got to all of this
20 discussion.

21 COL BOVARNICK: Sir, if I could --

22 MEMBER KENNY: I'm really interested

1 in knowing what that breakdown is in the times
2 when a convening authority brought a case where
3 the PHO said no probable cause, and without
4 having it been referred back to another Article
5 32.

6 COL BOVARNICK: Sir, I'll jump in
7 here. We do have those statistics and I can
8 provide a more detailed breakout for the panel.

9 But just very quickly, for eight
10 years, from Fiscal Year 14 to Fiscal Year 21 --
11 this is just sexual assault cases, and that's all
12 the we have the data for to start -- There were
13 530 cases, that's every service for eight years,
14 where there was no PC found on a sexual assault
15 offense.

16 So the PHO said no PC, 530 cases over
17 an eight-year period. And of those 530, the
18 convening authority referred 40 percent of those
19 530 cases, so 216 cases, sexual assault cases
20 went forward, even though their preliminary
21 hearing officer said no PC.

22

1 We'll have a further breakdown for the
2 group, but go ahead, sir.

3 MEMBER KENNY: Just to follow on, so
4 that 40 percent of the 530 cases were referred by
5 the convening authority even after the PHO said
6 no probable cause. Was that on the convening
7 authority only after discussing with the staff
8 judge advocate?

9 Or was that sent back to an Article
10 32, because new information had come up that
11 would have gone back to another 32 on that
12 specification and said, yeah, now we think we
13 have probable cause?

14 COL BOVARNICK: We could do a deeper
15 dive on that. But what I'm going to say
16 initially, because we did a detailed study of
17 this, the staff, I'm going to say it's based on
18 the staff judge advocate saying there's probable
19 cause to move forward.

20 In those numbers, I don't know. We
21 can go back and look, but I would doubt that
22 there's a case where the preliminary hearing

1 officer and the staff judge advocate said no
2 probable cause. And the convening authority
3 said, you know what, I'm sending it forward
4 anyway.

5 That's my initial guess on that second
6 piece. And I would say if there was, you'd be
7 in the range of, like, one or two cases if that
8 happened. But we'll get the details on that.
9 But I think we'd better definitely move on.

10 COL KENNEBECK: If I could jump quick
11 here, I sense a data dive in the future.

12 (Laughter.)

13 COL KENNEBECK: And that's fine.
14 We're happy to help support. And I know you've
15 already done some diving. But I would ask you to
16 take a look at how many of those cases out of
17 those 540 that were eventually referred where the
18 sex offense resulted in a conviction that
19 otherwise would not have been tried.

20 (Simultaneous speaking.)

21 COL BOVARNICK: We have that data.

22 CHAIR HILLMAN: Clearly the data

1 matters as well as your insight and experience.
2 I'm really grateful for the time you spent here.
3 We're already on the bridge to the defense side.
4 We're going to take a five minute break. And I
5 want to thank you all for being with us.

6 (Whereupon, the above-entitled matter
7 went off the record at 11:35 a.m. and resumed at
8 11:43 a.m.)

9 CHAIR HILLMAN: Good morning. Next
10 we'll hearing perspectives on Article 32 from a
11 panel of defense counsel.

12 It's a slightly different order than
13 the agenda we have. Lieutenant Commander Kevin
14 Brandwein from the Navy, then we have Colonel
15 Sean McGarry from the Army, Colonel Brett Landrey
16 from the Air Force, Colonel Valerie Danyluk from
17 the Marine Corps, and Lieutenant Commander
18 Jennifer Saviano from the Coast Guard. Thank
19 you.

20 LCDR BRANDWEIN: Thank you, sir. Good
21 morning, Madam Chair and member of the Military
22 Justice Review Panel. My name is Lieutenant

1 Commander Kevin Brandwein.

2 I'm currently serving as the Deputy
3 Director of the Defense Counsel Assistance
4 Program. In that capacity, I consult with
5 counsel across the globe on individual courts-
6 martial, everything from case strategy to
7 reviewing motions to sharpening their arguments
8 for opening and closings. I also work on
9 developing training and working with defense
10 leadership to talk about the different trends
11 we're seeing inside the defense practice.

12 I initially entered the Navy as a
13 Surface Warfare Officer. And I was fortunate to
14 be selected for the Law Education Program in
15 2009.

16 Since I transitioned to the JAG Corps
17 in 2012, I have served almost entirely in
18 litigation roles as trials defense counsel, as a
19 defense counsel in Bremerton, trial counsel in
20 Bremerton, Washington, trial counsel in Norfolk,
21 officer in charge of the Defense Service Office
22 in Pensacola, Florida, senior trial counsel in

1 Bremerton, Washington, and now as the Deputy
2 Director of the Defense Counsel Assistance
3 Program.

4 I'm excited to be here and look
5 forward to speaking with you.

6 COL MCGARRY: Good morning, everybody.
7 I'm Colonel Sean McGarry.

8 I am currently the Chief of the United
9 States Army Trial Defense Services. I have 28
10 years of service in the Army, 26 as a Judge
11 Advocate. The majority of that time has actually
12 been from a government perspective.

13 I have been fortunate enough to have
14 been assigned as a Deputy Staff Judge Advocate
15 twice and a Staff Judge Advocate three times in
16 three different types of organizations, the first
17 time for 7th Army and the Joint Military Training
18 Command in Grafenwoehr, Germany, second time at
19 the installation, the Joint Readiness Training
20 Center in Fort Polk, and then most recently for
21 Fort Bliss and 1st Armored Division.

22 COL LANDREY: Good morning, ma'am and

1 panel members.

2 I have 19 years of experience as a
3 Judge Advocate with a direct succession into the
4 Air Force in 2004. During my time, I have had
5 the opportunity to serve primarily in military
6 justice focused roles to include an Area Defense
7 Counsel, Circuit Defense, or excuse me, Circuit
8 Trial Counsel, and Senior Trial Counsel as part
9 of our Senior Litigator Program. The second
10 assignment I was the Chief Senior Trial Counsel
11 of the Air Force for two years.

12 I have also served as a Deputy Staff
13 Judge Advocate and a Wing Staff Judge Advocate,
14 and most recently, prior to coming into this job
15 as the Chief of our Trial Defense Division, as a
16 military judge for two years.

17 COL DANYLUK: Good morning. I am
18 Colonel Danyluk.

19 I have been a Judge Advocate in the
20 Marine Corps for about 27 years, almost entirely
21 in military justice, my first ten years mostly as
22 a prosecutor. I have twice served as a military

1 judge, been an Inspector General, an SJA.

2 I've had the highest, at the time, the
3 highest position of a trial counsel, which was
4 the Director of Appellate Government. I've been
5 a Regional Defense Counsel. And I've been in
6 this billet as the Chief Defense Counsel of the
7 Marine Corps. This is my fourth year.

8 LCDR SAVIANO: Good morning, panel
9 members. My name is Lieutenant Commander
10 Jennifer Saviano.

11 I've been in the Coast Guard for a bit
12 over 16 years. Most of that is not in the legal
13 career. Like Commander Brandwein, I was selected
14 for the legal program. So the first 11 years
15 were just doing regular counterdeployments and a
16 variety of other billets.

17 But after law school, I was fortunate
18 to serve in a Defense Service Office with the
19 Navy for two years as a defense counsel. From
20 there I went on to a Deputy SJA type position
21 with our Legal Service Command for three years,
22 and then most recently, this summer, transferred

1 into this billet as the Chief of Defense
2 Services.

3 I would like to make everyone just
4 really quickly aware that Coast Guard is very
5 unique when it comes to defense services compared
6 to our sister services. We do not have an
7 organic or internal trial defense team
8 whatsoever.

9 I particularly manage two appellate
10 defenders. And then all of our trials are
11 actually handled through the Navy under a
12 memorandum of agreement, or excuse me, a
13 memorandum of understanding that we have.

14 So, when it comes to more specifics on
15 Article 32s, I will definitely defer to my Navy
16 counterparts in that realm just because they're
17 more in tune of what's going on. Thank you.

18 CHAIR HILLMAN: Thank you all for
19 representing your colleagues here and helping us
20 grapple with these big issues that we're facing
21 as we step into this new role in military justice
22 as part of this panel.

1 So I'll start with the same question
2 that we started with the prosecution side that's
3 at the top of the list there. From your
4 perspective, have the 2014 changes to the Article
5 32 limited its usefulness? And if so, how?

6 LCDR BRANDWEIN: Ma'am, it's probably
7 not going to be surprising for the defense side
8 it has limited the usefulness. For the first
9 three years that I was practicing under the old
10 rules, Article 32 was robust. Now they are
11 typically paper 32s in which there is no real
12 quality information presented to the PHO for them
13 to make a determination of probable cause.

14 So the information that they're using
15 to determine probable cause, there is lack of
16 reliability, not necessarily in the nature of the
17 evidence, but it's all hearsay or double hearsay
18 or triple hearsay. It's being presented in a
19 manner in which there's sort of a desire to see
20 the case go forward.

21 And what we normally see is a
22 recommendation that says I think there's probable

1 cause here or it's possible a crime was committed
2 here and these are serious allegations, therefore
3 the case should go forward.

4 And once that recommendation is made,
5 the case proceeds to a general court-martial.

6 And there's no mechanism for the accused to do
7 anything other than wait for the members to
8 render a verdict. And that can take a long time.
9 And it puts them through a terrible ordeal
10 waiting for that verdict.

11 And then we do see cases where there's
12 no PC found at the 32. And the members panel
13 comes back with a conviction. And then they're
14 waiting for appellate review to find the
15 insufficiency of the evidence.

16 So we see a lot more cases that do not
17 belong at a court-martial making it through the
18 Article 32 phase because the evidence which is
19 presented to a PHO is simply a paper case where
20 they're not even being able to ask, or they're
21 not able to judge any credibility in a sexual
22 assault type case.

1 COL MCGARRY: I agree with my Navy
2 colleague. I would also, you know, like to point
3 out that in addition to the narrowing of the
4 focus of the 32, one of the other elements that I
5 think is worth mentioning is the way we have
6 distinguished a primary accuser in Article 120
7 type cases from other witnesses, in that you will
8 allow that person to sit through and evaluate all
9 of the testimony that goes on and consider that
10 for the period of time between 32 and trial.

11 I think that, combined with the
12 narrowing of the scope, along with the non-
13 binding nature of the 32, provides an even more
14 powerful disincentive for defense counsel to
15 bring cases to help, helping the government
16 perfect the case at a proceeding that is not much
17 more than a rubber stamp.

18 COL LANDREY: I'll make a third, in
19 that it is less useful as a tool regardless of
20 how you are looking at what the purpose of that
21 tool is.

22 If we're looking at the purpose of

1 that tool to be a non-binding check on
2 prosecutorial discretion in terms of the
3 establishment of probable cause, the non-binding
4 aspect of that makes it not all that useful, as
5 put very well by Commander Brandwein, in
6 practice.

7 If we're looking at it as a tool to
8 facilitate or assist convening authorities or
9 soon-to-be the Office of the Special Trial
10 Counsel in a disposition determination, frankly
11 as currently constructed, excuse me, it is not
12 all that useful either.

13 And as currently constructed, there
14 are minimal incentives, not to reiterate what
15 Colonel McGarry just said, but minimal incentives
16 for defense counsel to aggressively participate,
17 if you will, in the 32. And frankly, as was
18 pointed out during the last panel, that was
19 somewhat by design.

20 But, as it exists right now, many
21 times my advice to my folks is why are you having
22 this 32, consider waiving it, what does it do for

1 you right now.

2 So, again, on the policy spectrum of
3 where it should be, I concede. It's a policy
4 question, not necessarily a question of
5 constitutional rights. But that said, right now
6 from a policy perspective, it's, my position as
7 Chief of the Trial Defense Division, it's not
8 very useful.

9 COL DANYLUK: I agree with my
10 colleagues on all aspects. I won't rehash
11 everything that they have already said.

12 But one of the things that came up
13 earlier today was about what evidence the defense
14 should be able to gather through the discovery
15 process, and then with an inability to question
16 an alleged victim, whether that's directly or
17 even through the PHO.

18 One of the purposes of the 32 is to
19 make a disposition recommendation. And we feel
20 like our hands have become somewhat tied more so
21 post-2014 than they were previously in an ability
22 to try to convince the PHO that even if there is

1 probable cause at that very, very low standard
2 what the appropriate disposition should be in the
3 case.

4 LCDR SAVIANO: I only know the post-
5 2014 rules in effect. But I will state that when
6 it came to just straight sexual assault cases
7 that I was defending, I did find it pretty
8 limited in terms of its usefulness.

9 However, when I was managing a sexual
10 assault case with a variety of other charges,
11 it's often something I think we see in a lot of
12 our Coast Guard cases where they charge sexual
13 assault and a variety of other charges, at hand I
14 found the 32 in particular extremely useful to,
15 in this particular case, get the evidence that I
16 needed to show at pretrial litigation that
17 certain charges should have been dismissed. And
18 ultimately they were dismissed.

19 So, from the defense perspective, it
20 allowed me to really just focus on those sexual
21 assault cases at hand, so just a particular
22 example of where it can be extremely helpful from

1 the defense side.

2 MEMBER BRUNSON: Okay. A couple of
3 you have mentioned credibility or credibility
4 determinations during the Article 32.

5 If the Article 32 investigation exists
6 to ensure that there's probable cause on the
7 charges that are going to trial, then, and
8 understanding that, you know, credibility
9 determinations can differ from person to person.
10 So I look at it, you know, like we do, the light
11 most favorable to the government.

12 If the purpose of the Article 32 is to
13 establish probable cause and we look at evidence
14 in the light most favorable to the government,
15 then what is the purpose of having a credibility
16 determination or for the defense to present
17 evidence or any of the other things you say are
18 missing?

19 LCDR BRANDWEIN: Ma'am, I don't know
20 if, you know, under RCM 917 it's evidence in
21 light most favorable to the government without
22 any weight on the credibility of the evidence.

1 But for a probable cause
2 determination, some idea of how that credibility,
3 whether that's corroboration from other sources,
4 whether that is things that would give indicia of
5 reliability of the anticipated testimony, should
6 be necessary. That is something that is going to
7 weigh in the sufficiency of the evidence and
8 whether that is evidence even sufficient for
9 probable cause.

10 Otherwise, if you're just saying
11 weight, light most favorable to the government,
12 then an allegation by itself would be enough to
13 establish probable cause.

14 And in my opinion, there should be
15 some relevance to the credibility when there is
16 an allegation that depends entirely on the
17 credibility of, you know, one witness with
18 corroboration.

19 COL MCGARRY: I agree. I think in
20 order to be meaningful I think we have to have an
21 examination that makes it more than just an
22 unexamined allegation.

1 COL LANDREY: Agree, and would only
2 add that respectfully I believe the utilization
3 of the probable cause standard as low as it is
4 satisfies that light most favorable to the
5 government, if you will. That is a very low
6 threshold check.

7 COL DANYLUK: I would offer an analogy
8 to, when you approach a convening authority for a
9 search authorization under the probable cause
10 standard, you would expect the law enforcement
11 officer to include in his affidavit any
12 information conveyed that, for example, the
13 information is stale or that the information
14 comes from an informant that might be somewhat
15 unreliable or have a motive to fabricate, maybe
16 they're in a pretrial negotiation or something
17 like that.

18 And to that extent, we believe that
19 that type of information should be able to be
20 presented to the hearing officer so that he can
21 make a probable cause determination based on more
22 than just a mere allegation. Because if it is

1 just a mere allegation, then truthfully we don't
2 need an Article 32 hearing at all.

3 LCDR SAVIANO: In addition to that, I
4 think it really depends on what information the
5 PHO was given. If the PHO was given, for
6 example, summaries of an NCIS agent or a CGIS
7 agent or an OSI agent, that's that agent's
8 summary. That's not necessarily the best
9 evidence.

10 So there's no way -- I mean, the PHO
11 then is just relying on that agent's summary of
12 what occurred. It would be different, for
13 example, if they at least had the actual audio or
14 video of what that interview was like.

15 So I think credibility really does
16 come into play, because the PHO not only is
17 finding probable cause, but they're also making a
18 recommendation. And in order to make a
19 recommendation, you probably want to know how
20 credible your evidence and your resources are.

21 MEMBER SOMERS: Thank you, everyone.
22 So I think Lieutenant Commander Saviano is the

1 only one who really said what some of the
2 benefits might be for an Article 32 hearing. You
3 said you could use it to eliminate some of the
4 charges remaining with the sexual charge.

5 So, if you were to envision what would
6 be an alternative to the current Article 32, what
7 do you think would work best to balance the needs
8 for the prosecutors and the defense?

9 LCDR BRANDWEIN: I think making the
10 probable cause determination binding would be the
11 first step, as well as changing some of the
12 rules. So, for the reliability of the evidence,
13 other evidence is permitted at the Article 32.

14 But a lot of times that results in no
15 one coming in and testifying. And a lot of the
16 witnesses are not audio or visual recording. So
17 you're ending up with a summary by a witness who
18 doesn't even have to appear to discuss what
19 actually was said in the course of maybe an hour
20 or two-hour long interview. You're just left
21 with a piece of paper.

22 So requiring some witness to appear to

1 endorse the hearsay statements that are coming
2 in, whether that's the, you know, the law
3 enforcement agency, NCIS that did the interview,
4 that would at least allow for some ability to
5 discuss more fully what the witnesses said, the
6 corroborating or percipient witnesses said, as
7 well as their view on the credibility of the
8 allegation and what they've seen in the course of
9 their investigation, what they've found and what
10 they haven't found.

11 Often times as defense we're left not
12 really knowing where the investigation is at this
13 point, what they have found or what they haven't
14 found. And you're left with, okay, here's what
15 the government says happened. It's unrebutted.
16 And while there isn't a ton of corroboration,
17 it's unrebutted.

18 So it's going to be difficult to prove
19 at trial. But there's probable cause. And then
20 off you go to a general court-martial, which, you
21 know, based on our conviction rates, often times
22 there's a long break between probable cause and

1 beyond a reasonable doubt, being able to convince
2 one person of probable cause versus six out of
3 eight of beyond a reasonable doubt.

4 COL MCGARRY: I think the only thing
5 that I would add is we're trying to I think
6 balance interests between those of the accused
7 and those of a, in a 120 case, of a primary
8 accuser.

9 I think, you know, as we looked at
10 changes from 2000, we have very legitimate
11 concerns about treatments of primary accusers.
12 And I think if we're trying to balance that,
13 something that we could consider in the way that
14 we execute these proceedings is -- and not every
15 case is the same. Not every one depends with the
16 same amount on a primary accuser's testimony.

17 But in those cases where it is
18 critical, you could still get something from a
19 victim, but maybe it's, they are through
20 questions asked by the PHO vice by a defense
21 counsel. And that might be better, a better way
22 to at least balance and still, and not have it

1 tilt one way or the other as much as it currently
2 is.

3 COL LANDREY: I concur with my
4 colleagues. I particularly appreciated, it was a
5 note I had written down as well, but Commander
6 Brandwein's statement about, while I would not
7 personally advocate for a requirement that a
8 victim testify, getting to what Colonel McGarry
9 was just talking about, I do believe the process
10 would benefit from having someone with knowledge
11 of the case to endorse hearsay statements and be
12 subject to some degree of cross examination in an
13 adversarial process.

14 I think that would, from again a
15 policy perspective, create a tool that was more
16 useful to convening authorities or to the OSTC.

17 Particularly in terms of binding
18 determinations for probable cause, if we had a
19 standardization, and I know we're going to get
20 into this, for Preliminary Hearing Officers on
21 levels of experience, that in my mind would be no
22 different as part of the process from an adverse

1 determination understanding referral, take
2 certain things out of the convening authority's
3 hands.

4 But really I would analogize it to an
5 adverse determination made by a military judge at
6 court-martial, in that if we put that in as part
7 of the process, understanding the low bar of
8 probable cause and understanding that jeopardy
9 does not attach so that the government could
10 always go back and seek more evidence, that it
11 would not in my opinion take discretion away from
12 a convening authority or the OSTC in terms of
13 disregarding the determination of that
14 Preliminary Hearing Officer.

15 COL DANYLUK: I agree regarding the
16 binding nature of the Article 32 hearing. One of
17 the statements that was made I think frequently
18 earlier this morning was that the convening
19 authority should maintain the authority to make
20 decisions about good order and discipline in
21 their units.

22 But one thing that we know already

1 that exists in the rules is if the SJA says that
2 there's no probable cause then they cannot refer
3 the case to a court-martial. And so there is
4 already like some backstop on that.

5 And so the idea that having a binding
6 32 officer I don't think is foreign to having
7 sort of a check on the convening authority's
8 ability to go forward regardless of what a lawyer
9 is advising.

10 We would also like to see the 32
11 officer make an opinion about whether or not they
12 can obtain or sustain a conviction that survives
13 appeal.

14 I won't restate everything everyone
15 else has already said, though. Those are my two
16 main points to that question. Thank you for the
17 question.

18 LCDR SAVIANO: I think some of the
19 benefits that we would see as a collective unit,
20 not just defense but everyone in totality, is
21 that when we have a binding decision, when we are
22 bringing in additional witnesses and evidence at

1 this stage, you're going to end up most likely
2 having a more meaningful hearing and hashing out
3 some of those maybe issues with the case on both
4 sides, right.

5 I mean, like we definitely see, you
6 know, at client management, whether it's an
7 alleged victim, whether it's your defense client,
8 but by being able to get more information earlier
9 on in the process, I think trial counsel will
10 come to a 32 with a more crystalized case. And
11 then the PHO will be able to work through that
12 evidence to provide a better assessment in their
13 ultimate report.

14 COL MCGARRY: I just have one other
15 thing to say about, in terms of concerns for
16 victim care, you know, I think we all know that
17 trial fatigue, especially 120 kind of cases,
18 that's a thing.

19 And there were some observations from
20 the previous panel about concerns about losing
21 victims early. And if you force a victim or
22 primary accuser too much up front, you may not be

1 able to have, that person may not be willing to
2 continue with the process.

3 And I would just offer that for those
4 types of 120 cases where testimony or evidence
5 from the primary accuser is the linchpin, if we
6 were to feel that we might meet the low standard
7 of probable cause but we don't account for the
8 likelihood of success in terms of a conviction
9 later on, I think there is also a danger where
10 primary accusers and potential victims who have
11 not come forward yet would see this is what the
12 system does is it strings me along to get this
13 result when I could have screened this out up
14 front and eliminated some of this extra stress
15 and churn.

16 And so I think there is from a
17 government perspective, there is also a benefit
18 in front-loading something with, in a more
19 meaningful way with a preliminary hearing.

20 LCDR BRANDWEIN: I'll just add on to
21 what Colonel McGarry just mentioned. But
22 oftentimes the alleged victim is the first person

1 that NCIS or law enforcement interviews. And
2 then they never go back. So all the questions
3 that have been generated in the course of the
4 investigation are left.

5 Oftentimes if the trial counsel does
6 not do a substantive interview, which has
7 happened, it happens more frequently than defense
8 counsel would like to see because we don't get
9 any disclosures about them until the eve of
10 trial, often then the course and the outlook of
11 the case changes on the eve of trial.

12 If you had the alleged victim appear
13 at the Article 32, some of those questions that
14 have been generated during the course of the
15 investigation could be answered. And if our goal
16 is to have a just system, not just to secure
17 convictions, then these cases shouldn't be
18 fragile.

19 An alleged victim testifying at an
20 Article 32 is going to provide the government
21 some benefit as well, right. They're going to
22 have more investment from the alleged victim

1 early. It's going to demystify the process.

2 And it's also going to open up prior
3 consistent testimony under 801 if they are
4 impeached at trial. And if the inconsistencies
5 are minor, then most trial counsel are going to
6 be very effective at arguing like that
7 inconsistency is, doesn't impact credibility.
8 She's been consistent on or he or she has been
9 consistent on these major points.

10 I think we do ourselves a disservice
11 by preserving the case as is instead of trying to
12 assure a just outcome as early as possible.

13 LCDR SAVIANO: I have one additional
14 comment to that. I think that this was actually
15 brought up in the prior panel that they had. But
16 there are ways to create safeguards.

17 Absolutely, a preliminary hearing is
18 not trial. It's not the same standard as trial
19 is. And ultimately it's the PHO who's
20 controlling it and the PHO who needs the
21 information. So I think a safeguard that you
22 could have if you had witness testimony at the

1 hearing is to have the PHO control the answer, or
2 sorry, control the questions not the answers.

3 And ultimately you could have trial
4 and defense submit questions to the PHO that, you
5 know, they deem might be worthy of the PHO
6 understanding. But you could ultimately have
7 that highly qualified, trained PHO managing those
8 types of questions to determine just that
9 probable cause standard.

10 MEMBER MORRIS: I'm remembering the
11 book that Gilligan and Lederer wrote years ago,
12 which wasn't such a defense oriented book. But
13 in it they talk about the essence of a justice
14 system and if it's not widely trusted then it's
15 not very effective, and it being particularly
16 true for such a closed system as has been
17 generated over years in the military.

18 Do you all -- you all have done other
19 stuff. So you've not exclusively been defense
20 counsel.

21 But in your positions now where you're
22 not just, you know, broadly supervising but, you

1 know, you're leading counsel, you're dealing with
2 their faith in the system, you're talking to
3 parents, policymakers and all that, having worked
4 on, in the system prior and current, what does it
5 do to your confidence?

6 Has it had any impact on your own
7 confidence in the system? And how do you
8 communicate that in how you take care of the
9 people that you lead?

10 COL MCGARRY: I'll just start by
11 saying that I'm a big fan of our military justice
12 system. I have not seen any other system that
13 does it better.

14 I do think your point, sir, is well
15 taken about the need for legitimacy to underpin
16 that, because if outsiders don't perceive it that
17 way, then it's vulnerable to not being effective.
18 I will just say that.

19 I don't think that we are at the point
20 now where our system is not unfair. But I do see
21 the potential where we have -- especially as we
22 change the way we execute military justice now at

1 least for those covered offenses, if we have, if
2 we take away a meaningful process that's, and we
3 don't have anything that stands between an
4 accusation and a trial and you have the referring
5 authority is the prosecution, I think that there
6 is the potential where we might be subjecting
7 ourselves to some criticism that we are less
8 fair, that a pendulum has swung too far to a
9 particular, I won't say preordained but some
10 people might, outcome at the expense of fairness
11 for the accused.

12 COL LANDREY: I agree that our process
13 is -- having spent, I was fortunate enough -- I
14 know many of you have experience in the federal
15 realm. I was fortunate enough as a law student
16 to clerk for two years in a United States
17 Attorney's Office on the crim side. So I got to
18 see a lot of proceedings there and have friends
19 who served as prosecutors at the state level who
20 I keep in touch with.

21 And I agree 100 percent with Colonel
22 McGarry that from my personal perspective the

1 military justice system, particularly once you
2 get things into trial, is the most fair system
3 that I have ever had the opportunity to spend any
4 time in or to observe.

5 My concern, which I think goes to your
6 question, sir, is, dates back to my time as a
7 Staff Judge Advocate. So, if you look at that
8 job as a quasi-district attorney over a small
9 town, 3,500 people or so, the -- I will preface
10 this by saying I concur with some of the previous
11 panel that it is important to bring tough cases
12 and not necessarily only bring those cases that
13 you feel are quote, unquote guaranteed to result
14 in conviction.

15 But that said, I believe when you
16 bring tough cases to the point that acquittal
17 rates reach what they have, you run the risk of
18 among your potential panel members creating an
19 impression as to what is going on out there that
20 the conviction rate at this installation, where
21 everybody talks, is 20 to 30 percent.

22 And those are just numbers. I think

1 you can pull, and you'll see the numbers. I know
2 you all have access to that from recent years.

3 But it does concern me from an
4 enterprise perspective that without this kind of
5 check before we get to trial that the acquittal
6 rate eventually rises to a level, because they
7 are tough cases and not implying anyone is doing
8 anything wrong. We have some very, very highly
9 competent prosecutors in the Air Force. I was
10 very proud to be part of that team for years and
11 years.

12 But at the end of the day, these are
13 tough cases. And without a vetting process to
14 get them to trial, you do run the risk long term
15 of poisoning the thoughts towards the system of
16 the folks that we're counting on to be panel
17 members.

18 COL DANYLUK: I would say that my
19 concern is the mental health of the counsel that
20 represent the accused that go through this system
21 and then also the mental of the actual clients as
22 they go through what is an extraordinarily

1 lengthy system. And I am confident that the
2 alleged victims have a similar mental health
3 concern as well.

4 But, you know, we have Marines that
5 kill themselves over in JP cases, like very minor
6 BAH fraud and very minor -- not that hazing would
7 be minor, but they're, you know, on the continuum
8 of things. We had a Marine that killed himself
9 on Christmas Day who was a client.

10 And so, when we take it to the extreme
11 of, you know, a lifetime in prison and sex
12 offense registration over something that by all
13 accounts at least from the probable cause
14 standards shouldn't even be referred, my concern
15 is with the mental health and how it's impacted
16 on these, both the counsel that I lead and also
17 the clients that they represent.

18 LCDR SAVIANO: I think all in all
19 there's a lot of fairness to the system. I think
20 a lot of that has to do with how it is set up. I
21 think, though, that the more meaningful that we
22 make processes throughout the system, the more

1 meaningful, the more fair the system can
2 ultimately be.

3 When I think of fairness personally
4 from a defense perspective, I'm not so much drawn
5 to the 32. I'm more drawn to the overarching
6 process in terms of how long sometimes it takes
7 to even get to the referral process, where we
8 have members that are, you know, being
9 investigated for upwards of over a year, where
10 their careers are significantly impacted. And I
11 think of those cases where this person feels that
12 there's no other way out.

13 So, beyond just -- I know that we're
14 focusing on the Article 32 here. But when I
15 think of fairness, the Article 32 generally is
16 not where I think that there's an unfairness as
17 much. But focusing on the 32, I think if we make
18 it more meaningful it will make it more fair
19 across the board.

20 LCDR BRANDWEIN: I would concur with
21 everybody that I think our military justice
22 system is on the whole fair, and the trial

1 process more often gets it right. And I think
2 for the most part our members panels get it
3 right.

4 My concern has been the idea that
5 sometimes we leave the decision to the members
6 panels. And I think OSTC will help this. But
7 there is a deferral to, well, let the members
8 make that determination, rather than the
9 prosecutorial function being served by saying
10 some of these cases aren't sufficiently strong to
11 justify a conviction beyond a reasonable doubt.
12 And those are the types of cases that shouldn't
13 necessarily go forward.

14 MEMBER BARNEY: So that's perhaps a
15 good segue to my question. You know, in the
16 earlier panel one of the things that, initial
17 impressions I had was this question of so what is
18 the purpose of this Article 32 process anyway.
19 And if it's to establish probable cause, then,
20 you know, it's a low bar to achieve, and it
21 doesn't add a lot of value.

22 If that is the case, if Congress in

1 its wisdom decided that probable cause was the
2 term to use, now that we've looked at other
3 changes to the Article 32 process, is there a
4 better standard that would describe what the
5 purpose is of a 32 that would help to achieve the
6 kind of result that is in the best interest of
7 justice because it does afford parties an
8 opportunity to, you know, test how evidence is
9 gathered, to test the ability of people to
10 recount what they have seen as a witness, and
11 give the accused an opportunity to put forth more
12 than a pro forma response or simply to waive the
13 32?

14 Is there a better standard than
15 probable cause? And what would that be?

16 COL MCGARRY: Sir, I'm a fan of not
17 just the probable cause but also the likelihood
18 of success in terms of a conviction, so something
19 similar to what was currently articulated in the
20 non-binding disposition guidance of Appendix 2.1,
21 not exactly as it is now given the way we are
22 changing our system, but something that this is

1 more than just that low threshold of probable
2 cause, but there is going to be a result, as you
3 say, in terms of justice that is closer to the
4 high standard in American jurisprudence, which is
5 beyond to exclude all reasonable doubt. So I
6 think it needs to be something more meaningful.

7 COL LANDREY: I concur with that. I
8 think there's, really you're looking at the 32 or
9 the framework that we have right now for Article
10 32 UCMJ I do think could be a very useful policy
11 tool if you look at it kind of as a two main
12 pronged approach, the first being PC, which we
13 have discussed and you all have discussed with
14 the previous panel significantly, the second
15 being the disposition recommendation.

16 And if you have the right people as
17 Preliminary Hearing Officers conducting a
18 thorough and searching analysis on disposition
19 recommendation and providing that to convening
20 authorities, to referral authorities as the
21 Office of Special Trial Counsel, in a way that
22 provides a useful tool for those individuals

1 making those decisions, I clearly do not believe
2 that the disposition recommendation should be
3 binding, but would be a useful tool for those
4 individuals to get an impartial view aided by
5 incentivized defense counsel in representation of
6 their clients.

7 I do believe that would make for a
8 stronger system in terms of the right cases,
9 cases where there is a reasonable find or effect
10 could find guilt beyond a reasonable doubt,
11 making it into a trial. And it would enhance
12 confidence of our servicemembers in the military
13 justice process overall.

14 COL DANYLUK: As I said earlier, I
15 think the probable cause level is so low I don't
16 know really why it's not binding.

17 But I think an opinion from an
18 experienced, trained, educated, maybe randomly
19 selected PHO would go a long way towards
20 informing the government's case on whether or not
21 they should refer the charges. And I know that
22 kind of gets into a question that you have later

1 down the road.

2 But I do think that the quality of the
3 PHO who's making these recommendations is
4 impactful on the referral decision authority.

5 LCDR SAVIANO: I concur with what
6 everyone else has said. You know, with the right
7 person with the right training as your PHO, I
8 think it could be a good check and balance.

9 And probable cause is such a low
10 threshold. But again, like you're not -- that's
11 not the trial. You're just determining whether
12 this case should go to trial or not. So I think
13 it's, in that sense, appropriate.

14 LCDR BRANDWEIN: I would agree that
15 having some opinion on the sufficiency of the
16 evidence be required from the PHO would be very
17 helpful, especially if it's coupled with some
18 type of quality evidence being presented.

19 Whether that is at least some witness
20 to come in and endorse the hearsay or the
21 complaining witness coming in and testifying,
22 that would allow for the decision to be based on

1 a more structured case outlook, rather than,
2 well, there's probable cause and we'll figure the
3 rest of it out closer to the date of trial.

4 That is a long process and not
5 necessarily the most efficient process for the
6 government. And it's certainly not in the best
7 interest of the accused, who's the only person
8 with constitutional rights on the line.

9 CHAIR HILLMAN: Since you flagged
10 this, I think we should dive in. So who should
11 the PHO be? And how should that individual be
12 selected?

13 COL LANDREY: So there have been,
14 there's been some discussion as making military
15 judges PHOs. And certainly the Air Force uses
16 that process, as I think Colonel Dennis touched
17 on during the last panel. That would be the
18 ideal.

19 But like the other services have
20 indicated, we would quickly be overwhelmed. I
21 mean, having been a prior military judge, the
22 bandwidth would quickly reach its limit,

1 especially if the expectation would be for a very
2 thorough report addressing the issues that we're
3 talking about.

4 For that reason, I would set the
5 baseline as someone, and this is getting somewhat
6 into Air Force specific guidance, that in our
7 Litigation Development Program had been at the
8 very least what we used to call a Circuit, what
9 we now call a Senior Litigator, a Senior Trial
10 Counsel, a Senior Defense Counsel, someone who
11 had been a member of Litigation Division of the
12 Office of Special Trial Counsel as we move
13 forward. And for that reason, those are
14 individuals who have served as first chair on
15 general courts-martial and the like.

16 From a policy recommendation
17 perspective, again, understanding that's
18 certainly not my job as a uniformed officer
19 necessarily, but if asked the question directly,
20 I would say that the best way to go about doing
21 that would have a broad requirement statutorily
22 or from executive regulations requiring

1 experience and let the service secretaries deem
2 what that looks like given the inputs of senior
3 military justice practitioners.

4 COL DANYLUK: In our practice, the
5 trial counsel finds and nominates the hearing
6 officer for the case. And they make the
7 recommendation to someone who's most available I
8 think to the SJA, who makes it to the convening
9 authority, who then appoints the person in
10 writing.

11 I think there's a bit of forum
12 shopping that goes along with that. If they are
13 looking for a case to get killed, you know, then
14 they're looking for a particular characteristic
15 or quality of the PHO. And if they're just
16 looking to move the case along, maybe I'm not
17 supposed to say all this out loud, you know, then
18 maybe it's a different pool from which they are
19 being made recommendations.

20 What I would like to see is, as the
21 Marine Corps advances their litigation quasi-
22 track where we're now keeping, assigning

1 additional MOSs to people based on their
2 litigation experience, I think that could be an
3 indicator of who is qualified with litigation
4 experience to actually be a PHO and not what we
5 get mostly, which is a cadre of reservists.
6 Maybe they're U.S. Attorneys, but sometimes
7 they're just an environmental law attorney who
8 hasn't really practiced in the court-martial
9 system in quite some time. So I think there
10 should be some training specific to it, a
11 qualification that's required by it.

12 I do think that the Marine Corps is in
13 a position that our judges might be able to
14 support the process. In the Marine Corps, we're
15 unique to other services where we have O-4 trial
16 judges. And we could use sort of those O-4 level
17 trial judges, who go to the judges course and are
18 certified for court-martial, to be the PHOs.

19 I would like to see something like
20 that or, you know, the magistrate system, which
21 the Marine Corps has not embraced.

22 If we send them through the judges

1 course so that they're actually schooled and
2 educated in a court-martial process, and like
3 what does probable cause really look like, the
4 rules of evidence don't apply at this hearing,
5 but if I'm going to make a disposition authority
6 maybe I do need to know that the confession is
7 going to be suppressed and that this is not going
8 to be able to survive the appellate process.

9 LCDR SAVIANO: We are a fairly small
10 organization. As Captain Scott mentioned
11 earlier, a lot of our PHO decision selection is
12 based off of is the person senior enough,
13 hopefully, they have enough experience, and are
14 they available.

15 So I think any type of training that
16 is created would go help, go to help
17 consistencies among PHO, qualifications required,
18 prior experience in the various fields of trial
19 as well. I know personally sitting in front of a
20 couple of the reserve PHOs for the Navy you could
21 tell that some of them were prosecutors in their
22 real job on the outside from the onset.

1 But kind of like the Marine Corps,
2 we're also pretty small. And we have a handful
3 of special court-martial collateral judges. So I
4 can't speak on behalf of the Coast Guard. But
5 they go through the judge training school and
6 could possibly be a pool of folks that we already
7 have that, you know, kind of meet that higher
8 level of training and qualification and
9 experience to begin with.

10 But I think basing it off of the
11 training and qualifications would just make it a
12 better overall process.

13 COL LANDRY: And I have one more just
14 quick follow-up. Reminded me from what my
15 colleagues mentioned.

16 One of the things that when I
17 requested feedback from my subordinates in
18 anticipation of appearing here before you that
19 routinely came up in the context of the
20 experience of the PHO is that as currently
21 constituted Article 32 USMJ does not allow for
22 the PHO to explore or consider constitutionally

1 required evidence that would be admitted
2 otherwise under MRE 412 speaking about sexual
3 assault cases. So your rape shield rule of
4 evidence as I'm sure you all are aware.

5 Given that our many, many; and
6 understanding this is anecdotal, of our Article
7 120 cases are heavily influenced one way or
8 another by evidence that is admitted under that
9 rule. For example, evidence of potential biases
10 on the part of an alleged victim. I think that
11 could be another benefit of requiring a certain
12 experience level from a PHO in that you would get
13 a PHO who is competent and skilled in applying
14 that sometimes confusing rule to apply in a way
15 that protects the rights of the alleged victim
16 while allowing a more thorough exploration of the
17 charges and specifications that would benefit an
18 accused.

19 LCDR BRANDWEIN: The Navy, similar to
20 the Marine Corps that Colonel Danyluk talked
21 about was the senior trial counsel or the trial
22 counsel was often finding the available PHO until

1 the process that Captain Hamon talked about took
2 over. And now we use the Reserve PHO Unit for
3 most cases or the special court martial judges.

4 The special court martial judges often
5 are better suited just because they have tried
6 more of these Article 120 cases more recently
7 than the Reservists who often are AUSAs and might
8 not have tried this type of case, might not have
9 cross-examined or examined psychologists who
10 testify frequently at these types of trials on
11 memory. So something along the lines of a
12 special court martial judge, someone who's going
13 to have some qualification and some experience in
14 these types of cases would be helpful.

15 COL MCGARRY: I think we are all
16 completely in agreement that more experience is
17 better. The 50-year judge is the gold standard
18 followed by an independent magistrate that works
19 for the trial judiciary followed by more
20 experienced practitioners, again situated in a
21 way that maintains some semblance of
22 independence.

1 The only thing that I would offer to
2 just caveat that is just the recognition that all
3 the services are a little bit different in terms
4 of bandwidth and our ability to uniformly do all
5 of that. And so I think that as we are looking
6 at the way we would do this I think flexibility
7 is important. And it seems to me that this might
8 be an area where some non-binding kind of
9 guidance might be appropriate.

10 Just to highlight, these are things
11 that ideally we would like to have in a PHO, but
12 recognizing that we might not have that
13 availability. So I would just offer that for
14 consideration.

15 CHAIR HILLMAN: Thank you.

16 We're going to go to Colonel Brunson
17 here. Judge Kasold, just in case you have a
18 question, we'll check in with you next after
19 Colonel Brunson.

20 MEMBER BRUNSON: That was actually a
21 perfect segue and not a set up to my really crazy
22 question. Understanding that the services are

1 all different in many aspects in military
2 justice, do you think there is any ability to use
3 PHOs from other services? In other words, if you
4 had a group of people who meet the training
5 qualifications and you're in a smaller branch of
6 the military or you're located in a place that's
7 a smaller installation so you don't really have
8 availability on your installation but there is a
9 Navy person or an Army person or an Air Force
10 person who has the training.

11 My thought is especially, in these
12 sexual assault cases; we're all dealing with the
13 UCMJ, so we're not dealing with specialized
14 regulations or anything, do you think there's any
15 ability for that to be successful?

16 COL DANYLUK: I would offer there
17 should be some floor on the experience and
18 training of the PHOs. And then also I think it
19 would be helped by a randomized process of who's
20 assigned. Maybe the JAG certifies them in some
21 way. Maybe there is a list, that you spoke about
22 earlier with a previous panel, as opposed to the

1 person who's trying to convince the PHO being the
2 person who is selecting the PHO, which is the
3 experience that we have in the Marine Corps.
4 There's got to be some other way of -- something
5 in between the person who's going to sit at the
6 table and try to convince them that there's
7 probable cause and then the person who's
8 reporting back to them.

9 LCDR SAVIANO: And just to clarify
10 your question, ma'am, you're asking if there's --
11 if we could basically have PHOs that do PHO
12 hearings for other services?

13 COL DANYLUK: Oh, I misunderstood.

14 MEMBER BRUNSON: Yes, but also tied
15 into having sort of like a -- not a database, but
16 a list of trained people. That's step one. And
17 then step two was does it have to be service-
18 specific or could there be crossover?

19 LCDR SAVIANO: I think that could
20 absolutely be a database and crossover. I do
21 think that to a certain extent, as you mentioned,
22 it is kind of specific on what the charges are.

1 If you've got charges that are service-specific,
2 it might be best to have a PHO from that service.
3 Sometimes too it matters, you know, like if a PHO
4 understands like how a carrier is set up. You
5 might want to go pick somebody from the Air Force
6 to go do a PHO where -- like it really does
7 matter like the construct there. So I think it's
8 absolutely possible.

9 Practical? Potentially depending on
10 the case, but I think you're still going to end
11 up having it be kind of case-to-case-specific.
12 And there is some value to like being able to --
13 for an SJA -- from the SJA side there has been
14 value in being able to pick a PHO, just going
15 okay that person has this background. They're
16 already going to understand the fundamentals of
17 this case and they're going to be able to focus
18 on the root question at hand.

19 LCDR BRANDWEIN: I think it is
20 possible, ma'am. We see it -- I've been the
21 trial counsel on cases with Marine accused and we
22 have a Navy PHO serving there. Same thing with

1 military judges. Occasionally you'll see a
2 military -- Marine Corps military judge presiding
3 over a Navy service members courts-martial. I
4 don't believe there's any bar to that at all.

5 COL MCGARRY: I agree. I mean it is
6 the Uniform Code of Military Justice, so we
7 should all be able to do that. There are some
8 practical issues that have been identified. And
9 I think again that might be something as an
10 option that we might include in a non-binding
11 guidance as an option as we are looking for who
12 is available in a particular circumstance and who
13 might be suited for a particular type of case and
14 may not. So I think -- as an option I think
15 there is a lot of merit to something like that.
16 I don't think you were suggesting that it would
17 be mandatory.

18 MEMBER BRUNSON: No.

19 COL MCGARRY: No.

20 COL LANDRY: Agree it would definitely
21 be permissible under the law. In fact I wouldn't
22 say routinely but Air Force military judges, Army

1 military judges have presided over courts martial
2 in the other services. Good idea in some cases;
3 perhaps necessary in all case. Again
4 understanding that wasn't your question.

5 CHAIR HILLMAN: Thank you. Judge
6 Kasold, any questions before we wrap our panel
7 here?

8 MEMBER KASOLD: I don't have any
9 questions, just a comment as I listened to all of
10 this. First, we are listening to defense counsel
11 who have a narrower view as required in defending
12 their clients.

13 And second, I think we're seeing the
14 ramifications of changes that are made with
15 regard to the Article 32 in not requiring a
16 victim to testify and its impact on the Article
17 32. And we're grappling with the effects of
18 that.

19 But at the end of the day one thing
20 that keeps coming to my mind is the trial is when
21 the victim would be required to testify. And
22 having a 32 decision made on probable cause,

1 which doesn't necessarily take into consideration
2 all of the things that a commander and his SJA,
3 his or her SJA need to consider in making that 32
4 recommendation of non-probable cause binding -- I
5 think we need to seriously consider the effects
6 of that because we still are talking about the
7 military environment and over time that becomes
8 perhaps less and less with the communications
9 that we have today. But that's the thing that I
10 keep grappling with and considering and I'd just
11 throw that out as a comment. Thank you.

12 CHAIR HILLMAN: Thank you. So just
13 one last question. We'll hear next from the
14 Office of Special Trial Counsel. And I just
15 wondered any particular concerns you want to
16 highlight that we should keep in mind with those
17 pending changes that are coming and concerns
18 about the Article 32?

19 COL MCGARRY: The only thing that I
20 would like to highlight is I think the reasons
21 why we had not had the Article 32 pre-2014 had
22 not been binding is because there was a concern

1 about interfering in the province of commanders
2 and their role in the disposition process. And I
3 think when we are talking now about covered
4 offenses where the referral authority is the
5 prosecutor, you don't have the role of the
6 commander the same way. And so I think there is
7 less value in not having that recommendation be
8 not binding.

9 LCDR SAVIANO: I think that the chief
10 prosecutor position on covered offenses
11 definitely presents a unique situation because
12 essentially now you have trial counsel led by the
13 OCP -- sorry, for us it's OCP, OSTC I think for a
14 lot of the other services -- who is choosing to
15 bring this forward. And then basically you're
16 asking a PHO as this impartial person to convince
17 the person who brought the case to you in the
18 first place that they got it wrong or that
19 there's not probable cause.

20 So it's kind of unique there because
21 realistically trial counsels shouldn't be
22 bringing a case forward unless they think there's

1 probable cause. So our chief prosecutor -- it's
2 just kind of a weird juxtaposition I think in its
3 totality because you have a PHO trying to
4 convince trial, the other side of the table,
5 against defense that they shouldn't be bringing a
6 case forward.

7 And then there's also kind of the
8 interesting where the SJA piece comes in. So now
9 you don't have the SJA providing another level of
10 check and balance or third-party person input
11 into the chief prosecutor position.

12 COL DANYLUK: I think it's the one
13 area where we need to ensure that we have an
14 independent PHO more than any time previously.

15 COL LANDRY: Even very, very smart
16 attorneys who have done this for years and years,
17 as I expect all of our OSTCs -- well, I know who
18 they are, so I know they fit that criteria --
19 benefit from that impartial look that sometimes
20 as Judge Kasold mentioned that we get when we're
21 in our specific foxholes.

22 LCDR BRANDWEIN: Just that the binding

1 part of the probable cause determination be more
2 important, because again it is -- the OSTC is
3 bringing a case and if you have a non-binding
4 recommendation, they've already made their
5 determination at that point and you're not giving
6 them any type of check at all, right? It is just
7 a road bump or a delay between that and referral.
8 So having something binding, someone requiring
9 them to provide a substantial basis for the case
10 to move forward.

11 CHAIR HILLMAN: Okay. Thank you for
12 your time, your insight, and your commitment to
13 the system and the particular part of it that you
14 serve, which I find incredibly important. I
15 appreciate your candor and your support in this
16 process. Thank you.

17 (Applause.)

18 COL BOVARNICK: Lunch break is until
19 1:15.

20 (Whereupon, the above-entitled matter
21 went off the record at 12:40 p.m. and resumed at
22 1:15 p.m.)

1 COL BOVARNICK: Welcome back,
2 everyone. I think we'll go ahead and get started
3 in the interest of time. I'm just going to go
4 around the table quick and then hand it off to
5 our presenters to do quick introductions and then
6 get right into the Q&A.

7 For the Army, we have Lieutenant
8 General Risch, the Judge Advocate General of the
9 Army, joined by Brigadier General Wells -- he's
10 the Lead Special Trial Counsel for the Army --
11 Vice Admiral Crandall, the Judge Advocate General
12 of the Navy, joined by Rear Admiral Stephens, the
13 Lead Special Trial Counsel for the Navy;
14 Lieutenant General Plummer, the Judge Advocate
15 General of the Air Force, joined by Brigadier
16 General Select Brown, the Lead Special Trial
17 Counsel for the Air Force; Major General Bligh,
18 Staff Judge Advocate to the Commandant of the
19 Marine Corps, joined by Brigadier General
20 Woodard, who's the Lead Special Trial Counsel for
21 the Marine Corps; and Rear Admiral Bert, the
22 Judge Advocate General for the Coast Guard,

1 joined by Rear Admiral Lower Half Select Dwyer,
2 the Chief Prosecutor for the Coast Guard.

3 And, sir, I'll turn it over to you if
4 you want to -- table wants to go around for some
5 quick comments, and then we'll get into the Q&A.

6 LTG RISCH: Well, good afternoon.
7 It's a pleasure to be here. I don't know exactly
8 what we're looking for, if we're supposed to do a
9 formal introduction.

10 COL BOVARNICK: Oh, yes, sir. Just a
11 quick introduction. I just was doing that for
12 the record, but if the Panel wants to introduce
13 themselves for the Members.

14 LTG RISCH: Sure. Lieutenant General
15 Stuart Risch. I serve currently as the Army's
16 Judge Advocate General. I've been in the
17 position for about a year and a half.

18 BG WELLS: So Brigadier General Warren
19 Wells, and I've been in the position for just a
20 few weeks now.

21 VADM CRANDALL: Good afternoon. Vice
22 Admiral Del Crandall. Only my grandmother called

1 me Darse, so Del works. And I've been in the
2 position about as long General Risch, a little
3 bit less, about 18 months.

4 RDML STEPHENS: Good afternoon.
5 Admiral John Stephens. I've been the actual LSTC
6 for, I think, four days, but I was the interim
7 LSTC since this past summer, so for about six
8 months.

9 LTG PLUMMER: Good afternoon.
10 Lieutenant General Chuck Plummer, and I've been
11 the Air Force and Space Force TJAG for now about
12 ten months and counting. And we look forward to
13 chatting with you today.

14 BG(S) BROWN: Colonel Chris Brown. I
15 will be the Lead Special Trial Counsel in about
16 two weeks, but happy to be here with you today.

17 MG BLIGH: Major General Dave Bligh,
18 Staff Judge Advocate to the Commandant. I've
19 been in the job about a year and a half.

20 BG WOODARD: Brigadier General Scott
21 Woodard. I've been in the position just about
22 the same time as Brigadier General Wells. We got

1 promoted on the same day. So the Lead Special
2 Trial Counsel for the Marine Corps.

3 RADM BERT: Hello. Melissa Bert. I'm
4 the Judge Advocate General for the Coast Guard,
5 and this is coming up on my third year as the
6 TJAG.

7 RDML(S) DWYER: Good afternoon,
8 everybody. Captain Bill Dwyer. I will be the
9 Chief Prosecutor of the Coast Guard here in
10 March, currently the Chief of Maritime and
11 International Law for the Coast Guard.

12 CHAIR HILLMAN: I want to thank you
13 for joining us. Regardless of the length of time
14 you've been in your specific post, you bring a
15 tremendous wealth of experience to us. I'm Beth
16 Hillman. I have the privilege of being the Chair
17 of this Panel.

18 It's been an honor to hear from your
19 colleagues, actually, this morning, talking about
20 the same issues we're going to ask you to weigh
21 in on, too. Your best advice and your experience
22 is going to help us do the job that we've been

1 asked to do as we wrestle particularly with the
2 Article 32 question about where we are right now.

3 And we're viewing this as an
4 especially important part of what's coming next
5 because this is coming to us first, actually,
6 before we take on other tasks as directed under
7 the statute that created this Panel, and also
8 because of all the changes and the pace of change
9 and the extent of the impact that it's had on you
10 and your service members as we move ahead.

11 So I'll just start and ask you all to
12 weigh in about the overall utility of the Article
13 32 since the changes that happened in 2014. So
14 is your sense that those changes have limited the
15 usefulness of the Article 32, and if so, how have
16 they done that?

17 LTG RISCH: I guess I'll start. So,
18 given the Congressional intent in making the
19 changes and limiting the scope of the hearing, I
20 believe that it does in fact serve its designated
21 purpose. I know that there's certainly public
22 policy reasons behind some of the changes that

1 they made, and I think they carry those out.

2 I'll caveat that by saying I've been
3 around for 35 years. I've been doing this for a
4 long time. So, when I practiced, it was the old
5 Article 32, and I'll just simply tell you I
6 thought there was a benefit for the government in
7 providing more information.

8 What I see now is a lot of the cases
9 are done on paper alone. Certainly, the victim
10 is not brought. Maybe other witnesses aren't
11 brought. And so it tends to be a paper case.
12 Surprised that the defense doesn't waive more of
13 them, but I suppose there's nothing to lose in
14 going forward and getting whatever information
15 you can.

16 But I thought that the old manner in
17 which we moved forward on the Article 32 provided
18 not only a significant benefit for the government
19 in taking those, especially the complex,
20 difficult cases, to see what you had, to see the
21 credibility of your witnesses under cross-
22 examination, but provided more for the defense as

1 well, too.

2 And so, while I believe that it
3 accomplishes what the Congressional intent, I
4 think that we could put more procedures in place
5 to make it a more robust hearing for both sides.

6 BG WELLS: So I agree with much of
7 that. I think in the past, Article 32s -- one of
8 the stated purposes in the rules for court-
9 martial was a full investigation of the offenses
10 or the alleged offenses, and also a defense
11 discovery tool. That has changed under the
12 current statute, where it is merely a probable
13 cause check.

14 That's probably similar to what many
15 civilian jurisdictions do. Of course, there are
16 many civilian jurisdictions, so not an exact --
17 but certainly, for grand juries and probable
18 cause hearings in many states, they are just
19 that. They're focused on probable cause. And
20 so, certainly, with the change in the intent and
21 the purpose, they are much less robust.

22 I will say this. The rules still

1 allow the government to present more of a robust
2 case. You can still ask a victim to testify in a
3 sex assault case, and then non-sex assault cases,
4 you can still call all the witnesses you want as
5 the government and use that as a test bed to look
6 at the strength of your case. But it's not
7 required. And so I think part of that is how the
8 prosecutor determines how to use it.

9 VADM CRANDALL: All right. This is
10 going to be a little strained because I'm turning
11 this way, but I also want to face you as I talk.
12 I think I probably align myself, maybe, a little
13 bit more with General Wells here. I mean, I
14 really do believe that the 32 hearing remains an
15 important procedural safeguard for the accused.

16 It certainly has changed its purpose
17 in moving away from an investigative hearing, as
18 it was before. I think there were important
19 policy reasons why that occurred. I still think
20 there is an ability for parties to take a look at
21 their case through the process and to raise some
22 evidentiary and legal issues.

1 I also think as we look at all the
2 significant changes to the military justice
3 system that have come out of the fiscal year '22
4 and now '23 NDAA's and processes we're working
5 through in the Department with the Secretary's
6 Independent Review Committee on Sexual Assault in
7 the Military, that I don't see the 32 process
8 being something we necessarily need to change up
9 at this time. I think that our focus needs to be
10 on other parts of the process and delivering on
11 those at this point.

12 RDML STEPHENS: In my view, it still
13 is a fundamental right of the accused. And the
14 one thing that it allows and ensures is that
15 there is a disinterested person reviewing the
16 case in an effort to mitigate baseless
17 accusations from going forward.

18 And so, in the current system, it's
19 somebody from outside the chain of command,
20 somebody in the Navy from outside the prosecution
21 shop. And then, moving forward, that will remain
22 for non-covered offenses, and within the OSTC

1 realm, it will ensure that someone from outside
2 our offices, a disinterested person, gets to
3 review the case and make a decision.

4 And I think that that's been a
5 fundamental right and continues to do so. So I
6 think it's still extremely useful in that regard.

7 LTG PLUMMER: Thank you. To the
8 initial question as to the current state of the
9 Article 32 and its purposes, I think it certainly
10 satisfies those purposes, right, the probable
11 cause determination. I think it's no surprise
12 that this Panel has decided to speak to our
13 defense counsel, our victims' counsel, and our
14 prosecutors as well as the OSTCs.

15 And I view my role as to balance
16 those. And so, independent of whatever the final
17 answer is, all three of those parties need to
18 have due process and fairness in that. So I
19 would stop with that for now.

20 BG(S) BROWN: And I certainly would
21 agree with a lot of what has been said.
22 Certainly, I practiced when the old 32 was

1 happening. But I would say for the current
2 purpose that the 32 serves, it is still very
3 important. And any changes that we make we need
4 to balance not only the rights of the accused but
5 the rights of the victims. And so we need to
6 understand why those policies were put in place,
7 and any potential changes just need to balance
8 those. Thank you.

9 MG BLIGH: I'd echo Admiral Crandall.
10 I do believe it serves its usefulness for the PC
11 determination. And as we discussed earlier
12 before we came over, it also provides a due
13 process notification for the accused so the
14 accused knows what they're facing at the court-
15 martial. The charge sheet sometimes doesn't
16 contain all the charges that ultimately get
17 referred, and that's another check in the system
18 so the accused knows what to prepare for.

19 BG WOODARD: I agree. It's a due
20 process right that certainly we need to tread
21 very carefully if we're taking a look at changing
22 those, that due process, right? And also the

1 consideration of when looking at the two
2 different organizations now that's been set up by
3 the statutory scheme of how offenses make their
4 way into a court-martial arena, those coming from
5 the Office of Special Trial Counsel, those coming
6 from what in the Department of the Navy we
7 generally call general crimes, that -- does it
8 make sense to have two separate processes and
9 procedures to get to the same point?

10 And we need to be very careful of
11 further diversifying the roads, making more roads
12 available to get to that court-martial arena.

13 So, with that, ma'am --

14 RADM BERT: Hello. So, obviously, we
15 have the sea services here, and for -- I don't
16 know if you realize this, but we have mixtures of
17 Coast Guard, Marine, and Naval judge advocates at
18 many of the offices. So we have to make sure
19 that our procedures are fully aligned because a
20 Navy defendant could end up with a Coast Guard
21 counsel.

22 Obviously, I have the same experience

1 as General Risch, which was the Article 32s were
2 pretty robust years ago, and now they're not so
3 much. But at the end of the day, they do serve
4 their purpose. And the other thing that happens
5 very often is it's only the beginning of
6 collection of evidence because you have -- the
7 Article 32 itself sometimes turns up more issues.
8 So that's also helpful.

9 The other thing is the time. It takes
10 a lot of time to do these hearings. And so I
11 understand why it's evolved to paper, and I also
12 understand not having a victim want to be there
13 unless they -- it would be unusual to have a
14 victim who actually wants to do it. But again,
15 if we have more processes, we would have more
16 delay, and that's the worst thing for the victim
17 or the accused in a case. It's just time is
18 brutal to people, and we don't want to extend
19 that time.

20 So, until we figure out how the new
21 whole military justice process is going to work,
22 I don't know that we should be changing this on

1 top of it. It's just too much at once.

2 RDML(S) DWYER: Thanks, ma'am. I
3 think succinctly just say I concur with a lot
4 that was said earlier. Still an important
5 process. Obviously, it's proven to be less
6 useful as we move towards some of the more paper
7 32s.

8 And specifically to my colleague
9 Admiral Stephens' point about the use of a
10 disinterested party -- in theory sounds very
11 good, but as we've seen -- and I know I've seen
12 it in the Coast Guard and seen in some of the sea
13 services -- is the level and quality of that
14 disinterested party to ensure that they are
15 adequately trained to provide the right advice
16 and can act as a PHO appropriately in the case at
17 hand. Thank you.

18 CHAIR HILLMAN: Thank you. We'll go
19 to Captain Barney.

20 MEMBER BARNEY: Thank you. Earlier
21 today, we heard that since 2014, there have been
22 a significant number of cases involving sexual

1 assault where a preliminary hearing officer
2 determined there was no probable cause but where
3 convening authorities elected to go forward.

4 My question to you is how should we,
5 as we're approaching this question of the value
6 of the 32 and 34 process -- how should we
7 understand that? What's that all about? How
8 does that reflect the health and the benefit of
9 the 32 and 34 process?

10 LTG RISCH: I'll just say, sir, that
11 I think that as we all understand, the
12 preliminary hearing comes early on in the
13 process. And having served as a staff judge
14 advocate, I can tell you that evidence was
15 derived following that. It's very early on,
16 early in the investigative stage. Additional
17 evidence may come forward.

18 And as we all know, two people can see
19 the same witness and assess credibility
20 differently. And so, as a staff judge advocate,
21 I would get my team together -- a special victim
22 prosecutor, a Chief of Military Justice, a

1 Special Trial Counsel -- read statements, perhaps
2 look at the transcript, so forth, look at all
3 things, and we might make a decision to go
4 forward.

5 I know that the military had 16 cases
6 that were of that nature, and four resulted in
7 convictions, which I think shows that there is a
8 benefit to not making it a binding recommendation
9 on, now, a Special Trial Counsel, but on a
10 convening authority or an SJA, because there are
11 those circumstances where folks maybe have been
12 doing it for a little bit longer.

13 Now, I understand that would cause you
14 to assess the utility of it. But I certainly
15 believe there's utility in requiring the
16 government to present their case and having an
17 independent, neutral, unbiased observer come and
18 identify strengths and weaknesses of the case and
19 make a recommendation going forward.

20 BG WELLS: Sir, so I think with --
21 certainly, sexual assault is one of the big
22 issues, but of course a 32 goes beyond those type

1 of offenses. And there are times where you might
2 send something to a preliminary hearing officer
3 who comes back, and probable cause must be
4 established to each and every element. And
5 sometimes, they say, I don't find PC, because it
6 was one particular element. And as the
7 prosecutor, the government then goes back and
8 reassesses.

9 First, I think the government needs to
10 take that seriously and look at disposition after
11 that but sometimes becomes aware of other
12 evidence. As General Risch said, it's early in
13 the process. Sometimes there are additional
14 facts that may come to light or be known that
15 might address that element, which can give the
16 prosecutor -- either the Commander or the
17 convening authority or, in the Office of Special
18 Trial Counsel, the referral authority -- the
19 ability to say, yes, now we think we have enough
20 to go forward.

21 RDML STEPHENS: The numbers, they're
22 not great for the system, right? If we have that

1 many cases, there's a concern. So we understand
2 the concern. I think a couple things. That's --
3 which is all these changes built on top of each
4 other. One of the reasons that we tried to
5 institute this OSTC is to get experienced people
6 with the right temperaments and the right
7 training.

8 And so, hopefully, that will help
9 mitigate some of those numbers. And so it's hard
10 to say, well, has that worked yet, or do we keep
11 changing all the variables? Ultimately,
12 everybody wants to ensure a fair system for
13 everybody. That's all the stakeholders.

14 So that would be the first answer, is
15 I think Congress is attempting to address that
16 with the implementation of OSTC, and we haven't
17 been able to see how that works yet.

18 And then the only other piece that I
19 would say was with respect to some of those
20 findings, and I can just speak for the Navy. And
21 we've changed how we do 32s a little bit, but
22 earlier, it was kind of -- we would get all these

1 great Lieutenants to be SJAs and to be, at the
2 time, IOs or PHOs that maybe were OPLAW or they
3 were in their first tour.

4 But when I was in Japan, we just
5 needed somebody to do it. And they would do
6 their best, and that's not to say they couldn't
7 assess probable cause correctly. But I just
8 think we have to be a little concerned with -- to
9 the point that we overhear the experience of some
10 of the PHOs that maybe were making those probable
11 cause determinations that didn't have some of the
12 evidence that General Wells was speaking of.

13 So I would just caveat some of those
14 numbers a little bit as to the experience level
15 of the respective PHOs along the way. But then,
16 also, I think we need to let the OSTC at some
17 point see how we do.

18 BG(S) BROWN: So, in my day job, as
19 somebody who has advised some convening
20 authorities, I would say that sometimes this
21 happens when you get a report that maybe wasn't
22 done quite right due, maybe, to the experience of

1 the PHO. And you have a disagreement as to
2 whether or not the charge could go forward.

3 But as an SJA, I owe that to my
4 convening authority to say, I'm willing to tell
5 you now that we do have -- and ethically I'm
6 willing to say and I can say based on the
7 evidence that probable cause exists. So that's
8 going to happen sometimes, and I think it was 17
9 cases in 2017 is what the chart showed.

10 So it's probably, I would guess, one
11 of two things. There was a disagreement upon
12 further looking, probably more evidence. We got
13 more evidence that came to light after the 32,
14 and so probable cause now existed. But I also
15 agree with my counterpart sitting to my right
16 that we do need to let the OSTC form and let us
17 do our jobs and then let us inform and our
18 observations inform if the 32 process needs to
19 change.

20 BG WOODARD: I agree with Admiral
21 Stephens and Brigadier General Select Brown in
22 that the OSTC -- as we are looking at this, the

1 probable cause -- we're going to have the --
2 again, Congress wanted the experts taking a look
3 at these cases.

4 And I think when you have that
5 organization in the OSTC executing its military
6 justice mission, that that mission -- as they
7 execute that mission, they're also going to be
8 working with the general crimes organizations,
9 prosecution organizations, as well.

10 And a lot of those lessons learned
11 will flow back and forth between the OSTC and the
12 general crimes sections. But also, as an
13 advisor, command advisor for more than a decade
14 to convening authorities, I on more than one
15 occasion had the opportunity to go in to a
16 convening authority based upon my review of the
17 evidence, based upon my review of the law, and
18 advise a convening authority that I understand
19 that the PHO has said no probable cause, but
20 General, Colonel, Lieutenant Colonel -- you know,
21 or General or Colonel -- there is probable cause
22 here. Here is why there is probable cause here.

1 Here is the evidence that supports that probable
2 cause.

3 I think also, at least within the
4 OSTC, the probable cause standard -- if all that
5 you have in a case is probable cause and that --
6 viewing all the evidence in the light most
7 favorable to the government, that you can just
8 eke out that probable cause standard, that is
9 probably not where I think the services and the
10 OSTCs and their business rules will end up at
11 with regard to making the decision, a disposition
12 decision, to refer a case to a general court-
13 martial.

14 RADM BERT: I'll try to hit on some
15 different things because, obviously, there are so
16 many different thoughts on this that are helpful.

17 In my experience, I have seen
18 something go to an Article 32 for one reason, and
19 in the course of that, charges were added or
20 charges were changed, or the specs or the charges
21 themselves were changed, even as much as one case
22 started as a government theft kind of case,

1 embezzlement, that sort of thing, and it turned
2 into a child molestation case.

3 That's ridiculous that that happened,
4 but had to have a whole new investigation. But
5 it was because of some of the things that were
6 said at the Article 32. Most of the time,
7 though, it does help with cleaning up a charge
8 sheet. So having that third party looking at
9 this, that's helpful.

10 The other thing that I've seen happen
11 is, once the Article 32 has been held, sometimes
12 other victims come forward. So one case might
13 not have enough to sustain a conviction, which is
14 now the new standard, but other people sometimes
15 come forward once they see that this case is
16 moving. So I've seen that happen.

17 And the other thing I've seen, which
18 I don't think will happen -- obviously, this
19 system will break this. But we've had our
20 Article 32 officers and then the SJAs say that
21 there is not probable cause and they don't
22 recommend going forward, but our convening

1 authorities, who have the victim in their
2 command, they sort of have a different feel about
3 their role.

4 And so, in the past, we've had cases
5 where we said, this is not a case that's likely
6 going to succeed. And the convening authorities
7 have said, well, we need to try it because it's
8 the right thing to do. And it wasn't binding
9 advice. That's how it's gone.

10 So each of these steps along the way
11 are valuable, and they generally help in us
12 getting to a more just process.

13 RDML(S) DWYER: Thank you. I think I
14 concur with a lot that's been said earlier. But
15 again, succinctly, I think to General Risch's
16 point, that idea the additional evidence will
17 come to light often post-32 is common phenomenon.

18 And then, to the extent that any of
19 this is caused by those changes in 2014, again,
20 to Admiral Stephens' point, the formation of the
21 OSTCs, I think, will -- we'll see if that
22 mitigates that moving forward. And if we were to

1 sit down here in a few years, be able to look at
2 those same numbers again and see where we're at,
3 I think they'd be a lot smaller based on the
4 skill level and expertise we're allowing in that
5 area. Thank you.

6 CHAIR HILLMAN: So, because you are
7 here on the half of the OSTC -- and that's one of
8 our questions to everybody: how is this going to
9 change things? What impact is this going to
10 have? No one's better prepared to answer that
11 question for us than you.

12 So how is the OSTC stand-up going to
13 affect -- and I realize I'm asking you to
14 predict, and I'm a historian. I don't like being
15 in those shoes. But we're being asked to weigh
16 in at this point in the arc of change. So, in
17 your best estimation, how will the stand-up of
18 the OSTC and other names for that function -- how
19 is that going to change the Article 32 process?

20 BG WELLS: So, procedurally, as it
21 stands now, if the rules remain the same, I don't
22 see it changing procedurally. I do think that in

1 some cases where maybe there's a desire to feel
2 out a case that may be concerning on whether or
3 not -- can get a conviction, there may be times
4 where more experienced prosecutors are willing to
5 go forward and do something more robustly as
6 they're allowed under the rules in order to test
7 a case.

8 But that's going to be on a case-by-
9 case basis. I don't see significant changes. I
10 do agree with Brigadier General Woodard that
11 there certainly may be times where, with an
12 independent look, if a case says no, there's no
13 probable cause, there may be -- unless there's no
14 evidence that comes up, I think there's probably
15 more of an inclination to accept the PHO's
16 determination, but do not think that that should
17 be bound. I echo that.

18 The Congress stood up this
19 organization, and the people that we've selected
20 to make decisions have extensive military justice
21 experience. And so the ability to adjudicate
22 cases and make that referral decision despite the

1 PHO's recommendation, then, we think should
2 remain. But we do think that due weight should
3 be given to the PHO, and I think you'll see that,
4 perhaps, more.

5 RDML STEPHENS: I think one thing that
6 we're hoping and we're expecting is that it
7 should shrink the time, right? And so, a lot of
8 times, in the Navy, when you would go through the
9 process -- and again, the procedures themselves
10 shouldn't change too much. There's going to be a
11 charge sheet or requested PHO, and then we'll
12 have the hearing or it's waived.

13 Then, typically, we would have to send
14 it to the Regional Commander or perhaps to the
15 ship on the way to the Regional Commander. And
16 depending on what their operational commitments
17 were, that could add time so that, one, the trial
18 counsel could explain it to them, that they could
19 -- obviously, the Commanders have questions, and
20 it's incumbent upon the trial counsel to answer
21 those questions.

22 So the OSTC process should shrink some

1 of that. We still have a statutory duty to keep
2 the Commanders informed, which obviously we will
3 do. But as far as, now, we hold the hearing --
4 ultimately, the decisions will be made within the
5 Office of Special Trial Counsel, so we're not
6 going back to the convening authorities for
7 referral decisions. So I think that should speed
8 it up, which is important for everybody.

9 We need to make sure that we have the
10 rigor in the process, but I think to do it in a
11 timely fashion is important for all people who
12 are concerned. And so I think that, and then I
13 think, within the Navy, the implementation of
14 OSTC allows us to increase uniformity throughout
15 the process so we can impose some business rules
16 so that all of our STCs will handle these cases
17 and understand the prosecutorial standard, which
18 we don't have quite yet. We're working on it.

19 But when we get to that, everybody
20 will be employing the same one. And again, I
21 think now everybody -- it manages expectations.
22 People kind of know what we're looking for. And

1 I think those two things, to me, are two of the
2 key things that we can see that will help moving
3 forward and what we're predicting will help us
4 moving forward.

5 BG(S) BROWN: Well, I would guess we
6 won't have too many cases like the Coast Guard
7 described where a PHO recommended not going
8 forward and the SJA recommended not going
9 forward, but the convening authority said go
10 forward. So I would guess we wouldn't have many
11 of those.

12 I agree with my Army counterpart that
13 we wouldn't want that to be binding, the PHO's
14 recommendation, mainly because of many of the
15 things we've talked about. There could be
16 additional evidence. Our hope is that we
17 continue to evolve the process and use well-
18 trained PHOs, whether that's military judges or
19 some of our more senior trial practice
20 practitioners, so we don't have a case where
21 maybe there's a disagreement, except if we get
22 new evidence.

1 And I also would agree with my Navy
2 counterpart that streamlining the process, and
3 for us, the expertise that we will have at our
4 districts, will allow us to inform the process
5 along the way and hopefully get to a speedier 32
6 and then also get to a speedier referral. So
7 we're using all of those resources to inform the
8 investigation and to do it in hopefully a much
9 more timely fashion and allow us to get to that
10 answer much more quicker.

11 But again, I do not think the PHO's
12 recommendation should be binding, because again,
13 that goes against the authority that the Lead
14 Special Trial Counsels were given. Thank you.

15 BG WOODARD: Again, I echo my
16 counterparts. The timing, again from the OSTC
17 standpoint, is not just the prosecution. They're
18 involved from the investigation through, if
19 necessary, the prosecution all the way through
20 the fall of the gavel at the end of a court-
21 martial.

22 So those experienced, trained trial

1 counsel working with the investigators will help
2 develop the case quicker, will help the --
3 inform, better flesh out the facts in the case.
4 You'll have those in the position to be able to
5 make those legal determinations. Instead of
6 having to go outside of the OSTC to do that,
7 you'll have that.

8 At times, although keeping the
9 Commander informed, you won't have, sometimes,
10 the pull/push between the prosecution shop and
11 the SJA shop because there can be conflict there
12 --surprise, surprise -- at times, different
13 views. A Commander has a certain view of the
14 situation, whereas the prosecutor has a different
15 view of the situation. So I think the timing,
16 again, will be key.

17 And you ask, what will change under
18 the new system? I see several of my Joint
19 Service Committee on Military Justice
20 counterparts that I recently left at JSC. But we
21 have been working through the development of
22 modifying the rules for court-martial with regard

1 to, how does the Special Trial Counsel fit into
2 this whole process?

3 So there will be some minor tweaks
4 with regard to when a 32 officer being requested
5 by -- if a 32 PHO is requested by the Special
6 Trial Counsel, the convening authority shall
7 appoint if the EO is signed as currently drafted.
8 The distribution of that PHO's report -- instead
9 of it going -- if it is a covered offense handled
10 by the Office of Special Trial Counsel, instead
11 of it just going to the Commander, then from the
12 Commander back over to the Office of Special
13 Trial Counsel, it's -- again, informs the
14 Commander, but also, the report is sent directly
15 to the OSTC for that disposition decision to be
16 made within the OSTC.

17 So, again, there will be some minor
18 tweaks to how the paperwork moves through the
19 process. But they're also looking at to ensure,
20 at least from the JSC, as we were looking at
21 this, what other areas of the Article 32 with
22 regard to R.C.M. 405 -- could we look at

1 strengthening some of those procedures to the
2 benefit of an accused with regard to notice and
3 an opportunity to ensure that the information
4 that is presented actually gets to the decision
5 maker? And we have recommended some significant
6 -- well, not significant -- some changes to that
7 notice process and the ability of an accused to
8 file some additional matters for consideration.

9 RDML(S) DWYER: Thank you. I concur
10 with a lot that was said. Just a few other
11 points. I think we'll build uniformity and
12 standardization. From a Coast Guard perspective,
13 a few years ago, this was really handled by
14 individuals, staff judge advocate offices working
15 for two-stars at the district level and at the
16 area level for three-stars.

17 But now that we have a Legal Services
18 Command that kind of standardized it to some
19 extent, this will take it to the next level. As
20 a matter of fact, we've set up our Business Rules
21 Working Group, as I'm sure many of you all did in
22 your shops as well, to ensure that we can

1 standardize that process.

2 And the desire to ensure that
3 communications are flat and that communications
4 is going to be key -- back to servicing SJAs, to
5 the convening authorities, it is sometimes
6 difficult. I can remember as being SJA,
7 sometimes you get on your Commander's calendar
8 because of a variety of other missions that they
9 were taking part in. And this was an important
10 part of their job, but one of many important
11 parts of their job. We're having an STC focused
12 on this. I think we'll speed up the process, as
13 was said by my colleagues earlier.

14 And then, lastly, as we talked a
15 little bit beforehand -- I think I was talking to
16 Admiral Stephens about this -- the idea of
17 ensuring -- like the Joint Training Model, which
18 we're already working towards to ensure just this
19 summer that we're all going to be sitting in
20 classrooms together looking over this and talking
21 about not just the black-letter law, but how
22 we're going to execute it, as well, from the very

1 beginning.

2 So we're starting from that same point
3 together, and we can build that system with kind
4 of the same focus in mind.

5 LTG RISCH: So I would simply say I
6 agree with my colleagues on process and
7 procedure. I think that will roughly be the
8 same. There won't be a significant change to
9 minor tweaks around the edges. I think anything
10 else is extremely difficult for us to predict
11 right now.

12 I will tell you that we've been asked
13 by other panels -- and it's the seminal question
14 I think that we all stay up at night -- what does
15 success in the OSTC look like? What is success?
16 And I don't think it matters that much what we
17 think success is. It matters what panels like
18 this and Congress and so forth, who are making
19 changes -- if we achieve what we think is success
20 and that does not satisfy others, there will be
21 changes out there.

22 And I bring that up only because, in

1 my mind, I don't think success is more courts or
2 less courts. I don't think it's more convictions
3 or less convictions. I think it gets to the
4 heart of what our Fort Hood independent review
5 determined, which was there was significantly
6 less trust in the system from victims, trust
7 between soldiers -- and fellow soldiers, soldiers
8 and their leaders.

9 And so our goal is to increase the
10 trust. And I think OSTC being independent,
11 having different processes and procedures in
12 place, at least right now -- and you may
13 disagree. There may be some other -- I may
14 change my opinion. But right now, success, to
15 me, of OSTC is increased trust in the system.

16 And I bring that up because that could
17 very well mean that victims are much more willing
18 to take part in the system and testify in Article
19 32 hearings, which they're not necessarily
20 willing to do right now.

21 CHAIR HILLMAN: Thank you, each of
22 you, and especially on that last comment. It's

1 really helpful to us.

2 We have a couple members who are with
3 us virtually, General Ewers and Judge Kasold. I
4 don't know if they have questions for us. I want
5 to give them a chance. Anybody else here have a
6 --

7 (Off-microphone comment.)

8 CHAIR HILLMAN: Yes. And we'll --

9 (Off-microphone comment.)

10 BG(S) BROWN: No. We'll check in with
11 -- it looks like General Ewers might have
12 something.

13 MEMBER EWERS: No. Nothing from me.
14 Dr. Hillman, I'll be right there. Thank you.

15 CHAIR HILLMAN: Okay. He's en route.
16 So we'll go to Captain Schroder.

17 MEMBER SCHRODER: And I want to go
18 back to a couple of comments. This is spinning
19 off a little bit of what General Risch just said
20 but also something that Admiral Stephens said,
21 which was -- I quoted it. It's probably pretty
22 close. At some point, you just have to let us

1 see what we can do.

2 So we're coming up on -- we have time
3 limits. So we have to do an interim report in
4 2024, I believe, or is it a full report in '24?
5 Full report, and then interim in 2028. So I
6 guess the question is what is success from your
7 viewpoint? What might success look like in 2024
8 when we have to make the report? Not success,
9 full success, obviously. But what are you hoping
10 that we can report to Congress in 2024?

11 BG WELLS: So I think an increase in
12 trust. I don't know how -- that 2024 is going to
13 come up pretty quickly because --

14 MEMBER SCHRODER: It will come up
15 quickly.

16 BG WELLS: -- the way the statute is
17 written right now, we don't take jurisdiction to
18 make referral decisions until the end of December
19 of this year. And so, by the time the case is
20 investigated, we're really talking about the
21 spring of '24, probably, when those first cases
22 will be referred.

1 I think reporting, then, is that the
2 organizations are up and running, that the cases
3 that have been observed thus far have been
4 decided not only independently but have been
5 decided fairly. I understand that reasonable
6 minds can differ, but that there are not cases
7 that shouldn't be there that are there, or cases
8 that should have gone to trial that are not
9 there. And I understand, again, that's a bit of
10 backseat driving. But that the cases -- that the
11 right things in general are being done.

12 VADM CRANDALL: I mean, I let the cat
13 out of the bag a little bit in my first comment.
14 I think, with regard to success here in '24 --
15 and I understand the time constraints and exactly
16 what General Wells is saying about what we're
17 going to see for run time with OSTC.

18 I think success is an Article 32
19 system that does not impose any kind of binding
20 decision on the Special Trial Counsel with regard
21 to probable cause determinations so that they
22 have the ability to use their independent

1 expertise and specialized talents to make those
2 decisions moving forward.

3 MG BLIGH: So I'd add that success,
4 depending on what time in '24 your report is due,
5 you should be able to see fairly quickly the
6 disposition decisions in cases not going forward
7 made with a tempo that it isn't currently being
8 made, as the Office of Special Trial Counsel on
9 the no-go cases can make that fairly quickly
10 versus we have a very long timeline to get to
11 that decision with the convening authority.

12 MEMBER SCHRODER: Well, partially, it
13 seems to me, too, that -- some of you have
14 already talked about this -- is part of it is
15 going to be process. I mean, the idea that
16 you're all looking at business rules, you're all
17 looking at common training -- I mean, I think
18 that's all very important and will be important
19 for us to be able to report on that progress up
20 to that point.

21 LTG RISCH: Along those lines, I think
22 that success would be a seamless transition from

1 our current system to the OSTC, no cases being
2 dropped, as far as we're concerned. Certainly, I
3 know the other services feel that way. Other
4 than that, I think it would be too early.

5 But to General Bligh's point -- that
6 you'll have to wait until later in '24 to see
7 what we're doing. I hate to say that, but we
8 asked for the time because it was necessary to
9 put these business rules in place, to change our
10 EOs and get everything so that you didn't have
11 gaps in the cases and lose some, quite honestly.

12 MEMBER REDFORD: Right. I have a
13 couple of questions. One is, based on historical
14 charging analysis, meaning the charges that are
15 brought to court-martial, is there an estimate on
16 how many general court-martials will be the
17 responsibility of the Office of Senior Trial
18 Counsel as opposed to the more traditional
19 convening authority that many of us who served
20 had and experienced?

21 And the second is, what is the
22 longevity of the four either general or flight

1 officers who are sitting here or their
2 successors? Is this a by-definition four-year
3 billet? Is it a five-year billet? How do we
4 know that General Wells isn't going to be
5 assigned someplace else in six months? That's my
6 question.

7 BG WELLS: So, hopefully, I'm not
8 going to be assigned anywhere. But --

9 MEMBER REDFORD: General Risch, you're
10 welcome for asking the questions.

11 BG WELLS: -- but I think DoD guidance
12 has been so far that -- minimum of three years.
13 And so it hasn't set a maximum, but a minimum of
14 three years is the DoD standard.

15 As for proportion cases, I think right
16 now the latest look (phonetic) was about 60
17 percent of the cases that go to trial would be
18 covered offenses, although it's only about 40
19 percent of the investigations, criminal law
20 investigations that are done. And so the
21 investigations --

22 MEMBER REDFORD: One of the reasons I

1 asked that is we got a printout -- received a
2 printout -- I told my children, don't say got.
3 We received a printout of the court-martials
4 which were scheduled for February/March. It
5 looked like there were 60 GCMs force-wide for all
6 the services. And my count looked like 53 of
7 them had Article 120 allegations.

8 COL BOVARNICK: Sir, I'm sorry. If I
9 could just clarify for everyone -- so what we
10 prepare for the members are -- we look at
11 contested GCMs that the members would want to go
12 to, and then panel cases. So, in other words, we
13 would not send you to guilty plea. So the list
14 you're referring to, just so everyone knows, we
15 select those options for the members.

16 PARTICIPANT: Okay. So that's not
17 universal court-martials.

18 COL BOVARNICK: No, sir.

19 BG WOODARD: No, sir. It's not the
20 universal court-martial. I know that as we were
21 standing up or looking at how to stand up our
22 Offices of Special Trial Counsel in the

1 Department of the Navy, we did a lot of -- and I
2 know the other services did this as well -- a lot
3 of data-mining metrics and digging to see what
4 the numbers were.

5 And at least in the Department of the
6 Navy, it was two-thirds to three-quarters of the
7 cases that actually made it into court dealt with
8 a covered offense. The numbers of those
9 investigations was even -- it was pretty roughly
10 -- it was a little bit less but not quite the
11 three-quarters of the number of cases.

12 So, at least in the Department of the
13 Navy, it's a very -- we have an iceberg slide
14 that we have, and I wish I'd have brought it with
15 me, that kind of shows from the complaint up
16 through to the referral stage, and then referral
17 stage post on. So it is a significant number of
18 covered-offense cases.

19 What does that mean going forward,
20 though? The Commanders may find that those cases
21 that they have been sending to an administrative
22 proceeding, because all of their prosecutors have

1 been tied up with the 120s, those high-level
2 felony cases -- that now that those general
3 crimes trial counsel -- they've got bite space on
4 their docket. Are we going to see the return of
5 the more military-specific type offenses, whether
6 it be the drug offenses or the larceny offenses,
7 some of the other -- disrespect and 92s, those
8 types of things? Are we going to see a return to
9 that?

10 I don't know. Colonel Nick Gannon,
11 the Chief Trial Counsel for the Marine Corps, I
12 know he's going to be out working the Commanders,
13 saying, hey, I'm open for business.

14 So it's to be determined whether or
15 not those investigations -- because a lot of the
16 investigations, at least from a prosecutorial
17 standpoint -- those investigations never made it
18 into a law center to -- they ended in an SJA's
19 office and a command investigation and was
20 handled administratively. It never made it over
21 to a law center.

22 LTG RISCH: I'll simply say we can

1 give you exact statistics because it's how our
2 Operational Planning Team came to me with the
3 numbers that I had to go to our leadership and
4 ask for -- design the structure, and then know
5 exactly how many Special Trial Counsel and
6 support personnel we needed.

7 And the numbers -- we've talked about
8 that here, about two-thirds, 60 to 75 percent, of
9 that. Add in the new NDAA requirement for sexual
10 harassment investigations because, again, the
11 point was made, you may only have so many
12 referrals, but you've got to have a Special Trial
13 Counsel involved in the investigation phase to
14 know whether or not it's a covered offense and
15 it's one that you'll refer. You've got to do
16 that.

17 Unlikely that many sexual harassment
18 offenses alone -- and I don't want to be on
19 record as saying anything other -- we go where
20 the evidence shows. Unlikely that those alone
21 would be referred, but you still need to be
22 involved in the investigation stage.

1 And so I'm going to have to go back to
2 our leadership based upon that new change and ask
3 for additional structure because of the increased
4 workload based upon the sexual harassment
5 investigations.

6 RADM BERT: Okay. I would add one
7 thing that our investigator service brought to
8 us, which is to General Risch's point. So we'll
9 have the investigations for things that are
10 sexual harassment in nature, but our investigator
11 service said they need to add agents because what
12 generally happens in the sexual harassment cases
13 is more comes out.

14 So some of the sexual harassment cases
15 will become assault cases or other things because
16 once the victim has trust in an agent
17 investigating, sometimes more happens. So they
18 and our chief prosecutor will be reviewing all
19 the investigations.

20 CHAIR HILLMAN: Thank you. I'm going
21 to check in with our panelists for any final
22 questions that they have.

1 Judge Kasold, any question for us?

2 MEMBER KASOLD: No questions, but I
3 did appreciate the observation by -- and I don't
4 see the name tags -- the panel member who noted
5 the comment that we might be premature in trying
6 to do a real assessment as to what is needed.

7 And the second thing, the Army TJAG,
8 I believe, pointed out that I don't think success
9 should be based on if there's more trials or less
10 trials, because I think the statistic of cases
11 that might have a non-probable cause by a hearing
12 officer that then goes to trial and loses just
13 don't mean a lot to me because one is probable
14 cause and one is beyond a reasonable doubt. So I
15 think that always needs to be kept in mind as we
16 assess this. Thank you very much.

17 CHAIR HILLMAN: Thank you. Yes, and
18 then Colonel Brunson.

19 MEMBER GROSS: Yeah. I just wanted to
20 add one thing for you, Judge Redford, in response
21 to your question about would they be moved within
22 five months, six months. In addition to what

1 General Wells and the others have said, they also
2 by law and by SecDef policy -- they work directly
3 for the Secretary with no intervening authority.
4 They're reporting seniors to Secretary. So they
5 won't work for the TJAG.

6 MEMBER BRUNSON: All right. So we've
7 had a lot of discussion today about the
8 preliminary hearing officers. I'm not going to
9 beat the horse. But I would like your input on
10 training or standards for the preliminary hearing
11 officers.

12 We discussed whether -- for example,
13 should they have the same type of training that
14 the counsel in the OSTC have? What are your
15 thoughts on establishing a minimum standard for
16 those judge advocates, assuming they were acting
17 as preliminary hearing officers?

18 BG WOODARD: Ma'am, there are
19 currently standards that have already been set
20 with regard to those -- for the PHOs.

21 MEMBER BRUNSON: Excuse me, sir. To
22 be clearer, yes. Yes, there are, sort of. Would

1 you support -- and if not, why not -- a more
2 rigorous standard? For example, I understand
3 that it's -- we prefer a judge advocate. In
4 extreme circumstances, we don't have to. But
5 instead of that, something like a judge advocate
6 with significant trial experience, a military
7 judge, someone trained as a magistrate, something
8 along those lines?

9 BG WOODARD: So I'll let the JAG and
10 the SJA kind of comment on this because this is
11 really more in their lane than in the OSTC's
12 lane. But just from my experience working
13 military justice policy and as a SJA, at least in
14 the Department of the Navy, it's not just if
15 you're a 4402 judge advocate that you can be a
16 preliminary hearing officer.

17 With regard to certain offenses, those
18 sexual offenses, 120 offenses, there is
19 additional training and requirements that are
20 there. They have to be special-victim-qualified.
21 If they're not an O-4, a Major, they have to be
22 special-victim-qualified as a prosecutor in order

1 to be the PHO.

2 So we do have, currently, more than
3 just the 4402 gets you a card to be a preliminary
4 hearing officer. We do look at that. With
5 regard to making it a magistrate or a military
6 judge duty responsibility or into that bailiwick,
7 General Risch just talked about the oncoming of
8 the Article 134 sexual harassment and the OSTC's
9 involvement in that process and needing,
10 potentially, to go back and ask for more
11 structure to do that.

12 I won't speak for the TJAGs and the
13 SJA here, but just hearing some of the
14 discussions in the past is they've all gone to
15 their service leaders multiple times to ask for
16 structure to put into the military justice lane
17 of their very broad portfolio. Requiring
18 additional 44 -- we call them 4411 military
19 judges or magistrates -- that would be over and
20 above what we're already looking at and asking
21 for.

22 So could we? Would they do a better

1 job? Maybe. Certainly, more training is better
2 than no training. But I think it comes down to
3 ensuring that those individuals who are being
4 identified to be the preliminary hearing officers
5 is the right individual to hear that case as a
6 preliminary hearing officer.

7 LTG PLUMMER: And I would just say,
8 conceptually, absolutely agree with you. The
9 devil would be in the details, of course, right,
10 when you start talking judges or that sort of
11 thing. We would really be looking for more
12 capabilities and skill sets vice a duty title.

13 VADM CRANDALL: I think probably all
14 of us, as the JAGs and the SJAs, it seems would
15 look for some amount of flexibility to address
16 those concerns somewhat differently amongst the
17 different services depending on our structure and
18 how we move forward, because we have a lot of
19 competing needs and requirements to balance.

20 One way that we've tried to get after
21 that a little bit within the Navy is we've
22 created a PHO unit for our reserve component, ten

1 officers right now who -- that's what they do in
2 a reserve capacity. And of those, I want to say
3 four have either been military judges or civilian
4 judges at some point, and three others have gone
5 to the judges' course.

6 So that doesn't mean they're all
7 judges, and they're not all sitting judges right
8 now. But it's one way we've looked at trying to
9 raise the bar to some extent on standards and
10 maintain some flexibility across the force as we
11 try and meet a whole myriad of resourcing needs.

12 RADM BERT: So the Coast Guard is
13 small, and we would have people conflicted out
14 all the time if we had separate -- we had judges
15 and then judges. For the value added, I don't --
16 the flexibility is so important, and I would
17 think especially for the Army, but I can't speak
18 for the Army. But having that flexibility to
19 choose someone who has the right experience for
20 that case is important, and sometimes for us, it
21 has been a special court-martial judge or
22 whatever. We've used a variety of people.

1 But for what you would get by having
2 this whole other group of people who are either
3 magistrates or special courts-martial judges,
4 it's just not worth it. I mean, it just simply
5 wouldn't make a big -- I don't know if it would
6 make any difference. But you'd also have just a
7 lot of problems because you have people who can't
8 hear other cases because they can sometimes
9 jumble together or run over.

10 CHAIR HILLMAN: Thank you.

11 Colonel Osborn with our last question.

12 MEMBER OSBORN: Thank you, Dr.
13 Hillman.

14 And a follow-up to Colonel Brunson's
15 question and on the same area -- is there any
16 benefit to standardizing not only the
17 qualifications or level of experience for the PHO
18 but also the selection process and how the PHO is
19 selected?

20 And in that same regard, do you think
21 -- and I'm speaking primarily across service. Do
22 you think that there are any advantages to

1 utilizing judge advocates for this role cross-
2 service that might overcome some of the resource
3 challenges that I'm hearing from all of you?

4 RDML(S) DWYER: Ma'am, if I may, from
5 the Coast Guard, Marine Corps, and Navy
6 perspective, we already do that in a lot of ways
7 where we place folks. And I think, piggybacking
8 off the last question, STCs are going to rotate
9 out, and they're going to rotate into other jobs.
10 And that gives you a cadre of folks, often, to be
11 a potential PHO in the future because they've had
12 that training.

13 Would it be great if there are
14 additional seats in the future, as we fill those,
15 if we could put folks in there that had that
16 additional training? I think that would be a
17 great value added but not necessarily a
18 requirement at this time.

19 Again, as we see kind of as things
20 settle out over that time -- and I know that
21 doesn't always correspond with your timeline, but
22 I think that's going to be helpful for us as we

1 look to make future course corrections.

2 MEMBER OSBORN: As the smaller
3 service, Coast Guard, would it benefit you,
4 though, to have access to a pool, for instance,
5 of PHOs from the other services?

6 RDML(S) DWYER: Well, I would say we
7 do. I think we will. We haven't done the
8 agreement yet. I don't want to speak for Admiral
9 Crandall or General Bligh here, but I think the
10 idea is that the current arrangement that we
11 have, which -- we do work closely together, and
12 our folks train together from day one in Naval
13 Justice School -- that would continue, and we
14 would look to keep that relationship going to
15 have the same level of quality across the
16 services.

17 CHAIR HILLMAN: Okay. I want to thank
18 you for your time, your patience, and your
19 leadership. And we look forward to filling our
20 part of this bargain. So thank you.

21 (Whereupon, the above-entitled matter
22 went off the record at 2:24 p.m. and resumed at

1 2:34 p.m.)

2 COL BOVARNICK: Okay. This is going to
3 be our last open session of the day. And I will
4 hand it off to Mr. Chuck Mason to introduce our
5 Special Victim Counsel panel.

6 MR. MASON: Okay. Madam Chair, this is
7 our last panel for the day. And we have Col.
8 Brewer with the Army, Col. Park with the Air
9 Force, Capt. Cimmino from the Navy, Col. Pedden
10 from the Marine Corps, and Ms. Marotta from the
11 Coast Guard.

12 They are prepared to skip over the
13 bios and get right to questions, if that's what
14 you prefer.

15 CHAIR HILLMAN: All right. I think
16 we're ready for you. Thank you for taking the
17 time and sharing your expertise with us. It
18 makes a tremendous difference to us.

19 We're getting smarter all the time
20 hearing from experts like you. We haven't heard
21 from anyone who quite had the expertise that you
22 had and that you're bringing, the perspective

1 that you're bringing to the work that we're
2 undertaking right now with respect, specifically,
3 to the Article 32 and its impact on the folks who
4 you're working with the most.

5 So, I'd love for you to share your
6 thoughts on this. And we're all yours.

7 COL BREWER: I'll just keep the
8 tradition going. The Army will start off.

9 And I'll just say that from the
10 victims point of view there are benefits from the
11 32, both the prior version and the current
12 version.

13 The main benefit that we see for the
14 victims that we reached out to through their
15 special victim counsel are that it's a tangible
16 moment in the process where they can see that
17 things are advancing.

18 It's an opportunity for them to hear
19 from both the defense and the prosecution the
20 theories of the case.

21 And it really educates them on what to
22 expect should the case go forward.

1 Across the board we heard very few
2 people are requested by defense for to be present
3 at the 32, or even for interviews at that stage
4 of the proceeding. And so, we haven't seen that
5 there has been a lot of interest in them
6 testifying from that side.

7 To echo what was said in the prior
8 panel, we have seen instances where a prosecutor
9 has requested a victim testify, for some reason
10 where the case is complicated or there is
11 something critical about that case where they do
12 believe the victim or the case would benefit from
13 their presence.

14 But, overwhelmingly, both our special
15 victim counsel and the victims have said they do
16 not want to be forced to testify.

17 There's a lot of reasons why victims
18 may decline to testify. It may be because of the
19 traumatizing impact of it because they're not
20 prepared to testify at that point. They don't
21 yet know how much they want to participate
22 because this is new to them; they've never seen a

1 court martial or any kind of official proceeding.
2 And this is maybe their first opportunity to see
3 what that might look like by watching those other
4 witnesses and help them make a more informed
5 decision moving forward.

6 So, we do see a benefit to it. But
7 regardless of what changes are recommended, we
8 would definitely request that those changes do
9 not include making it mandatory for victims to
10 have to come and testify.

11 COL PARK: I would concur with that.
12 It was pretty overwhelming that, you know, the
13 biggest change was not requiring victims to
14 actually testify at the Article 32. And I think
15 that is something that should remain in place.

16 You know, I agree with everything that
17 Carol Brewer said in terms of the pros. It is
18 the first time for some of our victims to
19 actually see what the process might be like. It
20 can give insight into maybe trial strategies.

21 And it can, in some cases, build
22 relationships with trial and defense counsel in

1 opening that dialog so that the victim is aware
2 of the parties and proceedings. Which I think is
3 why victims counsel was started from the
4 beginning, is to give victims the voice to
5 empower them to advocate, navigate them through
6 that system that for most is very unfamiliar
7 with.

8 CAPT CIMMINO: Not surprisingly, I
9 would concur with my colleagues. And the
10 interesting thing about the mandate is,
11 especially from the victim's perspective, is
12 transparency and trust in the system. And
13 that's, in the 15 months I've been in this
14 assignment, I think trust and transparency is
15 really important from the victim's perspective,
16 that they understand not just are they a voice to
17 be heard, but that the process will run its
18 course.

19 I think with all of the changes with
20 OSTC it is really going to be hard to assess
21 what, if anything, and what the changes will mean
22 practically for us and our counsel as they evolve

1 through this process.

2 The thing I would -- I'm not a fan of
3 change for change's sake. We really should do a
4 holistic assessment to see where it impacts the
5 victims because we're building on a scenario
6 where victims went from feeling unheard, to being
7 heard, to continue to being heard in a process
8 that's evolving.

9 It took us a long way to get here, but
10 we're slowly getting to the point where I think
11 if the purpose of OSTC is to build transparency
12 and trust, we will get there eventually.

13 I just don't want to pile on and say,
14 yep, let's do all this and complicate it, because
15 we are going to continue from a client
16 perspective to continue to have them believe that
17 not just will their voice be heard, but they'll
18 have some form of a system that's fair.

19 But if changes are going to be made,
20 I think there are things we can do to help so
21 that victims are not retraumatized in the process
22 and you go through a process where you can

1 probably get the best of both worlds, but
2 removing the defense from being able to cross-
3 examine and take people on the stand and really
4 kind of use it not just as the old discovery tool
5 but a way to retraumatize a victim through the
6 process.

7 LTC PEDDEN: Good afternoon, ladies and
8 gentlemen. Unsurprisingly, I won't disagree with
9 any of what's already been said.

10 I think I would only add to it that,
11 you know, an Article 32 hearing is a very
12 important inflection point in the trajectory of a
13 prosecution, for the Government, for the accused,
14 and for the victim.

15 I think for a victim that's a moment
16 at which the procedural posture of that case
17 becomes very real, and they get their first sort
18 of first look at that process and what it's going
19 to mean for them from an evidentiary perspective.

20 I strongly agree that any modification
21 of Article 32 should not include a provision that
22 would force a victim to testify. I might be open

1 to the idea that we're to adopt something of a
2 procedural posture like a grand jury proceeding
3 that is not adversarial and doesn't include the
4 defense, that there might be some room for that.

5 But I think on that note it's also
6 very important to observe the fact that the
7 Government and the PHO right now can hear from a
8 victim during 32 and, in fact, in almost every
9 case they do.

10 You know, most every case there is a
11 sworn statement that was provided to a criminal
12 investigator throughout the course of the
13 investigation. And that statement is part of the
14 materials that are submitted to the PHO during,
15 during the Article 32 proceeding.

16 So, I think there is some voice in
17 that process already. And, again, a very
18 important inflection point in the course of the
19 prosecution for the victim.

20 MS. MAROTTA: So, in the Coast Guard,
21 again, most of our cases end up being paper 32s.
22 Many, most often the victim does not appear. But

1 if they do, we have the feedback we've received
2 is that it has been good for them to see that the
3 accused was being held somewhat accountable, was
4 being called to the carpet to at least, you know,
5 be part of this process. So, that was healing
6 for them.

7 And it does, for us, we found that
8 it's useful to the SVC because they learn a lot
9 more about the case because this is really the
10 first time that we're receiving information about
11 the rest of the Government's case, which could
12 assist the SVC in advising the client because up
13 until that point you just have their side, you
14 know, what, whatever they're telling you.

15 So, now this has opened up, you know,
16 information for the SVC to assist them in their
17 role.

18 If the victim is going to testify, you
19 know, I do agree it would be -- I don't believe
20 that it should, we should go back to having it be
21 where the defense counsel is cross-examining
22 again, because that was really why all of these

1 changes started in the first place back in '13
2 and '14.

3 So, if we are going to go back there,
4 I think we would really need to take a look at
5 having a military judge in charge, somebody who
6 really could take control of that process so that
7 we don't end up having 412 and 513 issues because
8 PHOs that are not trained and are not experts,
9 they really can't control that.

10 So, what, what we were seeing
11 previously is that it almost can become a circus
12 where the defense counsel is trying to put in
13 things, and the PHO is, like, well, I'll just
14 hear it and, you know, decide later whether I'm
15 going to consider it.

16 And then, you know, all of this stuff
17 was coming up. The victim was being traumatized.
18 And it's not, it's not helpful. It's not
19 building trust in the system.

20 And all of these changes, I've been
21 doing this since 2015, all of these changes were
22 brought about so that we could build trust in the

1 process and, you know, in that if the 32 is not
2 done in a way where it becomes more like a free-
3 for-all again, then I fear that we're going to go
4 backwards instead of forwards.

5 MEMBER SOMERS: Hi. So, I want to go
6 back a little bit. And this may be things that
7 aren't particularly for your panel, but maybe
8 with all your expertise you might be able to
9 answer this.

10 So, I understand the Office of Special
11 Trial Counsel might eliminate some of these
12 problems. But we've been talking a lot about the
13 PHO and the expertise that is needed for that
14 role.

15 And I'm also wondering, it seems as
16 if, let's say that the recommendation was no
17 probable cause, can the SJA assist the convening
18 authority to say, no, let's go ahead and go
19 forward? Is there a concern that the SJA doesn't
20 have the experience, and knowledge, and expertise
21 to actually make those recommendations that are
22 helpful?

1 You know, we talked about the PHO
2 having training, but are there SJAs that are kind
3 of newer, younger who don't have the expertise?
4 And does that hinder the process at all?

5 COL BREWER: I can speak from my
6 experience as a special victim prosecutor. That
7 just happened to be in a jurisdiction where I
8 advised a very different group of SJAs, some who
9 were more junior and some who were much more
10 senior, some about to retire, and some, you know,
11 on their first of many tours as SJA.

12 And there is a difference. There are
13 SJAs who have a lot of justice experience and can
14 make really wonderful decisions and that are very
15 well informed, and SJAs who are still in that
16 beginning learning curve, of course.

17 What I think we pointed out, though,
18 in a lot of these panels, and just moments ago
19 Capt. Cimmino, is that the OSTC is going to, I
20 think, improve that situation a great deal
21 because you're going to have far fewer people who
22 are justice novices weighing in on that.

1 The SJA's role in all of these covered
2 offenses is really going to be much less -- much
3 more, you know, administrative than it is going
4 to be making those important decisions. And I
5 think that's going to help a great deal so that
6 in the rare case where you have a 32 where
7 there's no probable cause, that special trial
8 counsel, working through that entire organization
9 is going to be able to look at that and explain
10 is it the case where that probable cause
11 termination either shows that we had not prepared
12 enough and that we missed something that they
13 pointed out to us that we can now perfect and
14 move forward, or where that person misapplied
15 that standard, for whatever reason -- just a
16 difference in opinion, not knowing the victim as
17 well as the special trial counsel may.

18 I can say as an SVP, I spent a great
19 deal of time with victims, and would have known
20 by that point where something that they said in
21 that sworn statement that, as we pointed out just
22 moments ago, not only is it their first

1 opportunity that the hearing officer's going to
2 see, it's also usually videotaped. So, they're
3 going to be able to watch that.

4 And we're going to be able to look at
5 it, now that we've worked with that person for
6 months, and say, yeah, they did appear maybe
7 poorly in this case, but that was two days after
8 this incident. They were an absolute wreck. And
9 now that we've talked to them and they've been in
10 counseling, we know they're going to be able to
11 do better. And we recommend moving forward
12 despite that recommendation. And it's going to
13 be the recommendation of those experience justice
14 practitioners.

15 LTC PEDDEN: If I can just answer the
16 first question.

17 I think that in a lot of ways in the
18 Air Force I think the SJA has the experience,
19 more experience, I think, than a PHO. And they
20 also have the counsel of, you know, they can, we
21 can talk to.

22 You know, when I was an SJA we, we did

1 talk to our senior trial counsel on cases
2 beforehand, right at the beginning of a case,
3 partnering our younger trial counsel with a
4 senior trial counsel, you know, as you go forward
5 on the more complex cases.

6 And then as an SJA, I had people above
7 me that I could also reach back and talk to.

8 So, in a lot of ways I think that we
9 have the resources. At least, you know, to your
10 first question on do SJAs have that experience?
11 I would say yes. And they just have the
12 resources to be able to do that. And they may
13 have more information because they do have --
14 they can build a relationship with the victim.
15 Right? The trial counsel can have that
16 relationship that maybe the PHO is not going to
17 have.

18 CAPT CIMMINO: Just one, just to answer
19 your question on the Navy side because we're
20 unique in that the way our military justice
21 system is wrapped up it's done by our regional
22 side. So, all of those admirals that are making

1 decisions have either a senior O-5 or an O-6
2 staff judge advocate, no one more junior than
3 that, that's advising them on those choices. So,
4 over time that's how it evolved.

5 With OSTC, obviously what Col. Brewer
6 said is going to be true, where those JAGs are
7 making those determinations. But previously and
8 up till now the experienced side is usually an O-
9 5, very senior O-5, or an O-6 advising those
10 flags on those decisions.

11 LTC PEDDEN: I'd say that roughly
12 parallels my experience in the Marine Corps,
13 ma'am. I think that the vast majority of SJAs
14 are very experienced practitioners. Almost all
15 of them have an extensive amount of trial
16 advocacy experience, either as a prosecutor or
17 defense attorney, or also as victim's legal
18 counsel.

19 I'm not really concerned about the
20 experience level of a staff judge advocate and
21 their advice to a convening authority. I'm
22 especially not concerned about it in light both

1 of our current practice which includes the
2 provision of what we call a case analysis memo
3 that is the very detailed analysis of the
4 prosecutors who are detailed to that case, and
5 their assessment of whether or not it's a viable
6 case.

7 And so, current practice I think
8 augments that experience at the SJA level.

9 And then future experience, I would
10 anticipate that prosecutions under the Office of
11 Special Trial Counsel paradigm will include even
12 more experienced practitioners who are analyzing
13 that case and assisting the lead special trial
14 counsel in making a determination as to whether
15 or not to proceed. So, I'm not concerned about
16 that experience at all.

17 MS. MAROTTA: And I wasn't concerned
18 about the experience before. And especially now
19 with the, with the new set up I think that that
20 issue kind of goes away because you're now going
21 to have these experts that are handling these
22 cases and making recommendations.

1 What I, what I would point out is that
2 in the issue kept coming up about whether the
3 PHO's recommendation should be binding and what
4 happens if, you know, the SJA's recommending
5 something different than the PHO.

6 One thing I wanted to point out about
7 victims is, okay, the PHO is doing these cases as
8 a paper case and the victim's not testifying,
9 what we've learned about victims is that the
10 effect of trauma on the brain and how it
11 processes information is very complex. And
12 victims are all different, depending on what
13 they've been through in their life and how
14 they're able to kind of piece through what has
15 happened to them.

16 So, depending on when you have that
17 interview, how close in time, and what they've
18 been able to process and put together, and also
19 the quality of the investigator. So, in the
20 Coast Guard some of our investigators are
21 specially trained in how to ask these questions
22 and not to try and put it in a timeline because

1 the pieces are going to be all mixed up.

2 But some of them are not. So, some of
3 the quality of the interviews is not going to be
4 that great.

5 Now, if that PHO is getting one of
6 those investigations, but yet the prosecution has
7 talked to the victim, and now time has gone by
8 and they've been able to kind of really sort
9 through what's happened to them, those are going
10 to be two different scenarios.

11 So, that's why I think I'm so
12 concerned with saying, okay, well, we're going
13 to, you know, have this paper case, but the
14 disposition's going to be binding. Sort of,
15 well, wait. You know, that may not be the best
16 picture and the best evidence of what, what
17 happened here.

18 CHAIR HILLMAN: Okay. On either side
19 of me here. We'll go to Col. Brunson and then
20 over to Capt. Morris.

21 MEMBER BRUNSON: I just said I always
22 have a question.

1 Okay. So, you guys have really
2 enlightened me, and I appreciate it, the
3 conversation about why a victim's even paper
4 testimony may not seem credible at the time of
5 the 32. So, here's a question.

6 If the purpose of the 32 is to
7 determine probable cause, and we can't do that a
8 lot of times if we're just relying on the
9 credibility of the victim, part of the question
10 is, in your experience is that what it comes down
11 to?

12 Do you know of cases where the hearing
13 officer said no probable cause, it's based on
14 something other than victim credibility? Because
15 if it's based on something else, then I think the
16 Government really has a big problem.

17 If it's just based on, oh, she doesn't
18 even have her times right, well, then, you know,
19 I defer to your experience on that.

20 So, what are your thoughts there?

21 COL BREWER: Well, I think if you look
22 at victim credibility in terms of looking at

1 every part of their statement, and is it
2 verifiable, and is it consistent, if you put it
3 into that broad scope I think almost every "no
4 PC" has something to do with that.

5 Most of our cases I would say from my
6 experience, most of our sex assault cases it is
7 mostly based upon testimony. The evidence is
8 going to, you know, usually if we have evidence,
9 like DNA evidence, most of the time both parties
10 are saying, yes, there was some kind of sex that
11 occurred between these two people.

12 It's just going to be a definition of
13 whether it was consensual or not. And so it
14 really is going to come down to those two
15 people's testimony and who appears more credible.

16 And so I do think in that case really
17 that broad definition of credibility is going to
18 be where most of them come in.

19 Sometimes, though, there is additional
20 information that comes out of a 32. You realize
21 there's another person that the victim disclosed
22 to you, or things like that that just come up

1 that will make your case even stronger.

2 And, obviously, sometimes there, you
3 know, information comes out, the defense will
4 call a witness who will say the victim talked to
5 me the next day and said, you know, this guy was
6 her best friend. She, she loves him with all of
7 her heart. Both of those things can happen at
8 the 32.

9 If the evidence comes out that's going
10 to absolutely blow up your case, the odds that
11 you're arguing, despite that, you know, hearing
12 officer's recommendation you should go forward
13 anyway, are pretty low.

14 We're going to have to have some kind
15 of extraordinary evidence to put that evidence
16 saying the victim said something different is
17 just completely not credible. And that's, that's
18 a pretty high bar to overcome.

19 But when it is those minor things
20 where we can have somebody come in and explain
21 why a victim would have said things in the wrong
22 order, a victim would have said, you know, why a

1 victim would have told somebody right afterwards,
2 like, you know, hey great night, but I've got to
3 get home. Like, why they would describe things
4 differently than they really were, we can
5 overcome it with expert testimony, their further
6 explanation.

7 That's when it might be worth, you
8 know, the effort and, in the interests of
9 justice, to go forward despite that hearing
10 officer's recommendation.

11 COL PARK: To your original point, I
12 don't, I don't have any information on why they
13 wouldn't -- the other reasons, what it would be
14 cannot find probable cause without going back to
15 my victim's counsel.

16 LTC PEDDEN: I can't think of a
17 specific case off the top of my head, ma'am. I
18 wouldn't want to speculate on something like
19 that.

20 I would say that it's easy in that
21 dialog to lose sight of how low a probable cause
22 standard is. Right?

1 So, I'm not, I'm not particularly
2 concerned that PHOs are getting that wrong. I
3 think there is a subset of the military justice
4 population that would be exponentially more
5 likely to get it right, and those are military
6 judges. But I can't think of a specific case
7 that's responsive to your original question.

8 MS. MAROTTA: The only thing that I
9 would add is, and I think this point was brought
10 up, brought up earlier, where sometimes, you
11 know, the PHO is saying "no PC" just because of
12 an element that the prosecution hasn't brought
13 forward.

14 And sometimes you might see cases
15 where they, they haven't drafted the charges
16 correctly, like despite, you know, having all of
17 those samples. They try to get creative. So,
18 sometimes, you know, we're still seeing where the
19 creativity needs to be corrected.

20 But that should be solved, hopefully,
21 with OCP when we're, you know, we've to, you
22 know, a more professional group instead of --

1 especially in the Coast Guard where we're very
2 dispersed, and you have offices that don't do a
3 lot of military justice, and then all of a sudden
4 they've got a case. And maybe it's the first
5 sexual assault case.

6 And so we're hoping that this shift
7 will improve things.

8 MEMBER BARNEY: Thank you, everyone.
9 Appreciate your experience in working with
10 victims.

11 And as I was listening to your
12 testimony earlier, at least a couple of you
13 suggested that there may be scenarios where a
14 victim could be participating more actively in an
15 Article 32, you know, without the kind of wide
16 open procedures that marked Article 32s prior to
17 the 2014 changes.

18 So, let me just ask you to assume for
19 this, for this point that we're going to an OSTC
20 type model on many of these covered offenses, on
21 covered offenses; that we are looking and we're
22 hearing from all the services of things they're

1 doing to improve the overall quality of the
2 preliminary hearing officers who would be
3 conducting these.

4 Tell me what are the, what are the
5 kind of conditions you would want to see to allow
6 a preliminary hearing officer to actually engage
7 with -- you know, sua sponte was the language in
8 there, right -- engage with the victim to try and
9 get the victim to participate more actively in a
10 32? What conditions do you want to see? How
11 would you see that work?

12 COL BREWER: Well, primarily in a case
13 where they're represented I would want to speak
14 through their special victim counsel. Because
15 for obvious reasons, they're represented parties
16 and that's, that's the right way to do it.

17 But in all those cases I think
18 empowering the victim by allowing them to make
19 that decision about what they're willing to
20 participate in, I think it has great value in not
21 just their well-being but in restoring trust in
22 that process, and making it more likely that

1 they're going to want to participate should the
2 case go forward to trial.

3 I think that's a huge value both to
4 victims and to the system.

5 In terms of protections, should the
6 victim elect to participate, I think that that
7 may vary based upon the victim. And that's why I
8 do think it's important to empower the victims to
9 make those decisions.

10 A case I worked on where we did ask
11 the victim to testify, we talked to her and we
12 said we think that it would be beneficial not
13 only for you to testify fully at our questioning,
14 but to allow both the defense and the hearing
15 officer question you about whatever concerns they
16 have.

17 She made the decision, with the advice
18 of her very experienced victim counsel, she was
19 up for that. And she was interested in making
20 those statements because she didn't know if the
21 case was going to go forward, and she wanted that
22 opportunity.

1 Many other victims I worked with did
2 not even want to attend the hearing because the
3 accused would be there, and they wanted to be
4 around that person as little as possible. And
5 that every time they had to be around that person
6 it was retraumatizing and made them less likely
7 to participate. And we respected that as
8 Government counsel because we didn't want to put
9 them in a place where it was not healthy for them
10 to participate in the process.

11 So, we see victims who just want
12 reports back after the hearing's over; victims
13 who don't want to hear about it at all; to
14 victims who want to sit in the room; and then,
15 like I said, to victims who are willing, and
16 able, and really interested in fully
17 participating in the 32.

18 And so, I think all of those things
19 have different benefits and drawbacks. As we can
20 all imagine as litigators, that can be very
21 dangerous to your case moving forward, or it
22 could really strengthen your case. It all is

1 going to be so dependent upon the factors.

2 But what we've learned talking to
3 victims is that them being able to make that
4 choice is important, valuable, and really does
5 restore their faith in themselves and the system.

6 COL PARK: I would concur with that.
7 And really empowering them and giving them a
8 choice is one, one way, one place to start.

9 In terms of just how do we get there,
10 I'm not sure it's forcing or any kind of
11 mechanism other than giving them the choices to
12 get victims to want to come back and testify in
13 anything but a court. But with anything, I think
14 that building the relationship, right, trusting
15 that somebody else, your victim's counsel, maybe
16 the Government, somebody else is there to help
17 you and protect you through that process I think
18 can just help in general.

19 So, it's not specific, necessarily, to
20 getting a victim back in court, but certainly
21 something that can help and, you know, try to
22 facilitate in building better relationships with

1 both parties, I would say, Government and
2 defense, right, to get to the outcome that the
3 victim wants because justice looks different to
4 every victim.

5 And not every victim necessarily wants
6 to go to court and/or end up with a conviction.
7 I think in a lot of cases we hear of -- not a
8 lot, but in some cases, you know, victims get to
9 the conviction point and it doesn't give them the
10 satisfaction, the healing they thought it would.
11 So, it's just very different, different stages.

12 So, it's an interesting question. I
13 don't know, I don't think I answered it with
14 exactly the criteria.

15 CAPT CIMMINO: Sir, what I think about
16 listening today to a lot of the testimony that
17 was provided, I think, as you evolve probably a
18 hybrid approach might be one of the best
19 scenarios where that the victim can come and
20 testify and really not be subject to the cross-
21 examine case.

22 If you're just talking a probable

1 cause, you can get the victim in to hear the
2 story, not be subject to the discovery process.
3 Because that's really what 32s were. That's why
4 we shifted it. It was really a tool for the
5 defense.

6 It really wasn't a tool for the
7 Government, it was a tool for the defense. The
8 change really made this a tool to go through a
9 probable cause finding.

10 So, if you completely maintain that
11 purpose, is just a probable cause, and don't
12 subject a victim to sitting on a stand and having
13 to be traumatized just in preparation to get to
14 trial, it would actually cause most victims to
15 probably want to lose confidence in the system.

16 That's, you know, one of the scenarios
17 if you're trying to say, hey, I went through
18 that. I was able to say my piece. It helps the
19 fact finders make a decision early on whether to
20 go forward.

21 But, ultimately it really is, if we're
22 trying to empower victims, I think a system that

1 isn't just there to help the defense.

2 And I believe in justice. I came from
3 the defense side, so I understand that part. But
4 listening to the balance everyone spoke about
5 today, the best approach might be a 32 that's a
6 little more open, with a lot of restrictions on
7 the tool, whether you're on the civilian side
8 where you can't question the witnesses, the
9 Government puts on its case, you move forward, a
10 secret grand jury kind of scenario.

11 I'm not saying that's the way to go.
12 Maybe have the defense in the room but not be
13 able to cross-examine the victim. And put up
14 rules how they apply that in the case. I think
15 that would continue the trust that Congress and
16 DoD leadership has tried to build into the
17 system.

18 It's been proven, because since these
19 changes more people are coming forward. We don't
20 want to go backwards where they might not want to
21 go through that process all over again.

22 LTC PEDDEN: Thank you for the

1 question, sir. I think it also bears mention
2 that that cross--examination process and the
3 discovery tool at an Article 32 is exactly why
4 Congress changed the rule. And it was one
5 specific case that crystalized that movement, I
6 think in 2013.

7 And so, I would compare that favorably
8 to what we hear universally. So, when we do our
9 victim's legal counsel certification course at
10 NGS, I've taught at the SVC course at the Army's
11 JAG school in Charlottesville several years ago.
12 And we host victims' panels where they talk about
13 their experience. You know, what they were
14 afraid of; what they admired and respected; what
15 instilled confidence; and what pushed them away.

16 They get frustrated when they feel
17 like folks don't believe them. They get
18 frustrated when they feel like they're being
19 called a liar because they don't remember things
20 precisely, or as precisely as others might like.
21 Those are things that I would view as probably
22 exacerbated in an Article 32 testimonial setting

1 where they are subject to cross-examination.

2 I think your original question was
3 under what circumstances might I view a sua
4 sponte initiation of a dialog between a PHO or
5 whoever is conducting that hearing and a victim,
6 not to be witty, but almost, almost none,
7 especially in the absence of victim's legal
8 counsel.

9 The one possible exception for that
10 potentially being a secret grand jury type
11 setting where there is no cross-examination and
12 there's no adversarial proceeding at all.

13 MEMBER BARNEY: Sure. Now, I didn't,
14 I didn't say that it would be done in the absence
15 of, you know, the victim's counsel. And there's
16 certainly merit in that.

17 But, you know, what I've heard from
18 others, including Capt. Cimmino, is the idea that
19 a more, a more objective process for asking
20 questions and getting responses, perhaps having
21 questions -- and now this is me, having questions
22 posed to the PHO by counsel for, for each of the

1 parties that is there, having that individual,
2 the PHO determine what questions to be asked in
3 what way, are those the kind of things that you,
4 you think could give more confidence to victims
5 to have a more active role?

6 LTC PEDDEN: And I didn't mean to
7 misunderstand your original question, sir. I
8 apologize for that.

9 I think my, my short answer is
10 probably no, because at some point that will
11 eventually take the tone of an adversarial
12 proceeding. And, again, to my response to the
13 colonel earlier, probable cause is a very low
14 standard. And a paper case has to be okay in
15 most settings.

16 I think it also merits mention that
17 RCM 405 allows now for a victim through counsel
18 to submit additional materials after the close of
19 a hearing that can be appended to the PHO's
20 report. And so there is an opportunity to be
21 heard there. That could potentially be made more
22 robust through other procedural rules.

1 But I think if we go down the road of
2 proposing specific questions, the identity of the
3 questioner will become less relevant.

4 The other thing I might add, if only
5 as a point of clarification with respect to
6 Article 32 hearings and the Office of Special
7 Counsel paradigm, is let's assume for the sake of
8 argument for the Office of Special Counsel as a
9 matter of policy or procedure adopts a standard
10 for prosecution. Or let's say that mirrored in
11 the National District Attorneys' Association
12 manual or the U.S. Attorney's manual, and that
13 that standard is higher than probable cause,
14 won't we be back here asking the same questions
15 from the same people in the 2024 report or beyond
16 when those standards, being higher, the
17 Government counsel will not proceed with a
18 prosecution if you're in PC range?

19 And, obviously, we can't tell the
20 future now. It seems clear at this point that
21 the prosecutorial standard will probably be
22 higher. If that's the case, then maybe a

1 different answer on amendments to Article 32
2 would be in the works.

3 I hope that answers your question,
4 sir.

5 MS. MAROTTA: I guess the only thing I
6 can add is just circling back to what Col.
7 Kennebeck said this morning: what's the purpose?

8 So, we just have to figure out what's
9 the purpose of the hearing. And then if, if it's
10 beyond probable cause then perhaps, you know, the
11 scenario where the counsel submit questions to
12 the PHO, and the PHO they decide what they want
13 to ask the victim. And then giving the victim
14 the option of whether or not they, the victim,
15 wants to get on the stand and answer those
16 limited questions.

17 MEMBER EWERS: I just want to follow up
18 on Col. Pedden's point.

19 It occurs to me that, you know, we get
20 beat up because at the moment we appear not to be
21 making enough cases go away at the 32 level.
22 Right? So, that's the current criticism.

1 And there are two things that happen
2 there. One is that we're, that we're
3 whitewashing everything.

4 The other is that we're setting the
5 victims up for failure when they go to court and
6 get the acquittal, and they think that things
7 were going really swimmingly after the 32, and
8 they're not so much going swimmingly.

9 So, going back to the point about the
10 OSTC, if the standard is elevated what is, what
11 is the anticipated impact on victim's will as a
12 whole? And what do you anticipate doing to fend
13 that off, if you will?

14 COL BREWER: So, under the current
15 standard, and under that I think what we
16 anticipate as the way forward the key is
17 communication and education of the victim. When
18 a victim understands that, like, while there's
19 probable cause, while we believe you, while we
20 want to support you, and while there are many
21 services available to you, this is why we cannot
22 prove this case beyond a reasonable doubt.

1 From my experience in general, victims
2 understand that, appreciate your honesty and
3 information, and the opportunity to have been
4 heard, to be taken seriously, and that you're
5 making a professional, reasonable decision about
6 their case.

7 As a special victim prosecutor there
8 are many times where I had to explain that to
9 victims that, yep, 100 percent I think this is
10 what happened to you. But I am confident I
11 cannot prove this beyond a reasonable doubt and,
12 therefore, it is irresponsible for us to move
13 forward.

14 And victims would say, hey, can I have
15 reasonable probability? We would visit it,
16 because I wanted to empower them to let them know
17 I'm hearing them. But at the end of the day I
18 had a responsibility as a member of the
19 Government counsel to give my bosses reasonable
20 good advice about what was going to happen. And
21 I was honest with them.

22 And I anticipate that's the way it

1 will move forward. And I think that's one of the
2 best advantages we're going to have from having
3 more experienced special trial counsel, that
4 they're going to be people who have been educated
5 on how to talk to victims, and what victims
6 expect to here, and how best to explain that and
7 communicate that to victims.

8 Special victims counsel it's not their
9 job to make that explanation to the client.
10 That's actually a Government responsibility. But
11 then the people who we supervise, they then can
12 sit there and say, what questions do you have?
13 Do you need to have another appointment with that
14 person, and to make sure that they're empowered
15 to ask those additional questions.

16 I would anticipate that.

17 The fact that fewer cases may go
18 forward is not the problem. Being heard, being
19 taken seriously, that's how we're going to build
20 trust. And having fewer cases go from probable
21 cause to court martial, I don't think that that
22 will decrease trust.

1 COL PARK: I think communication is
2 key, and that dialog between the prosecutor and
3 the victim through the victim's counsel;
4 understanding what the strength and weaknesses
5 are of the case throughout the investigation and
6 up and through court; and allowing the victim to
7 continuously make that decision to continue to
8 participate. Because we do have victims on the
9 eve of court say, I'm out. I'm done. Right?

10 But that we allow that to happen. We
11 give the victims the choice and we allow them, we
12 empower them to do so.

13 I think if you have that communication
14 you understand maybe why a case is not strong or
15 can, you know, end up in a conviction. I think
16 giving and empowering the victim with that
17 information will be helpful.

18 I think it remains to be seen, what I
19 anticipate is, honestly, probably more complaints
20 of the process; right? But we have to see it
21 through and see the effect of OSTC before we
22 actually figure out are less cases in fact going

1 forward, or do victims feel more informed
2 throughout that process, and then to reevaluate
3 them.

4 CAPT CIMMINO: Sir, I'd agree with my
5 colleagues, especially on the communication part.

6 But the thing you have to figure out
7 for us is what is victory? And every client is
8 going to be different. Every client's own
9 situation may warrant that just being heard,
10 going to trial, or making the complaint, those
11 are all steps.

12 So, universally I don't know what the
13 answer is. I do know that there is an
14 expectation, the chatter is that when OSTC stands
15 up and the standard's higher, less cases will go
16 to trial. Maybe the success rate of the ones
17 that go to trial will be higher. Right now
18 there's a high acquittal rate.

19 And, you know, there's a big case
20 going on at the academy later this month on the
21 administrative separation side where people are
22 concerned on those types of things on the outset.

1 So, we're talking courts-martial. But you're got
2 to think broader besides courts.

3 There's a whole administrative side to
4 this stuff that isn't even touched by what we're
5 involved with but our VLC are. Because when you
6 don't go to court, that doesn't end there.
7 There's the other side, the administrative side
8 that still carries.

9 So, I think there are concerns. I
10 don't know what victory is for us except for the
11 fact that a victim who is -- wants to come
12 forward, has a forum where they can, and be
13 heard. Whether you try that case in court or
14 whether, wherever they are, if we have victim's
15 legal counsel in place to be there to voice and
16 stand and be there for their concerns, I think
17 that's victory.

18 But I can't judge about success of
19 court. If I did that, I think we'd be failing.
20 I think we have to look at this holistically so
21 that every victim, no matter where they are,
22 feels that someone was there advocating for them.

1 And that's the best we could do, sir.

2 LTC PEDDEN: A strong second on that
3 point from me, sir.

4 I would, I guess, add, and it's been
5 observed in different, different ways already I
6 think, but, you know, victim's aren't monolithic.
7 And I've talked to lots of victims that are
8 represented by counsel that work for VLCO. And
9 they're all, obviously, individual people.
10 They're going to have different ideas about what
11 outcome drives their version of success.

12 I spoke to a victim last week who, if
13 you step back you would look at the ultimate case
14 outcome as probably a strategic defeat on the
15 facts. But the victim was content with the
16 outcome because she felt like she had her voice
17 heard at various stages in the process. And that
18 was what mattered most to her.

19 I can't tell you what institutional
20 success looks like beyond what Capt. Cimmino has
21 already described. I do think that in an Office
22 of Special Trial Counsel paradigm that the delta

1 between reported cases and cases that ultimately
2 go to trial will grow. If anything, that
3 emphasizes the importance of the communication
4 that my colleagues have already talked about.

5 We hear the term "expectation
6 management" a lot. I'm not a huge fan of that.
7 To me what matters the most is that my counsel
8 are correctly counseling their clients and
9 correctly applying the law to the facts. And
10 that they do that until their clients are content
11 with the advice that they've received and the
12 rights that they have in the process.

13 That's what it will look like in terms
14 of success on an individual basis for Marine
15 Corps VLCO, sir.

16 MS. MAROTTA: Sir, I don't, I don't
17 believe that we have too many cases going
18 forward. I think that I'm curious if the
19 situation really is that after that PHO comes
20 back and say "no PC," whether the case could have
21 been perfected.

22 Like as the, as the prosecution got

1 more evidence in, or kicks the charges, or, you
2 know, gathered evidence of pieces that were
3 missing, if they could have gone back and at
4 least gotten to PC at that hearing, does that
5 change the standard where once you get to trial
6 beyond a reasonable doubt, that's a whole other
7 ball of wax, you know. Because then you're
8 really getting into the credibility of the victim
9 and the accused.

10 And I believe that the way we explain
11 to victims what the 32 is, that they don't have a
12 false hope. They understand it's procedural,
13 it's a low bar. And I'm confident that they're -
14 - that that is not what is causing them to be
15 upset when the case doesn't go well.

16 It's just so many complex emotions.

17 CHAIR HILLMAN: Thank you. We're going
18 to go to Capt. Schroder. We'll check in with
19 Judge Kasold. Then we'll call it a day on this
20 panel.

21 MEMBER SCHRODER: As were getting to
22 the end here, I guess I wanted to, I wonder are

1 there things we should be considering to give
2 victims more confidence in the process? That we
3 -- that you haven't, you've given a lot of things
4 today, but things you haven't discussed?

5 MEMBER REDFORD: A friendly amendment.
6 Or are there things that should be changed, or
7 not necessarily taken away but added, fine tuned.

8 COL BREWER: I'll start off with saying
9 that it appears from, from my experience and
10 perspective, asking SVCs and taking surveys of
11 our victims that the 32 is a, as it stands, is
12 already increasing their trust in the process:
13 being able to review the report with their
14 counsel afterwards; being able to as a, you know,
15 one of my colleagues pointed out, being able to
16 submit additional materials when they, you know,
17 get the first initial readback from their counsel
18 on how the proceeding went.

19 You know, hey, the big question the
20 defense says you didn't answer this, or this was
21 inconsistent. The fact that they can then
22 present additional materials has already

1 increased their trust in the process a great
2 deal.

3 And, again, them being able to decide
4 how much or how little they participate at this
5 stage has had huge benefits in victims feeling
6 comfortable reporting, knowing that they're not
7 going to be forced to participate in an
8 adversarial process before they're ready, and
9 before they know that process is going to result
10 in a real finding that has long-term meaning,
11 which is the finding of guilt or innocence.

12 At this stage, the stage of just
13 probable cause or not just don't merit, you know,
14 violating that empowerment that we're trying to
15 build in them, in my humble opinion. And so it
16 seems that already this process from a victim
17 perspective results in a lot of disclosures that
18 are very empowering and educational.

19 And so I think whether it's changed to
20 become more robust or not, this process and their
21 allowance of their ability to participate or not
22 has been very positive.

1 COL PARK: I don't, I don't have
2 anything substantive to add. But just to note
3 that, you know, there is always a demand, and it
4 grows every year, for victim's counsel.

5 So, providing, I think, what we all
6 do, you know, in our jobs, to give them an
7 advocate, to navigate them through the
8 disciplinary process from, you know, the time of
9 report to the end, and even through appellate,
10 you have an appellate victim's counsel, giving
11 that voice throughout the process I think has
12 been just a tremendous benefit.

13 And getting the numbers, getting
14 victims to come forward, you know, we are
15 expanding; right? We not only represent victims
16 of sexual assault, but domestic violence. Right?
17 And at least, you know, in the Air Force we also
18 advise victims of sexual harassment and
19 interpersonal violence.

20 So, really, providing the resources I
21 think that we all do as advocates, specifically
22 for the victim and only the victim, was one of

1 the best things that the military justice system
2 could have done.

3 CAPT CIMMINO: Because it's January and
4 you asked what Christmas list I would have this
5 year for me in this position, sir, one of the
6 things that we've been working on is tied to the
7 32 but it's broader. I think one thing that
8 would be helpful to us in the Navy -- I won't
9 speak for my counterparts because I think some of
10 us may disagree on this one -- but it would be
11 very helpful for us in the Navy if our VLC had
12 access to the investigative reports that NCIS had
13 at the conclusion of an investigation so our VLC
14 can make a big determination looking at the
15 entire package and help advise their client.
16 That could help them build trust because they
17 don't know visibly everything else that might be
18 in the package.

19 But if my counsel had all of the stuff
20 the prosecutor had and looked at everything in
21 the investigation, I think it would help them, as
22 they advise their client, to build trust so that

1 they decide whether they subject themselves to it
2 or not very early on in the process. I think for
3 us it would be a very helpful tool on the Navy's
4 side.

5 MEMBER EWERS: When do you get that,
6 Dan?

7 CAPT CIMMINO: I'm sorry, sir?

8 MEMBER EWERS: When do you get that?

9 CAPT CIMMINO: Why can't we? As an
10 NCIS -- We don't get that, sir. We get our, we
11 get our victim statement. It's an NCIS policy
12 we're working to fight through, sir. But we get
13 the statement of just the victim.

14 We can submit a FOIA request, sir,
15 when the case is completed. But by that point
16 we're trying to advise our client as we're
17 working through the process of -- we're working
18 that structural side to get those documents so we
19 can advise our client early, sir.

20 MEMBER SCHRODER: But you don't get
21 discovery? I mean, if once they give it to the
22 defendants, you don't get it?

1 CAPT CIMMINO: The defense gets it. We
2 do not get that, sir. We only get the victim's
3 statement made to our criminal agency.

4 LTC PEDDEN: Ladies and gentlemen, I'm
5 only smiling because I'm thrilled that this
6 aspect of this discussion has emerged.

7 (Laughter.)

8 LTC PEDDEN: You have touched on a pet
9 peeve of mine.

10 And let me say at the outset that I
11 think in the abstract here's the problem: the
12 link between rights and remedies is too distant,
13 it's too weak. There is almost no linkage there.

14 In fact, when Congress imported the
15 Crime Victim Rights Act in Article 6(B), it
16 copied verbatim this list of rights. Where are
17 the remedies that allow them access to those
18 rights in the remainder of the code or in the
19 Manual for Courts Martial?

20 Along the lines of discovery for
21 victims and their counsel in courts martial
22 proceedings, allow me to, I guess, mention one

1 case that I think is illustrative of that. And
2 that's a case that recently went to the Court of
3 Appeals for the Armed Forces. It's Mallet
4 (phonetic). And it was a case related to
5 psychotherapist-patient privilege.

6 And in that case the victim sought to
7 intervene. The records had been sealed for the
8 benefit of the victim. The victim couldn't
9 access her own records and couldn't be heard on
10 appeal. It went back and forth and finally got
11 some limited representation.

12 Her civilian counsel is now
13 petitioning the United States Supreme Court for a
14 writ of certiorari.

15 That's often the case where victims
16 can't access critical information about the
17 investigation. They can't access critical
18 information that's required for them effectively
19 to assert their rights either at the 32, or at
20 the court, or on appeal.

21 And in the Marine Corps I'm in the
22 process now of working with my expert litigation

1 attorney advisor to build out a much more robust
2 written appellate practice for the purpose of
3 seeking more enforcement of those rights.

4 So back, gentlemen, to your original
5 questions: what could be added, what could be
6 subtracted? I would say direct, a black letter
7 rule that allows discovery to victim's counsel so
8 they can assess the facts of the case and
9 accurately explain to their clients what their
10 rights are and how best to enforce them, both at
11 the 32 and at trial.

12 We have counsel for the Government and
13 the defense at trial now who occasionally argue
14 the victim's legal counsel shouldn't be served
15 with other motions in the case because they're
16 not relevant to the assertion of the victim's
17 rights at trial.

18 That may or may not be correct. But
19 the thing I know for certain is that the attorney
20 who is assigned to our clients should be the one
21 making the judgment about whether or not that
22 motion is relevant to our clients' interests.

1 And so, specific procedural rights
2 that grant victims access, that will in turn
3 facilitate the kind of transparency that I think
4 most of our victims agree bolsters their
5 confidence in the broader justice system.

6 MS. MAROTTA: And you can imagine the
7 difficulty of advising a client about why charges
8 look a certain way, or why certain things haven't
9 been charged when special victim counsel is
10 jumping up and down in the SJA office saying, why
11 is -- you know, what's going on, why does it look
12 like that? And you get answers like, well,
13 there's more to this case that you just don't
14 know.

15 But it would be really helpful if you
16 would tell me so I can tell my client and advise
17 my client. But a lot of times you just don't get
18 that information. And it's based on
19 relationships about whether or not a trial
20 counsel is going to let you review the case file
21 or not.

22 And that, that is what really is

1 frustrating. So, some SVCs, if they have a good
2 relationship, or maybe there was a trial counsel
3 who used to be an SVC, will say, okay, yeah, you
4 should be able to see this. And others don't.

5 So, that disparity is kind of
6 frustrating.

7 And then the other aspect I know
8 you've heard a lot about this morning is, you
9 know, having PHOs that are, are trained so that
10 we -- so that they understand victims' rights.
11 So, we end up, not often, but I know that we --
12 that the services have done much better about
13 finding PHOs that are more experienced. But
14 experienced or senior doesn't always mean
15 experienced in victim victimology, and
16 understanding a sexual assault case, and all the
17 nuances that goes on in there. So, training,
18 specialty training would be very helpful.

19 COL BREWER: And I just wanted to,
20 before we moved on from this, just say that I
21 disagree because I do think that the victim is
22 primarily in this process the main witness, the

1 most critical witness.

2 And I think that potentially having
3 access could diminish their credibility by
4 allowing the argument that they have altered
5 their testimony in some way because they've been
6 impacted.

7 And I see my defense friends over
8 there smiling because they know that's the
9 argument they would make.

10 (Laughter.)

11 COL BREWER: And so I do think that
12 that is something that should not be outright
13 required, but is something that as prosecutors I
14 would ask them to consider that there are times,
15 especially when you're deciding not to go
16 forward, to share that information and to educate
17 that victim on here's the additional information
18 that's out there. Sometimes you have to do that
19 to be able to make the right determination
20 whether or not to go forward.

21 However, there are other times when I
22 think requiring that level of disclosure could be

1 detrimental to the case. And I think we should
2 leave that with the prosecutors who we are saying
3 want to be more experienced litigators, allow
4 them to make that decision.

5 But I do think that when it's
6 appropriate we do encourage, and we had a great
7 deal of success having our prosecutors explain
8 that, and explain that evidence that you didn't
9 have at the outset, but explain, hey, in a recent
10 case we had the victim, you said your friend saw
11 you behave this way, this is how your friend
12 described it. It's not at all what you
13 anticipated her testimony to be, and that's why
14 we can't go forward.

15 But if we had shared that with them
16 earlier in the proceeding, it might have impacted
17 testimony and really hampered the case.

18 So, that's just my two cents.

19 COL PARK: I just wanted to jump in.

20 So, in the Air Force we, because
21 counsel can request the report of investigation
22 through a FOIA request, and quite often I think

1 SJs do disclose the redacted copy of the
2 investigation to the victim's counsel. But it is
3 always with the caveat that you just don't turn
4 around and then turn it over to the victim's
5 counsel.

6 It's supposed to allow the victim's
7 counsel to be able to help advise the victim on,
8 you know, going forward. But it is, again, we
9 often, I think, in the Air Force do get it but,
10 again, with the caveat we don't turn it over.

11 And I have had some, some lively
12 discussions with my current counsel who happens
13 to be a former Army VC who brings up the point
14 that Col. Brewer brings, which is, you know, she
15 said, you know, why? Is that, is that a best
16 practice?

17 So, I think he's going to say yes.

18 (Laughter.)

19 CAPT CIMMINO: Well, and I asked for
20 that as my Christmas present. I didn't say I was
21 going to get it.

22 But the point I was trying to make for

1 the panelists, our goal was that our counsel
2 would get access as a protected agent, just like
3 a prosecutor. We're not trying to coach our
4 victim, but we're trying to have the information
5 so we could adequately advise them.

6 So, we're not asking you to radically
7 say give every victim the whole package. That
8 could affect the prosecution which, ultimately,
9 would not be what they want.

10 However, the counsel, the victim's
11 legal counsel representing their interests could
12 benefit greatly in how they advise them of it.
13 That's really what I was pursuing, not a carte
14 blanche just turn the whole thing over. Because
15 I agree with Col. Brewer, it could have negative
16 consequences.

17 So, if you do give us a Christmas
18 present this year, thank you.

19 COL BREWER: Well, just to be
20 argumentative and just bring it back to
21 empowerment, our policy is not to make decisions
22 on behalf of our clients. Our policy is to

1 educate them and then do what they tell us to do.

2 We are directed by our counsel -- by
3 our clients. We don't tell them what's in their
4 best interests; we do it. And so, if we had that
5 Christmas present and our client wanted it, we
6 would be obligated to give it to them.

7 So, we continue to disagree vehemently
8 with our friend.

9 (Laughter.)

10 COL BREWER: And but we do say, like,
11 we just want to keep empowering. And we think
12 regardless of most of these changes, as long as
13 our clients can still make decisions about their
14 level of participation, we, we appreciate any
15 changes you can to make the justice system even
16 better.

17 CHAIR HILLMAN: Thank you for the
18 robust exchange of views.

19 So, let me go to Judge Kasold.

20 Judge Kasold, do you have anything you
21 want to add here?

22 MEMBER KASOLD: No. But thank you to

1 the panel. I enjoyed it. That was very
2 informative.

3 CHAIR HILLMAN: Let me go to Judge
4 Redford then. Do you want to?

5 MEMBER REDFORD: Just a final follow-up
6 from Col. Brewer's just last comment.

7 Whether there's a military rule that
8 once you get it you have to give it to your
9 client, I think there's a very high likelihood
10 that there's a state bar rule that your license
11 requires you to provide that information to your
12 client.

13 And just sort of be careful what one
14 wishes for, you know. So, that would be the only
15 thought I might have.

16 CHAIR HILLMAN: I want to thank you for
17 your service and your leadership. Also, to let
18 you know, whatever the structure of the Article
19 32 is, I think that victims' faith in the system
20 and trust in the military justice system is
21 because of what you're doing every day, and what
22 your colleagues are doing every day,

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And thank you for that.

(Whereupon, the above-entitled matter
went off the record at 3:32 p.m.)

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In the matter of: Meeting

Before: MJRP

Date: 01-17-23

Place: Arlington, VA

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