

MILITARY JUSTICE REVIEW PANEL

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9TH MEETING

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WEDNESDAY
JANUARY 17, 2024

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The Panel met in the General Gordon R. Sullivan Conference and Event Center, located at 2425 Wilson Boulevard, Arlington, Virginia, at 10:15 a.m., Dr. Elizabeth L. Hillman, Chair, presiding.

PRESENT

Dr. Elizabeth L. Hillman, Chair
Colonel (Retired) Tara Osborn, Review & Assess
Working Group Chair
Captain (Retired) Benes Z. Aldana
Colonel (Retired) Kirsten V.C. Brunson
Major General (Retired) John Ewers
The Honorable Will A. Gunn
Major General (Retired) Robert G. Kenny
Colonel (Retired) Lawrence J. Morris
Judge James Robert Redford
Captain (Retired) Bryan Schroder
Judge Jeri K. Somers

ALSO PRESENT

Mr. Pete Yob, Executive Director
Ms. Nalini Gupta, Acting Deputy Executive
Director
Ms. Jennifer Campbell, Chief of Staff
Ms. Theresa A. Gallagher, Attorney Advisor
Ms. Amanda L. Hagy, Senior Paralegal
Mr. Michael D. Libretto, Attorney Advisor
Mr. R. Chuck Mason, Attorney Advisor
Ms. Meghan Peters, Attorney Advisor
Ms. Terri Saunders, Attorney Advisor
Ms. Kate Tagert, Attorney Advisor
Ms. Eleanor Magers Vuono, Attorney Advisor

PRESENTERS

Lieutenant Colonel Jacqueline DeGaine, U.S. Army
Colonel Matt Talcott, U.S. Air Force
Colonel Joseph "Mac" Jennings, U.S. Marine Corps
Mr. Ted Fowles, U.S. Coast Guard
Lieutenant Colonel Autumn Porter

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 Mr. Ted Fowles, U.S. Coast Guard

Defense Appellate Counsel Session.74
 Lieutenant Colonel Autumn Porter,
 U.S. Army
 Captain Arthur Gaston, U.S. Navy Lieutenant
 Colonel Allen Abrams, U.S. Air Force
 Mr. Thomas Cook, U.S. Coast Guard

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

2 (9:04 a.m.)

3 CHAIR HILLMAN: Welcome to our first
4 open session today with Government Appellate
5 Counsel. I'm grateful for everybody who's here
6 to join us. I'm going to ask Michael Libretto,
7 our staff lead on this issue, to introduce the
8 panel.

9 MR. LIBRETTO: Thank you, ma'am. Good
10 morning everyone.

11 For this panel, we've invited
12 representatives from each of the services
13 appellate government divisions to provide their
14 perspectives, opinions, and recommendations on a
15 number of the topics of interest to you in
16 conducting your comprehensive review.

17 You've each been provided a copy of
18 their official biographies. But joining us from
19 the Air Force we have Colonel Matt Talcott. From
20 the Navy and Marine Corps, we have Colonel Mac
21 Jennings. From the Army, we have Lieutenant
22 Colonel Jacqueline DeGaine. And from the Coast

1 Guard, we have Retired Captain Ted Fowles.

2 Thank you all for joining us today.

3 Each of the witnesses have been
4 provided the proposed questions, they're not
5 intended to limit the discussion or topics are
6 necessarily. They have been provided them, but
7 they're prepared to ask and answer questions on a
8 wide range of topics of interest to you.

9 Even if some of the topics, I'll just
10 point out, may not have reached their level yet
11 in light of the recentness of the changes that
12 have been made to the Uniform Code of Military
13 Justice. I've talked to them and informed them
14 that they can use the vast years of experiences
15 that they have in their other capacities to
16 answer questions and provide their perspectives
17 on those things.

18 So with that, ma'am, I turn it over to
19 you.

20 CHAIR HILLMAN: Thank you, Mr.
21 Libretto. Do we have any folks joining us
22 virtually?

1 MR. LIBRETTO: No, ma'am, we do not.

2 CHAIR HILLMAN: Okay, and just
3 checking, do we have any panel members who have
4 joined us virtually now?

5 MR. YOB: I don't believe so, but I'll
6 ask Amanda.

7 MS. HAGY: No, sir.

8 CHAIR HILLMAN: Any members of the
9 public who are with us?

10 MS. HAGY: No, ma'am.

11 CHAIR HILLMAN: Okay, just setting the
12 virtual universe for us there. So I'm grateful
13 that you're all here and that we'll run through
14 the questions that we sent you ahead of time so
15 you know some of the things we're interested in
16 hearing from you about.

17 I appreciate all the expertise that
18 you have. As Michael said, we've got your bios
19 here, so we realize what you're bringing to the
20 table. We will also have other panel members ask
21 questions as their concerns come up in response
22 to what you share with us.

1 So let's start with Colonel Talcott.
2 Can you talk to us a little bit about the new
3 plea agreements, how do you think the new plea
4 agreements are going compared to the old pretrial
5 agreements?

6 COLONEL TALCOTT: Yeah, I think there
7 aren't a ton of appellate issues related to this,
8 so I'll just more broadly speak that the new plea
9 agreements are much better, just as a start.

10 They're better in many ways, but I
11 would say perhaps the most obvious one I observed
12 in when I was a Trial Judge is the old system
13 ended up sort of where everyone was always
14 disappointed.

15 So if the judge ended up giving a
16 sentence that was above the cap, the victim felt
17 like maybe she was tricked or was led to believe
18 the case was worth less than it was.

19 If the judge came below the cap, the
20 accused might have thought or felt disappointed
21 perhaps that shouldn't have pled or agreed to the
22 terms as easily as he did or should have

1 negotiated for more specs to be dismissed.

2 With it all transparent out there,
3 everyone sees everything, everyone goes in with
4 sort of an expectation. And those expectations
5 are met. I think that level of transparency
6 makes the process seem fair to everyone involved.

7 From a judge's perspective, I do feel
8 like I was playing a game, but there was a sense
9 that I was trying to get a sense what was the
10 expectation of the parties here, even though I
11 wasn't supposed to know. That's nice to have
12 that gone.

13 No other real thoughts on the
14 difference.

15 CHAIR HILLMAN: Thank you. Colonel
16 Jennings.

17 COLONEL JENNINGS: Yeah, we have seen
18 Two main appellate issues arise out of the new
19 plea agreements, both of them center around case
20 in which there is a set, specific sentence that
21 is negotiated by the parties.

22 In other words, instead of a range of

1 confinement, we have both parties agree that
2 there will be an exact amount of confinement. Or
3 both parties agree that a certain punitive
4 discharge will be adjudged. For example, there
5 are a couple of issues that have arose. In one
6 case, we had a military Judge in the Navy,
7 attempted to exercise what you might call a line
8 item veto. In other words, the judge was fine
9 with the plea agreement, but was not okay with
10 the mandatory bad conduct discharge that the plea
11 agreement called for.

12 So he informed the parties that he was
13 going to line that out, and that they would
14 proceed with sentencing in the absence of that
15 agreed provision. That was over the objections
16 of both parties.

17 The government in that case, was the
18 Raines case, filed a writ of mandamus that was
19 ultimately successful. The Navy and Marine Corps
20 CCA determined that essentially the judges could
21 of course refuse to accept the plea agreement
22 writ large, but could not simply excise certain

1 provisions out of it.

2 Then we have also seen cases in which
3 the appellant, having agreed to a specific
4 sentence in a plea agreement, then claims on
5 appeal that such a specific sentence with no
6 range of confinement or other punishment
7 available, contrary to public policy because it
8 essentially turns the sentencing proceeding into
9 an empty ritual.

10 So far we have seen two such cases,
11 and neither of those have been successful at the
12 end in Criminal Court of Appeals.

13 CHAIR HILLMAN: Thank you. Lt.
14 Colonel DeGaine.

15 COLONEL DEGAINE: Yes, Doctor, thank
16 you. I was just going to add I think my past as
17 a Defense Counsel, absolutely loved not having a
18 floor, but I also understand the benefit for the
19 government in having a floor.

20 And I think to the extent that it
21 allows people to feel more comfortable with
22 entering into a pretrial agreement, I think that,

1 in that case it's beneficial to both sides.

2 It does not come to mind any issues
3 we've seen at the appellate level at this point,
4 Doctor.

5 CHAIR HILLMAN: Thank you. Mr.
6 Fowles.

7 MR. FOWLES: I concur with my
8 colleagues. Specifically with the Coast Guard, we
9 have not seen any appellate issues. I agree with
10 Colonel Talcott, and I listened in yesterday.

11 I agree with Admiral Purnell comments
12 on as we shift to judge-alone sentencing, you
13 have the ability to, for upward departures and
14 downward departures. And there's a process for
15 them to articulate the basis for that.

16 So I think the fairness to the accused
17 is that they get the benefit of the bargain. And
18 when they go to sentencing, they know exactly
19 what the sentence will be. So to prepare
20 themselves, I think that is a good thing for the
21 accused.

22 As far as the sentencing process, if

1 the judge does not see or hear what they think
2 they need to hear to justify the appropriate
3 sentence, the vehicle is in place for them to
4 depart from the sentence. So I don't have any
5 issues with the -- with the new process.

6 CHAIR HILLMAN: Thank you. Let's turn
7 to pre-referral judicial authority then. Your
8 experience with the Article 30(a) pre-referral
9 proceedings, whether it's appropriately scoped,
10 how you've seen that used, any concerns you have
11 about how it's going? And we'll stick to the
12 order, Colonel Talcott.

13 COLONEL TALCOTT: Yeah. For the most
14 part, specific to the pre-referral 30(a)
15 authorities that have been in existence. Most of
16 the communication warrants investigative
17 subpoenas.

18 On the communication orders, they seem
19 great, really beneficial to the process, really
20 helpful to our prosecutors. From an Appellate
21 perspective, they don't add much.

22 You know, if the accused preserves an

1 unlawful search authorization, he can still raise
2 it on appeal. But that's sort of the way the
3 process is meant to work.

4 We haven't had a lot of cases where
5 the preserved issue is preserved from a 30(a)
6 search warrant. In the military, you know, in
7 the Air Force, we did not use. Although I think
8 it's still authorized, military magistrates. We
9 use actual Military Judges for these.

10 So I don't suspect there's a lot of
11 errors in these. Then there's always the good
12 faith protection for these too, so not a lot of
13 appellate issues.

14 I will say, for the upcoming 30(a)
15 ones, you know, thinking in terms of the scoping
16 and the additions, most of the news that are
17 added are relatively low-threat issues. That is,
18 that issues that don't ordinarily create a lot of
19 appellate churn.

20 One I would highlight looks
21 particularly good or sensible is the one that
22 permits victims to seek review from the 32

1 decision at a 30(a), vice going directly to the
2 Air Force court, which I think is the way the
3 rules work now. It does make sense there would
4 be an intervening trial-level Judge to review it
5 before the supervisory court.

6 CHAIR HILLMAN: Thank you. Colonel
7 Jennings?

8 COLONEL JENNINGS: I would concur with
9 my colleague. We have not seen significant
10 appellate issues in the Navy and Marine Corps.
11 And I suspect that's largely just because we're
12 shifting litigation that was already taking place
13 simply from one stage of the proceeding to an
14 earlier stage.

15 MR. YOB: I'm sorry to interrupt.
16 There's a comment that came in from one of the
17 people online, just if the speakers could please
18 kind of lean into the mic and just make sure
19 you're heard, because they're having a hard time
20 hearing you, just wanted to put that out there.
21 Thank you.

22 CHAIR HILLMAN: Lieutenant Colonel

1 DeGaine.

2 COLONEL DEGAINE: Doctor, I haven't
3 had any experience with this at the appellate
4 level or at the trial level before this.

5 CHAIR HILLMAN: Thank you. Mr.
6 Fowles.

7 MR. FOWLES: Yes, ma'am. So we have
8 not had any appellate issues specifically with
9 respect to exercising 30(a) authorities. I
10 concur with my colleagues.

11 In preparation, I reached out to some
12 Trial Counsel. It's certainly a valuable tool in
13 the Coast Guard. You know, our ability to
14 exercise the tool is just growing as we learn the
15 ins and outs of the process and what we can see
16 with the existing tool.

17 I do not have any feedback or concerns
18 from an appellate perspective with respect to the
19 30(a) authorities at this time.

20 CHAIR HILLMAN: Okay, thank you. And
21 we'll turn to the sentencing process. In the
22 pre-sentencing procedures, based on the cases

1 that you've participated in, have seen, have
2 reviewed, do you think that the sentencing cases
3 -- cases are being put on effectively?

4 And would you think there would be an
5 appropriate cases for moving to a system similar
6 to civilian courts, where you have a neutral
7 authorities that do a pre-sentencing report?

8 So Colonel Talcott.

9 COLONEL TALCOTT: So then I think the
10 important caveat is I don't have any experience
11 with pre-sentencing reports. With that said, I
12 will just opine anyway because you invited me
13 here.

14 For the most part, our accused who are
15 convicted don't have real extensive mental health
16 histories, real extensive addiction histories.
17 Their employment history is pretty much just the
18 Military, and there's robust evidence about their
19 employment history.

20 Our defense attorneys for the most
21 parts I think do an excellent job. The rules are
22 written permitting them to put on, as I used to

1 say, anything they can think of. And just use
2 your imagination. The rules are very broad for
3 defense.

4 I would say that the rules are pretty
5 tight for the prosecution on the other side. I
6 think of them as five pinholes at sentencing the
7 government tries to squeeze their evidence
8 through.

9 I don't know if a pre-sentencing
10 report would help the prosecution get on better
11 evidence to the fact-finders or the decision-
12 makers, just because of my ignorance. But I do
13 wonder, sort of out loud as I just said, if
14 there's much information missing that would be
15 captured by a pre-sentencing report.

16 CHAIR HILLMAN: Thank you. Colonel
17 Jennings.

18 COLONEL JENNINGS: Thank you. I
19 concur with my colleague, and I also don't have a
20 lot of experience with pre-sentencing reports.
21 My experience is that Judge Advocates do present
22 effective sentencing cases.

1 However, I will note that at the
2 appellate level, we do frequently see assignments
3 of error for ineffective assistance of counsel
4 related to the presentation or non-presentation
5 of sentencing material.

6 Less often but still common, we do see
7 assignments vary related to prosecutorial
8 misconduct or improper material being presented
9 at sentencing hearings, either by the trial
10 counsel or by the victims in the context of an
11 unsworn statement.

12 My feeling as to pre-sentencing
13 reports would doubt the feasibility of them. My,
14 again, just sort of casual knowledge of how pre-
15 sentencing reports work in the federal system is
16 that typically there is a substantial gap in time
17 between the conviction and the sentencing
18 hearing, during which that pre-sentencing reports
19 are being compiled.

20 I think that Commanders in the Navy
21 and Marine Corps would be very skeptical of a
22 system that involved further delay, particularly

1 since, at least in many cases, the accused, now
2 convicted, would be returning to the unit.

3 And I think that if we tried to do
4 something like that, it would increase the
5 reluctance of Commanders to rely on the Court-
6 Martial system for adjudication of misconduct.
7 And would perhaps continue the trend that we've
8 seen for 10 or 15 years of fewer Court-Martials
9 and more administrative processing or
10 administrative separation procedures, which I
11 think is tied in large part to the desire of
12 Commanders to adjudicate things quickly.

13 CHAIR HILLMAN: Thank you. Colonel
14 DeGaine?

15 COLONEL DEGAIN: I agree absolutely
16 with what you're saying, Colonel Jennings. And I
17 hadn't thought of that before, but I think that
18 delay would lead to reluctance on commanders to
19 pursue routes that would end up that way.

20 I have no experience with pre-
21 sentencing reports me as well, but I can say both
22 my last job before this was Regional Defense

1 Counsel. So during that time, I saw absolute
2 effectiveness on behalf of both the defense and
3 the government at that point. I felt very
4 comfortable with the cases they were presenting.

5 I think that the training they had
6 from the TDS standpoint was some of the best
7 training I've seen in my career. And I imagine
8 the government has the same training on their
9 side to help with the effectiveness of their
10 advocacy, both from their direct supervisors and
11 TCAP and DCAP that are presenting training on
12 different aspects of the defense and government
13 roles.

14 So I feel comfortable with the way
15 that counsel are presenting themselves and also
16 with the appellate trials and the records of
17 Trials that I'm reading. From what I see from
18 there there is effectiveness on both sides. You
19 get one-offs here and there, but I think that's
20 the same anywhere you go.

21 CHAIR HILLMAN: Thank you. Mr.
22 Fowles.

1 MR. FOWLES: I feel somewhat redundant
2 just agreeing with my colleagues every time, but
3 I agree with everything that's been said. Having
4 had some experience with pre-sentence reports,
5 although it's been a little while, I agree with
6 Colonel Jennings.

7 We get the members' personnel records,
8 so for someone who's been serving for any, you
9 know, period of time, you have their enlistment
10 records or whatever records they completed when
11 they joined the officer corps, all their
12 performance records.

13 So the Judge usually gets a pretty
14 substantial amount of information on an
15 individual. Most of what I saw was on the
16 enlisted side. So you have ASVAB scores and you
17 had a sense of who they were.

18 Where I wish I had some of the pre-
19 sentencing report, like you don't get much socio-
20 economic data. I don't know too much about who
21 was that person before they joined the service,
22 which is an interest to me that an enlisted

1 members or a young officer, but usually enlisted
2 in the first couple of years of service.

3 I would like some time to know about
4 their background and maybe how they got down the
5 path that they're on. But those are usually for
6 low level offenses. If it's a pretty serious
7 offense, you know, sexual assault, I don't know
8 that that information would really alter the
9 judges' decision and how they thought the person
10 needs to be held accountable.

11 So that's the only stuff in the
12 military that I think in a pre-sentencing report
13 you don't have. But what we do have a Military
14 Judges usually have years of performance
15 evaluations.

16 In the Coast Guard, you have
17 documentation in the file when someone did
18 something good, when they did something bad, when
19 they were counseled. So you do get a pretty nice
20 picture of the individual.

21 And I think that's important for
22 Colonel Jennings' point. We're definitely not

1 structured to take a few months to sentence
2 somebody like they do in federal court. It's,
3 you know, they're rolling into it that afternoon
4 or the next day. The judge may grant a very
5 small delay.

6 But for feasibility purposes,
7 particularly in the Coast Guard, because we're
8 usually on the road doing the trials, it's -- we
9 don't have a major command where all the members
10 and witnesses and the accused are coming from.
11 You're flying people in from all over the
12 country.

13 So there is a substantial cost if you
14 want to kind of separate those proceedings and do
15 it a separate time. So I don't know that that
16 would make it any more efficient.

17 And then finally, to Lieutenant
18 Colonel DeGaine's point on sentencing, I think
19 the counsel is doing a very good job of
20 advocating in the courtroom. My experience as a
21 military judge is they make it hard on the judge.

22 I don't think it's bad that the

1 government's kind of limited to what they have to
2 present. They're, you know if you have a
3 conviction at that point, you know the details of
4 the crime. They don't need to put that much more
5 evidence on.

6 And that defense has an opportunity to
7 explain to you, give you the rest of the pictures
8 of the accused to see if there's a reason why you
9 should go a certain way with sentencing.

10 So I do feel like advocates do a good
11 job. And sure, sometimes they maybe take a
12 little too far, and we see that as an appellate
13 issue. But overall, I feel like our advocates
14 are doing a great job in the courtroom.

15 CHAIR HILLMAN: Thank you. We'll try
16 to get some other folks to agree with you, so
17 we'll start with you, Mr. Fowles, on this next
18 sets of questions. If you could pull the mike a
19 little closer to you. For some reason, yours
20 seems to drop in and out a bit.

21 Two questions, one about the
22 sentencing that you've seen. Are military

1 Judges, for arguably comparable and similar
2 situations, are they adjudicating sentences that
3 are consistent and not disparate in your mind?

4 And then related not to how the Judges
5 are functioning but the counsel, and many of you
6 have mentioned this already, do you feel like the
7 council are functioning effectively, especially
8 given the significantly reduced opportunity to
9 practice their trial skills, given the number of
10 courts that we have these days?

11 MR. FOWLES: Yes, ma'am. So taking on
12 your first question, I do think sentencing is
13 fair. And certainly, anyone who's practiced
14 criminal law knows every case is different. What
15 occurred during the crime are different, the
16 individuals are different. So I do feel like our
17 system provides judges and members with an
18 opportunities to balance all of those.

19 So it's really hard to look at, say,
20 a 120 defense, and if you're just looking at a
21 120 and you're looking at punishments, I just
22 don't think you're digging deep enough to

1 understand why there may be differences.

2 And so I, as a judge, I just don't
3 know that I ever saw a sentence I didn't think
4 was fair based on the facts of that particular
5 case. I certainly didn't see any deference to
6 senior officers or junior enlisted.

7 If anything, I feel like it's
8 different, the expectation rises as you increase
9 in rank. So I felt like the system was fair from
10 that perspective.

11 And then on to your second question.
12 So we're a little bit different than my
13 colleagues. So folks are aware the Coast Guard's
14 the smallest of the services. And so what we've
15 done with our transition, we call it the oxygen
16 prosecution.

17 And they're going to do -- they're
18 going to be legally prosecuted for all offenses,
19 not just covered offenses. And we feel like
20 there's some synergies in locating everyone
21 together.

22 It wouldn't necessarily preclude a

1 Staff Judge Advocate's office in the field from
2 assigning counsel to a case, but that would only
3 really be done if the prosecution asked them to
4 do so. So I think that would be pretty rare,
5 from -- I just don't think that would happen.

6 So we're trying to adopt a model where
7 counsel is getting those reps to have the
8 experience in the courtroom. My personal
9 experience as a judge is I think counsel do a
10 great job. There's lots of training
11 opportunities, there are lots of mentors in the
12 system.

13 We have people rolling in from
14 various, you know, the Department of Justice
15 offices, where they get to experience federal
16 court and work with some federal prosecutors. We
17 have Coast Guard lawyers that are co-located with
18 the Navy Defense service organization offices, so
19 they get experience over there and come back.

20 So I never had a challenge or felt
21 like the counsel was ill-equipped for the
22 courtroom. To me, it came down to the facts.

1 And sometimes, you know, the facts, it doesn't
2 matter how good you are as a litigator, the facts
3 just don't help your client.

4 So I think military lawyers work very
5 hard to be proficient at their craft. It's very
6 important to the command, it's very important to
7 senior leadership. And unlike most of my
8 civilian counterparts, again, listening to the
9 panels yesterday, we did a lot of training.

10 Judges, for instance, we go off to a
11 three-week course before you can even sit in the
12 bench. And you might have had a career as a
13 litigator, and we're going to still send you to a
14 three-week course. And you have to pass the
15 course, and if you don't, we send you home.

16 So I think we just have tools that
17 they don't have in the civilian capacity that
18 really enable our counsel to do a good job. So
19 no concerns from the Coast Guard perspective.

20 CHAIR HILLMAN: Thank you. Lieutenant
21 Colonel DeGaine.

22 COLONEL DEGAINE: Thank you, Doctor.

1 I agree, I think the sentencing is fair. I think
2 both sides are, you know, I think the judges are
3 taking each case on their merits, as they're
4 supposed to do. I think they're taking each
5 client or each accused on their merits, as
6 they're supposed to do.

7 And I think that's something that the
8 training that I talked about before has been
9 really helpful.

10 So I agree also with Mr. Fowles, who
11 says that maybe us worrying about sentencing and
12 standardized sentencing for each case, I'm not
13 concerned about that. Because what I've seen has
14 been fair, and I think the judges have the tools
15 that they need to do that. Thank you.

16 CHAIR HILLMAN: Thank you. Colonel
17 Jennings.

18 COLONEL JENNINGS: Thank you. To
19 address the first point, in terms of whether or
20 not military judges are sentencing fairly. It is
21 common for us to see assignments of error related
22 to sentence disparity. However, those claims are

1 very seldom meritorious because the case law sets
2 the bar for sentence disparity claims very, very
3 high.

4 With regards to the other question
5 about whether or not our counsel are sufficiently
6 experienced, given the relative lack of
7 repetitions that they get doing contested trials,
8 I would offer that there are basically three ways
9 for a counsel to be well-prepared.

10 One is to get a lot of repetitions.
11 Two is to get good training. And three is to
12 just do the preliminary spadework to be ready for
13 trial. And obviously in a perfect world, you
14 would have all three.

15 In the military justice system, I
16 think many judge advocates find it difficult to
17 do -- to get a lot of repetitions in terms of
18 doing contested trials. On the other hand, I
19 think that the military does an exceptional job
20 at training its litigators.

21 And I know that both trial counsel and
22 defense counsel, because they do contested trials

1 on, you know, on a not particularly regular
2 basis, are preparing very, very intensely for
3 those cases that they do contest.

4 So given that, I think that while it
5 would be perhaps ideal for our counsel to be
6 getting more repetitions as litigators, I don't
7 think that that creates significant concerns as
8 to their preparedness.

9 CHAIR HILLMAN: Thank you. Colonel
10 Talcott.

11 COLONEL TALCOTT: Yeah, I would agree
12 with everyone that's gone before me. In
13 particular with regard to the similar sentences
14 of the judges, nothing caught me off-guard either
15 being a judge, an Staff Judge Advocate, or even
16 from an appellate perspective. Nothing out of
17 the ordinary. It seems like Judges' sentences
18 relatively similar for similar facts and similar
19 cases.

20 On the effectiveness of counsel, you
21 know, I think repetitions help. I mean, I would
22 agree with what Colonel Jennings said. I'd also

1 agree with what the other -- what the other
2 members have said, and even Colonel Jennings
3 mentioned this, is that training can make up for
4 a lot of that or is another huge part of that.

5 And I think the Air Force training,
6 across the Department of Defense, I think the
7 training's very effective and relatively thorough
8 and repetitive. And that you continue to get it.

9 There isn't sort of like you take your
10 initial training and you're done. You know we
11 almost every assignment's got another course to
12 get you ready for that next step.

13 The other thing we do that in part
14 mitigates perhaps for the decreasing repetitions
15 is the Air Force takes kind of a tiered approach
16 to the way counsel works. And maybe that's not
17 the way other people would describe it, but you
18 have your base-level counsel.

19 But if they're going in a fully
20 litigated general court-martial, there's a senior
21 prosecutor's going to be there with them. Same
22 thing, and then if you make it through that, you

1 graduate and you get to be a defense attorney.

2 And then if you're a defense attorney
3 doing a fully litigated general court-martial,
4 you're very likely going to have a senior Defense
5 Attorney with you. And with the standup of the
6 Office of Special Trial Counsel, there's now the
7 district chiefs, who will be closely supervising
8 or litigating those cases.

9 So it's not as if the council who are
10 having little experience are lead counsel in a
11 fully litigated contested cases very often. I
12 think that's extraordinarily rare at this point.

13 So, a long way to say I think the
14 counsel that are actually litigating our bigger
15 cases, our contested cases, are quite effective.

16 CHAIR HILLMAN: Thank you. So we'll
17 go back to Mr. Fowles did you have another
18 comment?

19 MR. FOWLES: I did, I had one alibi.
20 So I came off the bench, but I was part of the
21 team. The other thing I would mention for
22 judicial fairness is I do think that the

1 establishment of criterion parameters will help
2 out a little bit.

3 But particularly I think it's going to
4 help convening authorities and counsel get a
5 sense of hey, these are generally the ranges that
6 are acceptable for a certain type of punishment.

7 So I, we haven't talked about that,
8 and that's kind of a new development for the
9 system. So you know, give this give us 6 to 12
10 months to see how that works out.

11 But I do think it's worth mentioning
12 for judicial fairness that we've kind of flagged
13 the acceptable range of punishment, if you will,
14 similar to the Federal sentencing guidelines in a
15 military versions that will also be available
16 folks will be able to look to that for guidance.

17 Thanks.

18 COLONEL DEGAINE: I was also going to
19 add something, if that's all right. I was going
20 to say just because the counsel is not getting
21 those reps, somebody in that office likely is
22 getting reps.

1 And when they're preparing, pretty
2 much the whole office, unless they're conflicted,
3 are preparing these, both at the appellate level,
4 where we're doing four moots at a minimum. And
5 if people want more moots, they're going to do
6 more moots than that. And that's everybody
7 collaborating.

8 And then the offices, they're doing
9 that as well out in the field. It's going to
10 base it's going to differ based on the office.

11 But generally, the counsel is all
12 getting together and working on cases. You hear
13 on the government side they call them murder
14 boards. On the defense side, they might call
15 them murder boards too. It just depends. But
16 they're all preparing, they're all preparing for
17 those cases.

18 CHAIR HILLMAN: Thank you. So I'll
19 ask one question, just one more, about issues
20 than about the capacity of different parts of the
21 system. And then I'll see if other panel members
22 have questions for you too before we move to the

1 last set.

2 Sentencing issues, you mentioned some
3 that come up on appeal. Could you identify some
4 of the common issues that come up, and if there
5 are faces that would make those come up less
6 often and clarify that part of the system or
7 improve it, if you could raise that too.

8 We'll start with you, Mr. Fowles.

9 MR. FOWLES: Yes, so I think the only
10 issues that strike me are it's usually -- it's
11 always government counsel that maybe is a little
12 bit emotional in their word choices, just
13 unfortunate.

14 So, we don't see a lot of big
15 appellate issues that come out of the sentencing.
16 Normally that's an argument on -- at the findings
17 stage. But, and I just don't know how you
18 correct that, other than let counsel mature.

19 And you know, trials can be emotional
20 settings, and I do think you want to encourage
21 counsel to be passionate. So it's just helping
22 mentor and groom them to find that fine line.

1 So I don't know that I see some sort
2 of magic fix to that, other than just mentorship
3 and leadership. Thanks.

4 CHAIR HILLMAN: Thank you. Lieutenant
5 Colonel DeGaine.

6 COLONEL DEGAIN: The only thing I've
7 seen with respect to sentencing I think that I
8 recall right now is just that sometimes a
9 sentence appropriateness, as was mentioned
10 earlier.

11 And I don't see any reason overall
12 that needs to be fixed. I think it's, again,
13 something that's handled through the
14 collaboration in the office and, you know, the
15 training and mentoring and the informal and
16 formal mentorship.

17 CHAIR HILLMAN: Thank you. Colonel
18 Jennings.

19 COLONEL JENNINGS: Yeah, I concur.
20 I've already mentioned several of the issues that
21 we see in sentencing pretty frequently. By far
22 the most common is sentence appropriateness.

1 I would say that we see some sort of
2 sentence appropriateness assignment of error in
3 most of the cases that are submitted to us.
4 Sentence disparity, less common. Sentencing
5 arguments or the inappropriateness of sentencing
6 arguments or the sentencing evidence that is
7 presented, slightly less common.

8 But bottom line, I wouldn't recommend
9 any procedural changes at these -- at this time,
10 largely because those sentencing arguments, while
11 common, are not often found to be meritorious.

12 CHAIR HILLMAN: Colonel Talcott?

13 COLONEL TALCOTT: My answer is
14 extremely similar to Colonel Jennings, although
15 I'm going to go, I will go one step further at
16 the end. But we counted them up. So our most
17 common appellate issues related to sentencing are
18 sentence appropriateness, improper argument. So
19 that's sort of what you heard.

20 The third most common though are
21 issues related to victim unsworn statements.
22 With regard to those, with all three of these,

1 although the issues are often raised, they're
2 often unmeritorious.

3 I don't mean to suggest that we've got
4 issues, but with regard to improper argument and
5 sentence appropriateness, you know, the lines are
6 gray on, you know, if you ask an appellant is
7 your sentence appropriate or was it too severe,
8 the answer is it was too severe. So the issue's
9 raised.

10 And improper argument, you could see
11 is sometimes a bit of the eye of the beholder, or
12 I think as Mr. Fowles said, you know, maybe
13 someone just got a little carried away. But then
14 how do you evaluate that in the context of the
15 whole case? So it becomes an appellate issue.

16 With regard to victim unsworns, this
17 is where, you know, the question was asked that
18 kind of compelled me to make a recommendation,
19 and so I have one. But I would like the
20 recommendations to be heard under the subheading
21 of it's hard to know second- and third-order
22 effects, and we've had a lot of changes.

1 So with that in mind, I am answering
2 the question which asked me to come with a
3 recommendation. As far as I can tell, there's no
4 need for victim unsworns to be so tightly
5 construed. I've got a list here of cases dealing
6 with victim unsworns. So Harrington, Tyler,
7 Barker, Cunningham, Edwards, and Hamilton.

8 Victim unsworns can't be done through
9 a law enforcement authentication. There's a
10 recent change I think that might fix where they
11 can be done through ask and answered. They used
12 to have to be provided in advance, I know that's
13 been fixed.

14 They can't use PowerPoints, they can't
15 use audio. There are a number of cases on these.
16 As a Trial Judge, a common source of litigation
17 and strain is, is this technically victim impact
18 or not.

19 So in almost every case, there's a
20 moment we have to pause and flyspeck the victim's
21 statements to decide is this stuff about her
22 mother or father impact, or is this stuff about

1 having to travel impact.

2 And none of these seem to be
3 protecting vital interests of the accused. They
4 just seem to be unnecessary. And they create
5 additional appellate issues. I don't understand
6 exactly why the victim unsworn needs to be
7 interpreted really differently than the accused
8 unsworn, which the case law said is essentially
9 largely unfettered.

10 To the extent there was concern that
11 members might be blown away by a victim's
12 presentation in some way they weren't blown away
13 by the accused presentation. I think those
14 concerns are largely mitigated now by judge-alone
15 sentencing.

16 So if you're asking me to make a
17 recommendation on being compelled to, I would
18 take another look at victim unsworn and why
19 they're so tightly construed.

20 CHAIR HILLMAN: Thank you. General
21 Ewers has a question the Colonel Brunson.

22 GENERAL EWERS: I guess my concern

1 stems from the sense that, and I think you've
2 disabused some of the notions, but this sense for
3 some people that this new system basically makes
4 the military judge just a rubber stamp.

5 The government makes the deal and they
6 usually dictate the deal, as we all know. I
7 mean, we've heard complaints about the federal
8 system and the way they get pleas in the federal
9 system for years.

10 And we heard from some victims'
11 counsel yesterday say that they -- the
12 government's less than consistent in keeping them
13 informed, consulting them on sentencing. Which
14 again makes it look like some, you know, big
15 animal that they don't have any control over.

16 Now we hear a little bit about the
17 fact, you know, meritorious or not, that
18 defendants were -- the accused who's now been
19 convicted has issues within sentencing. So
20 you're going to have a much less receptive
21 government who's listening to the things that you
22 might otherwise put on in a sentencing case.

1 Now you got to give it to the
2 government, because if they don't get the deal up
3 front, it doesn't do you any good in court if
4 it's not harmless error but it's hidden error.

5 So I guess my concern is do you have
6 any concerns based on, you know, certainty's
7 nice. We all like certainty. But certainty
8 without transparency is a little less useful.

9 Any thoughts on that?

10 COLONEL JENNINGS: Well, sir, I would
11 say that it has been my experience that victim
12 input is taken, or is given great weight before a
13 plea agreement is signed. And obviously the
14 rules do require that victims be consulted before
15 the convening authority signs a plea agreement.

16 As a matter of fact, I mean, I think
17 that my experience as an SJA advising commanders
18 was that more or less the only time that they
19 would go against my advice with regards to a plea
20 agreement was when the victim was staunchly
21 opposed to either the plea agreement itself and
22 wanted his or her day in court, or to a term of

1 the agreement, and that term was typically the
2 sentence.

3 So I think I would quibble somewhat
4 with the premise of the question. Nevertheless,
5 I think that the victim, in some cases, is apt to
6 make the same claims that the appellants have in
7 some cases made, in the sense that a tightly
8 constrained or specific sentence, when agreed
9 upon the plea agreement, makes the trial itself
10 or the sentencing hearing an empty ritual.

11 And the appellate courts have so far
12 disagreed on that, particularly with regards to
13 when the accused is making that claim, because
14 they can point to the fact that of course the
15 military judge still has a decision to make, even
16 if he doesn't have the ability to, for example,
17 not adjudge a punitive discharge or is limited to
18 a specific sentence.

19 The military judge still does have a
20 clemency recommendation to make or not. And in
21 those cases that have gotten to the CCA level,
22 they have found that the -- that that decision

1 being in play, and because that decision to
2 either make a recommendation or not then opens
3 the door for the convening authority to either
4 grant clemency or not, that it, even though there
5 is a set sentence, that it is by no means
6 reaching the level of an empty ritual.

7 And I would suggest, although we have
8 not seen that issue rise to the appellate courts
9 from the victim's perspective, that the same
10 would be true. The victim's input at trial, at
11 sentencing, could very well sway the military
12 judge in making that clemency recommendation or
13 not.

14 MR. FOWLES: Sir, I guess what I'd
15 just add, I agree with everything Colonel
16 Jennings just said. But it's interesting I wrote
17 down why when you asked that question. So to me
18 in the system, the question is who owns the
19 responsibility to explain to the victim the
20 sentence.

21 And unlike in the federal system,
22 military judges give no explanation for their

1 sentence. They announce sentence, adjourn, and
2 we go home. So there's never an opportunity.

3 And I think of the old days where
4 you'd get a plea agreement and the range was six
5 months to 18 months, and defense counsel argued
6 for six months and trial counsel had it for 18
7 months. And you kind of knew that was, hey,
8 that's probably the cap in the plea -- pretrial
9 agreement.

10 Or, government counsel would argue for
11 a punitive discharge and no confinement. You
12 know, I think judges kind of knew, huh, it's
13 interesting that they argued that. I guess
14 there's probably no confidant in the pretrial
15 agreement.

16 So from the victim perspective, I
17 think it's fascinating that in our system, I
18 think the convening authority and the trial
19 council and the SVC or VLC, depending on your
20 service, they should be able to explain to the
21 victim the sentence that's being adjudicated in
22 that case.

1 And the judge doesn't have the whole
2 portfolio. They just don't know what witnesses,
3 what are the problems in the government's case.
4 The military judge doesn't know.

5 So I think it's interesting that the
6 perspective is that the victim would have
7 concerns with a set sentence when the government,
8 big government, should be able to explain to them
9 exactly why this sentence that is being agreed to
10 is being agreed to. The military judge is never
11 going to give that explanation.

12 So I have some challenges with the
13 notion that because we agree to a set sentence,
14 that's somehow unfair to the victim.

15 I would think if a victim's in the
16 courtroom and the range is, you know, months or
17 years different, and the judge goes it alone, I
18 think the victim wants to know how the heck did
19 the judge end up on the low end, government. You
20 argued for two years and I got six months. How'd
21 that happen?

22 And you'll just never know. So I

1 think there's some inherent challenges with that
2 view of the system. So I think from the victim
3 perspective, I would rather have a convening
4 authority and trial counsel with a full view of
5 all the facts and the witnesses and the evidence.
6 They have to sit down and explain to the victim
7 why it's going the way it's going.

8 So I don't know if that helps her, but
9 that's my response to the question.

10 GENERAL EWERS: It helps from the
11 victim's side. Certainly helps on the victim's
12 side, not so much for the accused. But no, I
13 take your point. Thank you.

14 COLONEL DEGAINE: I was just going to
15 add, and I don't know that it's adding much,
16 maybe just agreeing, but to the extent that the
17 victim has concerns, I think that that's
18 something that the OSTC or the convening
19 authority, you know, will take into consideration
20 or has to take in consideration when they're
21 having these negotiations. As well as the
22 defense counsel can, from the other standpoint.

1 COLONEL TALCOTT: The only thing I'd
2 add, and this is me maybe going outside of area
3 expertise, but it seems to me our system,
4 military system, is uniquely able to handle these
5 types of plea agreements, in that our providence
6 inquiry is so lengthy and so carefully reviewed
7 in the appellate process regarding the care
8 inquiry or the accused is so detailed that
9 there's very little accused are pleading guilty
10 to offenses they had not committed. We don't
11 have Alford pleas or even something equivalent.

12 Addition, because, and I know we're
13 getting parameters, which will change this a
14 little bit. But because we don't have sentencing
15 guidelines, prosecutors can't go to an accused
16 and say hey, either take this deal or you're
17 looking at 100 years.

18 Or take this deal or we'll charge you
19 with a number of other offenses and you'll be
20 looking at a minimum of decades in confinement.
21 We can't make any of those promises.

22 So the leverage the State Prosecutor

1 or a Federal Prosecutor might have, our
2 prosecutors simply don't have. Now, they'll get
3 more of that I guess with the parameters. And so
4 I guess we are opening up to some of that risk.

5 You know, for penetrative sex offense,
6 the new parameters, judges are going to start
7 with two and a half years of confinement and move
8 up. At least that's the way I understand it's
9 going to work once those kick in. So that would
10 give the prosecutors more leverage, so I think
11 that's there and that's going to be new.

12 But it's still not, at least the
13 stories I hear about that U.S. attorneys are able
14 to go, you know, in a child porn case, there's
15 ten years per image or whatever, however that
16 works. There's certainly no equivalent to that
17 in our system.

18 CHAIR HILLMAN: Colonel Brunson then
19 Colonel Gunn.

20 COLONEL BRUNSON: Thank you. This may
21 be slightly off-topic or tangential, but Colonel
22 Jennings, something you said kind of raised this

1 question when we were talking about the pre-
2 sentencing reports.

3 And you mentioned that any delay
4 between findings and sentence would potentially
5 lead to a, these are my words -- a lack of trust
6 in the system by commanders.

7 So I'm just wondering if any of you
8 have any information regarding whether
9 Administrative Separations have increased as
10 Courts-Martials have decreased, and do you think
11 that's at all related to potentially commanders'
12 lack of confidence in the system?

13 COLONEL JENNINGS: Well, ma'am, I can
14 only speak anecdotally on that point. I don't
15 have any data at my disposal. I do know that
16 court martials have decreased, particularly in
17 the Navy and Marine Corps over the last 10 or 15
18 years.

19 That is a fairly well documented
20 trend. Whether or not there has been an increase
21 in administrative separations, that I do not have
22 data for. But after spending a few years as a

1 staff judge advocate at a major Marine Corps
2 command, I can tell you that typically commanders
3 are weighing either Administrative Separation or
4 Court Martials and very frequently choose
5 Administrative Separation because they perceive
6 it to be faster and they perceive it to be a more
7 certain outcome compared to court martial which
8 does involve a certain degree of rolling the dice
9 no matter what the facts are.

10 JUDGE REDFORD: I have a follow-up,
11 James Redford. When the accused service member
12 is being processed out, are they being required
13 to waive an administrative board and accept an
14 Other than Honorable? Not the formal OTC in lieu
15 of. But is that the sort of background
16 bargaining that's going on?

17 COLONEL JENNINGS: In some cases, I
18 think that does come into the picture. And
19 perhaps the other services have a different
20 answer on this. I mean, the Marine Corps is, I
21 think, by far the youngest service. And so the
22 vast majority of cases that any commander is

1 dealing with involve service members who have
2 less than six years in the Corps and who don't
3 rate an AdSep Board unless the commander decides
4 to go for an Other than Honorable discharge. So
5 what I'd seen in many cases is that rather than
6 take a relatively minor offense to a special
7 Court-Martial which a commander might have done,
8 say, ten years ago, they're simply doing a new
9 board Administrative Separation and pushing that
10 Marine out with a general other than honorable
11 conditions.

12 MR. FOWLES: Ma'am, if I could maybe
13 this is Coast Guard specific and I know I'm a
14 small service. So I can do some things a little
15 easier than the other services can. So we still
16 publish on a regular basis.

17 We're shooting for quarterly. It's
18 not always quarterly, but we do our best a good
19 deal to get that message. So we pull all the
20 data for Non-Judicial Punishments and
21 administrative discharges.

22 And so there is some transparency and

1 optics. So if you were to take a case that
2 normally should be in a courtroom and you want to
3 push it through an Administrative Separation,
4 you're going to get some leadership pushback
5 that's going to see the facts of that case and
6 just ask why. They're not going to overturn the
7 decision necessarily.

8 But I do think that level of
9 transparency keeps people from taking a case that
10 likely belongs in a court martial setting and
11 just trying to deal with it administratively
12 because it's the easier route. So I think that's
13 one tool that we use to keep everyone on a level
14 playing field in terms of how cases are handled.
15 Thanks.

16 COLONEL TALCOTT: The only thing I'd
17 add, ma'am, on this topic is you used the echo
18 everything my co-panelists have said. But just
19 so this false impression isn't left, you used the
20 phrase that sometimes commanders will take an
21 administrative route because they don't trust the
22 justice system.

1 That has not been my experience. It's
2 not -- the word, trust, threw me off. It really
3 is just time. For the most part, if they're not
4 using the court martial process, it's because
5 they just want the member gone and they can see
6 an easy way to success with some sort of 15 UO
7 (phonetic) waiver or just an admin sep.

8 And they get to the conclusion that
9 they thought they wanted. It's on their SJA to
10 explain to them the value of the court martial
11 process and the benefits to good order and
12 discipline if we pursue it. But that is
13 sometimes the struggle.

14 COLONEL DEGAINE: Ma'am, also
15 anecdotal, I would say I felt like before when I
16 was a defense counsel there were a lot of admin
17 seps. I felt like as a regional defense counsel,
18 there were a lot of admin seps. But I can't say
19 that a commander is going a certain route for
20 trust purposes or otherwise. I think that
21 commanders are still taking the serious courts --
22 the serious offenses to court martial. And I

1 would trust them to not deviate from that just
2 based on time.

3 CHAIR HILLMAN: Thank you all. And
4 just for the record, you're an excellent counsel.
5 Colonel Gunn?

6 COLONEL GUNN: Yes, Mr. Fowles, is it?

7 MR. FOWLES: Yes, sir.

8 COLONEL GUNN: I was intrigued by your
9 description of the -- I think what you described
10 as a new Office of the Chief Prosecutor.

11 MR. FOWLES: Yes, sir.

12 COLONEL GUNN: How old is that office?

13 MR. FOWLES: So that's our version of
14 an LSTC. So that's where our special trial
15 counsels sit. So it came online in April, and
16 they are up and fully functioning and exercising
17 authority over covered offenses as of 28
18 December.

19 COLONEL GUNN: And as I understood
20 your description, it sounded like you were saying
21 that they were going to be handling not only
22 covered offenses but all court martial offenses?

1 MR. FOWLES: Yes, sir.

2 COLONEL GUNN: And you also
3 anticipated at least that it would be relatively
4 rare for installation level folks to also be
5 called upon in those cases. Is that right, or --

6 MR. FOWLES: Yes, sir.

7 COLONEL GUNN: And why do you think
8 that is? Or why do you anticipate that? And
9 what I'm really getting at there is how then do
10 the people at the installation level, how do they
11 develop their experience so they become
12 experienced throughout trial counsel in a small
13 service with relatively few cases?

14 MR. FOWLES: Yes, sir. That's a great
15 question and certainly one we're wrestling with
16 now. So my leadership might get frustrated with
17 my response. But I think there's two ways we're
18 doing that.

19 And we have special victims counsel
20 which gets some representatives in the courtroom.
21 We have folks with Defense service offices. We
22 have several folks partner or co-located a

1 special assistant in terms with U.S. attorneys
2 offices and they have the trial counsel offices.

3 So those are kind of the grooming
4 ground, if you will, for initial litigation
5 experience. And the expectation is and what
6 we're trying to grow is this litigation track
7 where the pyramid gets tighter at the top. And
8 you're going to bounce back and forth between
9 those various opportunities to grow your skill
10 set.

11 So if you're a senior prosecutor or
12 trial counsel in our office of prosecution, you
13 spend a career now as a litigator or in billets
14 that are close to align with being a litigator.
15 And I think that's how we're -- that's our
16 approach. And we're going to do our best to
17 implement it.

18 You're right. It may not be perfect
19 at first. But it'll be flexible. I see the
20 installation level lawyers mostly getting
21 involved in a really complex case and you just
22 need to search because you need more assets.

1 Say we're going to do a trial up in
2 Juneau, Alaska. It might not be easy for trial
3 counsel coming out of Charleston, South Carolina
4 or Alameda, San Francisco. It might not be easy
5 for them to deal with all the issues that a trial
6 counsel has to deal with.

7 So I can see those type of
8 circumstances where we search. But the model
9 there is really to have the mentorship and
10 supervisors in place that have the sets and reps.
11 So when you're a new O-3 or O-4 trying to get
12 litigation experience, you really need to have an
13 O-4 and O-5 that's watching you, that's been
14 there, that knows how to teach you and maybe get
15 away from a new O-4 or new O-5 that is a
16 litigation supervisor billet, but they really
17 don't have the background for it. So that's
18 where we're going for the future.

19 COLONEL GUNN: Thank you.

20 CAPTAIN ALDANA: Captain Fowles, this
21 is a follow up. What's been the reaction from
22 the convening authorities with the standup of the

1 team prosecutor, especially taking away all their
2 convening authorities?

3 MR. FOWLES: Well, sir, this is a
4 personal opinion. I'm certainly not speaking on
5 behalf of the Coast Guard. I do probably get a
6 sense of the convening authorities. The Military
7 Justice is complex.

8 And I think over time, we've made the
9 system more complex. And so I don't know that a
10 convening authority necessarily is upset because
11 now someone is not walking with a case package
12 and talking about the merits of the case and
13 evidence. I haven't talked to a convening
14 authority. This is just my personal opinion.

15 But I'm not sure a convening authority
16 is upset that lawyers and peer lawyers are making
17 those decisions now. That's what lawyers do. As
18 you know, the convening authorities are still
19 involved in some of the traditional roles, member
20 selection.

21 And then in non-covered offenses, they
22 could go back to the convening authority for

1 prosecution. So there's still a role for them in
2 the Military Justice world. I don't think that
3 changes their responsibility for good order and
4 discipline.

5 They should be able to explain and the
6 communication and transparency piece with the
7 Office of Chief Prosecution. And a Flag Officer,
8 they should be able to explain to the field and
9 various units why we took the action that we
10 took. So I hope that brings some better
11 transparency in the system for us.

12 But I haven't heard anyone really
13 pushing back on the changes in the system. So I
14 don't have a better answer for you. Thanks, sir.

15 CHAIR HILLMAN: So the last set of
16 questions that we queued up for you involve the
17 changes that added new punitive offenses. And so
18 a few questions about that, the issues that
19 you're seeing to the extent you have yet on
20 appeal around the Article 93(a), Article 117(a),
21 Article 128(b), 130, 132, and then 134, sexual
22 harassment. So I don't know if you want to talk

1 about all of those. But if you'll just take a
2 stab at the ones that you've identified issues
3 around and characterize them for us, that'd be
4 helpful.

5 CAPTAIN ALDANA: The only one of those
6 new punitive offenses that we have seen
7 substantial appellate issues with is the Article
8 117(a). And there were two issues that had been
9 raised at the Navy-Marine Corps Court of Criminal
10 Appeals thus far. The first was we had an
11 appellant who alleged that his plea to 117(a) was
12 improvident because the inquiry did not
13 demonstrate a reasonably direct and palpable
14 connection to the military environment.

15 So in that particular case, it was a
16 it involved a video that was shot in a barracks
17 room. But when it was distributed, it was not
18 distributed within the -- the accused and the
19 victim were in different units and did not work
20 together. And so the argument that was made on
21 appeal was that in the absence of that nexus that
22 there couldn't have been a connection to the

1 military environment.

2 The Court of Criminal Appeals
3 disagreed with that and found that because the
4 video had clearly taken place in a military
5 environment and was distributed to members of the
6 victims unit that it had proven a distraction to
7 her duties and so forth, that the element was
8 met. In another case, the appellant alleged that
9 his pleas were improvident because the image
10 involved, it was essentially a photograph of a
11 person's genitals. And there was no way to tell
12 from the picture itself who the person was in the
13 picture.

14 And when the picture was distributed,
15 it also was not accompanied by other information
16 associated with the picture that would have
17 identified the victim. And so under those
18 circumstances, the Navy-Marine Corps Court of
19 Criminal Appeals agreed with the appellant and
20 found that, quote, if the victim cannot be
21 identified in connection with the image as
22 broadcast or distributed, then the broadcast ipso

1 facto is not likely to cause harm to the victim.
2 So those are the two issues that we've seen so
3 far.

4 COLONEL TALCOTT: We have seen almost
5 no issues with these yet except for 117(a) and
6 sort of relatedly 120(c) which is not on your
7 list. It is not as new of an offense related to
8 the definition of broadcast. Presently, there's
9 a split among the service courts about what
10 broadcast means.

11 The United States Court of Appeals for
12 the Armed Forces has yet to get to the issue.
13 But essentially, if you show someone a picture on
14 your phone, are you broadcasting it? And the
15 Navy/Marine Corps says yes because it's moving
16 within the phone essentially.

17 The Army and the Air Force court on
18 different reasons has said that's not a
19 broadcast. So there's actually three different
20 analyses about how you get to the definition of
21 broadcast. And the United States Court of
22 Appeals for the Armed Forces hasn't heard the

1 case yet.

2 COLONEL DEGAINE: So with 117(a), we
3 had a similar issue that the Marine Corps had in
4 that. The question was whether or not that
5 person was identifiable. And the Court found
6 that they were identifiable.

7 They linked it to was a spouse. The
8 spouse posted a video of a sexual relationship
9 with his spouse. But he used his user name that
10 was identifiable and they were also known in the
11 military community as a married couple on post
12 and also that the female service member, the wife
13 identified herself when she went to that website
14 where it was broadcast.

15 With respect to military recruiter
16 trainees, we don't see many of these issues that
17 were listed at all other than 128(b) which we see
18 most frequently. But with respect to the
19 military recruiter trainee, we have seen a few of
20 those. And they're still pending. One was a
21 question of whether or not the person was in a
22 Position of supervisory position at the time.

1 And the other one was whether or not the activity
2 was consensual and therefore not offensive as
3 required.

4 With respect to 128(b), we have seen
5 multiple cases there. I would say that the top
6 three issues with this group of offenses that
7 we've seen would be post-trial delay, legal and
8 factual sufficiency, and multiplicity. Once in a
9 while, we see Ineffective Assistance of Counsel
10 whether or not being crossed upon or another way.

11 MR. FOWLES: From the Coast Guard's
12 perspective, we haven't see many of the new
13 punitive articles on an appellant stage. We do
14 have one case going up where an offense was
15 charged under the 134 general article. And the
16 issue going before the United States Court of
17 Appeals for the Armed Forces is whether 117(a)
18 preempted the field.

19 And then quick facts on that were the
20 image. The people that saw the image were
21 primarily civilians. So it was charged the way
22 it was because they didn't think it really fit

1 within the elements of 117(a). And we'll see
2 what the United States Court of Appeals for the
3 Armed Forces has to say about it here shortly.
4 So thanks.

5 CHAIR HILLMAN: Thank you. Judge
6 Redford.

7 JUDGE REDFORD: Thank you. I'd like
8 to know how many opinions are issued by each
9 court, either approximately or exactly if you
10 know per year and how many judges serve on each
11 court if you happen to know.

12 COLONEL JENNINGS: I apologize, sir.
13 This is going to be sort of a rough guess. I
14 believe the NMCCA right now, we have 13 judges
15 who serve and three judge panels, although that
16 numbers is kind of up and down a little bit. But
17 it's typically right around 11, 12, or 13
18 depending on the normal influx in and out. As
19 for the number of opinions issued, I mean, it
20 sort of depends on how we define substantive
21 opinions.

22 JUDGE REDFORD: I happen to be an

1 Appellate Judge. So not a ruling on a motion,
2 seeking, okay, we're going to hear. But an
3 actual substantive multi-page opinion where
4 you're addressing issues raised by the government
5 or the accused. How many opinions does the court
6 issue, just ballpark?

7 COLONEL JENNINGS: Ballpark, I would
8 say 40 or 50 a year.

9 JUDGE REDFORD: Thank you. Anybody
10 else want to walk into this?

11 COLONEL TALCOTT: I would love to give
12 you a good answer, but I don't have one. I know
13 we have at least three panels of three judges. I
14 think there's more than that, though, on the Air
15 Force court. So this is the kind of thing I
16 think I can get back to you on and get you an
17 actual answer.

18 JUDGE REDFORD: That would be great.

19 COLONEL TALCOTT: And on the number of
20 opinions, I don't even have a very good guess. I
21 apologize.

22 COLONEL DEGAINE: Sorry, I think we

1 also have three panels with three judges but I
2 could be wrong. And that's why I could double
3 check that as well. And then for me probably a
4 better way to maybe kind of contextualize it is
5 how many arguments we see a month. I'd say
6 probably three to four a month.

7 JUDGE REDFORD: Okay, so 48, 50, 60?

8 COLONEL DEGAIN: Yes, sir.

9 JUDGE REDFORD: All right. Thank you.

10 MR. FOWLES: Sir, I have to submit my
11 answer. But we have two full-time Judges. Just
12 getting in the case load, it's unnecessary to
13 have more. Then we have seven collateral duty
14 judges that we picked to make sure there's no
15 conflict of interest in sitting on the bench.

16 And then I can supplement this. My
17 brain tells me it's in the 146(a) report to
18 Congress of how many appellate cases. But if you
19 wanted a guess today, I would say around 20.

20 JUDGE REDFORD: Okay. Thank you.

21 Appreciate everybody's answer.

22 CHAIR HILLMAN: Okay. One more

1 question about the new articles, just about the
2 elimination of the Article 134 terminal element
3 to the offenses that were migrated to the
4 enumerated punitive articles. Have you seen
5 issues raised with respect to that?

6 COLONEL TALCOTT: No.

7 COLONEL DEGAINE: I haven't either,
8 ma'am.

9 COLONEL JENNINGS: No, we had not seen
10 any issues raised there.

11 CHAIR HILLMAN: Okay. I have one more
12 question that I wanted to ask. Anything else
13 that other panel members want to ask? Okay.
14 This is about ineffective assistance of counsel
15 or prosecutorial misconduct or error. Do you see
16 those cases very, do you see those issues come up
17 very often and what context? And what's the
18 source of those?

19 COLONEL JENNINGS: We see IAC claims
20 all the time. And it comes up in every context
21 that you can think of. I mean, in terms of any
22 decision that a defense counsel might make could

1 at least be radically be challenges as evidence
2 of ineffective assistance.

3 But typically, we're not getting a
4 failure to file motions, particularly suppression
5 motions. I would say that's the most common.
6 With regards to sentencing, we do see sometimes
7 an alleged failure to put on an adequate
8 sentencing case, failure to call specific
9 witnesses who might have been helpful,
10 particularly expert witnesses and so forth.
11 Prosecutorial misconduct allegations are less
12 common.

13 But we do see those relatively
14 frequently. And most commonly, we're talking
15 about improper argument. That would be, by far,
16 the most common.

17 COLONEL TALCOTT: Yeah, I can just say
18 an almost identical answer. Ineffective
19 Assistance of Counsel is raised, I think, with
20 some frequency. I think meritorious is very
21 rare. I'd like to emphasize that point.
22 Prosecutorial conduct also raised with some

1 frequency but it's almost generally my
2 understanding going to be in the context of
3 improper argument, also very rarely meritorious.

4 COLONEL DEGAINE: We also see these
5 from time to time. Again, most of the time, not
6 meritorious. I think the ones that stick out in
7 my mind are cross examination or failure to ask
8 certain questions on cross examination,
9 sentencing, calling witnesses, and whether or not
10 somebody testifies from a prosecutorial
11 misconduct standpoint. I see those from time to
12 time as well and those would be more along the
13 lines of discovery and improper argument.

14 MR. FOWLES: Ma'am, nothing to add to
15 what was previously said.

16 CHAIR HILLMAN: Okay. Thank you. We
17 appreciate your time and your service to pursuit
18 of justice and all the many changes in the system
19 that you've had to navigate. And you're helping
20 us understand. So thank you very much for your
21 time. So we're going to take a break now, Mr.
22 Yob.

1 MR. YOB: We can take a break probably
2 for 15 minutes. Mr. Dean Rob is supposed to be
3 here at noon or a little before. So he can come
4 in.

5 If you want to get your lunch, you can
6 eat it in here. Dean can come in at noon or
7 slightly before and do a 15, 20-minute
8 presentation. Then you all can shut down if you
9 like to do an executive session for the remainder
10 of the lunch hour. And we'll pick up at 1:00
11 with the next panel.

12 (Whereupon, the above-entitled matter
13 went off the record at 11:39 a.m. and resumed at
14 1:03 p.m.)

15 MR. YOB: Okay. Welcome back everybody
16 who was here before. And welcome to the folks
17 who are just joining us. We were just taking
18 care of getting the right slide up there behind
19 me.

20 So, we have a public session, Defense
21 Appellate Counsel, who are here. We appreciate
22 you joining us.

1 I'm going to ask Mr. Michael Libretto
2 to introduce the panel.

3 MR. LIBRETTO: Thank you, ma'am.

4 Good afternoon, everyone, and welcome
5 back. Like Chair Hillman said, we have the
6 counterpoints of this morning's session with the
7 Appellant Government Counsel.

8 We have the service representatives
9 from the Appellate Defense Divisions to provide
10 again their perspectives, opinions, and
11 recommendations on the variety of topics that are
12 of interest to you in your comprehensive review,
13 although they have been provided the pre-forum
14 questions that have been developed by each of the
15 teams.

16 They are also prepared to share their
17 perspectives on a wide range of issues that are
18 also of importance to you.

19 So, with that, I will note that I
20 expect that their responses may be a little bit
21 more engaging than the Appellate Government, or
22 perhaps raise similar issues than they did. So,

1 I ask that you keep that in mind and ask as many
2 questions as you like.

3 Chair Hillman.

4 I'm sorry, I didn't.

5 Joining us from the Navy and Marine
6 Corps we have Captain Art Gaston.

7 From the Air Force we have Lieutenant
8 Colonel Allen Abrams.

9 Lieutenant Colonel Autumn Porter is
10 here from the Army.

11 And from the Coast Guard we have
12 retired Army Colonel Thomas Cook.

13 CHAIR HILLMAN: Thank you, Michael.

14 Just to confirm, there is no one
15 virtually with us, we have the four presenters in
16 person; right?

17 MR. LIBRETTO: Yes, ma'am.

18

19 CHAIR HILLMAN: Okay, thank you. I'm
20 just trying to keep up between the hybrid and the
21 in-person nature of what we're doing today.

22 So, thank you so much for joining us.

1 We appreciate your expertise hereby as a witness
2 here, it's the amount of military justice and
3 other strengths that you bring to us is really
4 profound. And we're grateful to have your help
5 as we take on the tasks set out for the MJRP.

6 I'm going to ask some questions that
7 we sent to you ahead of time, so you have a sense
8 of where we're headed. And then I'll ask panel
9 members to join in with additional questions.

10 And any time you want to add something
11 that you think is important for us to consider,
12 knowing what we're, what we're working on towards
13 a comprehensive assessment of the military
14 justice system, in light of all the recent
15 changes that have altered the practice of
16 military justice, please feel free to add those
17 for us while we have a chance to hear from you.

18 So, we'll start with the first set of
19 questions related to plea agreements.

20 So, let's start with the first set of
21 questions related to plea agreements. Can you
22 let us know what you see in the way plea

1 agreements are working now as compared to the old
2 PTAs?

3 And we'll just start, I'll just run
4 down in the order that you were introduced by Mr.
5 Libretto. So, Colonel Talcotte, can you -- Hold
6 on. Wrong panel here. That's the wrong one.

7 Captain Gaston, can you start for us,
8 Captain Gaston, talk about what you see in the
9 Navy with respect to the plea agreements?

10 CAPTAIN GASTON: Yes, ma'am.

11 So, I think the big difference that we
12 see now is that we're seeing plea agreements that
13 are for a range or, essentially, a sentence
14 that's being agreed to by the parties, so that
15 it's a very different context that we're seeing.

16 And, again, we're just seeing the
17 records of trial, right? I'm sure you've talked
18 to or will talk to trial practitioners about what
19 it's like in the courtroom during sentencing
20 proceedings. But there's certainly a different
21 flavor to the records that we see when the
22 agreement in the plea agreement is for pleadings

1 that goes to any number of offenses with the
2 usual withdrawal and dismissal of those not pled
3 guilty to, and the language not pled guilty to.

4 But now it's not for a maximum
5 punishment, it's for a, a set sentence that will
6 then be issued by the Military Judge. And that's
7 very different than it used to be where it was
8 this Part 1, Part 2 of the agreement. Part 2 was
9 the quantum portion that would not be seen by the
10 Military Judge.

11 And so, then, after a very thorough
12 sentencing proceeding, the Military Judge would
13 issue what she believed would be the proper
14 sentence in the case, and then would be informed
15 via the Part 2 of the agreement whether she had
16 gone below or above the agreement.

17 And if she'd gone above what was
18 agreed to as a maximum, then anything, anything
19 would be suspended in terms of confinement.

20 Well, now the parties and the Military
21 Judge all are aware of the sentence that's going
22 to be imposed. And more and more we're seeing

1 sentences that are just instead of a range
2 they're simply a sentence, this, this particular
3 sentence shall be given by a military judge. And
4 that's to set a different flavor of what the
5 sentencing proceeding looks like.

6 As for the appellate issues, one of
7 the issues that we raise on appeal is whether a
8 sentence is appropriate.

9 If the parties have agreed to an exact
10 sentence prior to the military judge issuing it,
11 then our, at least our appellate court has tended
12 to say, well, then this is, this is a sentence
13 that was specifically agreed to by the appellant,
14 so we don't find very persuasive any argument now
15 that is the sentence given was not appropriate,
16 because it was agreed to ahead of time.

17 We've seen that many, in many court
18 decisions.

19 Recently we have seen a case, United
20 States vs. Kerr, K-E-R-R, in which the sentence
21 was given by the Military Judge as agreed to, but
22 the Military Judge took issue with one part of

1 the sentence and recommended that it not be
2 imposed, or be suspended by the convening
3 authority. And the authority did not follow that
4 advice.

5 But the appellate court found that in
6 that particular circumstance, the sentence as
7 agreed to was actually inappropriate, and they
8 found that the Military Judge should have simply
9 overturned the plea agreement rather than give a
10 sentence that was agreed to under the plea
11 agreement, and then recommend suspension.

12 And so, if you want to take a look at
13 that case, that's United States vs. Kerr. And
14 it's 2023 CCA Lexis 434. It's an unpublished
15 opinion for the Navy, Marine Corps, in Court of
16 Criminal Appeals.

17 Otherwise, I would say that our
18 practice in terms of trying to get sentences
19 lessened on grounds of sentence appropriateness
20 at the appellate level has almost gone away.

21 CHAIR HILLMAN: Thank you.

22 Lieutenant Colonel Abrams.

1 COLONEL ABRAMS: Thank you, ma'am.

2 The biggest distinction first that I
3 draw from Captain Gaston is we don't have, we
4 don't see in the Air Force the same precision
5 with regard to sentences for confinement in the
6 plea agreement under the Military Justice Act of
7 2016. We haven't seen those.

8 That's been prohibited by regulation.
9 I know that leads us to another question, but I
10 highlight per his answer.

11 I think the bottom line perception
12 among my experience with folks that I've talked
13 to about this has really been that the change has
14 been good overall. But it's really just that
15 we're operating under a different set of rules.

16 So, and the way that that plays out
17 is, first, on appeal while the rules are
18 different for the plea agreements, and those can
19 derive different issues, like Captain Gaston was
20 talking about, ultimately most of the law in what
21 we're using to interpret that is largely the
22 same, at least under the precedent that we have

1 in the Air Force courts.

2 In terms of how it plays out between
3 the different parties, it is a little bit more
4 transparency. I think that's kind of the
5 perception of folks for military judges, for the
6 ones that I've gotten a sense of from that. They
7 at least, you know, they're not worried about
8 maybe seeing the wrong thing.

9 We do lose the risk of sometimes that
10 quantum portion that has the sentence limitation
11 and maybe the pretrial agreements getting pushed
12 over to the judge, which is a risk that we
13 sometimes come up with some inadvertent emailing,
14 basically, you know, to the judge. That's gone.

15 And for the parties, they're really
16 just completely open about their negotiations
17 back and everything's pretty transparent between
18 them. And everyone's got a good set of what
19 their expectations are.

20 The other impact, I think, that's
21 changed is just sort of the underlying data that
22 you would transmit to some of the parties, so as

1 they're making those negotiations. So, under the
2 old rules you'd basically get a sneak preview of
3 here's how a judge might see a particular case
4 versus how the parties are agreeing, or the
5 pretrial agreement might be a case, you might be
6 able to, well, is there a difference there?

7 And you might get a sense of how, how
8 the judiciary is actually being --

9 CHAIR HILLMAN: Sorry, Lieutenant
10 Colonel, if you could just pause for one second.

11 COLONEL ABRAMS: Sure.

12 CHAIR HILLMAN: I think the other side
13 of the room is getting distracted by the FSO.

14 There we are. We got it solved. So,
15 press on. Thank you.

16 COLONEL ABRAMS: Thank you, ma'am.

17 We kind of lost that in the sense of
18 you almost have this circle of negotiations
19 because you'll have the convening authority
20 essentially agree to what the maximum or what the
21 punishment is going to be for a particular
22 offense. That's what you get to go through.

1 Similar to I think what we'll probably
2 see for most of the services, while sentence
3 severity isn't raised very often on appeal, it's
4 often just deemed given a thumbs up. And that
5 just becomes, all right, well, that's our data
6 point driving the next round of negotiations, as
7 opposed to maybe then you will see how that
8 actually plays out.

9 Under the old system we could get a
10 little bit of that data. And for defense
11 practitioners, that was at times a useful tool,
12 depending on the information they were building
13 to disseminate that across the defense community.
14 And I've seen that change because the defense
15 community has had all of that for the last 10
16 years.

17 So, I got to see that play out across
18 the trial level as we were pre-Military Justice
19 Act of 2016, and subsequent to that.

20 CHAIR HILLMAN: Thank you.

21 Lieutenant Colonel Porter.

22 COLONEL PORTER: Thank you, ma'am.

1 I largely echo what my two colleagues
2 have spoken about with the new plea agreement.
3 Increase in transparency for both the prosecution
4 and the accused in many cases. And there are
5 many accused and counsel that like that
6 transparency and that ability to know going in
7 kind of what the, what their range of punishment
8 could be.

9 But we are increasingly seeing in the
10 Army more specified sentences. And that's, so
11 there's no discretion in that plea agreement.
12 And that's starting to percolate up prior to the
13 most recent Rules for Courts-Martial 705 change
14 that specifically puts that specified language in
15 the rule.

16 And so, we are kind of looking at, at
17 the Army level, when does the judge lose their
18 discretion? And when does the sentence, the
19 sentencing come into this rule, you know, to
20 support case law.

21 And so, that's a concern that's
22 percolating on the Army Defense Appellate side

1 with regards to the new plea agreements, and
2 their increasing lack of discretion by the
3 military judge.

4 CHAIR HILLMAN: Thank you.

5 Mr. Cook.

6 MR. COOK: Thank you, ma'am.

7 As Mike said, I'm currently a Civilian
8 Attorney with the Coast Guard. And before that I
9 served on active duty with the Army as a judge
10 advocate. The comments I make today are solely
11 my own. As such, they may not reflect the view
12 or opinions of the Coast Guard or the Army. I
13 can be as candid as I want, I guess.

14 CHAIR HILLMAN: Thank you, Mr. Cook.

15 Thanks for being so candid.

16 Will you pull that microphone a little
17 bit closer.

18 MR. COOK: Ma'am, I candidly will.

19 CHAIR HILLMAN: Thank you.

20 MR. COOK: I have nothing too much to
21 add here.

22 Captain Gaston wisely set up a call

1 last week with some of our trial defense
2 practitioners. I had sent out these questions
3 ahead of time, so I got some feedback from the
4 field.

5 I haven't seen any of these cases,
6 this issue on appeal yet.

7 Interestingly, we had one, at least
8 one attorney, if not two, say that it seems that
9 the Government's being a little bit tougher to
10 negotiate with on plea agreements, you know,
11 based on the new rules. In one case, oh, in both
12 cases they walked away and then became contests.
13 And one of those contests ended up in acquittal,
14 and one was a conviction with a pretty heavy
15 sentence.

16 So, I don't know how that will impact.
17 I bet the guy that got the acquittal and the
18 Government will probably want a deal next time.

19 I mean, based on my experience with
20 the Army, and as an SJA working with convening
21 authorities, and as a Trial Counsel and Defense
22 Counsel, it was really a lot of that was

1 dependent on the SJA's personality and the
2 convening authority as to, you know, were they
3 trying to get, you know, a lower deal?

4 Did they really want a deal? Were
5 they putting some, some big numbers out there?

6 So, based on the location, too.
7 Sometimes places like at a FORSCOM unit you have
8 heavier sentences being demanded by the convening
9 authority versus maybe a TRADOC installation.

10 But, again, today the defense is free
11 to walk away and then you can either go contest
12 or you can plead, you know, without a deal.

13 I don't know, we always thought on the
14 defense side that some of the trial judges gave
15 us extra credit to the accused when pled without
16 that as sort of a safety net. I know we have at
17 least three old Trial Judges here, so we know --
18 I mean prior, prior trial judges.

19 (Laughter.)

20 MR. COOK: They can maybe comment on if
21 that was, you know, wise strategy or not to plead
22 without the benefit of a deal.

1 But I haven't seen a lot of that
2 recently where they go in and plead. We used to
3 call it plea dated.

4 COLONEL PORTER: Yeah.

5 MR. COOK: I don't know if that's
6 politically correct, but usually they had the
7 deal or it goes contest. I, I know I haven't
8 seen one in quite a long time.

9 But like I said, this is some
10 anecdotal evidence from the field. I think we're
11 still going to figure out what the impact of the
12 new system.

13 I mean, again, what Art said, I like
14 the old system. I mean, you've got the benefit
15 of that deal with the convening authority, and we
16 always try to beat the deal with the judge. And
17 then your client got benefit of the better. You
18 know, that, that's gone. I don't know of any
19 defense counsel that would prefer the new one,
20 you know, to get that benefit of that.

21 CHAIR HILLMAN: Any of our colleagues
22 from the bench want to weigh in on any of the

1 issues that were raised there?

2 Judge Redford.

3 JUDGE REDFORD: I am an old Judge.

4 Still, still serving in another way.

5 What percentage of the cases are
6 resolved, do resolve by plea are resolved by a
7 specific number, a specific sentence? You know,
8 I know, it's, you know, 20 percent, 50 percent,
9 75? Just being curious.

10 COLONEL ABRAMS: Easy answer for the
11 Air Force because we just changed the regulation
12 in light of the amendments being applied. We had
13 a regulation previously that prohibited
14 negotiating for a specific confinement sentence.

15 There has been leeway for negotiations
16 for a punitive discharge or a dismissal. Those
17 have been challenged on appeal but for deciding
18 that confinement for the Air Force is zero.

19 COLONEL PORTER: I don't have a good
20 sense. We're just starting to see it for good up
21 to on the defense appellate side. So, I've seen
22 records of trial that are coming in, I would say

1 probably around 30 percent are coming in with
2 what we're most seeing are mandated or dictated
3 to the discharges, on the Army side.

4 And a very narrow range in
5 confinement. Sometimes specified confinement,
6 but usually in the narrow range. Sometimes it's
7 only 15 days. We've seen that.

8 It's just still, it's still working
9 its way and fairly new on the Army side.

10 CAPTAIN GASTON: I would say for the
11 Navy and Marine Corps we've seen a requirement
12 for a punitive discharge. I'd say that's
13 certainly in the majority of cases now.

14 For in terms of a specific sentence as
15 far as the sentencing range, I can't quote you on
16 that. I would say for specific sentences,
17 certainly less than half, maybe less than a third
18 still.

19 But I think as the -- it seems to be
20 proceeding in that way. At first we didn't see
21 the mandated punitive discharges. Now we see
22 that in the majority of the cases, I would say.

1 Although, I would say I would caveat
2 that with we haven't scoured the records or
3 polled our folks specifically with that question.
4 So, I'm not, I'm not certain that it would be
5 over half.

6 But I would say in many cases now we
7 see required punitive discharge, and then a range
8 that's either trending more is a closer to a
9 particular sentence in more cases now.

10 MR. COOK: Yeah, and I would, I would
11 just go with what Captain Gaston said. That
12 would be similar for the Coast Guard, too.

13 JUDGE REDFORD: Thank you.

14 CHAIR HILLMAN: Okay. I'll note we
15 have another panel member from Defense, Judge
16 Kasold, who has joined us virtually.

17 So, Judge Kasold, if you have any
18 questions, please let us know.

19 Do you have anything right now for
20 this panel before we move on?

21 Busy with bench-related matters.

22 So, I just wanted to ask you about the

1 pre-referral judicial authority, the Article
2 30(a) proceedings as a pre-referral proceeding,
3 and whether you think what's being addressed
4 there in terms of what can be addressed in the
5 Article 30(a), how that's working; whether you
6 think it's appropriate?

7 So, Captain Gaston, you can start.

8 CAPTAIN GASTON: Yes, ma'am.

9 I think that's one of the greatest
10 developments in Military Justice in quite a
11 while, not only from the Government perspective.

12 And, again, this is not really from my
13 perspective as an Appellate Defense Counsel, just
14 in terms of I having been a senior trial counsel,
15 having been a Defense Counsel, having been a
16 trial judge. The feedback we've gotten from the
17 prosecutors is that it's a great way to go and
18 get service authorizations from a military
19 magistrate, you know, a judge as opposed to a
20 convening authority.

21 And so, it kind of makes sense that
22 everybody speaks the language. And it's a good

1 setting for getting the type of subpoenas and
2 stored communications, warrants from a -- in a
3 military setting that hasn't existed or has been
4 much more difficult in the past.

5 From the defense perspective, I've
6 also learned just in preparation for this talk
7 today, that they're being used to challenge
8 pretrial confinement prior to preferral, which I
9 think is a good use on the defense side. They
10 feel like that their client has been put in, put
11 in pretrial confinement and not in compliance
12 with the rules.

13 And they don't have to wait anymore
14 until a Military Judge gets the case after
15 referral, not just preferral, after referral.
16 Now that can be sorted through earlier in time.

17 And I believe, but I'm not sure, that
18 there is some talk about whether it can be used
19 for the Defense Counsel to issue subpoenas or
20 obtain evidence, as necessary, to establish
21 things like an alibi defense or something along
22 those lines, which you could imagine the defense

1 counsel might want to do prior to the preferral

2 CHAIR HILLMAN: Captain Gaston, just
3 stay close to the mike. You can hear how
4 sometimes it goes out a little bit.

5 I'll ask you all to continue to do
6 that.

7 Thank you.

8 CAPTAIN GASTON: Yes, ma'am.

9 So, I don't know, I don't know how
10 much it's being used by the Defense Counsel in
11 the field. I know that it has been used to
12 challenge pretrial confinement.

13 I don't know that it's being used on
14 the defense side, obviously, as much as on the
15 Government side to obtain evidence to assert an
16 alibi defense, or something along those lines.

17 But it, it sounds like it would be
18 reasonably postured to allow the defense to do
19 that.

20 And so, with that in mind, I think
21 it's a great development in the military
22 practice.

1 CHAIR HILLMAN: Thank you.

2 Lieutenant Colonel Abrams.

3 COLONEL ABRAMS: Yes, ma'am.

4 In terms of the appellate perspective
5 on these, there really haven't been any concerns
6 that have come up.

7 There has been one case in the Air
8 Force that I could find where there was even
9 anything where it led to an Article 30(a)
10 proceeding. And it was in the form of a writ,
11 where someone was basically saying, hey, I need a
12 judge to sort out my pretrial confinement. But
13 there wasn't a mechanism at that time.

14 That's been resolved now by RCM, the
15 amendment to RCM 396.

16 So, that concern has so far been
17 mooted.

18 I agree with Captain Gaston in terms
19 of the utility of being able to garner
20 information, particularly the stored
21 communications. I remember both as a trial
22 counsel and as a defense counsel obtaining that

1 information was particularly challenging. And
2 having a mechanism to accomplish that is really
3 vital to where we see so much of the important
4 evidence in these cases.

5 Broadening the scope of the issues as
6 we see in the rule, in the rules, it is good. I
7 think from the defense perspective, the more
8 avenues that a defense counsel may have to raise
9 issues with the Military Judge prior to waiting,
10 basically, on the Government to get themselves
11 moving for whatever is going on in a particular
12 case, is a good thing. It's a mechanism for
13 teeing up issues, and it's a mechanism for
14 advancing the interests of your client.

15 All those are good things. There's
16 not a concern at this time that I'm aware of,
17 both coming from, I've been in the Trial Defense
18 community for about five years before this
19 current assignment.

20 Both from that assignment and this
21 one, I don't have any sort of concerns about the
22 scope, at least at this time. But I think we

1 also, at least, sitting here if I had a different
2 color hat on, you'd kind of have some of those
3 issues come up. So far it's nothing really
4 concerning.

5 CHAIR HILLMAN: Thank you.

6 Lieutenant Colonel Porter.

7 COLONEL PORTER: Yes, ma'am.

8 I don't have much else to add from
9 what Captain Gaston and Lieutenant Colonel Abrams
10 spoke on. I, too, think it's appropriately
11 scoped. I think it's a great tool for both the
12 prosecution and the defense.

13 And we'll just have to wait and see on
14 the appellate side if any issue percolate up. We
15 have not, to my knowledge, seen any significance
16 on the appellate side.

17 CHAIR HILLMAN: Thank you.

18 Mr. Cook.

19 MR. COOK: Thank you, ma'am.

20 And I don't recall this ever coming up
21 at all when I was with Pete and Terry on the
22 court. So, I'm glad that he and Art had that

1 conversation because that's the source of my
2 knowledge, too. He already, he already took that
3 issue to his credit because it was just called.

4 But seems like the field defense
5 counsel do appreciate that ability to subpoena
6 pre-referral to help them with the pretrial
7 confinement cases. So it's a utility for the
8 defense counsel.

9 CHAIR HILLMAN: Thank you.

10 I'm going to turn to some questions
11 about sentencing. And maybe we'll go in reverse
12 order. So, Mr. Cook, you can weigh in first.

13 MR. COOK: Right.

14 CHAIR HILLMAN: And the pre-sentencing
15 procedures, do you feel like those are running in
16 an effective way with counsel presenting and
17 arguing at sentencing?

18 And based on the cases that you've
19 participated in, reviewed, and seen, are there
20 changes that you'd recommend?

21 And, in particular, would you, would
22 you want to see it turn toward something similar,

1 more similar to what happens in state and federal
2 courts in terms of sentencing?

3 MR. COOK: So, again I would recommend
4 leaving that one well enough alone. I like the
5 old system, at least from the defense
6 perspective.

7 I know it's limited recently as to
8 when you can raise the good soldier, I guess good
9 sailor or airman defense, I guess the coasties,
10 too.

11 But, but that's something the defense
12 counsel always did was, hey, get a list of, you
13 know, your client's supervisors and peers, and
14 start working, you know, in a lot of the cases
15 start working on sentencing right away. It's
16 just not going to be in context.

17 So, to the extent the defense always
18 was building that up and if, again, relevant,
19 presenting a good person, good service member
20 defense, and then being able to go at trial right
21 into sentencing, I can see this only inuring to
22 the benefit of the Government. Where they get a

1 break and they go out and dig up all the bad
2 stuff on your guy that maybe they haven't had a
3 chance to get to. So, they sentence, you do
4 sentencing right away, and I think it's
5 definitely a benefit of the accused.

6 So, I think that that current way we
7 do it would be preferable. And conferring with
8 Art, I would give a lot of credit here, but
9 believe in the adversarial process that it
10 currently enjoys versus more of an investigative
11 process where you have, you know, pre-sentencing.
12 Somebody goes out and looks at all the stuff
13 that's available, then presents that separately
14 to the court, just to keep that as adversarial.

15 Because a lot of times the Government
16 hasn't had the opportunity to get their ducks in
17 a row. And a lot of the records show the
18 Government trying to get in NJP, they had the
19 right authentication, and the judge keeps it out.
20 So, again, I think, again, to the defense
21 community, keep it as is.

22 Thank you.

1 CHAIR HILLMAN: Thank you.

2 Lieutenant Colonel Porter?

3 COLONEL PORTER: Yes, ma'am.

4 I also agree that sentencing in
5 adversarial proceeding benefits the, usually the
6 defense counsel.

7 But I have noticed with the more, with
8 the new plea agreements and the more specified
9 sentences that there are occasions where maybe
10 the sentencing case is not as robust as we've
11 seen in the past, by either side, whether that's
12 the prosecution or the defense counsel.

13 And whether we attribute that to them
14 knowing the sentence going in or not, I can't
15 say. But I do think that the ability for the
16 defense to call witnesses and really make sure
17 that their client, right, that the court knows
18 their client in that proceeding is invaluable.

19 CHAIR HILLMAN: Thank you.

20 Lieutenant Colonel Abrams?

21 COLONEL ABRAMS: Yes, ma'am.

22 Taking up the, I think the first part

1 of your question related to the effectiveness of
2 counsel, broadly speaking I think counsel for
3 both sides are doing an effective job. We got it
4 from some of the other answers.

5 The system as it's built, the
6 adversary system that we have for purposes of
7 sentencing, there are ways for the trial defense
8 counsel to really take advantage of that, and
9 really provide input, give the court a robust
10 case on behalf of their client.

11 I think there's opportunities that are
12 available for the prosecution. But particularly
13 perhaps as you've heard in some of the other
14 answers where we got maybe a plea agreement, they
15 may not necessarily always go through and do the
16 same, necessarily, scope of investigation that
17 they might otherwise do to uncover some evidence.

18 Sometimes the defense knows about the
19 possibilities out there through their own due
20 diligence, and they get under the current system
21 they have the opportunity to basically not bring
22 that forward.

1 They, they're not, you know, that's
2 not pulling a fast one on the court, it's just
3 they have to bring forward appropriate evidence,
4 and they're not permitted to abuse their
5 obligation to tender to the court, but they get
6 to put on the best advocacy on behalf of their
7 client. And the prosecution is authorized to do
8 the same.

9 So, I don't have any concerns about
10 the adversarial system and the way that it's able
11 to shake out.

12 In terms of if we're shifting to some
13 sort of pre-sentencing report, I think there's
14 three areas of concern that I've got with that.

15 The first is, I'm not sure that there
16 is a ton of meaningful information that we would
17 gain from the pre-sentencing report that we don't
18 otherwise already have. I've only had one client
19 who had a corresponding federal case. And I had
20 the benefit of looking at that client's pre-
21 sentencing report.

22 It was a little while back, but from

1 my recollection of that, you know, we were not
2 going to be dealing with prior convictions
3 ordinarily for folks who are already service
4 members. Those folks are ordinarily not going to
5 be serving by the time they're, that they're
6 being represented by military defense counsel.

7 The other part of it is the pre-
8 sentencing report is going to be talking about
9 the deployment history and their performance, or
10 even their prior military service. That's
11 something that's already readily available
12 because the prosecuting authority is the
13 employer. And so, that's captured by the
14 existing rules.

15 The second concern that I have is more
16 of a logistical nature. The first step, and
17 they're trying to teach some parts of that, the
18 first is really a health and safety concern.
19 Because if we're talking about a pre-sentencing
20 report, that likely means we're talking about a
21 break between the findings portion of the trial
22 and the sentencing portion of the trial.

1 We know that, at least in the Air
2 Force, under regulation, if someone is released
3 from pretrial confinement that there's going to
4 be procedures there for the command. And then
5 ultimately folks within some sort of unit,
6 typically the active duty unit, responsible for
7 basically keeping an eye on someone because we're
8 not just going to throw them in confinement,
9 ordinarily, awaiting sentencing.

10 And so you get the health and safety
11 concern from, probably, from the perspective of
12 the accused. You've got the potential drain on
13 active duty, ordinarily unit resources.

14 And I can't speak for the Victim's
15 Counsel community. I would imagine that -- I
16 mean this is sort of baked into Article 6(b),
17 there might be concerns also, depending on the
18 nature of the offense, where if there is a
19 victim, how they might feel about an accused
20 being out pending sentencing.

21 So, there's those logistical things
22 that are backed in.

1 And kind of the flip side of that is
2 even though, like, we talked about we often get
3 these sentence appropriateness issues being
4 raised on appeal, at least at the trial level,
5 and we know that having worked trials and
6 appeals, trials feel a lot more stressful
7 ordinarily than appeals do. At the trial level,
8 at least, that tension you get clear on that,
9 ordinarily on, typically, the same day or the
10 next day, depending on the time that we're
11 getting the findings.

12 And then you sort of see around the
13 sentencing case that the parties need based on
14 those findings.

15 CHAIR HILLMAN: Thank you.

16 COLONEL ABRAMS: Yes, ma'am.

17 CHAIR HILLMAN: Captain Gaston.

18 CAPTAIN GASTON: I think primarily a
19 lot of the current system is an adversarial
20 system because it employs the rules of evidence,
21 and it treats the sentencing procedures just like
22 the trial in terms of what the Government is able

1 to admit and not admit. Gives the defense the
2 ability to relax the rules, if they desire.

3 But otherwise, the Government's got to
4 call witness, got to lay foundations, got to do
5 all the things that it needs to do. The rules of
6 evidence apply, 403 applies. All the things that
7 protect accused from being sentenced for
8 something that was aggravating but not actually
9 what they were convicted of. That's, that's the
10 real danger

11 And I think the current system really,
12 really defends against that.

13 And we're mostly dealing with, as
14 we've heard, you know, first time offenders for
15 the most part. And so, the type of contents that
16 you usually see in the pre-sentencing reports are
17 not really the same.

18 And what we're trying to prevent,
19 essentially, is a mud slinging contest at
20 sentencing, and trying to show that, you know,
21 you should convict this person because they're a
22 bad person, not because of whatever the offense

1 is that they committed.

2 And that's what the rules of evidence
3 really help protect against, and I think do a
4 good job of protecting against. So, that's why I
5 side with the status quo in terms of the
6 sentencing procedures and rules of evidence in
7 the adversarial system that we've still got right
8 now.

9 CHAIR HILLMAN: Thank you.

10 So, a little more about sentencing.

11 The Military Judges in their role in
12 the sentencing process, do you have a sense for
13 what are, arguably, comparable situations and
14 offenses? Is sentencing consistent and fair from
15 what you see?

16 And to what do you attribute the
17 differences that you do see in sentences adjudged
18 for roughly comparable opinions?

19 Mr. Cook?

20 MR. COOK: Sure.

21 So, I'll rely primarily on my time
22 with the Army Court of Criminal Appeals to the

1 extent, you know, reviewing hundreds of cases in
2 that capacity.

3 So, to the extent you get a record
4 trial and then you preside over by Judge Osborn.
5 Okay, I've seen 12 of hers. Here's the 13th in,
6 you know, in a certain, you know, category. It's
7 a drug case. It's this type of case. I bet she
8 ends up with a sentence close to here.

9 Or Judge Brunson has, you know,
10 settled her case.

11 So, to the extent it's personality-
12 driven and then you see some similarities there.
13 But, again, regarding my Army experience, you get
14 a Reserve Judge who's in for the first time.
15 That, that could be anywhere.

16 You know, what's this person's
17 background? They could be a Defense Attorney, in
18 civilian practice. They could be, you know, a
19 prosecutor with DOJ. It could be all over the
20 place.

21 Similar in the Coast Guard to the
22 extent that we get, we probably get maybe 80

1 cases for our appellate court a year, so I'm
2 seeing a lot fewer. But typically have more
3 inexperienced judges. And the first couple cases
4 they're looking at, again, you may get a wild
5 card there as to what sentence they come up with,
6 but based on what you see in other cases.

7 So, I would say the bottom line for me
8 would be I see a lot of that being personality-
9 driven. And then, again, based on the experience
10 of the trial judges.

11 CHAIR HILLMAN: Thank you.

12 Lieutenant Colonel Porter.

13 COLONEL PORTER: Sure.

14 I think depending on who you ask in
15 the Army, some will say, yes, sentences are
16 similar with similar type offenses. And then
17 you'll get the exact opposite answer with other
18 individuals.

19 What I've seen is it definitely does
20 depend in some ways on the military judge and the
21 location, also. I think those factors like where
22 they're sitting, you know, what circuit they're

1 in can, can play a factor. But it, it's also
2 just the effectiveness of the counsel plays. All
3 those things have a role, and they should, I
4 think, in determining an appropriate sentence,
5 right, for an accused.

6 And so, I think as a judge and counsel
7 just as we become more experienced we kind of get
8 a sense of what, where they are sentencing. But
9 it does vary across, you know, different judges,
10 by experience level, by location sometimes.

11 And I do think that the change with
12 having parameters and criteria will kind of level
13 this out I bet.

14 COLONEL OSBORN: When you say
15 "location," are you referring to perhaps the type
16 of command and operational command? Not that it
17 would state that in the end. But the operational
18 command versus, you know, a non-operational
19 command?

20 COLONEL PORTER: Yes, ma'am.

21 COLONEL OSBORN: Forward deployed
22 versus not forward deployed?

1 COLONEL PORTER: Yes, ma'am.

2 In addition, I mean, I will say you're
3 going to see a different type of sentences for
4 drug cases out of Fort Bliss, for instance,
5 because of location. Just you can potentially
6 see that because we see it more often, or there's
7 some varying factors.

8 So, yes, absolutely, depending on, you
9 know, what type of command it is. And also there
10 are certain locations, right, that just lend
11 themselves to slightly different sentences.

12 Does that answer your question?

13 COLONEL OSBORN: It does. Thank you.

14 MR. COOK: I'll just jump on that to
15 refresh my memory. Back what was then Fort Bragg
16 you would have 18th Airborne court cases. And
17 then you'd have 82nd. And then you'd have SF
18 cases.

19 So, if you got an SF panel on a drug
20 case you didn't want to get judge alone, because
21 that was their mission. I mean, they were
22 interdicting and they were putting guys in harm's

1 way. And if you had one of their own, you know,
2 going down and, you know, being involved with
3 drugs, it was like their buddies are getting shot
4 at to interdict, so.

5 That's actual point.

6 CHAIR HILLMAN: Thank you.

7 One more follow-up, Colonel Porter.

8 Just a question about you mentioned the
9 effectiveness of counsel can have an effect, too.

10 Do you think that defense counsel are
11 generally sufficiently prepared to be effective,
12 recognizing, you said, more experienced counsel
13 would do a different job than an inexperienced
14 counsel. But what, what's your sense?

15 And just to clear, you all can speak
16 to this to the extent you choose to. The reduced
17 number of courts that are happening across the
18 services has affected the degree of preparation
19 and experience that counsel get, especially
20 defense counsel. Were you concerned about that?

21 So, what are your thoughts on that?

22 COLONEL PORTER: I do think they're

1 well prepared for it. They have a tremendous
2 amount of training opportunities.

3 So, while they're representatives in
4 court, potentially it could, or less depending
5 on, you know, what jurisdiction they are in, they
6 are very well trained and well prepared. Our
7 Defense Counsel Assistance Program is very
8 robust. It's on a lot of training to help fill
9 that gap.

10 You know, in some cases when they're
11 not seeing the representatives they need they
12 can, their advocacy skills can also be honed, I
13 think, too. And Boards of Inquiry,
14 Administrative Separation Board, and other venues
15 where they can work on that advocacy.

16 So, I do think that they are well-
17 prepared.

18 Just naturally, the more you're in
19 court, right, the more comfortable you become.
20 And so that just lends itself right to, in most
21 cases, gaining more proficiency.

22 MR. COOK: Can I piggyback, too?

1 Sorry.

2 You spurred my memory there on the
3 excellence of the trial defense team.

4 So, the Coast Guard has a formal
5 arrangement with the Navy. And the Navy provides
6 Coast Guard members with their trial defense
7 service. They send the Navy seven to eight
8 coasties.

9 And we're the beneficiary of just some
10 outstanding litigators. Their DCAP program,
11 their Senior Defense Attorneys, and I think I can
12 count on probably a couple fingers how many times
13 we've raised IAC in my eight years with the Coast
14 Guard. It's been very reflective of the
15 excellence I've seen coming out of the trial
16 defense community.

17 Thank you.

18 CHAIR HILLMAN: Thank you.

19 Lieutenant Colonel Abrams?

20 COLONEL ABRAMS: Yes, ma'am.

21 I'll take a run at the first question
22 that you posed about similar sentencings,

1 sentences and what we might be seeing there.

2 I kind of have to answer this a little
3 bit flipping the question to a degree.

4 Oftentimes there is the possibility of raising an
5 issue on appeal, basically, whether someone has
6 not been sentenced in accordance with other folks
7 who are similarly situated. The law presents a
8 pretty high burden on those cases.

9 We don't see that issue raised a lot.

10 But I agree with the answers that
11 you've gotten so far is even though that specific
12 issue is not raised a lot, and even though
13 there's that, we do see almost every different
14 type of variable that you could imagine in a case
15 driving slightly different cases in one way or
16 the other.

17 So, it really depends on how closely
18 we're going to apply some of these to say that
19 they're similarly situated. I think if we're
20 talking about, say, a certain type of drugs case
21 versus maybe a certain type of Sexual Assault
22 case, we can kind of probably all give you about

1 a ballpark of what we would expect to see. But
2 it's just that there are so many variables.

3 Because it could be that there's a
4 disciplinary case for an EQ. It could be that
5 they're a longtime serving service member; that
6 could cut against them in a variety of ways
7 depending on the offense because if it's a
8 longtime service member who's in security forces
9 or something like that is then committing certain
10 conduct with drugs, that may then cut against
11 them. Whereas, otherwise they might on the other
12 side of that they may have extensive deployment
13 history or other credible service that could go
14 to their benefit.

15 So, there's a lot of variables there.

16 Unfortunately, at my fingertips I
17 don't really have all the data where we could
18 really try and line up, all right, this type of
19 offense versus this type of offense, what are we
20 seeing? That's a different part of do your
21 Courts of Military Justice, Foreign Policy
22 Division, they do that.

1 But at least in terms of what I'm able
2 to glean from the frequency with which we raise
3 those issues on appeal, it's rare, very rare,
4 because we just don't have the assets to do it.
5 We don't have the number of cases. And there's
6 often not substantial, substantial enough
7 similarity in order to enable appellate defense
8 counsel to raise that issue.

9 CHAIR HILLMAN: Thank you.

10 Captain Gaston.

11 CAPTAIN GASTON: All right. So, I'm
12 going to speak to kind of this general issue now
13 that we've gotten the perspective.

14 So, so "closely related," that's the
15 term of art that the case law has used to say,
16 okay, well, if two cases are closely related then
17 their sentences have to be close.

18 And as we've heard, that's a very
19 narrowly defined term of art that essentially
20 only applies to co-conspirators in the same co-
21 conspiracy. So, it almost never applies.

22 The sentence appropriateness function

1 of Courts of Criminal Appeals from the inception
2 of the Military Justice or at least the CCAs was
3 designed, and you can look at some of the early
4 opinions by Chief Judge Fletcher, it was designed
5 to sort of balance things out at the appellate
6 level to, to account for the differences or the
7 vagaries of different Military Judges. Because,
8 as we've heard, it does, it depends on the judge.
9 It depends on who is the prosecutor, what case
10 the Government depends on. It depends on who the
11 defense counsel was and what kind of case they
12 would put on.

13 So, all these things go into whether
14 you've got similar offenses, maybe on different
15 sides of the country involving different
16 commands, that are getting different sentences.
17 And the function was at the CCA level to kind of
18 iron that out. At least, at least that's how the
19 CAAF saw it, or the Court of Military Appeals,
20 the predecessor of the CAAF.

21 We don't see that as much anymore. I
22 think we're going to see it less and less, right,

1 because now, especially for guilty pleas, more
2 and more it's going to depend on who the
3 convening authority is. Or, in the Office of
4 Special Trial Counsel cases, who the lead special
5 trial counsel or who the trial counsel in that
6 case is because there's no convening authority in
7 that case, just going to be that prosecutor.

8 And there is some more leverage. I
9 think there is some increased leverage now to, if
10 you're a Government prosecutor under the current
11 system, to negotiate toward the sentence that you
12 want to get. And maybe you then narrow the range
13 so that you're essentially just going to be
14 telling the Military Judge what to sentence to.

15 And with the exception of cases like
16 Kerr, that I cited earlier, mostly the CCA seem
17 predisposed to that sentence and not do anything
18 about it. So, so you can see that as a
19 development in the law, or you can see that as a,
20 as a development you can see that's a development
21 in favor of justice, or in favor of efficiency,
22 or as a development away from the judgments that

1 we saw in the past at least, which was with, you
2 know, Military Judges who are supposed to be
3 giving individual, individualized sentences to
4 offenders based on not only the nature and
5 circumstances of the offense, but also the nature
6 -- the characteristics of the offender.

7 And then with an overarching CCA kind
8 of ironing out the extremes, right, particularly
9 the extremes in favor of the Government side.

10 I don't, I don't really think we see
11 that anymore. We don't see the CCAs taking a lot
12 of actions on the sentence at all anymore. And I
13 think they're going to do it less and less where
14 we're seeing more and more sentences which are
15 not even a range anymore, or very slight range.

16 And with the exception of cases like
17 Kerr, you know, I don't think Military Judges are
18 going to buck the tide on the sentences that
19 they're being told to give. Right? Because they
20 don't have a lot of case law telling them they
21 have the ability to do that.

22 Kerr in the Navy, in the Marine Corps

1 tells them they've got the ability to do that.
2 But I guess my concern would be that the Military
3 Judges become the rubber stamp for the convening
4 authority and special trial counsel leveraged
5 deals, and the CCAs become the rubber stamps for
6 the Military Judges. And so, there's not as much
7 of a robust look at the appellate level at
8 whether the sentences are fair or whether they
9 are actually similar for similar offenses.

10 So, I'll just put that out there. I
11 think, I think part of my job is to be a little
12 bit controversial. And so I want to put that out
13 there as 80 percent with my perspectives, as all
14 these comments it's just mine alone. But I think
15 that is a concern I just want to put out there
16 for everybody's thought.

17 CHAIR HILLMAN: Thank you.

18 Colonel Brunson.

19 COLONEL BRUNSON: That just raises some
20 questions for me. And I will start out by saying
21 I apologize for my ignorance on this topic. But
22 I'll just go real quick.

1 So, given what you just said kind of
2 about really the military judges being in a
3 position of just rubber stamping this, do you
4 read -- all right, here's my question.

5 Can the Military Judge give a
6 specified sentence, or is it the Military Judge's
7 role to simply disagree the -- disapprove the
8 entire plea agreement if they believe that the
9 sentence is inappropriate? Or can they just
10 disapprove the deal as far as the punishment?

11 How does, how does that work?

12 I'm, frankly, surprised that the Navy,
13 Marine Corps came to that conclusion. I'm not
14 saying that I disagree or agree. But it just
15 strikes me as unusual.

16 And so, it really sparked my interest.
17 And given this, this whole landscape in which the
18 judge is just kind of, to me, seems like often in
19 the position just going along with what the
20 parties have already decided, how do you see that
21 playing out where the Judge actually has a role?

22 CAPTAIN GASTON: So, I guess I'll

1 caveat my comments. And that it depends on the
2 trial judge.

3 You've got, you've got a Mike Libretto
4 over here as a trial judge, then maybe he's
5 within the experience is more apt to say, no, I'm
6 not, I'm not going to impose this sentence for
7 what I've heard. For what I've heard during the
8 providence inquiry about the offenses and what
9 this person is guilty of, I, I am going to find
10 that this imposing a punitive discharge -- that's
11 the issue in Kerr -- is not appropriate under
12 this case. And so, I'm not going to accept the
13 plea agreement under these circumstances.

14 COLONEL BRUNSON: The implied
15 agreement.

16 CAPTAIN GASTON: So that, there is
17 another case, I don't have the name for you, but
18 the Navy, Marine Corps at least found that the
19 Military Judge, like the President, does not have
20 a line item veto, was the quote from that case.
21 Right?

22 So, and I think that's right. I don't

1 think it went to CAAF, but I think they got it
2 right that if you can't just strike a term from
3 the deal and then make all the rest of the deal
4 stay in place over the objections of the parties.
5 Right? The parties have to agree to the deal as
6 administered at the court.

7 So, if you strike a term from it,
8 they've got to go back and make sure they agree
9 to the deal without that term.

10 So, I think the remedy is to strike
11 the deal and make the parties renegotiate around
12 that term and for a different term.

13 GENERAL EWERS: Theoretically, would
14 the parties be able to forum shop in that
15 instance?

16 So, this judge wouldn't accept the
17 punitive discharge, therefore they throw out the
18 whole deal because you can't line item veto. So,
19 then it goes back to the parties and they decide
20 whether they want to have an agreement without
21 the punitive discharge.

22 Can they say, you know, we really like

1 the punitive discharge, let's find another judge?

2 CAPTAIN GASTON: Well, I guess that
3 would depend on the circuit rules for that
4 particular circuit.

5 If you've got -- so, I don't want to
6 speculate. But I imagine that there might be
7 ways to forum shop. But if you're in a
8 particular jurisdiction and it has a particular
9 circuit judge that assigns the cases, then I
10 think that would be the answer about whether they
11 could steer the case to a different judge or not.

12 But that in and of itself, obviously,
13 would raise other issues that we would look at on
14 appeal or the appellate defense.

15 COLONEL ABRAMS: If I could take on
16 both of those questions.

17 First on the forum shop. At least in
18 the Air Force you wouldn't be able to do that.
19 The judiciary, the whole point of having an
20 independent judiciary is so that they can assign
21 their own judges in an independent fashion, free
22 from any outside interference.

1 GENERAL EWERS: I would think that if
2 they were in a court of criminal law --

3 COLONEL ABRAMS: Right.

4 GENERAL EWERS: -- they'd say the same
5 thing.

6 COLONEL ABRAMS: Right.

7 GENERAL EWERS: And they said, we're
8 not letting you do this?

9 COLONEL ABRAMS: Right.

10 I don't, I don't think there would be
11 I'd be doubtful about having any sort of forum
12 shopping to achieve an agreement.

13 If it's to go back to the other
14 question about how this plays out, I can kind of
15 think about this, about how I'd want to advise,
16 be trying to explain this to a client.

17 So, if I'm trying to talk about this
18 to a client and we've got the plea agreements
19 let's say before the most recent change.

20 JUDGE REDFORD: Is this at the
21 appellate or trial level?

22 COLONEL ABRAMS: Trial level, sir. I'm

1 putting my trial, trial hat here.

2 Thank you for that clarification.

3 So, infrastructure I'm advising that
4 client, right, we're going to, we're coming to a
5 agreement with the prosecution about how this is
6 going to play out. And it's got one of those the
7 discharge was taken to the sentence, or
8 something, it has to be taken. There has to be a
9 bad conduct discharge. Right?

10 The advice that I have to tell them is
11 basically, well, the Air Force Court of Criminal
12 Appeals that said you can do that, we haven't
13 gotten to the answer on scope. I think there is
14 potentially an argument -- there have been
15 arguments raised in the Appellate Defense Context
16 about whether that's proper, whether that --
17 whether you can permissibly do that. But so far
18 those have been shot down at the Air Force Court
19 of Criminal Appeals.

20 So, if you agree to a bad conduct
21 discharge in part of your agreement, then that's
22 going to likely be upheld.

1 That's especially true, I would think,
2 as we move to the most current legislative
3 framework. Because if we agree to that and we
4 say, and we're saying now there is a confinement,
5 a specified sentence to confinement that we've
6 agreed to, then under Article 53(a), as that's
7 been amended, the trial judge has basically no
8 latitude to go outside of that.

9 There are some ways where the Judge
10 can go outside of it, if the Judge -- if there's
11 no param -- if there's no sentencing parameter
12 and the sentence is otherwise, then they've got
13 some latitude where if the sentence is plainly
14 unreasonable.

15 But, otherwise, if it's within a
16 sentencing parameter, the Trial Judge is
17 basically boxed in. And then the way that
18 Article 66 has been amended, they're going to
19 look at that, and while there is maybe some, some
20 daylight in there, my read on the amendments to
21 Article 66 is I'd be kind of skeptical about
22 whether I would imagine the Court of Criminal

1 Appeals undoing that.

2 COLONEL BRUNSON: Okay. So, just a
3 quick follow-up.

4 So, the sentencing parameters,
5 sentence guidelines, whatever you call them. So,
6 let's say that the sentence as agreed to by the
7 parties does squarely fall within the guidelines,
8 but the Judge believes based on, you know,
9 individualized sentencing that it's an
10 inappropriate sentence. I'm just curious as
11 where you think that argument goes on appeal?

12 If the judge does accept it, I can't
13 -- I'm trying to imagine how it would get there.
14 But my idea is the judge says this is, this is
15 inappropriate. This sentence, although it falls
16 within the guidelines, is inappropriate under the
17 facts and circumstances of this case.

18 I'm not going to do the hard work of
19 figuring out how it gets to appeal. But let's
20 just say that's the framework.

21 Like, where do you think that -- does
22 that have legs? Or is the judge just stuck with,

1 well, it falls within the guidelines, even though
2 the guy's a war hero, and has never been in
3 trouble, and he did this one thing with PTSD but
4 it falls within the guidelines, so I guess he's
5 one and done?

6 COLONEL ABRAMS: So I share your
7 difficulty in figuring out how that would get to
8 an appeal. And I say that not to make light of
9 your question but, under Article 53(a), the way
10 that's been admitted, so for all of our offenses
11 that have just kicked in, basically, three weeks
12 ago, everything post that, the statutory text is
13 shall, the judge shall accept the agreement if
14 it's within the parameters. The language is,
15 53(a), subparagraph (b)(1), in the case of
16 offense with a sentencing parameter, the military
17 judge may reject a plea agreement that proposes a
18 sentence that is outside the sentencing parameter
19 if the Military Judge determines that the
20 proposed sentence is plainly reasonable.

21 The only other option that's under
22 there is subparagraph 2, and that talks about

1 offenses where the Military Judge or where there
2 is no prescribed parameter. So if there's a
3 parameter, my read on it, at least in the
4 arguments that I would imagine would be coming
5 from the Government side of things, I think
6 would, on their face, probably appeal to a trial
7 judge. I've not been a trial judge. There's a
8 little bit of speculation because these rules are
9 new, but I can see a Trial Judge, like, this is
10 shall, like, Congress told me shall, so what do
11 you want me to do besides accept the plea
12 agreement as it's been drafted by the parties?
13 But that plays out then all the way through your
14 Article 66 review where you're potentially
15 blocked into that start to finish.

16 So if we're thinking that's not enough
17 latitude for the Military Judge, well, then that
18 is potentially a concern. But if plea agreements
19 permit, the no kidding, you will go to jail for
20 three years and five days to be a viable
21 sentence, then that could potentially go through
22 all the way. That doesn't mean there might be

1 other ways to challenge that on appeal. I think
2 all of our Appellate Defense Staff would be
3 looking at it, well, what's the way we can
4 challenge that because I could certainly imagine
5 plenty of Appellate Clients who have a little bit
6 of buyer's remorse about sort of that agreement
7 or there's some things that they learn about
8 potentially after the case or they look at the
9 performance of counsel.

10 And then, you know, sometimes, for
11 these issues, the common thing that I would often
12 find myself explaining to clients on appeal is,
13 well, if an issue is waived, the workaround for
14 waiver is you're basically boxed in to
15 ineffective assistance of counsel, which is its
16 own high bar. Maybe we're saying that there's an
17 overall systemic problem, but that's basically
18 making a constitutional challenge, and that
19 presents a high bar; or we're talking about
20 potentially, you know, maybe some sort of
21 unlawful influence, but this is practice
22 legislation, and I think that presents its own

1 challenges under the statute applicable to
2 unlawful influence.

3 So there's some challenges potentially
4 on the defense side to perhaps attack that if
5 they think that there's a problem with it.

6 CHAIR HILLMAN: Judge Redford.

7 JUDGE REDFORD: Colonel Abrams, your
8 answer stated what I've been thinking. How is
9 this not completely waived by an accused? If
10 you've gone through this very thorough military
11 providence inquiry and you have agreed time and
12 time again this is the sentence I'm going to get,
13 and this is what you want to do, you're
14 volunteering, how is that not waived, other than
15 ineffective assistance of counsel?

16 COLONEL ABRAMS: I struggle to answer
17 that. Part of the discussion, I would imagine,
18 and the back and forth that I would look to in a
19 record between a Trial Judge and the accused as
20 they're going through the guilty plea inquiry
21 would be was there a common understanding of what
22 RCM 910(j) means, so that's been recently

1 amended. That's the waiver rule. That rule, the
2 text of that, it says basically, if you've got a
3 plea of guilty, it waives any objection, whether
4 or not previously raised, as to the factual issue
5 of guilt of the offenses to which the plea was
6 made, which I'm still trying to wrap my head
7 around exactly what that's meant to mean.

8 JUDGE REDFORD: I admit I was a
9 Military Judge last in December of 2011, but I've
10 been a state judge and I've been on our state
11 court of appeals for a number of years. Boy, you
12 see this record --

13 COLONEL ABRAMS: I mean, you've got
14 waiver issues under the prior iteration of
15 Article 66 where we have, a case is can think of
16 is United States v. Chin. I can't think of the
17 citation of Chin off the top of my head, but the
18 court basically took up a waived issue and
19 granted relief, but it was within the Article 66
20 context where they're like we're the court of
21 criminal appeals, we have broad powers under
22 Article 66, similar to what Captain Gaston's

1 talking about. That vow basically, even though I
2 think Chin is the exception rather than the rule
3 in what you might see, as inspiring as it might
4 be for trial and appellate defense practitioners
5 where it's like, well, we've got a shot there,
6 the way that Article 66 has been amended for
7 appeals going forward, I think, likely limits
8 those avenues. We haven't seen those cases play
9 out, so I think it's still to be determined. And
10 we've got a lot of smart creative counsel I'm
11 sure are going to come up with ways to try to
12 challenge that, but, at least looking at the
13 initial glance on the untried and untested rule,
14 it seems to be meant to basically limit those
15 being reduced in some way because Article 66
16 authority has really been narrowed, at least in
17 these cases where they're agreeing to it.

18 If it's the circumstance that Mr. Cook
19 was talking about before where they're pleading
20 guilty but without any sort of preliminary
21 agreement, well, now you're just in, well, how
22 does RCM 910(j) with that broad waiver provision,

1 how is that going to factor in? You maybe don't
2 have the same, you don't have the same concern
3 about the Military Judge necessarily being bound.

4 And so a lot of these choices might
5 find their way down more at the trial defense
6 level where they're talking to their clients
7 about, like, well, do we really need a deal here
8 or are we just willing to take this on with the
9 trial judge that we've got without potentially
10 the safety net of a deal because we think it
11 keeps more things open or do we just litigate?

12 JUDGE REDFORD: In the plea colloquy,
13 when there's a specific, whether a discharge has
14 to be given or a period of confinement, no more,
15 no less, has to be given, is the plea colloquy
16 more specific than in historically older plea
17 colloquies when, you know, Colonel Cook was
18 taking place.

19 COLONEL ABRAMS: I couldn't say
20 exactly. I mean, I've done pretrial agreements
21 and the agreements that we're talking about, the
22 new post Military Justice Act of 2016 agreements.

1 I've done both. I can't think of from the
2 records that I've reviewed or from my experiences
3 that they're different, but there's a lot more
4 experience on the panel who maybe have a
5 different perspective. I seem to recall
6 basically, like, look, do you understand what
7 this term, we're going to go line-by-line on the
8 terms of the agreement, do you understand the
9 agreement, have you had a chance to talk to your
10 counsel, and how about you talk to them again and
11 let's talk about maybe what that means.

12 Now, if the Military Judge, given
13 these other concerns, not concerns, given the
14 kind of how the plea agreement might ultimately
15 impact things on appeal down the road, I could
16 potentially imagine a challenge saying, look, the
17 Military Judge's colloquy wasn't robust enough
18 because all they did was say, hey, did you
19 understand that this is going to happen without
20 the additional information of, hey, you're
21 basically going to be stuck with this through the
22 course of the appeal. But that hypothetical that

1 I just came up with is subject to appeal and
2 interpretation and the typical appellate
3 adversarial process.

4
5 So I don't know where that would play
6 out, but I think Mr. Cook, Captain Gaston, and
7 Lieutenant Colonel Porter may have a different
8 set of experiences on that question.

9 CHAIR HILLMAN: We have a couple of
10 more questions from the panel pending, but if
11 there's another quick response to Judge Redford's
12 question.

13 CAPTAIN GASTON: I would say the quick
14 answer is, yes, this is an experienced judge and,
15 if there's a requirement for a punitive discharge
16 in a case that doesn't appear on its face to be a
17 punitive discharge case, there would be a
18 thorough inquiry, I think, with the accused. But
19 that depends on the experience of the judge.

20 There also may be an inquiry, there
21 used to be, maybe back in your day, you'll
22 remember this, a BCD striker inquiry, right. So

1 if somebody had their counsel ask for a punitive
2 discharge, then there would need to be a specific
3 inquiry from the military judge do you know what
4 your counsel is asking for on your behalf. A lot
5 of the experienced military judges will do that
6 same sort of inquiry for a pretrial agreement
7 that is requiring a punitive discharge to ensure
8 that the accused knows what he or she has signed
9 for in the agreement.

10 MR. COOK: Yes, I agree with that. I
11 think it's judge-dependent. The more senior
12 judges are going to be exhaustive in that
13 colloquy versus a newer one and then maybe they
14 miss something.

15 CHAIR HILLMAN: Thank you. General
16 Ewers.

17 GENERAL EWERS: This has turned into
18 a little bit of a parlor game. I think we really
19 need to hear from CAAF on this, on a lot of these
20 issues. But it occurs to me the point that Art
21 just made, Captain Gaston just made, we did BCD
22 strikers in the industrial raid in the 80s and

1 the 90s, and one of the things that I don't think
2 that we did was we never put a provision in the
3 pretrial hearing that required the accused to
4 strike for BCD and probably would have found it
5 contrary to public policy if it had been in
6 there. But now we have pretrial agreements that
7 allow you to do that.

8 It's also interesting, you know, it
9 was a catchy little remark that NMCCA made about
10 the line item deal; but, interestingly, they do
11 have a line item deal, so they can pick and
12 choose what parts of a sentence that they want to
13 approve without having heard a word in court.
14 I've watched them do it.

15 So, I mean, I think that's really
16 interesting, and I think that we really need to
17 hear from CAAF on this. But I think that you
18 have to ask yourself whether some of these issues
19 really need to be keyed up.

20 And the last point I'd make, and I
21 invite, you know, I always worry that I just like
22 the old way, like Mr. Cook, I just like the old

1 way. I'm used to the old way. But it occurs to
2 me, going to a less controversial issue but a
3 more fundamental issue maybe, is that if I'm the
4 prosecutor, let me strike that. If I'm the
5 defense counsel at a sentencing hearing where you
6 have picked an exact sentence and it's already in
7 the pretrial agreement, the only thing I'm
8 playing for is maybe get a clemency
9 recommendation from the judge. My incentive to
10 prepare for that case is zero. If I'm on the
11 trial side, all I'm trying to do is not get
12 overturned on appeal, so my incentive to put
13 anything in is even less than zero.

14 So, you know, if you really think that
15 socialism is going to break out and we're all
16 going to do the right thing because the right
17 thing is -- I think that we ought to be really
18 looking really hard at cases not where I like
19 where you have the floor and ceiling, I don't
20 care about that. But when the floor and ceiling
21 are identical and you have a specific sentencing,
22 I really do think there's a tendency for it to

1 become an empty proceeding, the sentencing.

2 So if you correct my thinking on that,
3 I'm getting a little wrapped around the axle.

4 Thank you.

5 CAPTAIN GASTON: I mean, I think, as
6 we've heard earlier, I think the sentencing
7 proceedings now under the new system are less
8 robust than they were in years past. I think it
9 depends on the individual military counsel,
10 particularly the defense counsel but also the
11 government counsel, I wouldn't say that they're
12 becoming the empty ritual that have been warned
13 about, but you can kind of get that sense that,
14 hey, the new agreements are about being
15 efficient. If the parties can agree to
16 something, let's just have them agree to that.
17 And then, naturally, as you said, both sides
18 don't feel as compelled to fight for the sentence
19 that they think the case deserves because they
20 don't have to. They just have to make sure the
21 deal seems reasonable, and then the incentive is
22 just to make sure there's enough evidence from

1 their sides to make it look like a reasonable
2 deal.

3 So I think it is wholly dependent on
4 who the counsel involved on both the government
5 and the defense sides are. But I think this goes
6 back to my earlier comment about it's just kind
7 of a different flavor to these records of trial
8 that we're seeing from the sentencing proceedings
9 than what we've seen in years past under the old
10 system in my personal opinion.

11 COLONEL ABRAMS: I think the only
12 thing that I would add on top of that is the
13 important thing for trial defense counsel under
14 kind of the scenario that you laid out, sir, is
15 is it in this client's best interest to even go
16 with this deal, given those potential concerns?
17 There's the potential concerns about what the
18 sentence might look like, but, at the same time,
19 every case may have, a certain case may have a
20 really good reason to take a deal like that and
21 not really be worried about the sentencing
22 proceeding. If you're taking, you know, if

1 you've got an accused facing multiple allegations
2 of sexual assault and child pornography and a
3 whole host of other offenses that are going to
4 have lifetime consequences for that client and
5 there's an opportunity for them to plea that in a
6 way where they can plea to something else and
7 maybe not have the same consequences, then that's
8 over the client, but there are some good reasons
9 maybe there for how defense counsel advised their
10 client.

11 So your question, I think, goes to
12 what is the universe of sentencing that we want
13 to have, but, at the trial level and the
14 application level, Trial Defense Counsel are
15 really mostly, I would think are mostly just
16 going to be looking at, all right, these are the
17 rules of the road that we've got now, what's in
18 the best interest of our client. And so if the
19 tradeoff for that sort of amazing sort of deal,
20 in their view, is to have a more efficient,
21 highly streamlined, not a lot of advocacy
22 sentencing proceeding, that may be in that

1 client's best interest, but that may not
2 necessarily be the way that we want, overall, the
3 system to play out.

4 MR. COOK: I'm just going to have to
5 look at these new records a little bit closer
6 because I haven't seen a big drop off. I mean,
7 they're still calling witnesses, we've still got,
8 you know, tons of paperwork that they're putting
9 in. But they're very smart guys, so maybe they
10 are starting to nail it in a little bit more.

11 CHAIR HILLMAN: Thank you. Colonel
12 Brunson.

13 COLONEL BRUNSON: Okay. I think I
14 found my answer, and I think, for me anyway, the
15 answer is that appellate defense counsel are
16 looking for sentence relief on appeal because, as
17 General Ewers mentioned, the appellate court can
18 do whatever it wants to do. My concern is that
19 with the relatively or comparatively limited
20 experience that our trial defense counsel are
21 getting -- I'm not saying that they're not good
22 at their jobs; don't take me wrong. But, you

1 know, Court-Martials are down significantly, and
2 so, with the amount of hours in court, in trial,
3 that they are getting, they have significantly
4 less experience, say, than the Military Judge.
5 And, currently, both the trial judge and the
6 appellate judge has said this sentence that all
7 of you agreed to is inappropriate. So there is,
8 to me, some role for the very experienced
9 Military Judge who has seen lots of these cases
10 and lots of these situations to say I think you
11 guys missed it a little here, I think you
12 overlooked something, I think you didn't take
13 something into account. And while I give much
14 credit to the defense counsel for knowing their
15 case and knowing their client and advocating for
16 what's in the best interest, I have to, and maybe
17 I'm probably biased, but I have to give more
18 credit to the Military Judge.

19 And so since it seems to me we have
20 effectively removed the military judge from the
21 sentencing procedure, other than to make sure
22 everybody colors inside the lines, then the only

1 remedy if you believe there's not an equal
2 balance of power between the government and the
3 defense, the only remedy for being boxed into the
4 specific sentence agreement is for defense
5 appellate counsel to seek sentence relief on
6 appeal. I'm just curious of whether you think
7 that has legs and where it will go.

8 CAPTAIN GASTON: That's what we do.
9 We're trying to get sentencing relief, among
10 other things, on appeal. And in guilty plea
11 cases, that's one of the main things we look at
12 is the providence inquiry was done correctly.
13 Most of the issues are waived.

14 I think, as we talked about earlier,
15 I think, under the Article 66, this language that
16 the Court of Criminal Appeals may affirm only the
17 sentence or such part or amount of the sentence
18 as the court, that's the CCA, finds correct in
19 law and fact and determines on the basis of the
20 entire record should be approved, I think that
21 language gives the CCA the ability still under
22 the current system to examine the appropriateness

1 of the sentence, even if the plea agreement says
2 that's the sentence that shall be imposed. We
3 haven't seen the waiver rule get pushed as far as
4 Your Honor suggested earlier.

5 JUDGE REDFORD: No. Just in the state
6 of Michigan, it really gets pushed if it's
7 waiver, if there's an agreement. It really does.
8 But I understand the intermediate military
9 appellate courts have fact-finding powers. I
10 mean, as an appellate court judge in Michigan, I
11 certainly do not have any of those powers. I
12 have no super powers, but I certainly don't have
13 any fact-finding powers. So the NMCCA, the other
14 service courts, have much broader ability to get
15 down into and examine the appropriateness of an
16 agreement, and I think it's appropriate. It
17 always has been.

18 COLONEL BRUNSON: Right. So we craft
19 those issues.

20 CAPTAIN GASTON: So we craft those
21 issues because, again, if you look at the case
22 law, some chief justice lecture opinions, about

1 how that was the role that was seen for the court
2 of criminal appeals is making sure that you don't
3 have these really disparate sentences in very
4 similar cases. And so that was the actions that
5 CCA's words sort of expected to take a closer
6 look at if you have an outlier where there was a
7 ten-year sentence in an offense that normally
8 sees four to five years, then that gets a closer
9 look on appeal. You know, my argument, again,
10 I'm sitting in the chair of an appellate defense
11 lawyer right now, is that that should apply even
12 if the parties agreed to a particular sentence
13 because the rules don't say that it's any
14 different posture on your Article 66 simply
15 because this particular accused, you know, our
16 language would probably be he got talked into it
17 by an inexperienced defense counsel who wasn't
18 aware of what the case was worth, and so, you
19 know, this is what CCA should be taking a look at
20 at their level.

21 To your question about military
22 judges, again, it depends on the experience of

1 the military judges. We're happy to see that you
2 have cases like Kerr that are telling the
3 military judges we're expecting you to police
4 these plea agreements to make sure that you
5 believe they're not contra public policy in
6 what's being agreed to and that they shouldn't be
7 overturned for any reason at the trial level
8 because, again, as things move toward a system
9 that is less adversarial and more similar to what
10 you see in state or federal court, I just think
11 that there's going to be potentially less
12 oversight by the Trial Judge or the CCA on the
13 deal that the parties reach. And that's
14 different than it's been in the past, and so
15 that's a concern for an old-schooler like me.

16 CHAIR HILLMAN: Thank you. Let me
17 just check in with Judge Kasold who is our member
18 joining us virtually. Judge Kasold, if you're
19 listening, do you have any questions for the
20 panel?

21 Okay. I have more questions. One is
22 a larger question about morale and independence,

1 and then I'll close with the last few questions
2 about appellate issues related to the new
3 punitive offenses.

4 So independence is always an issue in
5 justice systems, certainly in the military
6 justice system it has been. Concerns about
7 independence is why we have a new office of
8 Special Trial Counsel across the services, you
9 know, configured in different ways in each of
10 your services. I wonder how you think defense
11 counsel feel right now around independence and
12 ability to perform their mission in the most
13 robust of ways. We'll start with you, Captain
14 Gaston. You know, what's your sense of the
15 morale of defense counsel? Do they feel able to
16 pursue their role within the military justice
17 system zealously without negative consequence for
18 their potential career trajectories?

19 CAPTAIN GASTON: I mean, in terms of
20 sort of the type of issue about whether they feel
21 like they have adverse career repercussions by
22 being a defense counsel, I don't know that that's

1 there. I think they do, in the current
2 environment, feel like maybe more than in times
3 past that the deck appears to be stacked against
4 them because there is so much experience and
5 expertise on the government side in these OSTC
6 cases now, which is understandable, right,
7 because you've got, you know, not only an 0-7
8 but, at least in the Navy and Marine Corps, there
9 are 0-6s, their deputies out on the coast. I
10 don't know what the term is, if they call them
11 deputies or whatever. But several 0-6s, in
12 addition to an 0-7, you know, certainly among the
13 most experienced counsel at the 0-5 and 0-4 level
14 to actually trying the cases, and then, you know,
15 with everybody's eyes toward how to make 0-7,
16 then there is a natural inclination to think,
17 well, shoot, I need to be training to be a
18 special trial counsel so that one day I can get
19 to that 0-7 job.

20 So, you know, in my day it was I want
21 to be a Military Judge, and so I just got to try
22 to make 0-6 and I've got to learn both sides of

1 the aisle. And so it was not as, in terms of
2 career progression, not as potentially weighted
3 toward being the top prosecutor of whatever
4 service that you're in.

5 From the defense side again, these are
6 my Views, I feel that's a little bit of a concern
7 because I feel like that it should be just as
8 encouraged to fight for truth and justice on the
9 defense side of the aisle as on the government
10 side of the aisle. Not that the services aren't
11 doing that and training to that but just the
12 optics of having a star waiting at the end of the
13 road on the prosecutor's side and not on the
14 defense side, I think, creates a different
15 perspective for those who are embarking on a
16 career in litigation. It's just different than
17 it's been in the past, and so I think that's
18 worth at least an offering for thought and
19 discussion.

20 CHAIR HILLMAN: Thank you. Lieutenant
21 Colonel Abrams.

22 COLONEL ABRAMS: Yes, ma'am. So my

1 last job I had oversight over 23 installation-
2 level Defense Counsel, about 20 paralegals that
3 went with that, as well as 6 Senior Defense
4 Counsel traveling around and doing all kinds of
5 stuff. In my current job I've got, obviously,
6 I'm in the appellate shop. In neither of those
7 have I seen anything that gives me concern about
8 folks being able to focus on and do their job as
9 defense counsel.

10 Are there things that come up every
11 now and again? I think I've got enough tasker
12 exhaustion from about everybody has worked for
13 me, but you try and manage those as best we can.
14 And, I mean, when I reflect on the feedback
15 conversations that I've had with folks, because I
16 would have to get initial feedbacks and then
17 intermediate feedbacks during, basically, each
18 year and any other time they want to talk, there
19 were plenty of conversations where we were
20 talking about sort of some of the things that
21 Captain Gaston is talking about. Basically,
22 where do I go next, what will I do next in my

1 career, but I haven't seen those in a way where
2 they have any sort of impact in people doing
3 their job. And the first answer to that is
4 always focus on doing your job. The folks who we
5 want to see in the senior litigation, at least in
6 my experience and what I would tell them, would
7 be the folks who are capable of doing their job
8 and being able to focus on the client that's in
9 front of them, whether that client is the
10 government or that client is an accused.

11 I just haven't seen that play out in
12 a way where folks are concerned about being able
13 to just do their job. Gilmet is certainly a
14 concerning example of where that might go awry;
15 but, in terms of how I've seen that play out, and
16 I've seen plenty of opportunities where folks are
17 bouncing back and forth between the prosecution
18 or defense side, but I'd take any of the folks
19 that I had on the defense up against the
20 prosecution side any day and really didn't have
21 any concerns about their ability to go up against
22 the office of the special trial counsel.

1 Everyone is trying to pull personnel
2 from the same pool, but you can only pull so many
3 people. Ultimately, the assignments of that
4 isn't something that the OSTC is in charge of.
5 It's something that, at least for the Air Force,
6 the Air Force assignment folks are in charge of
7 within the JAG Corps, and it's been, I think,
8 fairly dealt with in terms of everybody having a
9 really good pool of advocates to go out there and
10 do their job. I mean, do we see a little bit
11 more senior people in the OSTC side? We do, but
12 they have a little bit of a different function
13 because, whereas they're dealing with essentially
14 general officer convening authority types or at
15 least having to interface with those folks and
16 their lawyers, you know, that's their job. And a
17 lot of folks have a little bit greater experience
18 in order to, I think, engage in that. I don't
19 necessarily have a concern with that.

20 I would have more concern if we were
21 seeing some of those issues trickle down to the
22 application of people doing their jobs at the

1 trial level, and we're just not seeing that.
2 We've got the training opportunities. Are there
3 small things I'd love to see change? Sure, but,
4 you know, I think the broader issues would be
5 maybe some of the systemic things that we've
6 otherwise been talking about today. But if
7 there's systemic things to afford an appropriate
8 opportunity for the defense counsel to provide
9 the check within the system that they're meant to
10 provide, I don't have any concerns about them
11 being able to do that and I haven't seen or
12 experienced any sort of pressures on them to do
13 anything other than what their job is.

14 CHAIR HILLMAN: Thank you. Lieutenant
15 Colonel Porter.

16 COLONEL PORTER: Yes, ma'am. I think,
17 naturally, young defense counsel, right, when
18 they see the changes with the office of special
19 trial counsel, to include the one star question,
20 whether their defense experience is going to get
21 the same weight. And I think, as they progress
22 up and have discussions with their supervisors

1 and the way the Army has handled this change in
2 prosecution and the stand-up of the office of
3 special trial counsel, is also to look at defense
4 expertise and increasing rank on the defense side
5 in addition and getting more complex defense
6 litigators spread across the field to kind of
7 help remedy this concern, whether it's a valid
8 concern or not. And I think, as counsel
9 progresses up to the more senior ranks on the
10 defense side, I think there's less of that
11 concern and it's just making sure and educating
12 our young defense counsel on kind of career
13 progression, what we expect if you want to remain
14 in military justice and you want to be a career
15 litigator. Both prosecution and defense are
16 invaluable, whether you want to be the lead
17 special trial counsel, you want to be a military
18 judge, or you want to sit on the Army Court of
19 Criminal Appeals, all of those are valuable.

20 And I think, naturally, there has been
21 talk over the last two years about whether it is
22 stacked against, and I just think that, in

1 actuality, my personal opinion is I don't
2 necessarily think so on the Army side, but I do
3 think that it's a constant struggle to make sure
4 that the defense is getting the same resources
5 that they need also to do their job.

6 CHAIR HILLMAN: Thank you.

7 MR. COOK: I'll piggyback on that last
8 thought and wearing my Coast Guard hat. So to
9 the extent that, again, we're the beneficiaries
10 of this relationship with the Navy and the Navy
11 is providing our trial defense, I'm very
12 comfortable with Navy trial defenders versus
13 Coast Guard prosecutors.

14 To the extent that for the last two
15 years I've had trouble getting billets filled,
16 usually that's, you know, especially to the
17 extent where they get to reside, you know,
18 Honolulu, San Diego, are you kidding me? An Army
19 guy would kill for those jobs. So last year I
20 had trouble getting someone in San Diego for the
21 first time in eight years and gapped that billet
22 with the Navy. Last year, I couldn't get an

1 Active Duty Coasty for one of my two appellate
2 defense jobs. We activated a reservist, a very
3 talented guy and we're fortunate to have him.
4 But, again, you know, the couple of hundred
5 people, I can't get one person to raise their
6 hand?

7 This year, trouble with the Navy Yard
8 here in D.C., which is usually a plum assignment,
9 and then, again, appellate defender, no one
10 raised their hand. Maybe it's me. They don't
11 want to come to be supervised by me. Terry can
12 probably speak to that. But I was able to
13 recruit somebody, so I think I will have someone.
14 But we had to get creative with this all-remote
15 work concept, and, for an old guy, it's like,
16 what, you're not going to come to work?

17 But, anecdotally, I would keep an eye
18 on that. You know, to the extent that Gilmet, a
19 Marine case, we had a Coasty take the lead, and
20 I'm very familiar with that. And that was
21 outrageous, you know, in my opinion as to what
22 was said and alleged as to you can't spend too

1 much time in the defense community and you better
2 watch yourself. And then wearing my Army hat and
3 talking to some of my old Army buddies, the whole
4 Warren Wells issue, getting fired over something
5 you said ten years ago when you were a regional
6 defense counsel, you know, what kind of chilling
7 effect does that have on someone wanting to spend
8 a lot of time in the trial defense services.

9 So I would keep an eye on it. I would
10 maybe talk to the detailers and see if the other
11 services are having, you know, select and direct
12 versus, you know, when I was an O-3 and, you
13 know, at old Fort Bragg, you would knife-fight
14 each other to go to trial defense. I mean, that
15 was, you know, a plum assignment to go and prove
16 -- that's why you went to law school if that's
17 what you wanted to be is a litigator and then
18 prosecutor, too. That's the other side of the
19 coin, wearing a white hat.

20 But I just, I was surprised, and now
21 I've seen it for two years in a row, and I don't
22 know exactly the cause of it. We call it the

1 OCP, not the OSTC, but that's the shiny penny.
2 That's all the assets and all the hoopla and the
3 new offices in Charleston and the one star. So I
4 think that's, you know, I have no specific proof
5 on that, but that's where I'm hearing a lot of
6 folks want to go. Thank you.

7 CHAIR HILLMAN: Thank you. Last set
8 of questions, from me at least, are appellate
9 issues concerning the new punitive offenses. So
10 what issues have you seen, to the extent you have
11 seen any, raised on appeal around some of the new
12 offenses, and the list that we sent over included
13 Article 93(a), 117(a), 128(b), 130, 132, 134 for
14 sexual harassment. So thoughts on those?

15 MR. COOK: I'll jump on that grenade
16 first. So I understand the government appellate
17 was in here and they were mentioning we have a
18 couple of 117(a) cases, but we don't because the
19 government chose to charge them as 134s and not
20 go under 117(a). Obviously, we're making the
21 argument, wait a minute, that's granted, you
22 should have gone under 117(a), so that's going to

1 be argued -- or not you should have, you were
2 required to go under 117(a), and that gets argued
3 at CAAF in February. We'll see how we do.

4 And then we have another case that
5 just come up recently where they substituted the
6 terminal elements for the 117(a) military nexus.
7 Again, we're saying that was an evidentiary
8 decision. You have, you know, a harder time to
9 prove the military nexus than the PGOD or service
10 discrediting. So that's the two week standard
11 non-117(a)'s.

12 COLONEL PORTER: Thank you. I think,
13 generally, we've really only seen some issues
14 perc up with 117(a), and it's the difference in
15 how the service courts have handled the
16 definition of broadcast. So the Army Corps has
17 come down and said, hey, if the video is on the
18 phone and it's just shown, right, to the
19 individual, it's not broadcast; but the Air
20 Force, I believe, has said something different or
21 the Navy has said something different and the Air
22 Force is with the Army. So there's a bit of a

1 difference amongst the service corps on that
2 issue.

3 Other than that, for the other fairly
4 new punitive offenses, it has not percolated up,
5 at least on the Army side, in any meaningful way
6 yet.

7 CHAIR HILLMAN: Thank you.

8 COLONEL ABRAMS: Same thing for the
9 Air Force. These issues just haven't made their
10 way up to the appellate shop, and we've got, I
11 looked -- I appreciated the opportunity to do a
12 little legal research in prep for today -- I
13 looked, there were ten Air Force Court of
14 Criminal Appeal decisions related to Article
15 128(b). Nothing really was developing any
16 meaningful legal issues there. Same thing for
17 the three cases that we're dealing with Article
18 130. It was just sort of, by the way, this is
19 what this person was convicted of.

20 The only areas where we've seen some
21 development is under Article 117(a). The three
22 issues that we've seen crop up are the

1 identifiability of named victim, the connection
2 to the military mission or environment -- I think
3 both of those were brought up by CAAF in the
4 Hiser case, H-I-S-E-R -- and then the broadcast
5 issue that Lieutenant Colonel Porter was just
6 mentioning, the Air Force Corps decision that
7 came out. It was an unopposed decision that came
8 out in this past December, Jennings. It was
9 dealing with a split between some otherwise
10 previously-decided Army and Navy cases, one being
11 Davis on the Army side and Lajoie being the Navy
12 case. And the Air Force agreed with the Army's
13 view of that. As Lieutenant Colonel Porter
14 described, for there to be a broadcast, the case
15 involved, showing it from a phone, it had to
16 basically go to some other device in order to
17 qualify as broadcast under the statute.

18 Otherwise, these issues just have not
19 made their way up. Like Captain Gaston has
20 talked about, the issues that we're more seeing
21 tend to be very, I would say, almost generalized
22 to here's kind of the typical appellate bucket

1 that you're going to see: you're going to see
2 sentence severity, I think you're going to see
3 issues related to victim unsworns, and you're
4 going to see, at least on the Air Force side,
5 you're going to see issues related to maybe the
6 propriety of sentencing argument. For these
7 specific offenses, very little is finding their
8 way up just because we haven't had enough time.

9 CHAIR HILLMAN: Thank you.

10 CAPTAIN GASTON: Yes. I agree that
11 the feedback that we got from the military
12 defense counsel is simply because we haven't seen
13 many issues on appeal is that at least the 134
14 sexual harassment is sort of a welcome change
15 because it has very clear definitions and
16 elements, and so it's actually helpful to
17 practitioners on both sides of the aisle to have
18 a clear target, for lack of a better term.

19 The other part of the feedback we got
20 is on a little bit different subject there, but
21 I'll broach the subject now. In terms of where
22 the plea agreements are going in terms of a

1 specific sentence, more or less, being agreed to,
2 the thought is, well, if things are moving in
3 that direction, shouldn't an accused also be able
4 to enter a nolo contendere plea or an Alford plea
5 if that's where things are going. If the
6 argument is that the practitioner should have
7 more control over what the plea agreements look
8 like and the military judge will simply maybe, if
9 the trend continues, be more and more in the role
10 of just making sure it seems like a fair deal,
11 then why shouldn't an accused be able to plead
12 guilty to something with a nolo plea or an Alford
13 plea the way they would in civilian court.

14 We've had at least one case where
15 there was an attempt to plead guilty to a pretty
16 serious offense. It wasn't accepted by the
17 military judge, and so the deal was not accepted.
18 So it had to go contested. The contested trial
19 resulted in the guilty finding that the accused
20 was or at least his defense counsel were afraid
21 of, and the sentence that was given was
22 significantly more than what was agreed to in the

1 plea agreement. So this kind of speaks to that
2 issue. I know this body may not have looked at
3 that particular issue, but, given your legal
4 experience of those who are on this panel, I
5 think that it is something that ought to be
6 looked at, which has been a difference of the
7 military justice system since its inception
8 essentially, and it's very different from what
9 the civilian system looks like.

10 CHAIR HILLMAN: Thank you. Let me
11 check and see if we have any last questions from
12 our panel members. Okay. You overwhelmed us
13 with insight and experience on that. So thank
14 you for your time with us today and thank you for
15 your support of the teams that you lead and our
16 accused service members right through the end of
17 the appellate road for them. It makes a
18 tremendous difference. It's essential to the
19 operation of the system, and we appreciate your
20 service and leadership there. So thank you.

21 MR. YOB: I also want to say thanks to
22 the panel members. We'll take a 15-minute break.

1 We'll discuss during that break whether we want
2 to move into, the rest of the afternoon is free
3 for the panel to do, not guest speakers but the
4 panel, we can either do presentations or
5 discussions about status of the projects for the
6 coverage report, you can go back into executive
7 session if you feel like you need to do some work
8 there, or we can move into the wrap-up of the
9 day's events and go from there. So we'll decide
10 over the 15 minutes.

11 (Whereupon, the above-entitled matter
12 went off the record at 2:36 p.m.)
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This is to certify that the foregoing transcript


In the matter of: Military Justice Review Panel

Before: DOHA

Date: 01-17-24

Place: Arlington, VA

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Court Reporter

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