

MILITARY JUSTICE REVIEW PANEL (MJRP)

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OPEN MEETING

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WEDNESDAY
APRIL 19, 2023

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The Military Justice Review Panel met in Salon 4 at the Renaissance Arlington Capital View, 2800 S. Potomac Ave, Arlington, Virginia, at 8:25 a.m. EDT, Elizabeth Hillman, Panel Chair, presiding.

PRESENT

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

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Ms. Meghan Peters, Staff Attorney*

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Staff Attorney

Ms. Kate Tagert, Staff Attorney

Ms. Eleanor Magers Vuono, Staff Attorney

*Participating virtually

Witnesses**Pretrial Process: Special Court-Martial Convening Authorities**

Col Todd Randolph CDR William Buford

LtCol Sasha Kuhlow

Pretrial Process: General Court-Martial Convening Authorities

LTG Patrick Matlock Maj Gen Kenneth Bibb

RADM Charles Rock RADM Brian Penoyer

Pretrial Process: Academic Experts

Prof. Geoffrey Corn Prof. Eugene Fidell

Dean Lisa Schenck

Pretrial Process: State and Federal Prosecutors

Mr. Victor Fitz Mr. Daniel Gardner

Mr. Thomas Swanton

C-O-N-T-E-N-T-S

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

2 8:32 a.m.

3 COL RANDOLPH: Good morning to the
4 panel. My name is Colonel Todd Randolph. I'm
5 the Joint Base Andrews Installation Commander,
6 Special Convening Authority for the 316th Wing.

7 Been on active duty Air Force for 34
8 years; 10 months in this role. Looking forward
9 to talking with you, and sharing my thoughts
10 today.

11 COMMANDER BUFORD: Hey, good morning,
12 thanks for having me. I'm Will Buford, I'm a
13 career ship driver, surface warfare officer.
14 Been on a variety of ships all over the place.

15 I had command of USS Chinook, coastal
16 patrol craft, and USS Momsen, a destroyer. Right
17 now I'm the constellation class frigate branch
18 head on the OPNAV ship staff.

19 LT COL KUHLOW: Good morning to the
20 panel. My name is Lt. Col. Sasha Kuhlow. I had
21 command of 3rd Radio Battalion from 2019 to 2021.

22 So that's a battalion of about 500

1 Marines, 100 whom of, of whom were usually
2 deployed somewhere, with about a \$55 million
3 inventory of equipment that we needed to maintain
4 to support III MEF.

5 I currently work in the Office of
6 Secretary of Defense, Intelligence and Security
7 in Warfare Support.

8 Thank you.

9 CHAIR HILLMAN: So, we asked you to
10 join us, because we're interested in
11 understanding how the recent changes in military
12 justice have affected your role, the part of your
13 role that involves being a convening authority.

14 So, we'd love your initial reactions
15 on how those changes in recent years have altered
16 your approach to military justice, and how
17 effective you think it is in the different
18 environments that you've seen it operate.

19 COL RANDOLPH: So, for me, this is my
20 first year in this role as the Special Court-
21 Martial Convening Authority.

22 And for the last 10 months, I've had

1 four cases where I, you know, worked through
2 preliminary hearing officer reports, two of which
3 I actually had you know, to make referral
4 decisions on.

5 So, I'm a little new to the nuances of
6 it, but actually working throughout my career in
7 different elements of the military justice
8 system, I haven't really changed my approach.

9 Through my, my focus has always been
10 through advising from my Judge Advocate staff,
11 trusting their expertise, and assessing all
12 elements of the facts that I have before me.

13 And all recommendations at all levels,
14 then making my command decisions based on that.

15 And so, with any change, you diagnose
16 the changes, and you look at the impacts. But at
17 the end of the day, command is about
18 accountability and responsibility of ensuring
19 good order and discipline, across the force.

20 And, as it relates to members involved
21 in the military justice system, you know, the
22 focus is on providing the support and services

1 that they need throughout the process.

2 Those are the things that won't change
3 from a command authority, and command
4 responsibility sampling.

5 CHAIR HILLMAN: Thank you, Colonel
6 Randolph.

7 COMMANDER BUFORD: So, I should preface
8 this by saying I have very little, if any, direct
9 experience as convening authority, not having any
10 cases during my time of command that came up.

11 The experiences that I have had along
12 these lines, particularly with, you know, the
13 more prosecutorial discretion with more severe
14 cases.

15 I've seen the impact of those on the
16 crew. I'll echo the Colonel's comments on the
17 commander's responsibility for good order and
18 discipline, as a foundational aspect of combat
19 readiness.

20 The changes from my view seem to be
21 helpful in terms of bringing in you know,
22 additional subject matter expertise to the

1 problem.

2 As I said, I'm a career ship driver.
3 So for legal matters, I'm not you know, the
4 diehard subject matter expert.

5 Having additional authority, or
6 additional subject matter expertise to help me
7 through that process, I think can only be
8 helpful.

9 And the, achieving a good outcome for
10 both victims and due process for offenders, the
11 more that we can do to achieve that outcome,
12 while simultaneously kind of I don't know
13 relieving the burden of, of the legal subject
14 matter expertise from commanders, seems to me to
15 be, to be all for the good.

16 CHAIR HILLMAN: Thanks, Commander
17 Buford.

18 LT COL KUHLLOW: So, I think the thing
19 that I learned while I was in command, aside from
20 leveraging the, the judge advocates and the legal
21 system for advice, whether it was the MEF SJA or
22 LSSS, was how much responsibility falls on the

1 commander during a legal process to ensure not
2 just the good order and discipline of the
3 command, but the command climate, and the welfare
4 of the Marines.

5 And so, the thing that I think struck
6 me while I was in command, was you've got about
7 10 percent of the problem that is legal and
8 outward focused, and the other 90 percent was
9 things like how are the Marines getting services
10 that they need, whether that's the victim or the
11 accused.

12 Managing the messaging in the command,
13 and ensuring that you know, if you have somebody
14 who's non-deployable and you have to replace
15 them. Things like that, that you can manage that
16 properly.

17 So, when I look at the changes both
18 enacted and proposed to the military justice
19 system, I think my biggest concern as a former
20 commander, is what is the impact on time, and how
21 does the commander have the tools to manage the
22 other portion of the problem, to maintain mission

1 effectiveness within the unit itself.

2 And, some, you know, some young
3 Marines can handle pressures like that
4 tremendously well, and others require a
5 tremendous amount of resources to ensure that
6 they remain not just mission capable, but healthy
7 and appropriately focused.

8 So, that was a big takeaway for me in
9 command, and as I look to kind of future service,
10 I'll be curious to see how these changes play
11 out.

12 And then what tools the commanders
13 have to maintain the other portion of the
14 problem, the other portion of the challenge,
15 which is command climate, and the welfare of the
16 Marines in the unit.

17 CHAIR HILLMAN: Thank you, Colonel
18 Kuhlow.

19 Let me turn it over to our panel
20 members. Captain Barney?

21 MEMBER BARNEY: Thank you for being
22 with us this morning, and sharing some of your

1 views on this.

2 I'd like to get a sense if you could
3 help us, about how you as you went into a
4 position with command responsibility as a Special
5 Court-Martial Convening Authority, what kind of
6 preparation did you receive in order to perform
7 those duties?

8 And how do you, if you had an
9 opportunity or have had an opportunity to do
10 that, how well prepared do you feel that you were
11 to work with the various players?

12 And when I think about the players,
13 I'm thinking about in the cases of like adult
14 sexual assault-type cases where you have, you
15 have military criminal investigators, you have
16 victim and witness coordination, special victim's
17 counsels.

18 I wonder if we can just maybe start
19 with you Colonel Randolph, talk a little bit
20 about that, that preparation, and how well
21 prepared you felt, if at all.

22 COL RANDOLPH: Well, sir, I'll start

1 by answering I felt well prepared for command,
2 every level that I've taken command.

3 At the squadron command level with
4 about 1,400 personnel under my command, one of
5 the things that the Department of the Air Force
6 does for commander preparation, we spend about
7 three weeks in command prep.

8 And part of that preparation includes
9 a Senior Officer Legal Orientation course, the
10 SOLO course that we take.

11 And it gives us an opportunity going
12 into a command, to refamiliarize ourselves from
13 the responsibilities that we are inheriting in
14 the command position, and distinguishing that
15 from what we may have witnessed prior to command,
16 in our engagements with non-judicial punishment.

17 And different legal dynamics that we
18 may have witnessed, or been a part of on our way
19 up to the command position.

20 And at each level from squadron
21 command, group command, and now at installation
22 command, at each interval I've always had that,

1 that training that focused on the legal dynamics
2 in the military justice system.

3 And the constant theme of that
4 training is to understand that your legal
5 advisory is legal advice. Those are your
6 experts.

7 But at the end of the day, the
8 commanders are responsible for making decisions.
9 And, those decisions affect good order and
10 discipline.

11 Those decisions are what is the
12 bedrock of the health and morale of the unit, as
13 well as the installation as a whole.

14 And so for me, it's always been the
15 gravity of getting that reorientation through
16 that SOLO course, in preparation to command.

17 And then leveraging the expertise of
18 your JA. That is what they're trained and
19 experts at doing, and providing you that sound
20 legal advice to help you make decisions.

21 Over.

22 MEMBER BARNEY: Thank you, Colonel

1 Randolph.

2 Commander Buford?

3 COMMANDER BUFORD: In terms of formal
4 preparation, there's three different legal
5 schools taught at the Newport, Rhode Island
6 Military Justice School for the Navy, for
7 prospective commanding officers.

8 There's also some scenario driven
9 things, and it is more of a philosophical
10 approach, at the Navy Leadership and Ethics
11 School, which is a two-week school prior to
12 command.

13 And then there are multiple aspects
14 throughout the command pipeline, of reiterating
15 that the details of the Sexual Assault Prevention
16 Response Program, sort of the mechanics of that,
17 which is less of a legal thing and more of a, you
18 know, mechanics in administrative thing. So, I
19 felt fairly well prepared in that sense.

20 And then on the operational side, I
21 had some pretty great support from a number of
22 JAGs.

1 I had direct speed dial access to the
2 base JAG where my ship was home ported, the
3 squadron JAG, and then the JAG for ComNav Surface
4 Cred Middle Pacific, which was the next echelon
5 up.

6 And all of those folks were, were
7 happy and willing to return all my phone calls.
8 And, I spent many hours in consultation with them
9 on any number of legal matters.

10 MEMBER BARNEY: Thank you.

11 Colonel Kuhlow?

12 LT COL KUHLOW: So, I would say prior
13 to command, you have the Cornerstone course,
14 which will cover both legal and some of the
15 sexual assault cases in the curriculum.

16 And, there's also the opportunity to
17 take legal courses ranging from two days, to two
18 weeks. Typically, the CO or the XO, or both,
19 will attend those courses.

20 In terms of things like victim's
21 witness, or the Victim's Witness Program or the
22 SARC coordinator, things like that, you will get,

1 you will end up sitting down as I did with those
2 individuals, to get your initial commander's
3 training, and then to go through whether it's
4 processes, inspections, regular meetings.

5 So, those are programs that you are
6 required to manage with the commanding general's
7 inspection programs. So, you have regular touch
8 points.

9 So, I would say those are kind of your
10 baseline. What I found was I learned more when I
11 engaged with like the MEP staff judge advocate,
12 because I had a specific circumstance that I
13 could kind of work through with them.

14 Understanding that they were providing
15 legal advice and that at the end of the day, the
16 decision rested on, on me as the commander.

17 I would say we had, the engagement
18 with the investigative services varied. And that
19 was based on they were busy, they were over
20 tasked in some cases. And in other cases, they
21 were regularly engaged with our command.

22 So, I would say that was probably one

1 thing that was not maybe as evenly spread out as,
2 or as reliable in some cases. And, I think that
3 was just based on their workload.

4 Over.

5 MEMBER BARNEY: In some of the earlier
6 comments you all made, you talked about you know,
7 your command accountability, your requirements to
8 take care of your people in order to do your
9 mission accomplishment.

10 And, I just wonder as you think about
11 a scenario now where serious cases involving
12 alleged misconduct can be removed from you as a
13 convening authority to handle and handed to
14 someone else.

15 How does that impact in your view,
16 your ability to maintain the kind of, of
17 supportive, engaged leadership with the
18 individuals in your commands, in order to perform
19 your mission?

20 In other words, if that military
21 justice role as a convening authority is no
22 longer yours to execute, how does that impact

1 your ability to maintain good order and
2 discipline in the command with the folks who are
3 there, as well as just take care of your airmen,
4 your marines, your sailors?

5 Colonel, would you like to start?

6 LT COL KUHLOW: So, I think my biggest
7 concern is timeliness. This process asks
8 commanders to assume risk that they may not
9 necessarily be resourced for.

10 And that is, because when these cases
11 happen, it's not a matter of weeks. And it's
12 sometimes not a matter of months. Sometimes
13 you'll have something that goes on for a year,
14 potentially longer.

15 And during that whole time you're
16 potentially supporting a victim, you're
17 supporting an accused, you probably have at least
18 one person that is on the books, but not
19 deployable.

20 You're trying to manage a chain-of-
21 command to make sure that the rumor mill does not
22 get out of control.

1 And so I think that's, some of these
2 cases I do believe that there is an opportunity
3 to provide some level of professional distance.

4 And, some of the covered offenses are
5 very clear cut. But I do think that there are
6 some that present a challenge in terms of either
7 how widespread an offense could be.

8 In the case of maybe, and if we're
9 talking covered offenses like distribution of an
10 intimate image. Like those chat groups are never
11 one people, or one person.

12 So, in the case of either how
13 widespread an offense is, or how maybe nuanced or
14 things like that.

15 So, that to me is the challenge space,
16 is the timeliness of resolution. And the whole
17 time that's going on, does the commander have
18 enough tools to, and enough engagement with
19 whether it's trial counsel or whoever else, to
20 manage what's going to happen next.

21 And, to manage the command climate,
22 and all the things in the command to make sure

1 that those individuals are supported, and that
2 the command can continue its mission.

3 So, I do think there are some
4 significant challenges but I think it's
5 timeliness.

6 MEMBER BARNEY: Thank you.

7 Commander Buford?

8 COMMANDER BUFORD: I think that the
9 issue of timeliness is definitely very important.
10 I had one case that went up you know, for
11 referral, a severe case that the perpetrator
12 confessed to upon arrest.

13 And, the case wasn't disposed of for
14 the better part of year. So that sailor was
15 still notionally carried on the ship's books, and
16 unreplaceable.

17 So from, there's that aspect, and
18 there's always a tension a little bit between
19 combat effectiveness versus sort of due process
20 as a service member, and a citizen.

21 And then the problem with
22 distributable inventory for the force. There's

1 not a great solution to you know, transferring
2 someone who's been accused of a crime even though
3 functionally, that person is no longer you know,
4 a frontline, effective, deployable sailor onboard
5 the ship.

6 But at the same time, you know, I
7 still have to operate. And I had the second part
8 that's tension with that, is the information
9 releaseability.

10 Again, for all the right reasons, you
11 know, it's not generally shareable details of
12 cases and, you know, where the prosecution's at
13 or not.

14 But it poses problems for good order
15 and discipline and command climate. At one
16 instance, I lost two of my better engineers
17 directly before a major engineering inspection
18 deployment certification.

19 And not only was it just a workload
20 increase, but it was also that I didn't have a
21 whole lot that I could tell the rest of the crew.

22 And these two individuals were fairly

1 well liked, and you know, known to be productive
2 members of the team.

3 So to take that hit, and the best I
4 could say was look NCIS gave me a report on these
5 two individuals and as soon as I read it, I had
6 them off the ship.

7 And, that got me a little bit of you
8 know, buy in from the crew. But there's still a
9 little bit of a, you know, a gap there between
10 what can happen.

11 So, those, I guess to sum up, the
12 timeliness of it. Particularly the timeliness is
13 exacerbated by the ability of the personnel
14 system, to provide replacement distributable
15 inventory.

16 And then there's also that issue of,
17 you know, what is the correct mode. Because
18 there's for all the right reason again, an
19 assumption of innocence until proven guilty.

20 But at the same time, like I still
21 have a ship to run, so.

22 MEMBER BARNEY: Thank you.

1 Colonel Randolph, please.

2 COL RANDOLPH: Yes, sir.

3 In those cases, where the Office of
4 Special Trial Counsel will exercise its authority
5 over offenses, I think commanders will still
6 largely have the same role.

7 We will, as mentioned by my colleagues
8 here, still be responsible and accountable for
9 supporting the victim and the accused throughout
10 the process.

11 Maintaining good order and discipline;
12 and, additionally, commanders will have an option
13 to provide input on the disposition.

14 So, it's about engagement to the
15 process. And I don't see the Office of Special
16 Trial Counsel being a separate system. It's just
17 part of the military justice system as it comes
18 onboard.

19 And it's about maintaining an
20 engagement. The legal process through all the
21 different procedural dynamics, can sometimes
22 delay cases for a variety of reasons.

1 And timing, and efficient execution of
2 a case is always something that commanders are
3 balancing with as it continues to support both
4 the accused, as well as the victims.

5 And so for me, not much has changed.
6 There are dynamics within the command structure
7 and responsibilities, that will always remain.

8 We will support the Office of Special
9 Trial Counsel in every way that we can, and work
10 hand-in-hand collaboratively, to ensure at the
11 end of the day, that our military justice system
12 is effective in deterring the behaviors that we
13 don't want to see in our armed forces.

14 MEMBER BARNEY: Thank you, and thank
15 you Chair Hillman.

16 CHAIR HILLMAN: Captain Aldana?

17 MEMBER ALDANA: Good morning, thank you
18 for being here to share your experience.

19 My question is a three-part question.
20 You all have indicated that you rely heavily on
21 your SJA, JAG as subject matter experts, to help
22 you or guide you in your decision making process.

1 First, how confident are you in that
2 legal advice? Or if you've ever deviated or
3 disagreed with that legal advice.

4 And then second, what type of
5 information are you provided in making that
6 decision?

7 Are you given a written memo, just an
8 oral advice? And do you actually read the report
9 of investigations, the whole entire perhaps the
10 PHO's report?

11 And then I think there was three
12 questions in there embedded, so.

13 Colonel Randolph?

14 COL RANDOLPH: So, for the first
15 question, I think it's the confidence that I have
16 in my SJA and my legal team in and of itself, is
17 just through my experience throughout my career.

18 I've found all of my judge advocates
19 to be extremely well knowledged and thorough;
20 very thorough in their review in the law; and,
21 focusing on giving me advice, and options.

22 And verbally, written, as well as a

1 multitude of conversations, and give me the
2 opportunity to ask questions.

3 And then, give me the deliberation
4 space to make the decisions that I need to make.
5 And then be impartial in their advice as they
6 give it.

7 And, from case-to-case, because I'm
8 not always, the commander is not always going to
9 take the advice given.

10 Although I've not had a situation
11 where I was given legal advice and went against
12 said legal advice, but I know of situations where
13 that has occurred through some of my peers and
14 colleagues for a variety of reasons.

15 But to be able to give advice. I've
16 seen the professionalism in our JAG Corp to give
17 advice. If that advice isn't specifically taken
18 to the letter, it doesn't affect their judgment
19 and ability to give advice on the next case, and
20 the next case.

21 And, that just gives me more
22 confidence in the advice that I'm receiving going

1 forward. So, that's really always been helpful
2 for me.

3 Your second question, sir, if you
4 could repeat that one?

5 MEMBER ALDANA: I think the second one
6 was you've deviated, and I think you've answered
7 the question of what type of information you're
8 given.

9 Do you actually read the report of
10 investigation, or is there a memo usually that's
11 like a memo that they could share with you?

12 COL RANDOLPH: Yes. Usually a legal
13 review memo that includes all the laws, and all
14 the options, and a little distilling of what X
15 equals, means in terms of if you go this way, or
16 that way, here are the implications.

17 These are the kind of things. And
18 then they give me a recommendation of which of
19 the COAs that they would recommend.

20 Over.

21 MEMBER ALDANA: Colonel?

22 LT COL KUHLOW: So, most of my

1 engagement was with the MEPS SJA, and I thought
2 our conversations, the SJA provided me options
3 and context, which was valuable. But at the end
4 of the day, the decision to proceed forward was
5 ultimately mine.

6 And, so I found the SJA to be a very
7 good sounding board in terms of figuring out what
8 my left and right lateral limits were.

9 So I could balance the tools that I
10 had in the command, to make sure that we took a
11 whole, a whole incident, or a picture of the
12 whole incident.

13 We did get, most of our conversations
14 were conversations. However, we did get some,
15 some memos or legal read outs of where the MEPS
16 stood on certain issues that were required, based
17 on process.

18 And those we read, and those we took
19 you know, took to heart, but at the end of the
20 day, I always had flexibility as a commander, to
21 add, add nuance within you know, kind of the
22 bounds of the UCMJ, to make sure that we were

1 doing what was right for the command.

2 And, I think the ability to just have
3 that robust conversation was incredibly helpful.

4 MEMBER ALDANA: Thank you.

5 Commander?

6 COMMANDER BUFORD: In terms of, excuse
7 me, in terms of confidence level, I felt very
8 good about talking to the JAGs. They were you
9 know, blunt and frank about what the letter of
10 the law said.

11 They were also very good about the
12 limits of their own knowledge. If they didn't
13 know a particular legal point, they would state
14 that straight up and then were great about going
15 to do research. And they would reliably get back
16 to me on any finer point that was missing.

17 The second piece that they gave me is
18 a greater amount of confidence, the dedicated
19 legal personnel have a much greater dataset to
20 draw from.

21 So in the course of a command tour of
22 18 months or so, you know, you might get a

1 handful of things that come up.

2 Whereas the JAG who's dealing with the
3 squadron, or the base, or the whatever, has a
4 much larger dataset to draw from, which gave me a
5 lot more confidence in terms of how to handle
6 things.

7 And then secondly, with the way the
8 system is set up, as noted, there's a lot of
9 things that still fall at the commander's
10 discretion.

11 It was extraordinarily helpful to have
12 those conversations with the JAG, and then go
13 have you know, seek guidance or mentorship, from
14 the chain-of-command.

15 Hey, this is what I'm getting, this is
16 you know, have you ever seen anything like this.
17 And it was, I felt zero pressure in any direction
18 from any of those people.

19 Both the JAGs and the chain-of-command
20 from the commander to the strike group commander,
21 were very much hey, you're in command, it's your
22 personnel, this is your issue, you're going to

1 solve it.

2 And if you, you know, need any advice
3 or additional contact, or information, we can
4 provide. But as the commander, you're the
5 authority to make the decisions.

6 The meeting was almost always verbal.
7 I sent a lot of email back and forth. That was
8 extraordinarily helpful particularly under way.

9 There's some voice comms with getting
10 into telephones from the ship sometimes, so I
11 would always try to talk on the telephone, if
12 possible. And if not, it is mostly email.

13 And then I don't know that I got you
14 know, sort of formal legal memoranda except for
15 you know, very serious things, which would have
16 been one or two in the course of the command
17 tour.

18 MEMBER ALDANA: Commander, Colonel,
19 have you ever disagreed, or took a different
20 route from the advice of your JAGs?

21 LT COL KUHLLOW: I don't think I ever
22 disagreed with them. But what I was afforded was

1 probably one or two options on how to manage,
2 manage an issue. And, I had the freedom to
3 choose.

4 So, but generally speaking, I mean and
5 I think to the commander's point, the dataset in
6 my mind, was very important.

7 Because I would deal with one case.
8 These folks would deal with many. And so just
9 hearing kind of how other commands did business,
10 and being able to kind of iterate off of that
11 was, was helpful.

12 And then they would also say, you
13 know, get references or hey, let's look this up
14 and see what you know, see what the statute
15 actually says.

16 Or you know, so, so I don't think I
17 ever had reason to deviate because the advice I
18 was receiving, I believed to be sound and well
19 thought out.

20 CHAIR HILLMAN: Colonel Brunson?

21 MEMBER BRUNSON: Good morning. I am
22 curious as to what value, if any, you place on

1 your responsibility to make decisions in cases,
2 to have the full authority as compared to the
3 cases where the Office of Special Trial Counsel
4 has full decision authority.

5 What, do you see any differences in
6 either how that affects the command, or on your
7 ability to command?

8 And, I'm just wondering what the value
9 is you place on either of those. The Office of
10 Special Trial Counsel completely handling it
11 versus you being the decision making authority?

12 COMMANDER BUFORD: I can start with
13 that.

14 I think that the, in principle, you
15 know, particularly with ship command there is a
16 strong tradition of, there's the captain's in
17 charge and makes all decisions.

18 So, and there's a little bit of a
19 philosophical cultural resistance to you know,
20 voluntarily reducing command authority.

21 But at the same time in 2023, the
22 commander's authority is already circumscribed in

1 a number of areas.

2 And this seems to be one, particularly
3 the list of severe you know, cases that the
4 Office of Special Trial Counsel gets referred to,
5 where it only serves to kind of reinforce I
6 think, the CO's trust.

7 And, like the deck plate service
8 members know that in the case if there's an
9 allegation of one of these serious offenses, that
10 it has to go through this process.

11 And that there is no mechanism for the
12 command to ignore, not treat seriously enough, et
13 cetera.

14 I think, so in this instance, I think
15 that, you know, Will Buford's opinion is that
16 that increases command faith in the commanding
17 officer.

18 It's difficult for me to imagine a
19 situation where there would be even a remotely
20 credible allegation of any of those crimes,
21 without a, you know, full investigation that
22 would be vetted through the chain-of-command

1 anyway.

2 There were you know, even for things
3 much less severe than that list of crimes, there
4 is no question that there would be an
5 investigating officer assigned, a formal report
6 written up, and then that report would be vetted
7 through the JAG.

8 So I think in that sense, I think it
9 lends credibility and again, draws that subject
10 matter expertise into the problem.

11 LT COL KUHLOW: So, I'll go back to my
12 point on time. I do think there is value in
13 having some professional distance, for some of
14 the serious allegations between the commander and
15 the process.

16 However, I think the biggest concern
17 for me would be if things are being taken out of
18 the command's hands that could be resolved in a
19 more timely manner, that has to, there has to be
20 a balance there.

21 If a process becomes, places undue
22 burden upon the command, if a process extends the

1 time line not based on investigation, but based
2 on things like backlogs or timeliness, and things
3 like that.

4 And that I think it actually may take
5 away some credibility from the process. And
6 probably incentivize some different choices.

7 So, I, to me it's a time factor. I do
8 see some value though in being able to take
9 things out of, I do see some value in giving the
10 command the professional distance from the most
11 serious allegations.

12 But I come back to time every time I
13 think through this problem set.

14 Over.

15 COL RANDOLPH: I'll just add that I
16 believe that the military justice system has
17 always had levels of authority for certain types
18 of cases, at certain levels. And they rise up.

19 For my role as the installation
20 commander as a Special Court-Martial Convening
21 Authority, there's certain things that are within
22 my authority to decide on.

1 And then those things above, goes to
2 the General Court-Martial Convening Authority,
3 and on up the chain-of-command.

4 That's sort of how our chain-of-
5 command has always worked. That's how the
6 military justice system has always worked.

7 And the Office of Special Trial
8 Counsel is just another level within the
9 particulars of the military justice system.

10 So for me as I mentioned earlier, the
11 command authority and responsibility to maintain
12 good order and discipline, will remain.

13 There's a collaborative opportunity
14 with the commander and the Office of Special
15 Trial Counsel, that I think that engagement needs
16 to be connected.

17 And I think at the end of the day,
18 we're all trying to do the same thing, is to
19 execute the military justice system as quickly
20 and efficiently as we can.

21 Over.

22 MEMBER BRUNSON: Thank you.

1 So, given that, would you, I will try
2 to phrase it differently. Do you think there
3 would be any different impact, or would your
4 opinions change, if the Office of Special Trial
5 Counsel was responsible for all major offenses?

6 Not just those involving sexual
7 assault, but all felonies. Murder, robbery, all
8 serious offenses. Would your opinion change or
9 would you keep that same opinion?

10 COL RANDOLPH: I'll start by saying my
11 opinion would remain the same.

12 COMMANDER BUFORD: I think that's
13 probably true. It's difficult to imagine a
14 scenario where there would be a credible
15 allegation of one of those offenses, that would
16 not involve a full investigation and process.

17 And at that point, bringing in a legal
18 consultation is probably going to happen anyway.
19 But I don't know that I have strong feelings
20 about that.

21 To the Colonel's point, I think
22 there's probably some room for data driven

1 analysis about timeliness and outcomes.

2 Because I do think you know,
3 referring, if the level of OSTC authority gets to
4 the point where it is handling things that may or
5 may not be as severe, that could be handled at
6 the command echelon, it's probably going to have
7 an adverse effect on combat readiness.

8 LT COL KUHLLOW: I don't believe my
9 opinion would change on that. I think where I
10 would be curious to see how this plays out, would
11 be things like determining pre-trial confinement,
12 and stuff like that for your most serious
13 offenses.

14 That would be something that I would
15 hope that there is either, I would like to see
16 how that plays out in terms of who determines
17 that, how that gets executed, and so on and so
18 forth.

19 But my opinion would not change.

20 CHAIR HILLMAN: Let me check in with
21 our virtual panel members. I think Colonel
22 Osborn, Colonel Morris are on there.

1 Do you have questions for these
2 Special Court-martial Convening Authorities?

3 Colonel Osborn?

4 (No audible response.)

5 CHAIR HILLMAN: Colonel Osborn's not
6 there. So, that would be a no for that question.
7 So she's double-booked all day, so Colonel
8 Morris, any questions?

9 (No audible response.)

10 CHAIR HILLMAN: Okay, back to the folks
11 in the room then. So, other questions for the
12 Special Court-Martial Convening Authorities?

13 (No audible response.)

14 CHAIR HILLMAN: I have one that runs to
15 something you definitely know more about than we
16 do.

17 You're telling us a lot of things that
18 we aren't familiar with right now, but this one
19 in particular.

20 What are the biggest challenges that
21 you face with your junior force, and matters of
22 in-discipline and good order? What are the most

1 frequent challenges that you see?

2 And let's start with the Marine Corps.
3 Not to suggest that you have more challenges than
4 anyone else, but let's just start there.

5 (Laughter.)

6 LT COL KUHLOW: So, I think in terms of
7 the biggest challenges, just good order and
8 discipline across the unit.

9 I would tell you within my unit, I had
10 serious concerns about illicit drug use. And, it
11 wasn't the stuff you can test for. It's all the
12 stuff you can't.

13 So designer drugs, club drugs, things
14 like that. And being able to hold folks
15 accountable.

16 I had concerns about how people
17 treated each other with respect. Particularly,
18 and I had a phenomenal unit. I was blessed in
19 command.

20 My familiarization with the legal
21 process is actually relatively weak, because I
22 had a great command. Probably not something I

1 should say on a panel, but.

2 I think how people treated each other
3 in terms of whether that turned into particularly
4 sexual harassment, or you know, comments, or you
5 know, people's weekends becoming fodder for
6 gossip at the smoke pit.

7 That, because those are insidious
8 problems that turn into things like sexual
9 harassment, or sexual assault.

10 I would tell you my biggest concern,
11 is that I did not have a sexual assault in my
12 unit in two years.

13 I know that that is an under reported
14 crime, so I know that there were issues that were
15 not getting reported.

16 Now if they were getting reported at
17 a restricted level, fantastic, that's the process
18 working.

19 But that was a concern because then
20 you can't get after the underlying problems,
21 whether it's good order discipline, whether it's
22 how the barracks are being run, things like that.

1 So I think those were probably my two
2 biggest concerns, which are relatively minor, not
3 minor, but they would not necessarily,
4 particularly the drug use, be addressed by Office
5 of Special Trial Counsel.

6 The sexual assault/harassment I
7 believe, you know, that obviously would be.

8 Over.

9 CHAIR HILLMAN: Thank you.

10 Commander Buford?

11 COMMANDER BUFORD: In terms of
12 frequency of infractions, I think drug use is
13 probably the number one.

14 In that swim lane, the delta between
15 the military standard versus the civilian
16 standard, particularly, my ship was home port in
17 Seattle.

18 You know, recreational marijuana usage
19 is legal, pervasive, universal. Like, you can
20 order CBD drinks in restaurants.

21 So, that, that was a little bit of a
22 difficult sort of standard to hold up, saying

1 hey, this is really important to our mission, but
2 you can do it on a street corner, right?

3 That delta was difficult. There was
4 also a little bit of a difficult messaging thing
5 between bad performance versus misconduct,
6 because those are two separate issues.

7 Whether or not someone is an
8 underperforming whatever, is not necessarily a
9 disciplinary issue, but not, you know, a
10 misconduct issue.

11 And, then I think the primary
12 challenge is just a leveling function. The
13 people that make up the Navy come from all over
14 the place, and have all different backgrounds,
15 and all different experiences with you know,
16 legal systems, and justice systems, formal,
17 informal, et cetera.

18 And so occasionally I think to the
19 Colonel's point again, the system only works with
20 full participation of everyone involved.

21 Many of the crimes, particularly
22 things like sexual assault, tend to happen away

1 from witnesses, have to be reported.

2 They have to have you know, full
3 participation in both the reporting process, and
4 then the subsequent prosecution.

5 And there were times with things
6 ranging from you know, sexual assault all the way
7 down to things like petty theft, where you know,
8 an individual's experience or trust, or
9 confidence in the process, would lead them to
10 sort of back up their peers, or friends, rather
11 than the sort of larger institution of the ship,
12 or the Navy.

13 And getting that like, you know,
14 message across in terms of hey, we all have to
15 have this good order and discipline to be able to
16 go out and fight.

17 There's also the prospect of you know,
18 with the combat being at sort of theoretical
19 construct for ships, we haven't done a whole lot
20 of it recently.

21 Driving that message home of how does
22 like, how does me reporting somebody like finding

1 a dollar and not turning it in to the lost and
2 found, translate to missiles out the barrel more
3 effectively?

4 I think that leveling function was
5 difficult across the force.

6 CHAIR HILLMAN: Thank you.

7 Colonel Randolph?

8 COL RANDOLPH: For me, the number one
9 challenge I face every day is communication.
10 Much like today. Communicating.

11 And with our more junior folks,
12 communication is even more challenging. Because
13 throughout my life and career, I have a certain
14 way of receiving and delivering information.

15 And, our more junior folks receive and
16 deliver information much differently than I. And
17 so that gap, trying to fill that communication
18 gap.

19 And my colleagues talked about the
20 time of the justice system, and making sure that
21 it's executed timely.

22 Because the longer it takes to

1 adjudicate, the longer we have to provide these
2 services, and ensure the services for the
3 accused, as well as the victim, are ongoing
4 throughout the process until we actually have
5 some disposition and decisions.

6 And so the communication piece. And
7 so the communication piece comes in such variety
8 of forms.

9 You heard my colleagues speak to drug
10 use. I'll also add alcohol abuse. A lot of our
11 junior folks are coming from families, and this
12 is their first time adulting. First time being
13 away. First time having access to alcohol.

14 And usually that leads to misuse of
15 alcohol, or abuse of alcohol. And, then gets
16 them into some of these behavioral dynamics
17 associated with that.

18 And so communicating on a preventive
19 side, to try to illuminate the resources
20 available to them on the front end, to maybe
21 prevent some of these behaviors that we'd like
22 not to see.

1 And also communicating with them once
2 events have occurred. How do we communicate
3 without compromising the rights of the accused,
4 the rights of the victim?

5 And competing with social media, the
6 speed of a perception and narratives, that can
7 run wild. And all of those things affect good
8 order and discipline.

9 And so those are the challenges that
10 I face, particularly, not just in the junior
11 folks, but for across the force. But really more
12 difficult for the junior folks.

13 So, one of the strategies I use, is I
14 keep a cadre of very junior folks at all ranks in
15 close proximity to me.

16 A) so I always know what the jargon is
17 that they're using today; and, B) it helps inform
18 me of some of the challenges they're facing.

19 How they see us, and how we see them,
20 and how we can kind of bridge the gap on that
21 communication.

22 But communication is the biggest

1 challenge for me.

2 Over.

3 CHAIR HILLMAN: General Ewers?

4 MEMBER EWERS: I have a question. How
5 many special courts-martial did you do while you
6 were in command?

7 LT COL KUHLOW: None.

8 MEMBER EWERS: I thought so.

9 COMMANDER BUFORD: Also zero.

10 COL RANDOLPH: Zero.

11 MEMBER EWERS: So I ask that, you know,
12 it would be nice for lawyers to have some cases
13 to try at the special court-martial level.

14 But I ask because, there's an
15 undertone here that part of military justice has
16 become getting rid of the problem.

17 So the other question, the next
18 question I ask is, what is the most serious crime
19 that you, that you took to NJP?

20 COMMANDER BUFORD: I think I can speak
21 to this. I had a somewhat relevant experience.

22 We had a couple of alleged sexual

1 assaults that were declined for prosecution and
2 due to lack of evidence, or lack of, you know,
3 there was a judgment that to proceed to court-
4 martial was not advised, because those are kicked
5 up to the 06 level.

6 And then at the 06 level, it was
7 declined to prosecute, so it was kicked back to
8 the command.

9 And I thought that those were
10 extraordinarily difficult position to place a
11 commander in.

12 Because it's kind of a Catch-22 of NJP
13 is a place for serious offenses -- it's not a
14 place for serious offenses to be adjudicated.

15 The alleged offense of sexual assault
16 if you adjudicated that at NJP, it's saying that
17 it's not a serious offense.

18 It's also very difficult with the two
19 standards of court-martial being beyond a
20 reasonable doubt versus NJP being preponderance
21 of evidence.

22 I think that puts commanders in a

1 serious bind. And sometimes that winds up being
2 diluted to like a simple assault, or you know,
3 just a case where it's extraordinarily difficult.

4 So, those cases were I think were the
5 most serious that I ever took to NJP. My
6 predecessor, who was in command when I was XO,
7 had a child pornography case that went to court-
8 martial.

9 But that was fairly cut and dry. The
10 individual accused confessed upon arrest, and
11 there wasn't a whole lot of, it was not difficult
12 to get to a guilty verdict with that case.

13 COL RANDOLPH: So I've had four cases
14 that referred to general court-martial. Sexual
15 assault in nature.

16 One came back with acquittal. Others
17 still in process. And one referral decision for
18 a special court-martial that, that I've had to
19 make. But no actual case there.

20 And I think that the seriousness of
21 the sexual assaults, a lot of sexual harassment
22 cases that I've seen and adjudicated at the group

1 command level, dealing with unwanted touching,
2 and those kind of things at the Article 15 level.

3 But --

4 (Simultaneous speaking.)

5 CHAIR HILLMAN: Colonel Randolph, I'm
6 having a little trouble hearing you. Could you
7 just move the mic a little closer?

8 COL RANDOLPH: Okay.

9 CHAIR HILLMAN: Thank you.

10 COL RANDOLPH: So, I'll repeat. I've
11 had four cases that I referred, using the pre-
12 trial hearing officer recommendation and pushed
13 up to the general court-martial.

14 And, one referral decision that I've
15 made as a Special Court-Martial Convening
16 Authority. Sexual assault cases would be the
17 most severe.

18 Lower than that under the NJP realm,
19 has been sexual harassment cases.

20 MEMBER EWERS: I'm interested to hear
21 your response Commander Buford. I wonder if
22 that's a sneak preview of the OSTC when a case

1 gets sent back from the OSTC saying we're not
2 interested.

3 When lawyers make decisions about
4 cases, they're different than when commanders,
5 which is part of what we're trying to do. But
6 that's going to echo in your command, in my
7 opinion.

8 But I'm also, do we still do when we
9 have a minor offense like a minor drug offense,
10 do we still like, send an NJP and then have an
11 ADSEP waiver so they get an UOTHC and they're
12 gone?

13 Are you getting rid of people with
14 ADSEPs, or are you retaining for relatively minor
15 misconduct?

16 COMMANDER BUFORD: So, for specifically
17 for drug offense, there's a mandatory
18 administrative separation processing that occurs.

19 And regardless of the recommendation
20 of the command, I've seen the Bureau separate
21 folks for almost every case of drug use.

22 The only way that that gets avoided is

1 by finding an NJP of you know, unintentional
2 consumption, right, like some sort of ignorance.
3 I was slipped something in my drink and didn't,
4 didn't do it on purpose.

5 But I've never seen a case where
6 someone is you know, found guilty of intentional
7 drug use, that was retained.

8 MEMBER EWERS: Really?

9 MEMBER REDFORD: For every offense?
10 First offense?

11 COMMANDER BUFORD: Every first offense
12 has been for, for marijuana, any kind of illicit
13 drug use, yes.

14 COL RANDOLPH: I would say for the
15 Department of the Air Force, very similar.
16 However, I look at each case on the merits of the
17 case presented.

18 The member has the burden to in his or
19 her rebuttal statement, has the burden to make
20 the case for why he or she deserves to be
21 retained.

22 And so, they have a few elements that

1 they must meet in order to be considered for
2 retention, despite that drug use. So we have
3 that, that caveat.

4 I have not had one that I personally
5 decided upon that rose, that met that criteria to
6 be retained and thus, we separated them
7 accordingly.

8 MEMBER EWERS: It's a lot easier to
9 find that criteria when you're fighting a war.
10 Because there's a lot of Marines that get in
11 trouble, and you find out that they're pretty
12 good at what they do. And, you don't want to
13 send them away.

14 Yes, so I guess that, I think there's
15 a tension here. And one of the concerns that I
16 have about anything that takes authority away
17 from commanders, is that the farther the
18 commander, and I think Colonel Kuhlow mentioned
19 distance, a professional distance between
20 commanders and the process.

21 Anything that puts commanders at a
22 distance from the process, is going to make it

1 somebody else's problem at some point.

2 And that spells disaster, in my
3 opinion. And I'm not just thinking out loud. Do
4 you have thoughts on that?

5 COMMANDER BUFORD: I do. I found some
6 difficulty or challenge, depending on the rank of
7 the accused. And their particular specialty.

8 There's a shocking number of sort of
9 one-of-one billets onboard a destroyer, that if
10 you depart an individual that is a critical
11 combat capability that just goes away, and you
12 know, due to problems in distributable inventory,
13 they may or may not get replaced during your
14 command tour.

15 And I think that puts a severe burden
16 on the commander, to whether or not. But I think
17 in the interests of justice I guess, like there,
18 it has to be prosecuted.

19 In that sense, I think OSTC probably
20 works as a good forcing function to, to not let
21 anything be you know, dismissed, or get like hey,
22 I can escape prosecution by getting an NEC, or a

1 classification, or a specialty.

2 But, I do think that poses some
3 challenges to whether or not an individual at a
4 higher echelon, or higher rank, gets treated
5 differently.

6 There's also sort of a fundamental
7 difference between how you know, limits at NJP
8 based on rank, right, a CO can recommend junior
9 enlisted can basically process people for ADSEP.

10 But once you reach E7 chief petty
11 officer and above, that decision is you know,
12 outside the commander's realm. It has to go to
13 PERS.

14 So, I think I've seen that generate a
15 lot of hate and discontent in junior echelons.
16 Particularly the brand new folks who don't
17 necessarily understand the career ramifications.

18 Because a chief petty officer found
19 guilty at NJP, whether or not they're retained,
20 is they're basically their career is over, right?

21 And that doesn't necessarily come
22 through, or is difficult to explain, the sort of

1 nuances in punishment or judgment.

2 So that's a --

3 (Simultaneous speaking.)

4 MEMBER EWERS: These are the things you
5 referred to earlier as crew impact?

6 COMMANDER BUFORD: Yes.

7 MEMBER EWERS: Mostly along these
8 lines?

9 COMMANDER BUFORD: Yes. And I think
10 that is the tension that comes up about, you
11 know, in terms of combat effectiveness.

12 I tend to think that it's easier to
13 cross-train someone else to fill one of those
14 gaps, than it is to like keep on board someone
15 you know guilty of misconduct.

16 MEMBER EWERS: I think that practice
17 has been discredited. I doubt it happens as much
18 as it used to.

19 CHAIR HILLMAN: I want to get Judge
20 Redford in. But just a point of clarification,
21 Commander Buford. When you said distributed
22 inventory, you're referring to people and

1 billets, is that correct?

2 COMMANDER BUFORD: Correct. Like
3 there's just not enough sailors. If you lose
4 someone with a school pipeline that takes six
5 months to get through, often there are not ready
6 replacements.

7 CHAIR HILLMAN: Thank you.

8 I know the rest of you want to respond
9 to General Ewers' question, but Judge Redford, do
10 you want to get in on this first?

11 Okay, so.

12 COL RANDOLPH: I'll just add, I think
13 I mentioned earlier authority levels vary within
14 our chain-of-command, and it always has.

15 And, I don't see this as taking much
16 away from the commanders per se, because there's
17 already some existence within our legal realm.

18 If a member goes and does something
19 you know, off the installation that's you know,
20 in the jurisdiction of civil authorities and it's
21 out of the hands of the military justice system,
22 I don't, I see that as a sort of a, a sort of

1 parallel there.

2 There's always going to be some level
3 that's outside of your authority. I think for me
4 as a commander, the thing I want mostly is
5 clarity of what's in my authority, so I know what
6 I'm able to make decisions on.

7 And then where are those things that's
8 outside my authority. And then knowing who and
9 where to engage to ensure that I'm commanding and
10 giving my folks the best services and support
11 they need to work through those dynamics.

12 So for me, commanders will always be
13 involved in that process. You know, whether it's
14 from ordering military protective orders,
15 removing folks from their duties based on what
16 the incident or, or offense may be.

17 Security clearances, promotion
18 actions, all the administrative things will need
19 to be done in conjunction with all the elements
20 of the Office of Special Trial Counsel.

21 Over.

22 LT COL KUHLOW: All right, I think to

1 the Colonel's point, there's a difference in
2 professional distance and the determination and
3 the outcome.

4 In that moment of like this has been
5 the decision and we're moving forward, and all
6 the things that happen during the process.

7 And I think that's where there's,
8 that's as a commander at least, the challenge
9 space is the process.

10 It is the MPOs, it is the clearances,
11 and what people can and can't do. Or supporting
12 victims in the process. So I think that's to me,
13 that's the biggest challenge space.

14 The outcome, it may tie a commander's
15 ability to take on, you know, depending on how
16 collateral misconduct is prosecuted, that to me,
17 that's a sticky wicket in terms of what goes to
18 the commander, and what gets pulled up by the
19 Office of Special Trial Counsel.

20 And, I think that probably deserves
21 some serious consideration. At the same time, I
22 could see where for certain offenses, the

1 commander, you know, as a commander I would have
2 been glad to say you know what, this is the
3 decision and we are moving forward, and that is
4 it.

5 And that, being able to be a little
6 bit objective in the process is not a bad thing.
7 The question is what's that process can be, have
8 a lot of challenges to it as that plays out over
9 time.

10 MEMBER EWERS: Thank you.

11 CHAIR HILLMAN: Judge Redford?

12 MEMBER REDFORD: Thank you, Doctor.

13 Thank you for your service, thank you
14 for your leadership to your commands. My
15 question follows up on the NJP question.

16 When you were in command, how frequent
17 if ever, was the occurrence of a service member
18 refusing NJP, refusing Article 15?

19 And for sea service friends, does the
20 vessel exception still apply? That would be you,
21 Commander, on the NJP. So.

22 COMMANDER BUFORD: Never, and yes.

1 MEMBER REDFORD: Okay, thank you.

2 COL RANDOLPH: I missed the last part
3 of your question?

4 MEMBER REDFORD: Just for the Navy, if
5 a service member is attached to a ship, back
6 1,000 years ago when I was a Navy JAG, it was you
7 had an exception and the member did not have the
8 right to refuse NJP.

9 And I wondered if that was still in
10 place, and it is, which is a good thing, in my
11 opinion.

12 But the other question is, in command,
13 have you had service members decline Article 15?

14 COL RANDOLPH: I personally, have not.
15 And I think that's attributed to you know, going
16 back to the previous discussion we had on our
17 judge advocate's advice and thoroughness, and my
18 confidence in them.

19 In my command practice, I've never
20 offered an Article 15 that I didn't think we
21 could take to court. Because the member has that
22 right to decline it.

1 And so if they decline it, you'd
2 better be ready to take it to court, because that
3 would be the next step.

4 Or, you know, you pull back and that
5 doesn't really sit well with maintaining good
6 order and discipline, in my view, so.

7 Over.

8 MEMBER REDFORD: Thank you.

9 LT COL KUHLOW: Fall in the same
10 category. Would not offer an NJP that wouldn't
11 stand up in a court-martial.

12 We did have one that we were going to
13 just jump over the NJP and go straight to court-
14 martial on, and the young Marine accepted a deal,
15 and out processed.

16 MEMBER REDFORD: The final question.
17 Approximately how many times, or how many
18 different service members during your command
19 tour, did you impose NJP on? Just ballpark.

20 COL RANDOLPH: In total, I would
21 probably say in the neighborhood of 20.

22 COMMANDER BUFORD: First command over

1 the course of 21 months, I had three, but that
2 was out of a crew of 26.

3 On the destroyer, I was only in
4 command for 12 months, and I had probably closer
5 to 50 or 60.

6 LT COL KUHLOW: Four.

7 MEMBER REDFORD: Thank you.

8 CHAIR HILLMAN: Captain Barney?

9 MEMBER BARNEY: Earlier we'd been
10 talking a little bit about cases of serious
11 covered offenses, that might go to an Office of
12 Special Trial Counsel. I want to ask you to help
13 us understand.

14 If our nation suddenly finds itself in
15 sustained combat operations against a near peer
16 competitor, where you're looking at you know,
17 deployed, needs to be deployed, and to be
18 operational.

19 What concerns if any, do you have
20 about the ability to perform your mission, to
21 maintain good order and discipline, with covered
22 offenses still needing to go to a special trial

1 counsel for review, and for action?

2 Can I start with you, Colonel

3 Randolph?

4 COL RANDOLPH: Well, I think, sir, the
5 concerns we have for readiness is continuous.

6 And, it doesn't change based on folks who enter
7 the military justice system, based on their
8 behavior or dynamics.

9 Obviously, number wise, personnel
10 wise, we need a certain number of personnel to be
11 able to do the things that we're tasked to do.

12 And so if we have an abundance of
13 folks going through that system, that would be a
14 challenge.

15 But I don't see the few members that
16 we end up in that system, affecting our ability
17 to have the numerical forces to engage and defend
18 America.

19 So, I don't see that as a challenge.

20 MEMBER BARNEY: Colonel?

21 LT COL KUHLLOW: So I would say in
22 terms of -- I mean as a battalion commander, I

1 would end up leaving those individuals behind if
2 we went forward. I would have some kind of
3 arraign -- element that would manage their legal
4 processes, probably led by my XO and a first
5 sergeant. Your challenge space, I think, would
6 be if witnesses were required, because there's a
7 good chance of those witnesses would be forward
8 deployed, potentially reachable, not reachable
9 depending on the austerity of the deployment.

10 And so I think pursuing those cases would
11 probably take longer if that was a dependence.
12 But those individuals, I don't think they -- I
13 can't see how they would effectively deploy. And
14 even if they were deployed, I can't see how they
15 would effectively operate because chances are,
16 their clearances can be pulled, or chances are
17 they've got a lot of stress on their mind in
18 addition to potentially combat stress. Over.

19 MEMBER BARNEY: Commander Buford?

20 COMMANDER BUFORD: I think -- first
21 off, I think in times of higher operational
22 tempo, I found disciplinary cases go way down.

1 The majority are the -- there's a definite, you
2 know, positive tendency for increasing cases
3 during sort of idle times, so yard periods, in
4 port. There's a lot of -- so high op tempo I
5 think mitigates, to a certain degree, inherently
6 against severe offenses.

7 That said, if someone were, you know,
8 murdered under way on a wartime mission, it would
9 be difficult. The ship doesn't really have like
10 a brig, right, like so physical confinement would
11 be an issue if someone were a legitimate danger
12 to someone else as well as an opportunity to get
13 that individual off the ship. So I mean someone
14 accused of a serious crime has generally gotten
15 off the ship as rapidly as possible, and then we
16 try to start this disciplinary process. As
17 noted, it can take months, if not, you know,
18 years to get to conclusion.

19 And then the same issue with sort of
20 operational readiness. If it's difficult to get
21 a replacement, how difficult is it going to be to
22 get a replacement up forward. But, you know, for

1 the moment, it would probably have to get shelved
2 under the, you know, driving the ship, fighting
3 the war, and we'll deal with the legal problems
4 when we get a breath as well as, you know, a lot
5 of the operational, tactical sort of -- conceive
6 of not communicating terribly much. So there
7 would be a, you know, further delay in that
8 process.

9 MEMBER BARNEY: Thank you.

10 CHAIR HILLMAN: So Captain Barney's
11 question pointed to readiness and as did your
12 responses. I wonder if you think in an open
13 universe space, as you think about military
14 justice and the issues that it helps you address
15 as commanders, what do you want to know more
16 about that you think we might be able to study
17 and learn how to improve? In other words, what
18 topics are sort of pressure points? We -- we
19 hear those from the Hill, from the legislators
20 who are keen on what's happening. You also have
21 a window into -- and from the public we hear
22 those. You also have a window into where there

1 are challenges in the system and we could do
2 better. What do you think we could learn more
3 about and potentially improve on in the years
4 ahead? Looks like you have an idea, Colonel
5 Kuhlow.

6 LT COL KUHLOW: So I think probably
7 two things; one, the -- I would say the
8 timeliness staffing of the investigative process
9 as it relates to the legal process, and are --
10 what's -- you know, when I talk about timeliness,
11 like what is the holdup and how do we mitigate
12 that. Is it more investigators? Is it more
13 specific, you know, specificity in
14 investigations? Is it that kind of stuff?

15 I think the other thing -- and we have
16 not really talked about this too much -- is
17 mental health in relation to the military justice
18 system. The vast majority of my folks that were
19 under, were either victims or accused, they were
20 on a force. We ended up briefing them on a force
21 preservation counsel where we talked about what
22 resources they had. They were probably seeking

1 counseling from a chaplain or a life counselor of
2 some form. And a good number of them ended up in
3 the emergency room with some kind of mental
4 health issue as part of that process.

5 So the stressors that some of our
6 youngest service members face when they make
7 mistakes are substantial. And I think
8 understanding the nexus between how do we support
9 people not just in terms of getting them to a
10 chaplain or having their first sergeant checking
11 on them, but what are the other -- the mental
12 health consequences of this and how can we better
13 manage those throughout a process would be, I
14 think, beneficial to commanders.

15 CHAIR HILLMAN: Thank you.

16 MEMBER REDFORD: I have a follow-up on
17 the mental health. Colonel, when -- for the
18 service members or -- well, service members
19 anyway that manifest mental health challenges to
20 their ability to be a, you know, fully ready
21 marine, how much, if any, of that was disclosed
22 or discoverable if it had been disclosed in the

1 recruiting process?

2 LT COL KUHLOW: So I don't know that
3 much of that was disclosed in the recruiting
4 process, and given when I was in command, I'm not
5 sure that it was asked about. What I would say,
6 though, is whatever those individuals certainly
7 had, whatever they came into service with, or
8 whatever challenges they were facing were
9 exacerbated once they were either under
10 investigation, once they were victim to
11 something. And so it can be disclosed, it cannot
12 be disclosed, but there's a decent chance you're
13 going to see an increase in mental health needs
14 or requirements for an individual.

15 COL RANDOLPH: I would just add
16 change. Any time you make a change -- and I
17 think this body, your panel is evidence of this
18 point -- maturation of a change, a major change
19 or shift in a longstanding process -- in this
20 case, the military justice system requires some
21 time to evaluate if the change is generating the
22 outcome -- the desired outcome of its

1 implementation; whatever that time span is to
2 evaluate that and then make course corrections as
3 required oftentimes, you know, we change and then
4 we change again and then we change again before
5 we had a chance to manifest whether the initial
6 changes actually gave us what we were looking
7 for. And sometimes, you can counteract your
8 changes by virtue of your change.

9 So I would say that one of the
10 greatest challenges, not just to our military
11 justice system but across the spectrum, is when
12 we make a change that with that change comes a
13 deliberate effort to evaluate the change
14 consistently and to be able to assess whether or
15 not the change is delivering what we originally
16 desired and then make adjustment for it so that
17 we give ourselves, in this particular chance, an
18 opportunity to see how the Office of Special
19 Trial Counsel is performing in relationship to
20 prior to that and going forward, and then we
21 modify along the way as opposed to just change
22 for change sake. Over.

1 CHAIR HILLMAN: Thanks Colonel
2 Randolph. Commander Buford.

3 COMMANDER BUFORD: I think to the
4 point of resources, that's absolutely true. Some
5 of the large non-zero portion of the time limits
6 aspect is due to just people. And I know it's
7 difficult for the military, I think, to
8 effectively allocate resources when there are any
9 number of other challenges which may be closer to
10 combat effectiveness than, you know, legal
11 processing. But certainly resourcing JAGs, NCIS,
12 et cetera would help.

13 I think the mental health aspect is
14 absolutely true. There just -- there aren't
15 sufficient resources. Occasionally, you know, as
16 the CO going through training or just to sort of
17 get a personal experience, I tried to make an
18 appointment and see how long it took. Took a
19 while. It wasn't the next day. And granted,
20 again, there's a triage function that goes along
21 with that but additional mental health resources
22 --

1 CHAIR HILLMAN: Commander Buford, how
2 long did it take? Not the next day. How long
3 did it take?

4 COMMANDER BUFORD: To get an
5 appointment with a family life counselor was
6 pretty responsive initially, about a week or so,
7 you know, I was able to sit down with that person
8 in person, but again, not presenting, you know,
9 serious issues. And then we had a problem
10 getting someone into emergency room care, but
11 then when they would go to like a routine
12 treatment program, often they were waiting for
13 weeks to see a, you know, no kidding, doctor-
14 level mental health professional.

15 I think there's also something that
16 was really helpful for me personally, is sort of
17 learning the difference between performance and
18 misconduct and the ability to sort of shape the
19 team, the force, the crew. One of the things
20 that I think is useful for a commander is the
21 discretion to recommend someone for separation
22 based on performance. There are a number of

1 people who just weren't getting what we were
2 doing there without really committing any crimes
3 or whatever, who I was able to get out of the
4 Navy, you know, the standard for being a service
5 member in the U.S. military is higher than just
6 not being a criminal. So I think that is a
7 useful thing for commanders to be aware of.

8 And then the other thing is that sort
9 of trade space between NJP and court-martial.
10 Some of the hardest things we had were when
11 prosecution was declined. Something happened,
12 right; like these are normal regular people who
13 all of a sudden went sideways, like got very
14 agitated, you know, had a decline in mental
15 health, like were outgoing and friendly and turn
16 introverted and so on. Something occurred. And
17 it came back to us with like, hey, you figure out
18 what happened and do it. And so it's also a
19 little bit of a messaging thing where like how is
20 this person being found guilty at NJP? They
21 couldn't even get to court-martial, right, like -
22 - or hey, we're not going to take it to NJP.

1 Well, that person got accused of this. How can
2 they not be going through this process? So some
3 sort of clarification on that level or some sort
4 of leveling function or understanding, I think,
5 would be super helpful, cause that process, the
6 case in question allegedly occurred when I was
7 the XO in like March, and I took over the next
8 June as the CO. And the case was still hanging
9 out and came back to me to adjudicate shortly
10 after I took command, so like July-August
11 timeframe, we're going to NJP on a case that's
12 now, you know, a year-plus old.

13 CHAIR HILLMAN: Thank you. Okay. I'm
14 going to check for last questions for our special
15 convening authorities, the panelists, any virtual
16 panelists have last questions?

17 MEMBER MORRIS: I do. I was too slow
18 to hit the mute button last time -- the unmute
19 button. So pardon me, quick one. Colonel
20 Kuhlow, you had talked about what you had
21 mentioned as a professional distance, and you
22 said that this revised system would be asking

1 commanders to assume a risk that they're not
2 resourced for. So from your perspective, does
3 that go mainly to you feeling like you've lost
4 some elements of authority, or it could be both I
5 suppose? Does it relate to your subordinates',
6 your troops' perception of you and your overall
7 sense of command?

8 LT COL KUHLOW: Just for
9 clarification, sir, are you asking me to define
10 the risk that commanders accept with a process
11 once the authority shifts the OSTC over?

12 MEMBER MORRIS: Yes. Or how you are
13 seeing that? In other words, do you -- yes, if
14 you could further explain that if that's one of
15 perception by the marines who you are leading or
16 your own sense of now not being as
17 comprehensively in charge as you would have.

18 LT COL KUHLOW: I would say it's a
19 little bit of both. You are required to manage
20 the perception of the marines throughout the
21 process, and if you know, whoever in your unit
22 is, you know -- not that they should be

1 discussing a case -- and there's perception of
2 things getting dragged out or things being
3 unfair, you have to manage that, and you don't
4 necessarily have control over the process.

5 I think the bigger issue in my mind is
6 in an NJP or other processes where you have more
7 direct influence, you can apply a wider range of
8 tools, whether it's communication, whether it's
9 communicating through your leadership, whether it
10 is using counselors, you can apply a wider range
11 of tools to manage the situation, not just with
12 the individual but across your unit. And if
13 something gets taken out of your authority, the
14 question is what tools remain at your disposal,
15 and do you have full access to those. And until
16 we see how the OSTC thing plays out, I don't know
17 that -- I believe that that potentially incurs a
18 level of risk, particularly in respect to
19 timeliness, because if I have a billet that's
20 gapped for 14 months because of a process, who is
21 doing that job and are they trained to do it, and
22 are they enabled to do it. If I have an

1 individual that is in my unit for an extensive
2 time that is combat ineffective essentially
3 because of a legal hold, what are the
4 ramifications of that?

5 And those are things that an OSTC
6 would not necessarily be privy to, and I would --
7 it would be my hope that communication between
8 the commander and the legal system would help
9 resolve some of that. But that, I think, is --
10 that's -- to me, that's risk as a commander
11 because I would feel, at least with respect to an
12 accused, like I have essentially a little hand
13 grenade running around in my unit. And the
14 question is, are they going to have a mental
15 health issue? Is there going to be another issue
16 because there's other disciplinary stuff, and how
17 do I manage that?

18 And I'm not trying to be crass about
19 the term, but that's, as a commander, you feel
20 that very deeply. You're constantly worried
21 about this individual both in terms of their
22 impact on the unit and how they are doing,

1 because a lot of these folks, they're young, and
2 they have not been in the real world, and they
3 are learning through this process, and many of
4 them committed an egregious mistake. And so
5 trying to manage that and trying to balance that
6 with your unit is an incredible challenge.

7 And so what are the resources during
8 the process that a commander has matters, and
9 what is the, you know, the process in terms of
10 communication, timeliness, and how do we
11 anticipate things so that you can lean forward as
12 a commander and start to manage a situation as
13 it's evolving. I hope that makes sense. Over.

14 MEMBER MORRIS: It does. Thanks a
15 lot.

16 CHAIR HILLMAN: Okay. I want to thank
17 you for your service, for your leadership, and
18 for your willingness to share your insight and
19 expertise to make this panel smarter as we face
20 the future right with you so thank you. Okay.
21 We're going to take a five-minute break.

22 (Whereupon, the above-entitled matter

1 went off the record at 9:46 a.m. and resumed at
2 9:55 a.m.)

3 CHAIR HILLMAN: Okay. Colonel
4 Bovarnick gave us a thumbs up. We're ready to
5 go. Go ahead.

6 COL BOVARNICK: Okay. This is our
7 general court-martial convening authority
8 session. We have representatives from the Army,
9 Navy, Air Force, and Coast Guard. From the Army,
10 Lieutenant General Matlock; for the Navy, Admiral
11 Rock; from the Air Force, Major General Bibb; and
12 from the Coast Guard, Admiral Penoyer. Our
13 panelists are going to do brief introductions
14 down the line starting with General Matlock, and
15 then we'll hand it over to the panel for
16 questions. Sir, over to you.

17 LT GEN MATLOCK: Okay. Thank you. I
18 think that's working. All right. Excellent. So
19 first of all, thank you very much. It's truly a
20 privilege, a pleasure to be here. I think you've
21 read the bios but just for emphasis, I was a
22 general court-martial convening authority for two

1 years including a unit commander, a division
2 commander and a community, Fort Bliss, Texas, and
3 I did GCMCA for the entire country of Afghanistan
4 for a year when I had a triple hat job forward.
5 Also, a special court-martial convening authority
6 for three years; again, a brigade, a community in
7 Europe, and one year of that in Northern
8 Afghanistan with area responsibilities for all
9 U.S. Forces in Northern Afghanistan. So I --
10 maybe that helps guide some of your questions,
11 and I'd be glad to follow-up on any of that. So
12 thank you again for having me.

13 ADMIRAL ROCK: Good morning. Rear
14 admiral retired, Chip Rock, recently retired in
15 September. As a flag officer in general court-
16 martials convening authority, I served as
17 Commandant Naval District Washington and most
18 recently as Commander of Navy Region Mid-Atlantic
19 where my primary responsibility was base
20 management and oversight. But during those six
21 years in those two positions, I convened 116
22 court-martials that represented nearly 25 percent

1 of the Navy's total during that period. So I
2 have deep respect for our military justice system
3 and, moreover, for our Judge Advocate General
4 Corps that protects that. And I am honored to be
5 here this morning. Thank you.

6 MAJ GEN BIBB: Good morning. Major
7 General Thad Bibb from Broken Arrow, Oklahoma.
8 It's a privilege to be here today. I am
9 currently your Deputy Inspector General for the
10 Air Force and the Space Force. I just left
11 command in August. I was commander of 18th Air
12 Force for two years. 18th Air Force has 36,000
13 airmen across 12 wings across 12 different
14 installations in the CONUS and mostly your
15 heavier craft cargo and tanker aircraft across
16 the United States, so a lot of experience on the
17 general court-martial convening authority. I
18 learned a lot during command and it's an honor to
19 be here today. Thank you very much.

20 ADMIRAL PENOYER: Good morning. I'll
21 just echo the appreciation for the invitation and
22 the work of the panel. I'm Admiral Brian

1 Penoyer. I am currently assigned as the
2 Assistant Commandant for Human Resources at Coast
3 Guard. It's the CG-1 position, but I am double-
4 headed as the Director of our Talent Management
5 Transformation Task Force, so I'm spending most
6 of my time these days in that lane. In the prior
7 four years before that, I spent two of them as
8 the commander of the 11th Coast Guard District in
9 the southwestern part of the United States with
10 operations extending about halfway to Hawaii and
11 all the way south to Chile. And then in two
12 years prior to that command, I was the commander
13 of our Force Readiness command, which is really
14 the training education command for the Coast
15 Guard with purview over training centers and all
16 that that entails. Thanks for having me here
17 today.

18 CHAIR HILLMAN: Thank you. It's a
19 privilege for us to have a panel with the
20 experience and insight that you all have earned
21 during your careers, and I'm grateful for your
22 attention to these issues and your service in the

1 past. We're going to ask you to help us both
2 understand the past and the present and look to
3 the future. And so your ability to help us be
4 effective as a panel, as a new and permanent body
5 as part of the military justice system, to
6 navigate the concerns people have outside and the
7 concerns folks have inside. That's what we're
8 looking to you to help us figure this out.

9 So the first question I'll have is
10 about your command experience. What is -- how
11 have the recent changes in military justice
12 influenced or not influenced the role of
13 commanders in the system itself, and what are
14 your concerns about where we are right now with
15 respect to commanders' ability to use military
16 justice as an effective tool to promote good
17 order and discipline within the force? So -- and
18 we'll go backward here. Maybe we'll start with
19 you, Admiral Penoyer, and run down the table
20 here. Thank you.

21 ADMIRAL PENOYER: Thank you, ma'am.
22 So I think with regard to the question, there are

1 changes about to take effect with regard to
2 covered offenses that I think are probably the
3 most significant. And I would say that as an
4 example of that, you know, granted the Coast
5 Guard as a service is significantly smaller and
6 our case load accordingly is significantly
7 smaller, my two years in command in California, I
8 had seven initial disposition decisions to
9 render. And in that case, all of them Article
10 120.

11 And so largely, I would say the impact
12 of the most recent changes that we're talking
13 about will be a significant bifurcation, if you
14 will, of the military justice workload at this
15 level. And I would say I don't know that I would
16 voice it as a concern about that change, but I
17 would submit that it will necessitate a level of
18 communication between the general court-martial
19 authority and what in the Coast Guard we're
20 calling the chief prosecutor, the OSTC, at a
21 level that is currently more uncommon.

22 But I would note, and I think the

1 panel is more than aware, that these issues of
2 communication between folks involved in complex
3 cases, particularly where collateral misconduct
4 is involved, are already common. And so that
5 communication itself is not new. However, I
6 think it does -- it's useful to think about that
7 level of communication in terms of the challenge
8 ahead simply because as a commander, none of my
9 authorities will be relieved of me -- my
10 responsibility will be relieved of me for good
11 order and discipline of the force or for the
12 employment of various administrative tools except
13 in coordination with the new structures. So that
14 will require a significant degree of additional
15 communication and as we've seen, you know, just
16 making sure that equivalent collateral misconduct
17 is treated similarly by -- get equivalent
18 punishment from different commanders where that
19 occurs. That's not an easy thing to work out.
20 Thank you.

21 CHAIR HILLMAN: Thanks, Admiral
22 Penoyer. General Bibb?

1 MAJ GEN BIBB: Thanks, ma'am.
2 Appreciate the question. Answer that in a couple
3 of different ways. First of all, I do think our
4 military justice system is just one tool that
5 commanders have, among many, in keeping good
6 order and discipline. And I think that it is a
7 very effective tool and maybe a central tool in
8 that both in deterring future bad behavior and I
9 think for our airmen, soldiers, sailors, marines,
10 or guardians to have confidence in our system, to
11 know that it's a fair system and that it's going
12 to take care of both the subject and the victim.

13 As far as the changes that were made
14 that we inherited, I think, you know, the NDAA
15 changes from 2014 have been very effective,
16 especially as we changed the Article 32 to allow
17 the victim not to have to testify at the Article
18 32 phase, you know, with the PHO. And I think
19 that has enabled more victims to stay with us
20 through the process. One of the biggest
21 challenges is a joint court-martial convening
22 authority on sexual assault type crimes was

1 keeping the victim with us for the entire
2 journey. And a lot of times, their -- whether
3 they had physical or not, having their
4 participation was key in able to take the case
5 all the way through the system. And so I think
6 those changes were very helpful.

7 I also think the addition of SVC that
8 we had several years, the victims' counsel, I
9 think, is a best practice that, you know, I hope
10 someday in our civil system we see that as well
11 so that the victims are protected, that we take
12 care of the victims, that they have somebody to
13 go to for legal matters, somebody to see all the
14 way through the process that understands what's
15 going on and is able to be an effective
16 representative for them.

17 Looking ahead, it's -- I'm really
18 looking forward to the OSTC and how we partner
19 with OSTC and how they're part of the team. I
20 think there's a lot of effective parts of command
21 that will -- even for the OSTC cases that
22 commanders are still going to be heavily

1 involved, whether it's on the admin side or
2 whether it's on security clearances or whether
3 it's taking care of the subject and the victim.
4 I view this as a partnership, and I think the
5 additional training that we get for our
6 investigators and our prosecutors and defenders
7 in the OSTC process will be helpful. Thank you.

8 CHAIR HILLMAN: Thanks, General Bibb.
9 Admiral Rock.

10 ADMIRAL ROCK: The Navy, in practice,
11 over the last dozen years has been consolidating
12 convening authority with its region commanders.
13 The Navy breaks the region -- the world into 10
14 regions with a flag officer responsible for
15 support to our afloat operational forces. And
16 all court-martials end up being consolidated into
17 those 10 region commanders. And that's why at my
18 introduction, it seemed that my numbers were high
19 given that we have this consolidated effect that
20 I think does a couple things for us. One, it
21 provides some consistency to the processing of
22 the courts-martialed and also builds inherent

1 expertise in these 10 region commanders and their
2 Judge Advocate General staffs, and it becomes
3 more efficient.

4 So the changes that we're looking at
5 really aren't a big change for the way the Navy
6 has been operating and I think only brings an
7 additional level of oversight and an expertise
8 that, quite frankly, can only make us better.

9 I do agree with the previous comments
10 in terms of the challenges that may lie ahead,
11 and that is that commanders cannot outsource good
12 order and discipline. This is an inherent
13 responsibility in each of our commanders, so the
14 relationship the commanders have with our Offices
15 of Special Trial Counsel, I think, are real key
16 to the success in going forward. There will
17 probably be a lot of learning going on in this
18 regard, but I think it is imperative that
19 commanders don't look at the future as a loss of
20 authority but more as building more opportunities
21 for them to focus on good order and discipline
22 and use additional tools that have been provided

1 to us by the NDAA.

2 CHAIR HILLMAN: Thanks, Admiral Rock.
3 General Matlock.

4 LT GEN MATLOCK: Thank you, again. So
5 I'll try to be as precise as I can be, and I'll
6 certainly follow-up on anything where I use a
7 phrase or a term incorrectly. So my personal
8 belief is that the reforms that have already been
9 taken and the ones that are in play now will
10 significantly increase the ability of commanders
11 to maintain good order and discipline in their
12 formations and their communities.

13 So to be -- hold myself accountable
14 for being candid and clear, so to be specific,
15 lessening the role of commanders along the lines
16 in the judicial -- lessening the role of
17 commanders in the judicial aspects of this
18 conversation that are in play actually will
19 increase their ability to maintain good order and
20 discipline. And I've held that view for a long
21 time, over a decade, and I've recommended changes
22 along the lines that we are currently making for

1 over a decade. Early on in that conversation, I
2 was often a minority of one in that conversation.
3 Over time, other -- a number of people have, you
4 know, come along in my relationships and, you
5 know, mentors have come along in that dialogue.

6 So what exactly do I mean? I think
7 what my practical experience was as a general
8 court-martial convening authority and a special
9 court-martial convening authority is that the
10 chain of command focused so much on the judicial
11 part of their toolkit that they underutilized the
12 normal leader tools and the adverse
13 administrative tools that they had available to
14 them, and the net result was a less effective
15 approach to maintaining good order and discipline
16 in their formations. And I am convinced and I am
17 hopeful that the changes that we're undergoing
18 right now will lead to a renewed conversation
19 about the leadership tools and the adverse
20 administrative tools and will actually free the
21 commanders up to do things in those spaces that
22 heretofore they've hesitated to do because

1 they're awaiting on an investigation or they were
2 waiting on the outcome of a judicial proceeding.

3 I know I threw a lot there on the
4 table. I'd be glad to follow-up on any part of
5 that statement that I just made. Thank you.

6 CHAIR HILLMAN: Thanks, General
7 Matlock. Captain Barney.

8 MEMBER BARNEY: Thank you all for
9 participating. The combined experience that you
10 bring to this important issue for us is
11 critically important for us to help to understand
12 the impacts of some these recent changes as well
13 as the future. I'd like to get your sense of the
14 value of the Article 32 pretrial hearing as it
15 relates to the ability of commanders to be able
16 to effectively use military justice as a tool for
17 maintaining good order and discipline and the
18 like. In particular, I wonder whether your
19 recent experience with receiving Article 32
20 hearing reports has been helpful to you, whether
21 you think it is an area that requires any changes
22 that would make it more effective and more

1 helpful. And General Matlock, when -- I'd like
2 to start with you. I'd also like to invite you -
3 - when I think about your extraordinary service,
4 especially in leading joint forces overseas, I
5 wonder if there's any particular aspects to
6 military justice in a joint and deployed
7 environment that you think would benefit from any
8 changes to the Article 32 process?

9 LT GEN MATLOCK: Thanks for the
10 question. You know, as I prepared myself for
11 today's hearing -- so I kind of thought about,
12 you know, how did I approach that as a division
13 commander, again, in Afghanistan. Typically, the
14 results of the preliminary hearing and the -- you
15 know, came forward with the advice of the Judge
16 Advocate. And I kind of looked at them all
17 together.

18 And now I'm looking back and I didn't
19 always -- you know, I looked at the totality of
20 that, and I thought it was useful, and there were
21 things that came out of the preliminary process,
22 you know, that were relevant and useful, there

1 were things in the advice, and putting those two
2 things together. And I look back and I realize I
3 didn't always draw a fine distinction between
4 what was coming from one side of that to the
5 other, cause it tended to come together. But I
6 thought the totality of that was, you know, more
7 than appropriate for the support of the decisions
8 that I was asked to make and the approaches that
9 we were asked to make.

10 In the joint -- you know, it's
11 interesting the way military justice is typically
12 inside of the, you know, service space is -- and
13 at the joint level, there is oversight and that's
14 appropriate, but I think we could strengthen that
15 for certain types of good order and discipline
16 questions inside of a military operation, the use
17 of force, for example, or the misuse of force or
18 other types of things that -- I hadn't thought of
19 the question the way you'd asked it, that way, so
20 I'd have to spend a little time considering that.
21 You end up also with, you know, the civilian
22 workforce and the contracted workforce which, you

1 know, in Afghanistan, for example, had I don't
2 know how many nations, 20 or 30 nations. So we
3 had a case where an Indian citizen sexually
4 assaulted an American soldier, and we used the
5 law that was passed several years ago, and this
6 is where my precision will fail me, but we took
7 that Indian citizen through, you know, working
8 with the State Department, Embassy, and
9 prosecuted him in Virginia in a federal court, if
10 I remember correctly. I thought that tool was
11 really important to the totality of the good
12 order and discipline mission for example, because
13 you don't want gaps in jurisdiction to come into
14 play for any part of the mission force, military
15 members, civilian members, or contracted members.

16 So on the Article 32 specifically, I
17 never felt like I had a problem with what came
18 out of either side of the preliminary hearing
19 process or of the Judge Advocate's advice to me.
20 I always felt very comfortable with what they
21 were doing.

22 MEMBER BARNEY: Thank you, General

1 Matlock. Admiral Rock.

2 ADMIRAL ROCK: I absolutely agree with
3 General Matlock. An independent review of
4 evidence by an experienced Judge Advocate was
5 extremely helpful, and I would always supplement
6 that by advice from my own Staff Judge Advocate,
7 somebody that I trusted, somebody that knew me
8 and I knew them extremely well. And in the end,
9 I think that only made for disposition decisions
10 to be even better. So I appreciated the Article
11 32 advice and the reports that I got, and I
12 appreciate the discussion that I would -- that
13 would ensue out of it with my own Staff Judge
14 Advocate to make better decisions, to make the
15 best decision that I thought was appropriate for
16 that particular case.

17 MEMBER BARNEY: Thank you, Admiral
18 Rock. General Bibb.

19 MAJ GEN BIBB: Yes, sir. Thank you
20 very much. Let me answer that in a couple of
21 ways. First of all, I think the Article 32 is
22 very valuable. I agree with the previous two

1 officers and what they said, that independent
2 review is very helpful. And this is somebody
3 from a senior JAG that has taken the time to
4 really get deep into the case. And so I think --
5 you know, as I read a lot of, you know, proposed
6 changes in the future years and those kind of
7 things, it seems like the focus is all on the,
8 you know, should this go to trial, do we have the
9 preponderance of the evidence, and that's
10 definitely the meat and the heart of it.

11 But also, you know, that PHO is
12 providing a lot of technical information in their
13 analysis for additional discussion. Sometimes,
14 you know, they may feel like the prosecutor
15 doesn't have the charges quite right or the dates
16 of the charges, or the -- it needs to be charged
17 differently or separately. Sometimes there's
18 litigation risk that isn't obvious at first
19 review but because of their in-depth analysis, it
20 helps us as -- if we do decide to go to court-
21 martial, it helps make some of those decisions
22 along the way a little easier to be better

1 informed.

2 That being said, I didn't find -- the
3 solution was not 100 percent. I had a couple
4 Article 32s that I didn't feel like -- or that
5 felt like they may have missed the mark in one or
6 two areas. You know, these are experienced JAGs,
7 sometimes 15-20 years of experience, which is
8 valuable, but what I really found valuable was my
9 SJA put their opinion on top of it. And, you
10 know, 99 percent of the time, they agreed and
11 there was no issue. But there were one or two
12 percent of the ones that came through that I
13 didn't agree with or I don't think they had quite
14 right or because of their level of experience at
15 15 years maybe weren't seeing a bigger picture
16 where our judicial system is today or where our
17 force is today. So I thought it helpful but also
18 helpful as a starting point with my own SJA and
19 their team. Over.

20 MEMBER BARNEY: So General, what I
21 think I've heard from you as well as the other
22 panelists so far is that this pretrial advice

1 process seems to be most effective for you in
2 understanding your options when it is combined
3 with that SJA's advice as a package that comes to
4 you. First of all, am I understanding you
5 correctly on that, General Bibb, that that SJA's
6 advice sometimes makes up for anything you feel
7 would be otherwise lacking in the Article 32
8 report that comes?

9 MAJ GEN BIBB: Absolutely, sir. I
10 think -- I fly a crew airplane or I like to get
11 as many opinions as I can. As a commander, I'm
12 going to make the final decision in the end, but
13 I don't want to neglect any points there. And I
14 do think that that PHO, you know, well, SJA is
15 focused on hundreds if not thousands of cases,
16 and his very experienced team and also it's not
17 just a single SJA. I mean the team that he has
18 behind him, many of those, you know, civilians
19 have 30 or 40 years of experience in military
20 law. And so to have them lay their opinions in
21 on top of that and also an honest SJA that comes
22 in and says, hey, sir, this is one that's kind of

1 on the line, or this is one downstairs; when we
2 debated it, you know, there was different
3 opinions and, you know, bring me the opinions of
4 others as well. So I think to file an Article 32
5 process is fantastic but even better with the
6 SJA's advice. Over.

7 MEMBER BARNEY: Thank you. Yes,
8 Admiral Rock.

9 ADMIRAL ROCK: What's missing in the
10 PHO's advice is the dialogue, and that's what the
11 Staff Judge Advocate provides, the dialogue of
12 the PHO's report, the dialogue of their own
13 opinion in the matter.

14 MEMBER BARNEY: Thank you, Admiral.
15 Admiral Penoyer, would you care to comment? And
16 we were returning to this issue of the value of
17 this Article 32 preliminary hearing in assisting
18 you as a commander and convening authority.

19 ADMIRAL PENOYER: Yes, sir, I would.
20 I'll be perhaps a slightly different angle on
21 this. I found there to be less value in the
22 Article 32 as currently configured under the 2014

1 revisions. That's based on my limited experience
2 with them, but I will say that I found that there
3 appears to me to be an implicit assumption about
4 the litigation risk and approach of referring to
5 Article 32 that a validation of the probable
6 cause is required. As a commander, I wanted
7 that, but I have to tell you I did not feel
8 relieved of that, of the burden of judging that
9 and making disposition decisions in any way by
10 the Article 32. I had already had that
11 conversation with my JAG. It wouldn't have gone
12 to an Article 32.

13 And I found my JAGs to be abundantly
14 litigation risk averse and careful about this.
15 Their preponderance of recommendations are more
16 conservative than mine would be as a commander
17 because I am interested in good order and
18 discipline. And there's a presumption that the
19 evidence will be evaluated for adequacy to obtain
20 and sustain a conviction. In fact, that's a risk
21 proposition. There's -- it's not a yes/no
22 answer. And as a commander, I found myself in

1 the position frequently of wanting to take --
2 accept additional risk of losing a prosecution in
3 order for there to be the good order and
4 discipline effect that I needed.

5 And I would say that in this regard,
6 the dialogue that all the panelists have
7 discussed was by far much more important than
8 what I got out of another JAG checking the
9 homework of the first. So I think in some
10 respects, this idea that you need maybe an
11 outside look is valid. I value that aspect of
12 it, but I got to tell you, it did not make me
13 feel more or less confident about what I had to
14 judge myself as a commander.

15 MEMBER BARNEY: So Admiral Penoyer,
16 you've raised an issue that's been of really very
17 high interest to us, and that is that while at
18 the Article 32 process, there is a need to
19 establish whether or not there is probable cause
20 to believe an offense has been committed, you
21 suggested that, you know, the standard -- the
22 higher standard that is more consistent with your

1 views perhaps -- and I wanted to be careful, I
2 don't want to mischaracterize you -- but the idea
3 that it needs to be more than that. It needs to
4 be, you know, is there sufficient evidence that
5 goes -- if it goes forward is likely to result in
6 a, let's just say, a just use of the military
7 justice system. Have I understood you correctly,
8 or would you care to comment on that?

9 ADMIRAL PENOYER: Yes. I think just
10 to, you know, be a little more precise, my sense
11 of this is that that's a lower threshold than to
12 obtain and sustain a conviction under the
13 charging; right? So that probable cause
14 determination is valuable, but I found that in my
15 experiences, the JAGs presenting these cases to
16 me were automatically going to the next step.
17 And as they prepare and think about this from a
18 prosecutorial side, they weight more heavily the
19 military justice outcome than I would, because I
20 have this good order and discipline
21 responsibility that weighs, frankly, more heavily
22 on me.

1 So, you know, as I think about this,
2 I found the JAGs were coming in very conservative
3 on probable cause before it ever went to an
4 Article 32. And so the value of having the
5 dialogue with the JAG is where we got to a point
6 where we were confident we had probable cause.
7 Then sending it to an Article 32 for a check of
8 homework, I'm not sure that was as much value

9 MEMBER BARNEY: Thank you. I would
10 invite our other members -- I don't want to
11 dominate the time, but I would invite them to
12 continue to explore this. It's a very important
13 issue, and I thank you gentlemen for your
14 answers.

15 CHAIR HILLMAN: Captain Aldana.

16 (Off microphone comments.)

17 CHAIR HILLMAN: Captain Aldana, can
18 you punch your mic? Thanks.

19 MEMBER ALDANA: Sorry about that. You
20 mentioned a lot of advice you get from SJAs. I
21 just wanted to get some clarity. Specifically,
22 what form are you getting that, in a written

1 memo, and is it both an analysis of the
2 recommendation, or is it just sometimes written
3 memo in declination cases? Start with General
4 Matlock.

5 LT GEN MATLOCK: So I would, you know,
6 usually on a weekly basis have a significant
7 amount of time set aside on a day to review all
8 of the legal actions. I mean it's pretty
9 standard procedure. So that advice would come in
10 in the form of a written memo on each case, and
11 then a dialogue would occur where we -- you know,
12 I would review the materials and have the
13 dialogue. A number of you have mentioned that I
14 found incredibly -- in fact, I found it to be the
15 most useful thing that I did was have that
16 conversation with my Staff Judge Advocate. So,
17 you know, I think that system worked very well,
18 and I didn't feel constrained in any part of that
19 conversation by what had particularly happened,
20 you know, at the preliminary hearing or inside of
21 the, you know, advice rendered. We were able to
22 adjust as appropriate given the nature of that

1 conversation.

2 MEMBER ALDANA: Admiral?

3 ADMIRAL ROCK: I think it's very much
4 the same. I tell you, that standing weekly
5 meeting with my Staff Judge Advocate was, by far,
6 the best meeting I have every week, because it
7 forced me to think, right, and the issues were
8 not routine. And we're talking about individual
9 sailors that -- whose careers that are at stake.
10 So I took this very, very seriously.

11 In terms of form of advice, it would
12 always be in writing in a memo with an analysis
13 of the evidence as it related to each of the
14 specific charges and then an ensuing dialogue
15 about it. None of this is routine but for
16 routine cases, if I can call it that, I think the
17 discussion would be straightforward, and a
18 decision to proceed or not would come out of it.
19 But for more complex cases, I'd always ask the
20 SJA to leave the evidence with me and let me
21 think about it, and I'd lose a lot of sleep;
22 right? I'd lose a lot of sleep over weekends in

1 particular thinking about the importance of some
2 of these. And then we have another informed
3 dialogue following that after I had time to pull
4 my thoughts together.

5 So yes, in writing but really, the key
6 would be to have that back and forth discussion
7 with a trusted advisor in your SJA.

8 MEMBER ALDANA: Thank you, Admiral.
9 General?

10 MAJ GEN BIBB: Okay. Thanks. Yes, in
11 writing. Yes, there was a weekly meeting. A lot
12 of times, the weekly meeting for me turned into a
13 daily meeting or, you know, he was downstairs and
14 I had him on speed dial, and he was up in my
15 office usually several times a day as we would go
16 through this. The subjects that were discussed
17 were broad, from technical issues, you know, with
18 going forward to oftentimes the credibility of
19 the witnesses and the way that the PHO put on the
20 different witnesses compared to the SJA's read of
21 the evidence. You know, a lot of times your
22 victims or witnesses aren't perfect, and so if

1 there's inconsistencies in their testimony, then,
2 you know, weighing all those is very difficult.
3 And so those sleepless nights. Yes, these are
4 not easy decisions, and just like the other
5 commanders, I would spend significant time on the
6 -- you know, on a more straightforward case,
7 maybe not. You know, it would be laid out. But
8 the more complex ones, pulling the report of
9 investigation, pulling the evidence, pulling the
10 dialogue from the Article 32 and what was
11 actually said was very important to us and
12 getting down to the details. Those are the kind
13 of discussions we would have with our SJA. Over.

14 MEMBER ALDANA: All right. Admiral
15 Penoyer?

16 ADMIRAL PENOYER: Sir, I think
17 probably a luxury of smaller size and smaller
18 caseload, I had the luxury of the same sorts of
19 meetings that we're describing but in my case,
20 they were attended by my Judge Advocate -- Staff
21 Judge Advocate and by the Coast Guard
22 Investigative Service Lead Investigator for the

1 Region. And we routinely had these discussions
2 beginning with initial investigation status all
3 the way through disposition. Same comments
4 apply. Formal advice, always written, always
5 that dialogue back and forth, and I would say
6 probably the best way to explain that dialogue
7 from investigation through final advice is to
8 think about, you know, the manual for court-
9 martials is an appendix. It talks about the
10 factors to weigh, and those were the topics of
11 discussion, right, always. And, you know, as all
12 the panelists have mentioned, those are not easy
13 matters, and they range far beyond military
14 justice matters into all the other mechanisms
15 available to a commander to impose good order and
16 discipline as well as chief outcomes.

17 And for example, the kind of dialogue
18 that you have when you receive victim input in
19 preferred disposition, whether that input is at
20 odds with good order and discipline or not, I
21 would -- you know, I had one particular case, it
22 was an Article 120 case. It was one that I

1 wanted personally to bring to court-martial.
2 Both victims provided the same input which is
3 they wanted this person out of the Coast Guard,
4 and they did not wish to be a part of a court-
5 martial. And as we know, they don't have to
6 testify at the Article 32. And they told us
7 outright that they didn't want that, right, so
8 that input I found persuasive.

9 But that is a challenging decision,
10 and that dialogue between me and the chief
11 investigator and the Judge Advocate was - that
12 was a tough conversation, and it wasn't a simple
13 conversation because it involved me watching the
14 video of the victim testimony to the
15 investigator; right? So I -- you know, the whole
16 principle in the military justice system is that
17 the commander knows the people involved. This is
18 -- they're not -- this isn't a paper file
19 exercise, and that living color reality is what
20 made these conversations both valuable and hard.

21 So I would say, you know, getting back
22 to your original question, the advice was much

1 more valuable in helping me -- and my JAG
2 frequently accused me of thinking out loud in
3 these discussions, but that process was
4 incredibly important to me, far more so than a,
5 you know, here's your recommendation from an
6 Article 32.

7 MEMBER ALDANA: Just a quick follow-
8 up. Are there any specific additional tools that
9 you think would help convening authorities to
10 make the decision?

11 You already mentioned the factors that
12 are listed in that appendix. Are there any
13 specific that you think we should consider to
14 include?

15 ADMIRAL PENOYER: I would lead off,
16 sir. I would say, something to consider, in my
17 opinion, and take this as a, for what it's worth,
18 from a non-lawyer offering opinions, there's a
19 very heavy weight to the military justice,
20 procedural justice sort of thing in terms of, you
21 should have the evidence available, not just
22 probable cause evidence, but evidence available

1 to obtain and sustain if you're going to proceed,
2 right? That makes perfect sense to me.

3 But I would also submit that if that
4 becomes a gate threshold, like we can't win, end
5 of conversation, the Commander is left with a
6 dilemma of appearing to not take military justice
7 action, but then using all of the other tools in
8 the toolkit, and the General talked about all of
9 them, and freeing the Commander to focus on them.
10 I think those are valid points.

11 But I think if you use that as your
12 first threshold, and after that the rest of the
13 conversation is kind of irrelevant. You haven't
14 met the first gate, you can't really go forward,
15 that's something to think about.

16 And I found in my failures that that
17 frequently, as I mentioned before, the JAGs were
18 very focused on that. They don't want to bring a
19 case that they don't believe they can win or that
20 they might lose. But I found my risk tolerance
21 was a bit higher than theirs. And so, like
22 having a yes/no gate is probably something to

1 think about. Over.

2 MAJ GEN BIBB: Along those lines, I
3 don't have anything to add on the criteria for
4 consideration, but I would say I am concerned on
5 the OSTC going forward, the criteria we use for
6 success. And if the only thing we're looking at
7 is conviction rates, then I think we're missing
8 the mark. And I think the articles I've read,
9 you know, talking about, well, is, you know, the
10 preponderance of the evidence, you know, do we
11 have that wrong at the Article 32 and is that the
12 reason our conviction rates are so low.

13 And I think there, you know, I'm sure
14 there is cases where they'll get it quite right
15 across the Department of Defense, but in general
16 I think we do have the preponderance of the
17 evidence and we do have enough evidence to move
18 forward.

19 The vast majority of the cases that we
20 ended up not taking to trial, or we took to trial
21 and did not get a conviction, were very dependent
22 on the witnesses. And especially the victims.

1 And so, I would hate to see us chase that
2 statistic and change the way we do business on
3 Article 32, only look at the best statistic. I
4 think I -- we have to look at good order and
5 discipline across the board. Over.

6 MEMBER ALDANA: Thank you, General.

7 ADMIRAL ROCK: I think the Admiral
8 said it best. While I appreciate process, paper
9 cannot replace an understanding for the good
10 order and discipline climate within a command and
11 a commander's responsibility to execute that.
12 There has got to be this touch point with the
13 commander and OSTC, such that both of them work
14 together.

15 Because as I mentioned at the start,
16 you cannot outsource good order and discipline.
17 So I don't think there are additional tools that
18 I would recommend. I think we have them all.
19 Commander has got to command.

20 MEMBER ALDANA: General.

21 LT GEN MATLOCK: I think to my earlier
22 point, so what I think comes forward in the

1 judicial part of the process is very good and
2 more than sufficient. I think to my earlier
3 point, so I would look for ways in policy, and
4 other ways, to clarify that it is appropriate for
5 commanders to use their other tools, particularly
6 their adverse administrative tools, before an
7 investigation is complete. And before the
8 judicial proceedings are complete.

9 And as you all know better than I do,
10 that is not to address the criminal offenses,
11 it's to address all of the other professional
12 aspects of the full situation. So in other
13 words, the administrative tools are not a
14 different form, again, you don't say it out loud
15 so it just, it's not a different version of a
16 judicial proceeding, the purpose of, in my view,
17 the purpose of the administrative tools and all
18 the other leadership tools are to address the
19 professional standing of the military members
20 involved in the entire set of circumstances for a
21 particular incident.

22 And to my point earlier, when, and I

1 used those tools early, before investigations
2 were completed because it was appropriate to use
3 those tools to maintain good order and discipline
4 and to clarify the professional standing of the
5 military members involved. And in many cases,
6 sometimes civilian members too.

7 I'd like to see that stated that
8 explicitly so that commanders feel empowered to
9 use those tools earlier in the process, in an
10 appropriate way, with all of the procedural
11 protections that are involved in our
12 administrative tools, so that when we get to the
13 decision on whether to proceed with a courts-
14 martial, it's not all or nothing. Right?

15 And that's currently, in many cases,
16 that's how people treat it. So once you decide
17 not to prosecute, you're left with a range of
18 poor outcomes and the perception of not doing
19 something is very real. And it puts more
20 attention into the judicial decisions when in
21 fact we could remove some of that attention by
22 using other tools appropriately before you get to

1 the judicial decisions. And I think that's
2 critically important.

3 And I, you know, if I had a hundred
4 conversations with commanders about good order
5 and discipline, 99 of them involved using their
6 tools, at their level, earlier in the process to
7 maintain good order and discipline and to
8 establish the professional standing of those
9 military members.

10 So, for example, I would be an
11 advocate of approving an administrative
12 separation of somebody prior to the completion of
13 investigation. Not based on the criminal
14 offenses, but the other violations of military
15 and civic values and the other, you know, minor
16 misconduct, if you want to use that term, and
17 then suspending it depending the outcome of the
18 judicial result.

19 And then having that in place so that
20 then no matter where the judicial result goes
21 you've made an appropriate administrative
22 decision beforehand and you implement that

1 decision. And of course, the commander always
2 has the authority to reverse that decision, which
3 may be appropriate after the judicial hearing, or
4 it may not.

5 So I would look for things like that
6 that don't put us in the all or nothing position
7 of a judicial decision. Hopefully that's clear
8 enough to have further conversation.

9 MEMBER ALDANA: Thank you. Thank you
10 all.

11 CHAIR HILLMAN: General Ewers is
12 coming for you next, but first, Admiral Penoyer,
13 did you want to put a footnote on that?

14 ADMIRAL PENOYER: Just a quick
15 footnote to the General's comments. So I don't
16 think I probably need to remind the Panel, but
17 I'll just say it out loud anyway. The majority
18 of the covered offenses are inherently very
19 difficult and complex investigations that take a
20 lot of time. So these are automatically drawn
21 out affairs and highlights the importance of
22 everything the General just said.

1 Having the OSTC involved in that
2 investigation process will likely produce more
3 proficient investigative outcomes that support
4 the Military justice process. It will also
5 likely extend the investigative effort, right?
6 And so, all those things the General is talking
7 about become even more important when you think
8 about the covered offenses.

9 GEN EWERS: So good morning,
10 gentlemen. I think you validated in many ways
11 the military justice narrative that we've all
12 grown up with and that is, there's a lot of hands
13 in the decision making. The prosecutor provides
14 either risk aversion, litigation risk aversion,
15 or sometimes they're rabid. And the SJA levels
16 that with his or her sound advice.

17 But ultimately it comes down to the
18 commander, who doesn't bring expertise but brings
19 wisdom. You know, it's the Solomon who gets to
20 make the final decision based on his
21 understanding of the unit, or her understanding
22 of the unit, and the Marine, or the service

1 members in the unit.

2 Probably, as I think Admiral Penoyer
3 alluded to, that makes it more likely that a
4 court, that a case is going to go to a court than
5 not. Absent the recent concern about conveying
6 authorities making sure that sexual assault cases
7 go because they want to get their second or third
8 or fourth star, whatever that is. But just
9 leaving that aside.

10 I'm concerned about the OSTC. And if
11 the commander has always been the special
12 ingredient in our military justice system, you're
13 not it anymore. And we think maybe 80 percent of
14 the cases recited to us as the number of covered
15 cases that the OSTC is going to be involved in.

16 So the commander is no longer, no
17 longer has the final say. How do you feel about
18 that and how would you propose, you know, clearly
19 communication is going to be important. I would
20 really love to be a fly on the wall for the first
21 meeting between the OSTC and the CG whose case he
22 made go away. And so, anyway, your thoughts on

1 that please.

2 LT GEN MATLOCK: I don't think I agree
3 that the commander is not involved, at all.

4 (Off microphone comment.)

5 LT GEN MATLOCK: Right. Yes, that's
6 fair. But I never thought of in terms of having
7 the final say anyway. I'm not sure. That wasn't
8 the rubric I used to decide whether I was
9 effective or not.

10 So on the cover, I think there is a
11 division of labor, right, where there are, to
12 maybe pull my points a little bit from earlier,
13 where there are offenses where commanders should
14 have all the authorities per our traditional
15 approach, right? Particularly those things that
16 have to do with uniquely Military and disrespect
17 and dereliction of duty, et cetera.

18 And where you would draw that line is
19 an interesting question. We've drawn a line in a
20 particular place. I assume we're going to
21 renegotiate where that line is drawn a little
22 bit. Assaults may be the most difficult category

1 where you would draw that line. And maybe that's
2 worth a follow-up conversation.

3 But I think the commander remains, you
4 know, involved in communications with the unit,
5 with the leaders, with the individuals involved
6 in the case. Remain a very important part.

7 And I think if the commander uses, per
8 my earlier point, the commanders use all the
9 tools they have available, where the special
10 trial counsel makes that final decision now, the
11 commanders are still fully able to accomplish the
12 objectives of good order and discipline in their
13 formation.

14 I don't think that's a either or
15 proposition. That's not how I would look at it.

16 ADMIRAL ROCK: Perhaps I misunderstood
17 a comment you made regarding convening
18 authorities, referring charges for the sake of
19 promotion. I'd push back on that a little if I
20 understood your comment.

21 GEN EWERS: I was trying to describe
22 that. So there's been conversation, and we've

1 heard, you know, just through the grapevine, in
2 addition to hearing it inside of this Panel, that
3 there is at least anecdotal information that
4 suggests that because convening authorities who
5 are seen as soft on sexual assault, fill in the
6 blanks on what they're soft on, that their
7 promotion is being held up or there is some,
8 there's, if you're not listening to our victims,
9 we're not going to give you your next star.
10 That's essentially what it is.

11 Whether that's true or not, it's out
12 there. And whether it's an urban legend or not,
13 it's out there.

14 And I just wanted to describe that.
15 I wasn't suggesting, I wanted to focus on
16 commanders trying to make hard decisions that
17 commanders make.

18 ADMIRAL ROCK: Yes, I would categorize
19 that as urban legend, at least from my
20 experience. With regards to communications
21 between OSTC and the commander, I think the devil
22 is in the details in terms of how that is

1 executed.

2 I had mentioned in my introduction
3 that by and large the Navy has practiced like
4 this by having our Navy regional commanders be
5 the convening authorities. I think the only
6 challenge that I experience in over six years in
7 doing this was conversations with other
8 commanders that had the authority to convene a
9 general courts-martial, but because of Navy
10 practice pushed it to me.

11 In the balance of understand good
12 order and discipline from that commanders
13 perspective, yet not crossing a boundary of
14 attempting to influence my decision making.
15 Where that has been somewhat problematic. To
16 have that balanced discussion.

17 So I don't know what the solution
18 looks like going forward, other than I think
19 there is an imperative to have this discussion
20 between the commander of the unit and the OSTC.

21 MAJ GEN BIBB: Sir, I agree. Just
22 personally I've never had any pressure to push a

1 case forward or take action on a case based on
2 promotion.

3 As a side, a little more than urban
4 legend I think. You know, I worked for
5 Lieutenant General Franklin in Europe when he
6 overturned a sexual assault courts-martial and he
7 was not, the Air Force made the decision not to
8 send him to the senate for a waiver to retire as
9 a three-star or to put him forward for another
10 three-star position.

11 So I think it's very rare that a
12 general courts-martial convening authority would
13 overturn the results of a courts-martial. I
14 never did. The other officers may have, but,
15 anyway, I think that's kind of a one off. And
16 maybe the source of some of that are urban
17 legend, but I have never felt any of those
18 pressures today.

19 As far as the -- I lost my train of
20 thought, so I'll come back to it in a minute.

21 Thank you.

22 GEN EWERS: If I could just, so I

1 allowed an aside to swallow the question that I
2 wanted to ask you. So I just wanted to dispense
3 with this as quickly as possible.

4 I am not suggesting that that's
5 happening, I'm simply saying that's one of the
6 optics that is out there, that commanders feel
7 pressure to send cases forward that they wouldn't
8 otherwise send forward because they don't want to
9 appear soft on, again, fill in the blanks.

10 MAJ GEN BIBB: Yes, sir. That's fair.
11 And I think that's a fair discussion item. As
12 far as the OSTC goes, I work for a general named
13 Frank Gorenc that I have a lot of respect for.

14 And similar thing. Different
15 situations but similar discussions. And he said,
16 Thad, we have to trust up, trust down, trust
17 left, trust right that the other officers that we
18 work with are going to stand up and do the right
19 thing and make the right decisions.

20 And so our relationship with the OSTC
21 so far, we started working with them last year
22 when I was still in command. It has been very

1 positive in moving forward.

2 I think you're right, you know, the
3 commander no longer has the final say on these
4 covered cases, and so we'll see how that works
5 out. I trust they're going to make the right
6 decisions for the right reasons, but I do think
7 it's important on how we measure their success
8 and what metrics they're shooting for, and that
9 we're not chasing a metric, but chasing fairness
10 and transparency and a system that's just.

11 ADMIRAL PENOYER: To your question.
12 I would echo the previous panel comments about
13 the level of communication that will be required.

14 And I would say, I think it's
15 important to note that for, if you look at
16 Article 120 offenses or any of the other covered
17 offenses, I think all the services have some
18 version of the same process in which immediate
19 safety of victims, family advocacy, all of these
20 factors, mental health, physical health, pre-
21 trial confinement, all of these matters are
22 jointly considered. And they're really outside

1 of the limited question of military justice,
2 right?

3 The chief prosecutor in our case, or
4 the OSTC, is going to have to be involved pretty
5 much from instant. Because many of these things
6 can have an adverse effect. Where I decide to
7 put somebody can change their availability for
8 interview or can be perceived as an adverse
9 consequence, which may be contrary to the
10 interest of justice as we're investigating, et
11 cetera, et cetera.

12 So that conversation is something that
13 is ongoing. And the chief prosecutor is going to
14 have to be involved at a level that I think we're
15 going to have to see how that plays out. And if
16 I had a concern, it would be the volume of
17 communication. I know what that imposed on me as
18 a commander to be involved in all of those 360
19 degree management efforts.

20 But I would also say to a point that
21 you made about, at the opening of your question,
22 right, our chief prosecutor, and I'm certain the

1 OSTCs as well, are completely aware that, like as
2 you say, the final decision authority does not
3 really derive from any Solomon like quality that
4 a commander has, it derives from their complete,
5 total and personal responsibility for what
6 occurs, or fails to occur, at the unit. Right?

7 You own that outcome and therefore I
8 think the question really won't be one of, how
9 far afield the OSTC goes from what you would have
10 wanted as a commander, it will rather be one of
11 supporting the commander in the sense that that
12 commander is still responsible for that unit.
13 Right?

14 Severing the trial decision, I don't
15 think we'll change that in the military culture.
16 And it's going to, again, require that that
17 communication between commander and commander,
18 OSTC and me, will be, you know, that's going to
19 be a very intense and frequent conversation
20 during the outcome decision by the OSTC.

21 CHAIR HILLMAN: John Redford.

22 MEMBER REDFORD: Good morning. I have

1 an observation, and then I value what, if anyone
2 wants to add any input or thoughts on the
3 observation.

4 Each of you Flag and General Officers
5 have described the extraordinary time commitment,
6 mental commitment, emotional commitment you've
7 made to the decisions to exercise your general
8 courts-martial convening authority. Each service
9 will have one one-star to make all those
10 decisions that each of you made every week, with
11 all those meetings with your SJAs, for the entire
12 force. How is it possible?

13 LT GEN MATLOCK: I can't say I'm
14 conversant on the staff support that that one-
15 star will receive, so I'm not sure I'd be
16 comfortable saying that that's not possible. So,
17 that will be a busy one-star for sure. I assume
18 there will be a robust set of staff support and
19 procedures that enable that one-star to do their
20 work. Yes.

21 But I think we need to see, we need to
22 see that, right? We made a lot of changes and I

1 think it's appropriate for us to let those
2 changes proceed and maybe not add a lot of new
3 changes to the equation and develop --

4 MEMBER REDFORD: You must have been
5 listening to all of our closed sessions --

6 LT GEN MATLOCK: Right.

7 MEMBER REDFORD: -- in that sense --

8 LT GEN MATLOCK: Yes. And then make
9 measured change after we understand what the
10 outcome of these changes are.

11 ADMIRAL ROCK: The change is good.
12 And I recognize your concern, but in terms of
13 providing a focused attention at the right level,
14 I'm confident we'll see success here.

15 But I agree with General Matlock that
16 we need a hold on what we have. Let's make these
17 changes, let's see the lessons we've learned from
18 it before we make any additional changes. And
19 there will likely be some puts and takes, and
20 some things we'll need to tweak along the way.
21 But I think your concern is very, very founded
22 and it's something we've got to keep our eye on.

1 MAJ GEN BIBB: So I'll just point out
2 that I do feel sorry for that one-star, that's
3 going to be a lot of work. But also, that's
4 going to be the focus of their job. I would say
5 that, maybe even the sole focus of their job,
6 right?

7 And so for me we were, you know, at
8 the same time we were talking about the cases we
9 were talking about. We were executing the go to
10 zero out of Afghanistan. You know, two months
11 later we turn around and evacuating 123,000
12 Afghans from Afghanistan and bringing them back
13 to the U.S. Right?

14 Right. So there was, that's not the
15 only part of command. It wasn't also commanding
16 7th Fleet or commanding all the Army forces down
17 range, right? There is significant other parts
18 of our job. Not to say this was a distraction,
19 because I think we each knew how important this
20 was and put the right amount of focus on it, but
21 for that one-star, if that's their entire focus,
22 there may be some efficiencies in that. Over.

1 ADMIRAL PENOYER: Sir, I would only
2 add that I think, maybe two quick points. The
3 first is that I think that the staff judge
4 advocates will be deeply entrenched in the same
5 kind of work-ups that they're doing today. So
6 it's not as though you simply hit the forward
7 button to a charge sheet and that's the last you
8 hear of it, right?

9 I think at a staff level I think I
10 will be interested to see whether there is
11 actually any reduction in workload to the staff
12 judge advocate attached to a general courts-
13 martial authority. I doubt it.

14 My second point would be that as a
15 uniformed outside observer, my sense is that as
16 the military rightfully placed emphasis years ago
17 on getting after sexual assault cases, the
18 Article 120 cases, and the many changes that have
19 occurred there, the relative number of other
20 lesser offenses prosecuted through that versus
21 administrative channels dropped.

22 And so it's an interesting question

1 for me, what will general courts-martial
2 authorities be spending their time on because my
3 sense is, prior to paying as focused attention as
4 we have, especially under the changes of a 120,
5 we spend our time on other uniquely military
6 offenses. It will be interesting to see if you
7 see an uptick in the use of military justice
8 tools for those other offenses as a result of the
9 special prosecutor taking some of the covered
10 offense workload off.

11 CHAIR HILLMAN: General Brunson.

12 MEMBER BRUNSON: Good morning.

13 Gentlemen, I have two questions. The first is,
14 what are your thoughts on expanding the role of
15 the OSTC, so not just for the 120 offenses but to
16 throughout military justice. So for example,
17 everything that is not a uniquely military
18 offense, how do you think that would impact the
19 force, how would it impact your role taking that
20 referral authority away, and do you think that
21 would impact good order and discipline?

22 LT GEN MATLOCK: So I mentioned

1 briefly earlier, I think the current division of
2 labor between what we're going to ask the general
3 officers, the general courts-martial convening
4 authorities to do, and this special trial counsel
5 to do, is a very appropriate, reasonable
6 approach. And I think we need to watch how the
7 system, as it's currently going to be
8 implemented, works out.

9 I did note that one of the more
10 difficult categories that I found, is as both a
11 general courts-martial, and especially as a
12 special courts-martial convening authority, was
13 assault. The tendency to use -- the misuse of
14 violence outside of your professional obligations
15 to use violence, I consider to be a very serious
16 problem.

17 In cultural insight, especially I
18 would say combat arms units, that's not
19 necessarily considered by junior commanders and
20 junior leaders to be such a serious problem.
21 Soldiers got into a fight downtown, et cetera.
22 And so I found myself pulling that type of

1 offense up to my level from time-to-time when I
2 thought there was a degree of difference in the
3 nature of an assault that needed to be looked at
4 with a more experience eye, for example.

5 So I think that would be an
6 interesting conversation to have. But based on
7 what I understand from our current system now, I
8 wouldn't recommend further expansion until we put
9 into practice the current contemplated changes.

10 ADMIRAL ROCK: I agree. I believe the
11 reform side will take place later this year. It
12 struck the right balance.

13 And I understand why the changes are
14 being made. And the necessity of looking more
15 seriously at the more serious cases. And I
16 support that new approach.

17 But I believe that the more we divorce
18 the commander from the discipline process the
19 more difficult it is for that commander to
20 maintain, build and lead an effective unit. So
21 I think we need to hold what we have and see how
22 that plays out before we make any additional

1 changes.

2 MAJ GEN BIBB: Yes, ma'am. I'll echo
3 Admiral Rock. I do think there is some
4 advantages of freezing the stick for a moment and
5 seeing how the OSTC works out and then go in from
6 there.

7 And I think I would approach it with
8 an open mind. Maybe that's the way of the
9 future. But I think there is some pluses and
10 minuses maybe we don't see yet.

11 ADMIRAL PENOYER: And I would just
12 echo everything that was previously said, and I
13 would, to the point about, I would, just maybe
14 the general observation that it's not really
15 possible to sever the military justice from the
16 other good order and discipline tools to the
17 General's keynote point about this. In the sense
18 that unit commanders will still be doing all of
19 those other things that they need to do to create
20 the conditions that they're in for operational
21 success.

22 So I think the farther you go, the

1 more you bifurcate. You know, there is probably
2 an exponential or logarithmic sort of function
3 with regard to the amount of communication
4 between the military justice component and all of
5 the other tools in the toolkit. Which will be,
6 and need to be, exercised.

7 On a time frame that is good for good
8 order and discipline, procedural justice moves on
9 a certain timeline. And it's my experience that
10 good order and discipline timelines are not the
11 same. And so, I would submit that, you know,
12 that logarithmic function should be the key
13 decision point about how far you go.

14 That being said, I think all of us
15 expressed an open mind to that. I don't know
16 what that set point is. We picked one to start
17 with. It will be interesting to see where that
18 lands.

19 MEMBER BRUNSON: Thank you. And then
20 my second question, a little different. If I
21 understood you all correctly, what I heard was
22 that you value, or weight, the dialogue with your

1 SJA over that of the preliminary hearing officer.

2 I am wondering, well, I can only speak
3 for the Army, I don't know about the other
4 services, but SJAs have varying degrees of
5 military justice experience. If you have a FLEP,
6 for example, they probably have very little. So
7 I'm curious whether in relying on your SJA for
8 that advice, if you are aware of their military
9 justice experience?

10 LT GEN MATLOCK: Definitely. I'm
11 probably not a good person to answer that. I've
12 been blessed with some pretty experienced, who
13 had really robust backgrounds in military justice
14 across the board.

15 I think the Army is very thoughtful
16 about where they put their colonels, especially,
17 and lieutenant colonels, into spaces where there
18 is area jurisdiction, a larger set of issues.
19 Like our senior commanders and installation. So,
20 I've never, I've never personally felt that a SJA
21 that was providing me advice wasn't well prepared
22 through the range of their professional career to

1 be in the room providing that advice.

2 ADMIRAL ROCK: I'd agree. And I too
3 have been extremely blessed over my career to
4 work with incredible officers. At every unit
5 that I was assigned to that had an SJA, that SJA
6 was the best officer at that unit.

7 And I don't know why this worked out
8 this way for me, but just incredible, incredible
9 talent. As a convening authority, the SJAs
10 assigned to me were either a senior O-5 or an O-
11 6. So they came with 16, 18, 20 years of
12 experience. So I never had any question about
13 the experience that they brought to the table.

14 MEMBER BRUNSON: And just to be clear,
15 sir, I recognize that, full disclosure, Army JAG.
16 So I recognize all of the training and the
17 experience and what the years bring, but I'm
18 specifically interested in military justice
19 experience.

20 For example, it is possible to reach
21 the rank of Colonel in the JAG Corps if you were
22 a FLEP and came in as a major with one tour as a

1 trial counsel and then moving into supervisory
2 positions. So that's really the question I'm
3 getting at is, if you are aware, I don't doubt
4 that they were phenomenal officers, they wouldn't
5 have been SJAs if they weren't, but if you are
6 aware of their military justice background?

7 ADMIRAL ROCK: I didn't have a say in
8 the assignment process, right? You get what you
9 get. But our top JAGs end up becoming SJAs and
10 they are trapped. In terms of specific areas of
11 expertise. In military justice specifically.

12 So could I look at a resume and make
13 a determination whether they had sufficient
14 experience or not, the answer is no. Could they
15 make that determination based on the interaction
16 and advice, and the trust and confidence that we
17 built together, absolute yes.

18 MAJ GEN BIBB: I mean, my experience
19 was that our judge advocate corps was very
20 careful about the officers that were placed to
21 advise your general courts-martial convening
22 authorities. And while I did have good friends

1 that were phenomenal officers that spent 25 years
2 in environmental law, those weren't the officers
3 that were assigned to me as an SJA. And so I
4 found their military discipline and background
5 more than enough.

6 I will say that your SJA goes on leave
7 sometimes, right? So sometimes if it was the
8 deputy SJA that was coming up or Reservist that
9 was filling in for two weeks, I took that with a
10 different level of weight, right?

11 And I don't want you to think that I
12 discounted the PHO. This all started with the PHO
13 and the Article 32. It was just, to me, the SJA
14 was the top off. Or if there were areas where I
15 had questions or where this didn't seem quite
16 right or it wasn't concurrent or congruent with
17 previous PHO products that I had gotten or
18 Article 32 write ups that that's where I went to
19 my SJA to ask why those differences were there or
20 what the PHO might have been considering.

21 MEMBER BRUNSON: What I took away from
22 that, sir, is you allowed the SJA to go on leave?

1 Okay.

2 ADMIRAL PENOYER: Ma'am, I'd echo the
3 complete confidence in the JAGs that I've had,
4 but I would also submit to you that by the time
5 you get to be a general courts-martial authority,
6 you are pretty steep in the factors that are
7 going to drive you forward. And I don't want to
8 portray it as an adversarial relationship with
9 our JAG, but it is a highly candid back and forth
10 with the JAG.

11 And my experience is, you detect very
12 quickly their prosecutorial savvy. And you also
13 detect the flaws that typically occur. For
14 example, I found that when I had a staff judge
15 advocate with a really robust prosecutorial
16 background, they tended to forget the commanders
17 larger responsibility for the administration of
18 military justice. Including the rights of the
19 accused, access to services that we're obliged to
20 provide to them in terms of expert witnesses and
21 so on, right?

22 And so, that dialogue back and forth

1 on points like that, you get to know your JAG at
2 a level that I think is no degree of experience
3 indicator or number of years in military justice.
4 And I take your point about OPLA and all the
5 other things that are demanding on an SJA. I am
6 more interested in how they think about military
7 justice than the amount of years they have
8 practiced.

9 MEMBER SOMERS: Hello. I have a
10 question based upon some of the comments that you
11 said regarding the Article 32 report. It sounds
12 as if the report is really secondary to your
13 decision making process and you rely more on your
14 JAG to decide.

15 One question. What would you want to
16 see in the report that would be more helpful?

17 And second, do you have any
18 opportunity to ever speak to the person who was
19 the Article 32 officer to find out more of an
20 understanding of why they reached the conclusion
21 that they reached? And I'll just go down the
22 list. General, thank you.

1 LT GEN MATLOCK: Thank you. Ma'am, so
2 I'd say it's foundational to what the advice is
3 of the JAG, not secondary. So it's clearly a
4 building block on what the SJA does. And fully
5 reviewed, along with all the other materials that
6 are presented. And occasionally a couple of
7 people mentioned conversations with
8 investigations and others.

9 So, I don't, you know, I rack my
10 brain. And I did a lot. I don't know what my
11 numbers were, maybe not that many, but I did a
12 lot of these over the years and I never felt like
13 there was a disconnect between those two parts of
14 the process.

15 I was an Article 32 officers for a
16 murder when I was a major, murder case. And I
17 felt like, I looked back and I felt like I was
18 diligent and responsible in everything I did
19 there, but I'm not sure I would ask my younger
20 self to do that again as a, yes, as a non-SJA.

21 So I think the move towards the lawyer
22 doing this work is appropriate. I think it's

1 made it an even stronger part of the process.

2 And I think the process works really well.

3 MEMBER SOMERS: Thank you, Admiral.

4 ADMIRAL ROCK: I agree with the
5 General. It's supportive. I don't want to
6 undervalue the PHO's report. It really does
7 provide the foundation for the discussion.

8 I think what is missing is that
9 dialogue. And I think back, the cases, all the
10 cases I've done, there has probably been a half a
11 dozen times where I've had questions about the
12 PHO's report where I haven't talked directly to
13 the PHO, but through the SJA. There's been some
14 clarification that has come out of that. And I
15 think there may have been one or two times that I
16 disagreed with a PHO.

17 But by and large it's consistent. And
18 I think the theme that you're hearing from us is
19 the value of having a dialogue with a trusted
20 advisor, and that's not the PHO. But it doesn't
21 mean the PHO's report is any less valuable.

22 MAJ GEN BIBB: I agree, it's

1 foundational in the Article 32, the PHO's report.
2 We found that very helpful. It was very rare
3 that we went differently than what the PHO
4 recommended. There were a couple of cases.

5 In those cases I don't ever remember
6 ever directly engaging with a PHO, but there was
7 a couple of times I asked my SJA to go back and
8 ask the PHO some follow-on questions or for some
9 additional analysis.

10 And there was one of maybe hundreds
11 that I remember that I just didn't feel like the
12 PHO, I didn't feel like it was a professional
13 report and so I passed that through the SJA chain
14 to say, hey, I'm not sure this officer should be
15 fulfilling PHO responsibilities for future cases.
16 But yes, that was very, very rare.

17 ADMIRAL PENOYER: Anyway, I have a
18 small sample size here, so I won't try to
19 overgeneralize, but I would say my personal
20 experience with it would have been to hypothesis.
21 I would have thought it more valuable had there
22 been a surprise to me. Right?

1 So I had the preliminary hearing
2 officer come back and said, there is not a
3 preponderance of evidence here or we'd recommend
4 the disposition that like was wildly out of touch
5 with what I thought. That would have been
6 interesting.

7 But what I procedurally found is that
8 it was really an edit check. And the edit checks
9 didn't surprise me in the cases that I had. It
10 was pretty much what I expected I was going to
11 get. It's useful. It's very useful to have
12 somebody independently validate your thinking in
13 line of position.

14 But I wouldn't say it was like
15 determinative. The way I describe it in general
16 terms is, neither the JAG's advice nor the
17 Article 32 made me feel any less relieved of my
18 obligation to determine disposition from first
19 principals.

20 MEMBER SOMERS: Thank you.

21 CHAIR HILLMAN: So let me check in
22 with our virtual colleagues. Colonel Morris,

1 Colonel Osborn who are joining us virtually, do
2 you have questions for this Panel?

3 COL OSBORN: Hello, Chair Hillman and
4 gentlemen, thank you. I apologize if someone has
5 already asked this question, but I came into the
6 meeting rather late.

7 My question is a broad one from a
8 larger military perspective, and from your
9 positions as senior leaders. I'm concerned that
10 our junior commanders, after the OSTC goes into
11 operation, will have less contact perhaps with
12 military justice. And so my question is, is what
13 do we do as the Military at large, and you as
14 senior leaders, to ensure that those junior
15 commanders stay involved with military justice
16 and not just get a view that, well, let's the
17 OSTC handle it?

18 LT GEN MATLOCK: Ma'am, that's a great
19 question. So in the Army system, right, where we
20 have company grade officers, typically captains
21 who perform Article 15 proceedings, so my contact
22 with SJAs was early, right, you know, four or

1 five years in the Army and fairly consistent in
2 both command and non-command positions since
3 then.

4 And so, that vehicle by itself demands
5 that we put training into the professional
6 education of very junior officers. That
7 professional education includes the non-
8 commissioned officers who are their senior
9 enlisted advisors.

10 At the higher, at the intermediate
11 level, our system, I think, I'm trying to
12 remember, I definitely went to our legal course
13 in Charlottesville as a prior brigade command.
14 I'm about a hundred percent certain, about 99
15 percent certain, I went before a squadron
16 command. That's starting to be a long time ago.

17 And I went back again during the
18 general officer before taking division command.
19 I actually went back again when I came back to
20 the Army staff. So I've had regular touch points
21 there.

22 And I think just on that foundation

1 alone there is, I think leaders for our PME walk
2 away from that with a clear message that they
3 are, it's important for them to have a
4 relationship with their legal team, whatever that
5 form is, and that they regularly interact. And I
6 don't think there is an Army, I haven't observed
7 Army leaders who hesitate to engage their legal
8 advisors in their appropriate role. And I think
9 we can sustain that through our existing use of
10 non-judicial punishment, administrative actions
11 and our professional education.

12 COL OSBORN: Thank you, sir.

13 ADMIRAL ROCK: It really is an
14 excellent question. And I think that the
15 results, at least the initial results as we
16 implement OSTC is really going to be telling.
17 Certainly education is foundational to that. And
18 ensuring other commanders, particularly our
19 junior commanders, understand the role of OSTC
20 and more importantly their role with OSTC.

21 But we touched on this earlier. And
22 measures of success are something that are

1 probably important. And prosecutorial measures
2 probably aren't good enough. And if we stay
3 foundational and grounded in good order and
4 discipline and the effectiveness and efficiency
5 of our units, I think we'll be in a better
6 standing to be able to answer your question as we
7 implement OSTC.

8 COL OSBORN: Thank you, sir.

9 MAJ GEN BIBB: Ma'am, I agree, great
10 question. I don't see any immediate actions for
11 the Panel per say, but I think we have done that
12 as commanders. And I think that's a constant
13 challenge.

14 I know as a commander, going up from
15 flight commander, to squadron command, to wing
16 command, to center, to NAF, at every level I more
17 appreciated the relationship I had with my SJA
18 and you had more involvement with the military
19 justice side. And so for our younger commanders
20 I think that's something new and that's something
21 that we need to continue to train them on, I
22 think, as we go forward with OSTC. You raise a

1 great point, we need to lead through this and
2 make sure our younger commanders stay involved
3 and are more active. Over.

4 COL OSBORN: Thank you, gentlemen.

5 ADMIRAL PENOYER: Ma'am, I think if I
6 can just add. I agree with the point, I'd go
7 back to where the general started which is to say
8 that a commander's responsibility to use all the
9 tools in the toolkit are particularly primary
10 prevention is really the point here.

11 And a negative outcome would be if
12 commanders were left with the impression they
13 were relieved of responsibility, simply because
14 there's an OSTC. And I don't believe there is
15 any likelihood of that occurring.

16 And further to that point, I would say
17 that the integration of OPLA advice into their
18 daily work, there is ways to, there is an
19 adherent meshing of judicial minded thinking that
20 goes into what a commander is being groomed for
21 all along. So, I don't believe there is a lot of
22 risk that we're going to see. Junior commanders

1 lose that judicial mindedness, lose interface
2 with the JAG Corps or lose the sense that they're
3 responsible for these matters. Even though there
4 is now this other entity involved. I think the
5 previous speakers really hit that perfectly.

6 COL OSBORN: Thank you, gentlemen, for
7 your thoughtful answers on that question that has
8 been on my, top of my mind for quite some time.
9 Thank you.

10 CHAIR HILLMAN: I think that's a great
11 place to close. I want to thank you for -- oh,
12 General Kenny. General Kenny.

13 MEMBER KENNY: I just have one
14 question that is brought on because of the
15 testimony that you've given has been tremendous,
16 but it brings to mind a question. So want to
17 preface it this way. It's not personal to any of
18 you, it's based on your experience.

19 Are you familiar with any time when a
20 general courts-martial convening authority did
21 not refer a case to courts-martial after the
22 preliminary hearing officer and the staff judge

1 advocate found both probable cause and evidence
2 that would likely obtain and sustain a
3 conviction?

4 LT GEN MATLOCK: I'm not personally
5 aware. Never had that experience?

6 MEMBER KENNY: Thank you.

7 ADMIRAL ROCK: None, sir. Zero.

8 MEMBER KENNY: Thank you.

9 MAJ GEN BIBB: No, sir, zero.

10 MEMBER KENNY: Thank you.

11 ADMIRAL PENOYER: Sir, I have to join
12 my colleagues, I can't think of a single
13 instance.

14 MEMBER KENNY: Thank you very much.
15 I appreciate that.

16 CHAIR HILLMAN: Okay. On that note,
17 thank you for your dedication for, the stamina
18 that allowed you to exercise that dedication over
19 such distinguished careers and the services for
20 our country and for the world. And we really
21 appreciate your time this morning, so take good
22 care.

1 (Whereupon, the above-entitled matter
2 went off the record at 11:23 a.m. and resumed at
3 12:45 p.m.)

4 COL BOVARNICK: Welcome back,
5 everyone. This next open session of our academic
6 experts, our panel, and joining us back again
7 today, is Dean Schenck, who was with us
8 yesterday. Ma'am, thank you for coming back.
9 Professor Geoff Corn from Texas Tech University
10 School of Law, and Professor Eugene Fidell from
11 Yale Law.

12 And the panelists will give brief
13 introductions, comments, and then like always,
14 we'll turn it back to the panel.

15 Dr. Hillman, do you have any initial
16 comments?

17 CHAIR HILLMAN: No. Thanks, Colonel
18 Bovarnick. It's great to have some of my -- I
19 used to be a law professor.

20 It's great to have my people back here
21 with all these military justice practitioners who
22 surround me, and we're excited to hear from each

1 of you. So, thanks for being here.

2 Okay, we have an order, Colonel
3 Bovarnick.

4 COL BOVARNICK: Dean Schenck, if you
5 want to start, and then we'll just go down the
6 row with your colleagues. Yes, if you'll press
7 the red button, Dean Schenck, then you'll have
8 it. There you go. Okay, perfect.

9 DEAN SCHENCK: Chair Hillman and Panel
10 Members, thank you for inviting me to speak with
11 you today.

12 As my bio indicates, I've been
13 involved in military justice as a brigade, legal
14 advisor, and an infantry brigade, assistant
15 professor at West Point, chief of military
16 justice, and as an associate and senior appellate
17 judge on the Army Corps of Criminal Appeals,
18 where I served for nearly six years,
19 participating in 1,700 cases, and serving as the
20 lead judge on 790 cases.

21 I also served on several federal
22 advisory committees focused on sexual assault in

1 the military services, including a senior advisor
2 to the Defense Task Force on Sexual Assault in
3 the Military Services.

4 I recently served with Gene as a
5 member of the Executive Review Panel for the
6 Comprehensive Review of the Navy and Marine Corps
7 Uniform Legal Communities.

8 I was a member of DoD Judicial
9 Proceedings Panel Subcommittee, the DoD Response
10 Systems to Adult Sexual Assault Crimes Panel, RSP
11 Victims Services Subcommittee, and I was a
12 consultant to the Air Force Scientific Advisory
13 Board that studies combating sexual assaults, and
14 of course, I was on the Code Committee for four
15 years.

16 I write extensively in the area of
17 military justice, currently working on the fourth
18 edition of my case book, Modern Military Justice
19 Cases and Materials, and coauthoring the Horn
20 Book Military Criminal Justice, Practice and
21 Procedure, as well as coauthoring Constitutional
22 and Military Law, the book that's used by the

1 cadets at West Point, and I teach military
2 justice.

3 Since my retirement from the Army JAG
4 Corps, I've watched the extensive and numerous
5 changes to the military justice system.
6 Specifically, since 2013 to the present.

7 At this point, I see a need to take a
8 pause from making changes, and just let the
9 change system work. Any future changes must be
10 based on a measured, educated, holistic approach.
11 I look forward to your questions.

12 CHAIR HILLMAN: Thanks, Dean Schenck.
13 Professor Corn?

14 PROFESSOR CORN: Good afternoon, and
15 thank you for the opportunity to offer my
16 thoughts on the issue of the Article 32. I'm
17 assuming you have my bio, so I won't go into
18 detail on that. Obviously, retired Army JAG
19 Officer, and I've been a law professor for
20 eighteen years now. Recently moved to Texas Tech
21 University.

22 I'll just come out and put the bottom

1 line up front. I think the dilution of the
2 investigative role of the Article 32 is deeply
3 troubling and unfortunate.

4 I think if we look at the history of
5 the Article 32, there's a consistent thread that
6 runs through it from when it appeared in the 1917
7 Manual for Courts-Martial, into the 1920 Articles
8 of War, and then further beyond that, which was
9 to do a thorough and comprehensive investigation
10 of the charges, in order to inform the convening
11 authority as to whether or not those charges
12 warrant putting a service member in jeopardy, in
13 the form of a court-martial.

14 The goal, according to General Ansell,
15 was to reduce the number of courts-martials that
16 were being referred to trial, to guard against
17 hasty, ill-considered charges to save innocent
18 persons from the stigma of unfounded charges, to
19 prevent trivial cases from going before general
20 courts-martial.

21 My view is if we're going to call the
22 new procedure a preliminary hearing, we have to

1 be true to what a preliminary hearing is.

2 And I would cite the case of Powell v.
3 Alabama, from 1970, where the Supreme Court of
4 the United States, reviewing a preliminary
5 hearing that was, number one, not required under
6 Alabama law, and number two, did not result in
7 any evidence that could be used against the
8 defendant at trial, nonetheless concluded that a
9 preliminary hearing is a critical stage in the
10 adversarial process, precisely because the role
11 of the defense counsel at that preliminary
12 hearing enabled the vigorous cross-examination of
13 prosecution witnesses, and enabled the lawyer to
14 develop testimony that could be preserved for
15 later use at trial.

16 And to allow a preliminary hearing to
17 be conducted with no meaningful opportunity for
18 the defense to confront accusers, undermines this
19 critical role of the preliminary hearing, and I
20 think does disservice to the notion of the
21 preliminary hearing as a critical stage in the
22 adversarial process. I look forward to your

1 questions.

2 CHAIR HILLMAN: Thanks, Professor
3 Corn.

4 PROFESSOR FIDELL: Gene Fidell. I'm
5 the Coastie on the panel. I've been involved
6 with military justice since I graduated from OCS
7 in 1969.

8 I'm also a textbook, casebook author.
9 The Fourth Edition of the other casebook, called
10 Military Justice Cases and Materials, will be
11 available for the fall semester for anybody who's
12 teaching the subject.

13 The only comment I want to make at the
14 outset is that in my opinion, the many worthwhile
15 changes, incremental changes, that Congress has
16 made over the years, have both over-complicated
17 the military justice system, and failed to get
18 rid of features that are obsolete and wasteful.

19 Colonel Jim Young and I -- he's
20 retired Air Force -- make these points in a law
21 review article that I expect Villanova Law Review
22 will be publishing later this year, and I hope

1 you'll have an opportunity to read it.

2 Based on what we said there, I urge
3 the review panel to recommend a complete overhaul
4 that would simplify and modernize the military
5 justice system.

6 Such an overhaul cannot be completed
7 within time. Article 140 of the Code allows for
8 the first periodic comprehensive review
9 assessment and report. But the sooner it's
10 undertaken, the better.

11 And I hope you'll set the wheels in
12 motion for that. I have some thoughts in
13 Article 32s, but I understand you have some
14 specific questions. So, let me reserve on that
15 until we get to that part of the agenda. Thank
16 you.

17 CHAIR HILLMAN: Okay, thank you.
18 Briefest opening remarks ever by academics. So,
19 just, we want that in the record.

20 So, you know some of the questions
21 that we wanted to focus on, and I appreciate that
22 you set out some initial positions on this. I'm

1 going to open up to the panel, questions around
2 this.

3 MEMBER GUNN: Professor Fidell, I'm
4 very interested in your statement about a
5 complete overhaul. And specifically, I can
6 understand an overhaul from the standpoint of
7 we're trying for efficacy and efficiency.

8 But you haven't really elaborated.
9 You said you would want to simplify the system.
10 But to what end?

11 PROFESSOR FIDELL: I think the goal
12 everybody shares is that justice should be done.
13 That's mother's milk. That's easy.

14 I believe that over the now
15 centuries -- certainly a century since the
16 Ansell-Crowder Controversy in the 1920 Act,
17 Congress has encrusted the system with parts that
18 no longer play a necessary role. And in a way,
19 this is as good a time as any to talk about the
20 Article 32.

21 As an example, you remember the case
22 from Annapolis a number of years ago, that

1 horrendous five-day Article 32, where multiple
2 lawyers were hammering the victim and the
3 Article 32 officer, who was a lawyer, I believe.
4 Am I right on that? He was a lawyer?

5 It blew my mind. And I wrote an op-ed
6 for the Baltimore Sun saying, this is crazy. And
7 really, something has to be done.

8 I'm not saying my op-ed caused
9 Congress to change the statute, but if it had
10 some effect, I'm all for it.

11 I think the Article 32 -- and this is
12 by way of an example of what I was talking about,
13 in terms of artifacts of an earlier era -- the
14 old Article 32 was an artifact from a period
15 before we had military judges, before we had
16 lawyers in every courtroom. It's been that way
17 since 1968, right?

18 It's before we had a proper appellate
19 review. It's before we had modern rules of
20 evidence. Military rules of evidence were, what,
21 late-'70s? 1980 or so? Before we had Supreme
22 Court review of some cases.

1 So, the whole cosmos has changed. And
2 yet, we're still dealing with what I'll call the
3 old Article 32 -- that which is kind of a
4 discovery tool, everybody knows that -- in an era
5 where it no longer makes any sense. It's like
6 having a crankshaft on an electric car. You
7 don't need it anymore.

8 We now have the basic features of an,
9 I'll say, late-20th Century system. We don't
10 have a 21st Century system yet.

11 But that's an example of an artifact
12 of an earlier era. Sure, cases were being
13 casually sent to trial. Sure, that was very
14 unfair. Obviously, a terrible situation.

15 Did it make sense to have a pretrial
16 investigation at the time? Yes. And Congress
17 gave that a serious haircut after the kinds of
18 abusive uses that we saw.

19 Nonetheless, I think that the model
20 that we should be looking to on the preliminary
21 hearing should be the model that's used in the
22 federal district courts.

1 And that has two aspects. Number one,
2 it's not much of a discovery tool. That's life.
3 I mean, we have other means of getting discovery
4 in criminal prosecutions in the federal system.

5 Number two, it means that if there's
6 a finding of no probable cause, the system says
7 stop. And we'll get to this, about whether there
8 should be a binding determination as to whether
9 there's probable cause, or whether the criminal
10 justice system, the military justice system,
11 should proceed over the conclusion of the
12 attorney who is presiding at the preliminary
13 hearing.

14 The attorney, by the way, ought to be
15 a military judge or a military magistrate.

16 Let me stop there. But that's by way
17 of example. And I have a number of other things.
18 I don't want to monopolize time. I'm anxious
19 that everybody be heard from.

20 I have a number of items that I want
21 to get to at the tail end because, perhaps
22 unwisely, there was a wildcard question. What

1 would you like to change? Or what would you like
2 to see us on the review panel do?

3 And I have taken some time to come up
4 with some suggestions. I don't want to do them
5 now, because I think that would sort of flip the
6 logic of your own inquiry. But that's my answer
7 to your question.

8 MEMBER GUNN: Thank you.

9 CHAIR HILLMAN: Dean Schenck?

10 DEAN SCHENCK: Yeah, I'd like to
11 respond to that. We are not equivalent to the
12 federal system. The federal system has a
13 preliminary hearing and a grand jury.

14 Now, remember, we're exempt from the
15 Constitution to have a grand jury in the
16 military.

17 A preliminary hearing involves a
18 judge. It involves the ability to subpoena
19 witnesses.

20 The accused is generally confined.
21 And in the military, our accused aren't confined.

22 The grand jury has to have -- the

1 prosecutor's got to convince twelve people, and
2 the grand jury can subpoena the victim.

3 Now, think about what we have in the
4 military right now with the new system. We have
5 no incentives on the parts of counsel, because
6 the accused is not confined. So, the defense
7 counsel need not provide anything. And the
8 prosecutor doesn't need to provide anything
9 because it's probable cause, and they don't have
10 to perfect their case.

11 And this is early in the process. We
12 do these early in the process so that victims can
13 see the process moving.

14 So, the prosecutors don't have time to
15 perfect their case. The hearing officer may or
16 may not have criminal law experience. The
17 prosecutor, at the time of the preliminary
18 hearing, is going to admit what meets probable
19 cause, and then they're going to get DNA.

20 They're going to get fingerprint
21 analysis. They're going to get other evidence,
22 and they're going to perfect their case. And

1 they're going to be able to persuade the staff
2 judge advocate to find probable cause based on
3 the victim credibility.

4 The victim is not testifying at the
5 preliminary hearing. So, those cases that are in
6 balance, there's no victim credibility to assess,
7 except for the paper.

8 Now, there are some video statements
9 by the victims. So, the problem with making -- I
10 think we've got to figure out what do we want
11 from the military Article 32 hearing?

12 Do we want it to inform the accused
13 about charges and information? Do we want to
14 make the prosecutor perfect their case? If
15 you're going to make it binding, it's going to
16 change the dynamics.

17 But remember, it used to be touted as
18 a grand jury equivalent, and it's not. Right? I
19 mean, because of the changes, it's definitely
20 not.

21 But the federal system has a lot of
22 differences that people need to understand. And

1 one is the accused not being incarcerated, and
2 the other one is you can subpoena the witnesses,
3 including the victim.

4 CHAIR HILLMAN: Professor Corn. Thank
5 you.

6 PROFESSOR CORN: Well, maybe it's
7 appropriate that I'm sitting in the middle,
8 because I share concurrence with both of my
9 colleagues.

10 I agree with Professor Fidell that if
11 at all feasible, the preliminary hearing should
12 be presided over by a military judge. At a bare
13 minimum, a military magistrate. And I know that
14 now it has to be a judge advocate.

15 But I think, could the judiciary, with
16 the support of the Reserve and National Guard
17 components, sustain the ability to do preliminary
18 hearings for what are, in effect, felony general
19 court-martial-related cases?

20 If it could be done, I think that
21 would be better. I also think that a no bill
22 decision, a finding of no probable cause, should

1 be binding.

2 And let's not forget that there's no
3 double jeopardy at that point. If the
4 prosecution wants to perfect the case beyond
5 then, re-charge the defendant, seek another
6 preliminary hearing, they'll have the opportunity
7 to do that.

8 But this notion that the preliminary
9 hearing is what? It's reviewing some information
10 to inform the staff judge advocate who's making a
11 probable cause determination, without any
12 assessment of credibility, presupposes, I think,
13 guilt. Candidly.

14 And I understand that most cases that
15 are referred to trial probably have to do with
16 someone who is, in fact, guilty. But not
17 everyone.

18 And there is a transaction cost on
19 both sides of that equation. When you don't send
20 a case to trial when there's been a genuine
21 victim, there is a transaction cost. When you
22 send a case to trial that has somebody who

1 shouldn't be sent to trial, there's a transaction
2 cost on that end.

3 And that's the whole notion of a
4 preliminary hearing. It's a very basic screening
5 of evidence. But in many cases, that includes
6 assessing credibility.

7 And I agree with Professor Fidell,
8 that ultimately we all seek the same outcome,
9 which is justice.

10 But I'm reminded of Justice Scalia's
11 comment in Crawford v. Washington, where he says,
12 dispensing with trial by jury, or dispensing with
13 confrontation for an obviously reliable witness,
14 is like dispensing with trial by jury for an
15 obviously guilty defendant.

16 His point was clear. True justice is
17 something we aspire to. Procedural justice is
18 something we can control. We can ensure that
19 defendants receive the process they're due.

20 And as we further attenuate, the
21 decision of whether to send a case to trial, from
22 the locus of the incident to the senior service

1 prosecutor, I think it's even more imperative
2 that that individual be fully informed of the
3 strengths and weaknesses of the case, to make a
4 decision of whether or not it's appropriate to
5 put somebody in jeopardy, to whether or not it's
6 appropriate to devote the resources required for
7 a trial.

8 And that is the function of a
9 meaningful preliminary hearing. We want to get
10 rid of it all together, let's get rid of it all
11 together.

12 I'm not sure what function it's
13 serving now. We call it a preliminary hearing.
14 But again, I don't really see that as what it's
15 doing.

16 And I agree with Professor Schenck
17 that we're not analogous to the federal system.
18 Just like in *Coleman v. Alabama*, the preliminary
19 hearing was just an initial screening to
20 determine whether or not to submit the case to
21 the grand jury. Then, there's a more robust
22 process.

1 We don't have that. So, either we're
2 going to have a grand jury, with the opportunity
3 for the grand jurors to decide who they want to
4 hear from, the grand jurors to decide who to
5 subpoena -- because, ultimately, that's their
6 prerogative -- or we're going to have a
7 meaningful preliminary hearing.

8 But we can't split that and have
9 something that's neither, without doing a
10 disservice to the protection of the presumption
11 of innocence.

12 CHAIR HILLMAN: Thank you. Captain
13 Barney.

14 MEMBER BARNEY: Thank you so much for
15 joining us.

16 Earlier today, we heard from senior
17 military commanders, both currently serving, as
18 well as retired, who had served as general court-
19 martial convening authorities.

20 And we talked to them about the
21 Article 32 hearing, and trying to get a sense of
22 what value that might bring to their process.

1 I think that they were being polite
2 when they said that it was foundational to the
3 process that then leads to a more fulsome
4 discussion with an experienced judge advocate,
5 SJA, to understand their options for disposition.

6 My point is, if they're merely being
7 polite, if there is no value currently to the
8 Article 32 process, what would you propose would
9 be done to fill an information gap between the
10 criminal investigation of an alleged offense, and
11 the point where it is presented to a convening
12 authority for a decision? And may I start with
13 you, Professor Fidell?

14 PROFESSOR FIDELL: Right. Let me make
15 a couple of points. And some of this builds on
16 our conversation here.

17 It's kind of interesting that there's
18 two conversations going on in the room at the
19 same time, among us, and then with you all.

20 In the case of Hurtado against
21 California, the Supreme Court held in the 1890s -
22 - I think 1892 or so -- that a state didn't have

1 to have a grand jury.

2 So, the notion that we need something
3 that even broadly replicates a grand jury, I just
4 don't think that's the constitutional pattern
5 that we've lived with for a hundred and something
6 years, 120-something years.

7 Proposition number two. We now have
8 robust discovery, supervised by a military judge.

9 There's a lot of motion practice now
10 in a court-martial. There's a whole lot of
11 protections that have been built into the trial
12 piece of this process.

13 And the notion that we have to have a
14 replica of either a grand jury -- I don't think
15 we do, *Hurtado* against California -- or a trial
16 before a trial strikes me as off the mark. I
17 just don't see it that way. I think simplicity
18 is perfectly good, and the key thing is that the
19 probable cause with it has to be preserved and
20 administered by somebody with appropriate
21 qualifications -- the qualifications basically of
22 a judge -- followed by a determination by an

1 official, basically like the United States
2 Attorney. And we're getting a little bit ahead,
3 maybe.

4 But in my view, what Congress has, I
5 think unwisely, called a special trial counsel,
6 is that person. And I think that's the model
7 that we should be looking at, rather than trying
8 to preserve the artifact of decision-making on
9 the administration of justice by military
10 commanders who lack law degrees.

11 Now, I wouldn't have proposed to get
12 into all that because there's a sense in which
13 that's kind of water over the dam. The Congress
14 of the United States has spoken on that subject.

15 Now, what happens next is another
16 subject, which I would hope that we'll have time
17 to get to.

18 I wanted to make one other point while
19 I have the floor.

20 We were given a two-pager with some
21 questions. And we want to ask questions about
22 this, but I had some questions before question

1 one. May I?

2 There are two propositions immediately
3 before question one. In the 74% of preliminary
4 hearings in 2021, 26 percent resulted in a
5 finding of no probable cause for an offense.

6 And for the 192 non-probable cause
7 determinations, 55 percent were referred despite
8 a finding of no probable cause.

9 And these are the two questions that
10 occurred to me when I read that. And maybe this
11 will be helpful to you all when you huddle behind
12 closed doors and try to make sense of any of
13 this.

14 What were the trial and appellate
15 results for the 106 offenses that were referred
16 despite a finding of no probable cause?

17 That, it seems to me if I were on the
18 panel, I would want to know the answer to that.

19 The second thing I'd want to know is,
20 was the acquittal rate higher for cases in which
21 the Article 32 officer found no probable cause?
22 That's another fact I'd want to know if I were

1 trying to get into this a little bit.

2 MEMBER BARNEY: Thanks. Professor
3 Corn, please.

4 PROFESSOR CORN: I may be mistaken,
5 but I believe in all the states that are not
6 using grand juries, because they're not required
7 to under the Fourteenth Amendment, there is a
8 pretrial screening mechanism: initial
9 appearance, preliminary hearing, preliminary
10 examination, whatever the case may be.

11 And to suggest that eliminating that
12 is not going to have a consequence I think is
13 wrong. And I think if we just look at acquittal
14 rates, that's misleading as well.

15 Anybody who served as a defense lawyer
16 wants to believe that people only plead guilty
17 when they honestly believe they're guilty of the
18 offense they're pleading to.

19 But we know that there's reality.
20 That sometimes people make a decision based on
21 risk-and-reward. And sometimes people do plead
22 guilty to offenses that they don't believe

1 they're guilty of because the advice they're
2 receiving is that the evidence is going to
3 establish guilt.

4 That begins with a charge that's bound
5 over for trial. And so, the preliminary
6 examination, whatever we want to call it, serves
7 a purpose.

8 I also think that the question to the
9 convening authorities, it misses a transparent
10 layer.

11 Because the advice they're getting
12 from their staff judge advocates is, itself,
13 informed by the preliminary examination of the
14 charges in the case and the witnesses and the
15 evidence.

16 That information is going to influence
17 their assessment of whether this is a case worthy
18 of going to trial.

19 Not to mention the fact that we still
20 are an expeditionary, or you still are, an
21 expeditionary organization, and there are times
22 when there's tremendous evidentiary value of

1 preserving evidence at a preliminary hearing,
2 where a defendant has an opportunity to subject
3 the witness to cross-examination for purposes of
4 confrontation clause issues.

5 If you eliminate all that, then if you
6 have witnesses in a theater, it's much more
7 difficult to preserve their evidence.

8 So, I think there are second- and
9 third-order consequences of simply saying we're
10 going to do away with it, we don't need it.

11 Yeah, I understand that you can charge
12 somebody by information, and then you can have
13 the first hearing of the case, which is a motion
14 to dismiss, which is a testing of probable cause.

15 But there are consequences to bringing
16 somebody to that point. And the question I would
17 ask is, why would it be so difficult to implement
18 a meaningful screening opportunity before you get
19 to that point?

20 And if the answer is, because we want
21 to preserve or protect alleged victims from
22 trauma, I mean, that goes to the very heart of

1 the Sixth Amendment.

2 The very notion of confrontation
3 imposes potential consequences and trauma on a
4 genuine victim. Nobody likes to see that happen.

5 But again, we define justice by
6 process, and that's built into the system.
7 Eventually, that confrontation's going to have to
8 occur if the defendant pleads not-guilty.

9 But how many defendants plead guilty
10 in the military system after the decision to
11 refer a case to trial has been made? About the
12 same percentage as in the civilian system.

13 Which means, in a vast majority of
14 those cases, there never is a genuine moment of
15 confrontation.

16 Maybe if it happens early on, it will
17 better inform plea bargaining, it will better
18 inform the decision-making of convening
19 authorities, and it will actually contribute to
20 the type of efficiency that Professor Fidell
21 seeks to achieve in the system.

22 MEMBER BARNEY: Thank you, Professor

1 Corn. Dean Schenck?

2 DEAN SCHENCK: I agree with my
3 colleagues here. I think it's really important
4 that we remember that the military justice system
5 must appear to have due process.

6 If you eliminate that hearing, the
7 perception from the public will be that we have
8 no process.

9 Even though we're exempt from the
10 constitutional requirement of a grand jury,
11 doesn't mean we take advantage of that.

12 If there are pretrial hearings of any
13 sort in states and in the federal system, I urge
14 you to maintain some sort of hearing in the
15 military.

16 The optics aren't good, and I just
17 don't think it's good for the accused or the
18 victim either, because there's no vetting of the
19 evidence.

20 Going back to an earlier point, I
21 would agree it may be helpful if the preliminary
22 hearing officer was someone of expertise, like a

1 trial judge or a magistrate.

2 As I understand it, the Navy uses
3 their reserve unit and they activate the
4 preliminary hearing officer from the reserve unit
5 that pulls from trial judges and those with
6 criminal law expertise in the civilian sector.

7 So, I mean, that's just one of the
8 thoughts. And if it's difficult to get a
9 preliminary hearing officer, I also think that
10 maybe we should cross-pollinate services and look
11 at maybe sharing the potential of that if there's
12 a shortage and we're looking at expediting the
13 system.

14 But eliminating the hearing, to me,
15 would be a very, very, very bad decision.

16 MEMBER BARNEY: Thank you, Dean
17 Schenck. Thank you.

18 CHAIR HILLMAN: We do have one of our
19 MJRP members who's joining us virtually, Colonel
20 Osborn. Colonel Osborn, I just wanted to check
21 in with you. Do you have any questions for our
22 panel?

1 COLONEL OSBORN: Not at this time, but
2 I reserve to ask questions later. Thank you,
3 Chair Hillman.

4 CHAIR HILLMAN: Wouldn't expect
5 anything else, Colonel Osborn. Thank you. So,
6 let me turn us to the next section after the
7 Article 32, just about prosecution standards.

8 I'd love each of your reactions on
9 what you think would be appropriate or not
10 appropriate, and to how we approach the standards
11 we might set out related to when prosecution is
12 warranted. So, let's start in the middle this
13 time. Geoff?

14 PROFESSOR CORN: The decision to refer
15 a case to trial is based on the staff judge
16 advocate's advice that there's probable cause.

17 I've always thought that that was a
18 little bit troubling in theory. I think in
19 practice that's not necessarily how most staff
20 judge advocates view a case.

21 I actually think that the sufficient
22 evidence to meet your prima facie burden would be

1 a better standard, whether or not you have the
2 preliminary hearing or not.

3 What I mean by that is, you can
4 establish probable cause at an Article 32
5 preliminary hearing using information that would
6 not be admissible at trial. Just like a grand
7 jury, you can consider information that's not
8 necessarily going to support the conviction, or
9 the pursuit of a conviction.

10 I think if we're going to send a case
11 to trial, the staff judge advocate, or whoever is
12 advising the referral authority, should make a
13 judgment that the case has sufficient evidence
14 that will overcome a motion for acquittal on that
15 charge.

16 If they don't believe that the
17 evidence in the file and the case is sufficient
18 to meet that prima facie burden, then I don't
19 think that case should be sent to trial.

20 Now, I'm not saying that doesn't mean
21 a crime didn't occur. Again, a decision not to
22 refer a case to trial doesn't implicate double

1 jeopardy. You can refine the case.

2 But ultimately, I think the function
3 of a prosecutor is to make a judgment that
4 somebody's brought to trial because you believe
5 the state's evidence is strong enough to support
6 a conviction.

7 And that's not the same standard as
8 binding a charge over for trial itself. So,
9 that's something I would suggest to be
10 considered.

11 CHAIR HILLMAN: Gene?

12 PROFESSOR FIDELL: I think the simple
13 answer to the main question about standards is,
14 the same standard should be applied as that which
15 is applied by the Department of Justice.

16 I can't imagine why there would be a
17 different standard for going ahead with a case.

18 The materials that we were provided
19 before this were very helpful. And I wanted to
20 make two comments about the non-binding
21 disposition guidance. And here, I'm going to get
22 a little granular, if that's okay.

1 Several of the considerations that are
2 currently found in Appendix 2.1 strike me as
3 inappropriate, and I'll be specific here.

4 If you refer to Section 2.7, the
5 matters that are listed in Section 2.7(a), (d)
6 and (e), I think you might want to take a look
7 at. They seem to me to be of questionable
8 pertinence.

9 Section 3.1(d) deals, is under the
10 heading of special considerations. And one of
11 the special considerations is the victim's
12 preference for which jurisdiction --

13 CHAIR HILLMAN: I'm just going to
14 point everybody to the materials that you're
15 talking about for a moment. So, this is
16 Tab 7(f), if you want to look at this, where 2.1
17 appears, and then 2.7, the inappropriate
18 considerations, the piece you're talking about.

19 PROFESSOR FIDELL: Right. So, if you
20 just take a look at (a), (d) and (e) under
21 Section 2.7, if you just jot a note for future
22 reference.

1 Section 3.1(d) would take into account
2 the victim's preference for which jurisdiction a
3 particular offense should be handled by.

4 And my own view is, the victim's
5 preference for a jurisdiction is not something --
6 I mean, it's interesting and the victim may have
7 strong feelings about it, but those feelings I
8 don't think should bear on the official decision,
9 the governmental decision, as to which
10 jurisdiction the military, or the Department of
11 Justice, or downtown, ought to deal with any
12 particular case. So, that's just a comment about
13 the Appendix 2.1 matters.

14 There was a question -- question
15 number ten -- question number ten is, what impact
16 do acquittals have on the public's perception of
17 the effectiveness of the military justice system?

18 These are very good questions, by the
19 way, I'll just say. Here's my answer to that
20 one.

21 In itself, an acquittal can contribute
22 to public confidence in the administration of

1 justice by showing that the accused has gotten
2 effective assistance of counsel, for example, and
3 a fair trial.

4 On the other hand, where, as everybody
5 knows in the case of sex offenses under the UCMJ,
6 acquittals exceed the levels normally associated
7 with the trial of criminal cases, public
8 confidence can suffer, especially given the
9 unique nature of the Armed Forces as a
10 hierarchical society that's pervasively regulated
11 as a way of life, and as a workplace. And so, I
12 believe the system has paid a penalty, in terms
13 of public confidence, from that perspective.

14 CHAIR HILLMAN: Thank you. Dean
15 Schenck, do you want to weigh in on this one?

16 DEAN SCHENCK: Yeah. As far as adding
17 something to the appendix regarding ethical and
18 level of evidence for a prosecutor, again, I go
19 back to my initial comment. I don't think we
20 should add more change, and we should wait and
21 assess change.

22 With the OSTC implemented, this should

1 not be necessary. These are allegedly going to
2 be skilled criminal law attorneys who are already
3 abiding by their own service ethics requirements.

4 And I just think adding another
5 requirement to assess is going to just compound
6 to the difficulty implementing this bifurcated
7 process. This is a bifurcated process.

8 Also, if we're considering it, we
9 should look at the ABA rules. The ABA has set
10 forth standards and functions for prosecutors at
11 3-1.2. So, I don't think we can just do it in a
12 vacuum.

13 I would also note that one of the
14 rationales for this proposal is weak pretrial
15 procedures.

16 Again, weak pretrial procedures. Is
17 this ethical code going to change the procedures?
18 I think the OSTC, the special trial counsel, are
19 hopefully going to be qualified.

20 And there's going to be some
21 difficulty implementing the bifurcated system,
22 and prosecutors generally don't like to lose.

1 So, now that the cases are with
2 attorneys themselves to assess, I think we should
3 just let them try it. Let them do their jobs.

4 Actually, I think this was something
5 we looked at many years ago at one of the
6 subcommittees. Not this specific rule, but
7 ethical rules for prosecutors to assess cases.

8 So, maybe we can drudge up that
9 history from one of those older reports. But it
10 was something we did look at previously.

11 CHAIR HILLMAN: Can I just follow up
12 in particular? Colonel Brunson often has
13 questions about the Office of Special Counsel and
14 how that's going to work moving ahead.

15 But since you mentioned the
16 difficulties of having a bifurcated system, what
17 do you think those are, as we implement -- that's
18 ahead of us, implementing this system with OSTC.
19 So, what's your sense?

20 DEAN SCHENCK: So, first let me be
21 clear. I'm looking at it from an Army
22 perspective. Gene and I did some assessing the

1 Navy, and I'm a little bit more educated about
2 the Navy, and the Marine Corps reflects more of
3 the Army.

4 But the other services, as I
5 understood it, were more regionalized. So, for
6 the Army, the Army had to set up a completely new
7 system to enforce the OSTC.

8 From an infantry brigade legal advisor
9 history -- that's where I came from, I lived with
10 an infantry brigade -- there were no other women,
11 and I was the one who was bringing forth cases.

12 And the cases were assessed at my
13 level, and then moved on. Me and the brigade
14 commander.

15 And of course, good order and
16 discipline was tied to that. So, the
17 difficulties I see are, when a case -- first of
18 all, how fast is this system going to work for
19 the purely military offenses that are tied to
20 some covered offense. Right? How fast are those
21 cases going to be assessed?

22 Are the local special trial counsel

1 going to have authority to assess that the
2 accused went AWOL, and then committed a covered
3 offense?

4 Probably not. They're probably going
5 to go to their bosses. So, they're going to go
6 to their bosses.

7 Meanwhile, the infantry brigade, the
8 infantry service members, are waiting to see what
9 happens to the guy who went AWOL.

10 So, my concern is, how fast are the
11 cases going to be processed and separated, and
12 sent back to the convening authorities for them
13 to take action on the offenses that clearly
14 impact morale and discipline in the unit?

15 Because we don't want a discipline in
16 the unit encouraged. We want swift, sure justice
17 administered.

18 We would prefer charges in the field
19 when we were out there on an exercise, when I was
20 with the infantry brigade.

21 Defense counsel was flown in. We
22 moved those cases.

1 What's going to happen now, when
2 there's something that happens in the area of
3 operation that has a covered offense tied to it.
4 Those witnesses are going to have to go -- all
5 those things are going to have to go through the
6 OSTC.

7 I'm also concerned about what happens
8 to those cases that don't meet this new standard
9 that you're requiring? That the OSTC decides, I
10 can't do anything with it.

11 Now, it's eight months down the road.
12 It's a covered offense. I'm returning it back to
13 the convening authority, and what can the
14 convening authority do?

15 Administratively separate a person who
16 looks like a sex offender. That's what he can
17 do. So, I'm afraid about the optics of that.

18 Don't get me wrong. Convening
19 authorities, commanders, are happy they don't
20 have to deal with sexual assault. They're super
21 happy.

22 They're like, no more external

1 pressure to go forward with a trial. I don't
2 have to worry that the victim wants to go
3 forward. I don't need to worry about it anymore.

4 So, we have a lot of people who are
5 very happy about it. But from an old JAG, I'm
6 not happy with it.

7 CHAIR HILLMAN: Thank you. I'm
8 standing by for Colonel Brunson. But in the
9 meantime, Professor Corn, I see you want to weigh
10 in on this too.

11 PROFESSOR CORN: Just two quick
12 points. I think tying back to the topic of this
13 discussion, which was the Article 32, I think
14 that the imperative of what was historically
15 supposed to be a thorough and comprehensive
16 investigation or inquiry into the charges,
17 becomes even more significant when the decision-
18 maker, on whether or not to send those charges to
19 trial, is so much more attenuated from the
20 installation, the unit, the interest involved.

21 So, it will better inform the whole
22 process, which I think ultimately would be a good

1 thing.

2 There's also something ping-pong around
3 my law professor mind, and I haven't crystallized
4 it yet.

5 This bifurcated system, I don't know,
6 if I were a defense lawyer, if my client were
7 charged with a non-covered offense that was
8 referred to trial by the GCMCA, I'm thinking
9 there's got to be some due process or equal
10 protection issue there.

11 How can this commanding officer be
12 competent to subject my client to trial for one
13 category of offense, but incompetent to subject
14 him to trial for another category of offense?

15 I don't know where that is in the
16 discussion. But I would certainly think if I
17 were a regional defense counsel, I'd be working
18 on those motions to dismiss for due process
19 violations.

20 So, I think ultimately that's going to
21 be another challenge involved in this new system.
22 Not one that I don't think can be worked out. I

1 think it can be worked out.

2 But when we talk about public
3 perception, and perception of the troops, it does
4 seem a little bit perplexing that this soldier,
5 there's a lawyer up in Washington who's deciding
6 whether he goes to trial. In this soldier, it's
7 general so-and-so in the command building. And
8 why the difference?

9 PROFESSOR FIDELL: So, let me ping off
10 Geoff's last point. I would hope that defense
11 counsel would have better fish to fry than to try
12 to fashion due process or a Fifth Amendment equal
13 protection claim, tacking the fact that we have
14 two parallel systems.

15 Congress is entitled to extraordinary
16 deference. Anyone who has read any of the
17 Supreme Court cases on military justice over the
18 last 75 years can cite you chapter and verse
19 about basically, if Congress decides that's what
20 you're getting, that's what you're getting.

21 So, I take your point, Geoff, and I'm
22 all for defense counsel to knock themselves out.

1 But I would say, knock yourself out, facetiously,
2 if that's what you're spending the taxpayers'
3 time and money on.

4 Now, there is a way out of even the
5 question. And that way out -- I don't know
6 what's going on in the next room there. I hope
7 we're not being piped in, in the left, and it was
8 about what I just said.

9 In fact, in my view, it is ridiculous
10 to have two parallel systems that are
11 fundamentally -- it's like running an Apple
12 system and a Dell system, trying to achieve the
13 same purpose. They're not compatible, and
14 Congress is eventually going to have to bite the
15 bullet on this.

16 Now, we three on this panel have been
17 in different parts of the forest on these issues.

18 And I don't think Congress is
19 infallible. I have a lot of problems with the
20 fact that they conducted their business behind
21 closed doors; that nobody knows how this soup was
22 made, in fact, and a very irregular, not entirely

1 rational, allocation of which offenses go to the
2 OSTCs, and which offenses remain with command.

3 That's not a particularly fabulous way
4 of making sausage, in my opinion. And doing so
5 behind closed doors.

6 All of that said, I want to just make
7 a few comments.

8 I think having two systems running at
9 the same time, even though you've got some that
10 are in Column A and some that are in Column B --
11 although some of the ones that are in Column A,
12 the person in charge can say, you can handle
13 them; we'll deem those to be in Column B -- I
14 think that's needlessly complicated, and it makes
15 it a serious challenge to develop and maintain a
16 coherent holistic policy, with regard to
17 prosecutorial decision-making.

18 And now I want to talk about
19 resourcing.

20 I have been astounded at the kinds of
21 resources that at least one branch of the Armed
22 Forces is dedicating to the OSTC.

1 I strongly recommend that those in
2 positions of responsibility carefully review
3 resourcing, to make sure the services are not
4 improperly seizing on the new system as a means
5 of expanding JAG personnel roles.

6 The system is already bloated, in my
7 opinion, in other respects. For example,
8 military judges, system-wide, purple, are trying
9 something like 1.35 cases per judge, per month.
10 1.35 cases per judge, per month.

11 What is wrong with that picture? So,
12 we have a bloat problem to begin with, and I'm
13 concerned that we're going to see more bloat as
14 two systems achieve lavish manning.

15 (Off-mic question.)

16 PROFESSOR FIDELL: Let me finish,
17 Geoff.

18 CHAIR HILLMAN: Let me just ask you
19 though, if you would send us the numbers that you
20 base that on.

21 PROFESSOR FIDELL: Yes, of course.
22 They're from the government's own numbers.

1 They're from the Article 140(a) reports that are
2 online. And these calculations have been -- I
3 put them on the public record.

4 I'm not sanguine -- this is in
5 response to question number twelve. I'm not
6 sanguine that there's a rigorous way to gauge the
7 impact of the OSTC system on good order and
8 discipline.

9 That was one of the questions. It's
10 a perfectly reasonable question.

11 The method that comes to mind is to
12 carefully gather data on reported OSTC-type
13 cases, and non-OSTC-type cases, for several
14 years, and see if any trends emerge, in terms of
15 deterrence.

16 If the data are not rigorously
17 comparable from one service to another, any such
18 effort would be pointless.

19 But that's the only way that I can
20 think of that you could gauge which one is more
21 effective, in terms of deterrence, which I gather
22 was the gist of the twelfth question.

1 The thirteenth question was, if you
2 have two different standards, do I see a due
3 process issue?

4 MEMBER REDFORD: Professor Fidell,
5 excuse me.

6 PROFESSOR FIDELL: Yes.

7 MEMBER REDFORD: Before we get swept
8 away in the music, the 1.35 cases per month, per
9 judge, worldwide in the service, is that 1.35
10 contested trials, or 1.3 just some type of court-
11 martial?

12 Could be a guilty plea, could be --

13 PROFESSOR FIDELL: Total. Those are
14 the only numbers that I had. There's a real
15 problem in data, by the way. And all I've done
16 is taken the data that are available from the
17 services' reports.

18 MEMBER REDFORD: Okay, thank you.

19 PROFESSOR FIDELL: And I can give you
20 the cite for where you can find the data.

21 Let me also say, inevitably, we're
22 talking about a decision that Congress made that

1 has left us with this odd-shaped boundary between
2 OSTC-type cases and non-OSTC-type cases. Not
3 satisfactory from anybody's perspective.

4 At one point, my view was that lawyers
5 independent of the chain of command should have
6 the disposition that all offenses for which more
7 than a year's confinement is authorized, it's the
8 felony, misdemeanor, bright-line, that's it.

9 But now that I see what I'll call a
10 crazy quilt of what's in Column A and what's in
11 Column B, and how the dual system arrangement is
12 unfolding, I've changed my mind.

13 In my view, the OSTC should have sole
14 authority to refer cases to special and general
15 courts-martial. Period, end of story.

16 Commanders should have authority over
17 only those minor offenses that can and should be
18 disposed of by NJP.

19 And I would repeal provisions for
20 summary courts-martial.

21 PROFESSOR CORN: Just a quick two-
22 finger. We do come from different parts of the

1 forest, but I think I was quoted in the Texas
2 Tribune about a month ago saying I think
3 inevitably, we're going to end up where you just
4 recommended.

5 PROFESSOR FIDELL: I'm going to sit
6 closer to Geoff now.

7 PROFESSOR CORN: Well, I just think
8 that the optics are cryptic now, where you have
9 different authorities deciding different soldiers
10 are going to face what are in effect felony-level
11 convictions and records for the rest of their
12 lives.

13 I mean, the water is over the dam.
14 And people have said, the reporters have asked
15 me, are you really upset about what happened? I
16 said, the military will make it work. We're good
17 at that.

18 I mean, I didn't think it was
19 necessary. There's no surprise there. I thought
20 it was, as I said in one editorial, putting the
21 tourniquet on the wrong limb, but it's done.

22 And so, here we are. And as far as

1 the waste-your-money-on-challenging-it, there are
2 a lot of defense lawyers who are challenging the
3 non-unanimous verdict provision of the UCMJ right
4 now, based on Ramos vs. Louisiana.

5 I don't think that's a waste of time.
6 I think defense counsel have an ethical
7 obligation to pursue any matter that they believe
8 has some merit to advance the interests of their
9 client.

10 I mean, you talk about a unique
11 system. Now, we really have a unique system,
12 because we have different authorities making
13 prosecutorial decisions, referral decisions, and
14 one of them, because of an assessment that the
15 other one was not competent to do it because of
16 the nature of the offense.

17 Not the evidence. Not the nature of
18 the crime. In my view, the system can work. It
19 will work.

20 But we have to have a meaningful
21 pretrial screening process at the location of the
22 alleged crime.

1 And if I could change one thing about
2 the referral process, as I say, I would make the
3 burden of proof for the referral decision more
4 demanding than simply probable cause.

5 CHAIR HILLMAN: Thank you.

6 MEMBER BRUNSON: So, given what you
7 two just said about where you see the military
8 justice system going, and based on our
9 conversations with the convening authorities, I
10 got the impression that they're more than happy
11 to turn over military justice to the lawyers,
12 with the exception of being able to maintain in
13 their toolkit those commander actions,
14 administrative actions, things like that, to
15 maintain good order and discipline.

16 So, let's have that as the framework.
17 And we talked about public perception of military
18 justice.

19 If we have vested in a special trial
20 counsel the authority to charge, prefer, and
21 refer, in spite of a no probable cause
22 determination by a PHO, where does that leave us

1 in the public perception, and where does that
2 leave the justice part of the military justice
3 system?

4 PROFESSOR FIDELL: Is it my turn?

5 PROFESSOR CORN: I'll go.

6 PROFESSOR FIDELL: Go ahead.

7 PROFESSOR CORN: I think the issue is
8 not so much who's doing what, but how things are
9 articulated and explained.

10 But I also think there's an element of
11 be careful what you ask for, because you just
12 might get it.

13 My colleague noted that we all know
14 that prosecutors tend to be acquittal-averse.
15 And I think you've heard, over and over again,
16 that that's not necessarily an instinct that a
17 general court-martial convening authority would
18 have.

19 And maybe that's good. Maybe that
20 serves the interests of justice. But we may end
21 up with statistics that don't match the
22 expectation that now that this change has been

1 made, everybody's going to be prosecuted,
2 everybody's going to be convicted.

3 That's fine. To me, that's what
4 justice is about. You have a process where
5 people make decisions, and the system is given
6 both the state and the individual the process
7 they're due within the system, and then we accept
8 the outcomes.

9 We might not always agree with them,
10 but we can respect them. So, I think part of it
11 is a marketing element. Right?

12 And I'm reminded of all of the
13 experience I've had working with the Israeli
14 Defense Forces. They're under this scrutiny
15 quite frequently.

16 And sometimes the MAG sends cases to
17 trial that the commander doesn't agree with, and
18 sometimes vice-versa.

19 But for them, it's just second nature.
20 That's the justice system, and that's how it
21 works.

22 So, from a perception standpoint, I'm

1 not so sure -- I doubt you'd have a convening
2 authority in front of the press complaining about
3 the Office of Senior Trial Counsel not sending a
4 case to trial.

5 But I think that you have to work
6 through all of those second- and third-order
7 issues that Lisa brings up about timing and what
8 happens when there's a no bill decision, and is
9 it too late to do the administrative action.

10 Those are complicated aspects. But I
11 don't think unifying it in one prosecutorial
12 authority is necessarily corrosive to confidence
13 in the ability of the system to serve the
14 interests of justice.

15 MEMBER EWERS: What if the whole thing
16 went? So, forget about justice for a minute.
17 Let's assume justice. What about good order and
18 discipline?

19 So, if we think that a prosecution
20 team can take these cases, why don't we just make
21 it the Department of Justice?

22 PROFESSOR CORN: Because nothing that

1 has been done in this process has negated the
2 important influence of the commander in this
3 decision-making equation.

4 If anything, what we've done is we've
5 inversed the role of the commander and the
6 lawyer.

7 I mean, up until now, the lawyer gives
8 advice to the commander, the commander makes the
9 referral decision.

10 Now, we've reversed that. I don't
11 think we're suggesting that the general court-
12 martial convening authority has no influence on
13 that decision-making process.

14 And I think keeping the prosecutorial
15 authority within the military institution is
16 important. Because it would be analogous to a
17 MEJA case.

18 So, you're in Iraq, you have a
19 civilian who commits an offense, they're under
20 the jurisdiction of MEJA.

21 Now, you're going to do an
22 investigation in Iraq, you're going to put the

1 file together, you're going to hand that off to a
2 U.S. attorney in the first district where the
3 civilian lands when they come back after being
4 fired from their contractor role.

5 So, now he lands in the Northern
6 District of Texas, and I'm the United States
7 attorney for the Northern District of Texas.

8 I don't want this case. How did I get
9 stuck with this?

10 But if you're talking about the
11 military prosecutorial institution, the judge
12 advocate institution, there's an innate
13 understanding of the needs of the command, the
14 needs of the institution itself.

15 So, I don't think we can just say, if
16 we're going to let a senior military prosecutor
17 make the referral decision, that we might as well
18 just put it into the civilian system.

19 And that doesn't even consider all the
20 stuff that happens before and after the referral
21 decision.

22 You still have a military jury, a

1 panel, you still have all the rights under the
2 UCMJ, you still have the perception of the
3 military doing justice for the military.

4 I don't think that that one change is
5 analogous to just shifting it to the civilian
6 system.

7 MEMBER BRUNSON: I need to back up a
8 little bit. I'm sorry. Because I don't think I
9 was clear on what I was asking, because I keep
10 hearing you talking about a convening authority,
11 and I'm referring to the situation with the
12 Office of Special Trial Counsel, where my
13 understanding is the court-martial convening
14 authority is no longer involved, or the OSTC is
15 that person, or is the referral authority.
16 Correct?

17 So, as it stands, presumably this
18 person, whoever this trial counsel is, is
19 preferring the charges, is sending them to an
20 Article 32 investigation, which he or she can
21 then ignore the result of, and then making a
22 referral to general court-martial.

1 So, essentially, one person could be
2 deciding the fate of a particular soldier or
3 service member, to go to a general court-martial.

4 And I ask about that in two realms,
5 under the public perception realm, of whether
6 justice appears to be being served, and under the
7 realm of whether the Article 32 investigation, or
8 the PHO's finding, should be binding or non-
9 binding.

10 And let me be blunt as far as the
11 public perception realm, because every single one
12 of these new one-stars are white males.

13 And what you're saying to America is,
14 I'm going to take this white male general
15 officer, he's going to be the sole individual
16 deciding whether a black service member, male,
17 committed an assault against a white female
18 service member, and whether that should go to
19 trial, without anybody else having any input into
20 it. That, to me, is a public perception of
21 justice problem.

22 PROFESSOR FIDELL: Well, it is. Now,

1 the one thing that I think -- are we on this
2 panel all in agreement that the Article 32
3 officer should be able to make a binding probable
4 cause --

5 DEAN SCHENCK: No, I don't agree with
6 that.

7 MR. FIDELL: You don't agree with it?
8 Well, anyway, that's at least a partial way of
9 avoiding the -- everybody -- you know, all power
10 is vested in a single individual.

11 And the diversity thing I can't fix
12 and this panel can't fix. I mean -- but at
13 least, if you have another person in there who is
14 an independent decision-maker, who has something
15 on the wall that says you're a military judge,
16 you're a military magistrate, and nobody can
17 hammer you if you come out the wrong way on your
18 probable cause determination. That's at least a
19 break -- that's a guard rail of one kind.

20 But the larger diversity issue and the
21 appearance of that to the consumers, the American
22 public, I can't -- I hate to say this, that's

1 above my pay grade. I don't have a fix for that,
2 I wish I did.

3 However, I do want to say in response
4 to your question, General, is I don't know
5 anybody who actually wants to abandon the
6 military justice system -- I don't know anybody.

7 There was a guy who taught in Chicago
8 a number of years ago that -- I'm not even going
9 to mention his name -- but he was the only person
10 I knew in the American legal community who
11 thought, just get rid of the whole thing. And
12 obviously the three of us are, at least on that
13 issue, I'm confident singing from the same sheet
14 music.

15 So, although I think on things like,
16 what's the prosecutorial standard, the Justice
17 Department is the gold standard, in terms of
18 public confidence in the administration of
19 justice. Even though there are some people that
20 don't even agree with that these days.

21 But let's posit that that's the case,
22 there's no reason why applying Justice Department

1 standards can only be done by the Justice
2 Department, the Justice Department standard is
3 replicable within the military justice system.

4 Beyond that, you know, we're all
5 originalists today, right? We're all textualists
6 today. The founders and the framers thought that
7 the military justice system -- thought there was
8 a place for the military justice system, a
9 separate military justice system -- I will sleep
10 like a baby tonight not concerned about the
11 continued existence of the military justice
12 system. I'm committed to it, it's been my whole
13 career.

14 DEAN SCHENCK: Well, I'm glad to hear
15 that, Gene. I thought you were the person trying
16 to get rid of the military justice system --

17 (Simultaneous speaking.)

18 MR. FIDELL: You were misinformed.

19 DEAN SCHENCK: So I'm thrilled
20 actually. I believe the military justice system
21 still can work, as my colleagues have said -- I
22 think everybody will work through the process.

1 I understand your concern, ma'am. I
2 think if we look at the way it's being
3 implemented, that might make you feel better. In
4 that, as I understand, at least the Army's set
5 up, there's going to be a completely -- there's
6 going to be a referral office.

7 There's lots of STCs involved, so that
8 one white guy at the top and his influence, I'm
9 not sure it's going to be as horrible as it
10 appears for public perception. I believe the way
11 that the Army at least is responding to how it's
12 going to work, there's going to be a number of
13 people involved. That's why I worried about how
14 fast it would work, because there's so many
15 individuals involved.

16 As far as the military justice system
17 goes, the military justice system predates the
18 Constitution and the Declaration of Independence.
19 And it was in place in order to effectuate the
20 judicial process and during war, peace, land,
21 sea, and air.

22 And that's why I'm one of the folks

1 that didn't want a bifurcated process, I believed
2 we needed to be able to implement the system
3 wherever we are. And we, the United States Armed
4 Forces is much larger than the Israeli Armed
5 Forces, right? So, we -- I mean, that's, I
6 think, the size of Texas -- I mean, Fort Hood.
7 I'm sorry.

8 But anyway, so we have to think about
9 how big we are and how every little change is
10 going to impact the sheer numbers of accused we
11 have, and victims we have in the process.

12 CHAIR HILLMAN: Thank you Dean
13 Schenck. General Ewers?

14 MEMBER EWERS: Yeah. I certainly
15 wasn't advocating --

16 MR. FIDELL: If I can be excused.
17 There's a point that is left hanging, the
18 suggestion that commanders have been cut out of
19 the current system -- at least formally.

20 And I want to make it clear that,
21 nothing that I'm familiar with prevents
22 commanders from expressing their view, from the

1 standpoint of good order and discipline on the
2 ground, where the rubber meets the road, and
3 communicate that view to the Office of Special
4 Trial Counsel -- provided the victim and the
5 accused are given a copy of that.

6 So, I think that the notion that the
7 commander is going to be sitting there with a
8 sock in her mouth is just a misunderstanding.

9 MEMBER EWERS: But, flipping the
10 model, as Geoff was talking about, sort of belies
11 this argument that we've been making for years
12 about how important this is that commanders
13 control the military justice system.

14 So, one of the things that happened
15 this morning, we were talking to the convening
16 authorities -- the general court-martial
17 convening authorities -- was they said, yeah, no
18 big deal. We're not too concerned about it,
19 plenty of tools in the kit bag. No problem.

20 And then we asked them, well, what if
21 we take the other 10 percent of cases from you?
22 Not just the covered cases, we take everything?

1 And one of them said, well, I think the less
2 we're involved the worse it is for good order and
3 discipline.

4 Well, what happened to the first
5 question? And so, I think -- I mean, I wonder
6 whether we're creating something that's
7 ultimately going to be the death knell. Because
8 we are undermining our own arguments and all the
9 things that make sense about military justice.

10 Thoughts on that?

11 PROFESSOR CORN: Well, I mean, it's
12 interesting to think about whether or not the
13 advice of the general court-martial convening
14 authority should be formalized. We're all
15 talking about an informal process where you can
16 submit that, we have a formal process now where
17 the -- or, had a formal process where the Staff
18 Judge Advocate has to give a pretrial advice as a
19 condition precedent to the general court-martial
20 convening authority sending a case to trial.

21 Why not flip that script? It wouldn't
22 be that hard to implement, and at least you would

1 have a system that ensured that those interests
2 were communicated to the Office of the Senior
3 Trial Counsel.

4 I also want to just respond quickly to
5 Colonel Brunson about the issue of perception.

6 In my view, the public perception of the
7 legitimacy of military justice turns on two
8 factors, results and who's making the decision in
9 the courtroom.

10 So, the results. I mean, that's
11 effects-based criticism, we've seen that for the
12 last 10 years in this whole debate. There's very
13 little discussion of why there's an acquittal
14 rate, why cases are not being convicted -- it's
15 sheer numbers. Look at the number of incidents,
16 look at the number of convictions -- there must
17 be a flaw.

18 So, that you're not going to change in
19 the public. On who's making the decision,
20 though, I think that raises an interesting point,
21 ma'am. And that is, whether the -- you asked
22 about other changes that might be considered,

1 should we require a fair cross section rule, not
2 for the pool of members but the actual court-
3 martial panel?

4 Because, we know under Taylor versus
5 Louisiana the fair cross section requirement does
6 not apply to the petit jury, in the civilian
7 system. But, there's no reason why it couldn't.

8 And I think of the Ahmaud Arbery case
9 in Georgia. Now, he was convicted -- the three
10 men were convicted, but had they been acquitted -
11 - I mean, if you followed that case and you saw
12 the Defense use of peremptory challenges to
13 remove all but one African-American from the
14 jury, in a jurisdiction that was populated by
15 about 40 percent African-American. Had there
16 been an acquittal, I think that would have been a
17 scandal.

18 So, if we're interested in that
19 aspect, in a very diverse institution it would be
20 something that I think would be fair to consider.
21 I don't think it would be that hard to implement,
22 that the actual trial panel reflect a fair cross

1 section of the jurisdiction.

2 MEMBER BRUNSON: But, I mean, the vast
3 majority of cases are not tried by panel. And
4 so, in the vast majority of cases you're just
5 dealing with, who's the prosecutor, who's the
6 defense counsel, who's the military judge, and
7 who's the convening authority. Those are really
8 the only parties at play.

9 PROFESSOR CORN: I understand that,
10 and I recognize that the plea rate is analogous,
11 that it is in the civilian system. But, what
12 we're talking about is creating a system where
13 the defendant at least has the opportunity to
14 exercise that right, if he or she so chooses.

15 I don't think getting down into the
16 details of requiring a fair cross-section -- I
17 mean, the institution itself is a reflection of
18 that. You can't solve everything, but in terms
19 of public perception where you have a defendant
20 who pleads not guilty and is tried by a court-
21 martial, I think perception would be enhanced the
22 more diverse the actual jury that decides that

1 fate is, in that particular case.

2 MEMBER BRUNSON: I do not disagree
3 with you.

4 CHAIR HILLMAN: Aware that we've
5 stepped away from the brevity that characterized
6 initial remarks on the panel here, and we are
7 going to run out of time here. I'm going to
8 check in with Colonel Osborn and then ask you to
9 make some last comments about the future here.

10 So, Colonel Osborn, any questions for
11 this panel?

12 (No audible response.)

13 CHAIR HILLMAN: Don't see Colonel
14 Osborn, okay. Colonel Morris is there, though.

15 Colonel Morris, any questions, for the
16 panelists?

17 MEMBER MORRIS: I don't, thanks.

18 CHAIR HILLMAN: Okay. Then, if you'd
19 wrap for us here the last set of questions -- and
20 Professor Corn already started to address this --
21 future issues, what we should pay attention to,
22 and what you'd recommend. I'd love to hear from

1 you, Professor Fidell.

2 MR. FIDELL: Right. And what I'm
3 going to be saying here is in a written
4 statement, which I will provide to the Chair.

5 I would recommend that the review
6 panel review and assess -- that's the phrase from
7 the statute -- the following issues.

8 Should GIs have the same right to seek
9 Supreme Court review as all other federal, state,
10 and military commissioned defendants enjoy? At
11 the moment they do not. Only if they pass
12 through the wicket at the Court of Appeals for
13 the Armed Forces and get a grant of review, or in
14 the very rare capital case, are they assured that
15 they will even be able to file a cert petition at
16 the Supreme Court.

17 So, if you're talking about
18 appearances, that's a lousy appearance. There's
19 no other way to put it.

20 Do the Armed Forces have too many
21 military judges? I mentioned this before, this
22 is a wonderful area to think purple, the statute

1 permits purple military judges. And I'll be
2 happy to give you the numbers that suggest to me
3 that we have a bloat problem right now.

4 Should military judges and CCA judges
5 have eight-year terms of office, rather than
6 their current shorter terms of office? Eight
7 years is the term enjoyed by U.S. Magistrate
8 Judges who serve full time.

9 Should military judges have law
10 clerks? I constantly hear about how much more
11 complicated military cases are these days, than
12 once upon a time when nine out of 10 cases were
13 AWOLs or desertions, and this kind of thing.
14 They don't have military judges. You might want
15 to look into that.

16 (Off microphone comments.)

17 (Laughter.)

18 MR. FIDELL: I guess. I'd have fewer
19 judges and more law clerks.

20 Should Reserve officers who are
21 current prosecutors or criminal defense lawyers
22 in civilian life be permitted to serve as

1 military judges and CCA judges? Frankly, I think
2 that's a real conflict of interest, probably.

3 Given its cost and output, should the
4 Court of Appeals -- the jurisdiction of the Court
5 of Appeals for the Armed Forces be transferred to
6 the District of Columbia circuit? For the last
7 couple of years CAAF has decided 25 cases,
8 thereabouts -- plus/minus -- on full opinion. It
9 cost the tax payers over \$17,000,000 a year.

10 Should there be a single kind of
11 standing court-martial? Enough already between
12 specials, special specials, and generals -- I've
13 already mentioned what I think about summary
14 courts. And, with all deference, there's only
15 one service that really uses them with any
16 regularity.

17 Should the selection of members -- we
18 talked about member issues -- should the
19 selection of members be taken out of commanders'
20 hands and given to independent court-martial
21 administrators? Some other countries that share
22 our legal tradition have done that.

1 Should the military justice system be
2 brought within the federal court's PACER system?
3 This is a no-brainer.

4 Can and should the National Guard
5 Military Justice Systems be subject to Title 10
6 rules and appellate review? There's a
7 Constitutional issue lurking in there but what we
8 have now is a crazy quilt where the states are
9 going their various ways, in ways that are
10 incompatible with the UCMJ and the manual that
11 we're all familiar with.

12 Should courts-martial have
13 jurisdiction over offenses that have no
14 substantial direct service connection? I know
15 that the Constitution doesn't require a service
16 connection but my question for you is, should
17 that be the rule, anyway? There's a difference
18 between doing the bare minimum the Constitution
19 requires and doing what seems to make sense by
20 21st century standards.

21 And finally, has the time come after
22 nearly 75 years and many amendments, many of them

1 desirable, for a fresh military code that is
2 simpler than what currently exists, and more
3 closely represents contemporary American
4 standards for the administration of criminal
5 justice? I think that time has come, and I hope
6 that you at least give some thought to whether
7 that's a project that can be undertaken within
8 your mandate.

9 Thank you.

10 CHAIR HILLMAN: Thank you, Mr. Fidell.

11 Professor Corn?

12 PROFESSOR CORN: I don't have as
13 extensive a list from the years of proposals --

14 CHAIR HILLMAN: Thank goodness.

15 PROFESSOR CORN: But focusing mainly
16 on this issue of the Article 32, just to
17 summarize again, I think that you really have to
18 look at whether or not the process that's evolved
19 is a meaningful opportunity to screen the
20 legitimacy or the credibility of the accusation.

21 Again, I'd look at Coleman v. Alabama,
22 where The Court said, a lawyer's skilled

1 examination and cross-examination of witnesses
2 may expose fatal weaknesses in the State's case,
3 and may lead the magistrate to refuse to bind the
4 case over.

5 So, on condition that the Article 32
6 provides that type of meaningful confrontation at
7 the screening stage, I do believe that a no
8 probable cause determination should result in
9 dismissal of the charges, without prejudice. If
10 the state -- or, if the prosecution wants to
11 refine the case and bring it forward again,
12 they'd have the opportunity to do that.

13 Thanks to this discussion, I now
14 realize I'm recommending a formal process for
15 command recommendations. Basically, reverse the
16 existing modality, so you'd have kind of an
17 Article 34 pretrial advice from the command, as
18 opposed from the staff judge advocate.

19 And I do believe that an increased
20 burden for justifying referral to trial is
21 appropriate beyond probable cause, I don't think
22 any case should be sent to trial unless the

1 prosecutor is convinced that the evidence is
2 sufficient to meet the prima facie burden of
3 proof in the trial.

4 I'd also say, retain the non-unanimous
5 verdict. I know that's an issue for other
6 panels, but I think that serves the interest of
7 efficiency and, actually, I think, fairness,
8 ultimately.

9 So, thank you.

10 CHAIR HILLMAN: Thank you.

11 DEAN SCHENCK: I think the biggest
12 challenge is going to be letting the system work.
13 I think it's important that both the government
14 and defense counsel have criminal military
15 justice experience, perhaps maybe have a military
16 justice track for the services.

17 I agree that there has to be a
18 meaningful hearing, if you choose to make the 32
19 binding it must be meaningful. And what I mean
20 by meaningful, I mean that there should be maybe
21 a judge or a magistrate sitting as a PHO and that
22 that PHO have some opportunity to either subpoena

1 or have an in-camera interview with the victim.

2 Not in the presence of counsel, maybe,
3 not in the presence of the accused, similar to
4 the grand jury where the grand jury can call and
5 subpoena the victim, without counsel and accused
6 present. That would be meaningful, if it's not a
7 meaningful hearing then it shouldn't be binding.

8 And I do agree with Gene regarding the
9 ability to petition the Supreme Court.

10 And thank you, again, for letting me
11 appear today.

12 CHAIR HILLMAN: Thank you for your
13 insight and your candor, for taking time to share
14 your thoughts with us today, and we appreciate
15 your patience, too, as we got started a little
16 bit late there.

17 We're going to kick up again in 10
18 minutes, so break for everybody here. Thank you.

19 (Whereupon, the above-entitled matter
20 went off the record at 2:06 p.m. and resumed at
21 2:21 p.m.)

22 COL BOVARNICK: I think we are about

1 ready to get started. For our last panel of the
2 day of State and Federal Prosecutors I wanted to
3 reiterate what Dr. Hillman mentioned this
4 morning, a special thanks to Judge Redford and
5 Captain Schroder for helping us pull this panel
6 together.

7 We have, going from your left to
8 right, Mr. Swanton, and, again, I am going to let
9 them cover their bios themselves, we have Mr.
10 Daniel Gardner and then Mr. Victor Fitz from Cass
11 County, Michigan, so thank you all.

12 Dr. Hillman, if you had any opening
13 comments, and then we can turn it back to the
14 Members for some brief comments.

15 CHAIR HILLMAN: Thank you so much for
16 your patience as we got a little bit late as the
17 day went on today and for the insight and
18 dedication to different kinds of systems than the
19 one that we are working on to understand better
20 today, but your insight and experience will be
21 really important to us.
22

1 So if you could just make some opening
2 remarks around, you know, your experience and
3 what you want to share with us and then we'll
4 have a conversation about it. We'll start with
5 you, Mr. Swanton.

6 MR. SWANTON: Thank you. My
7 experience that is of direct relevance to this
8 panel, I spent six years as a Judge Advocate on
9 active duty, was a trial counsel and senior
10 defense counsel under the old Article 32 system,
11 or whatever is about to change, and put it to
12 good use.

13 I got some good results by cross
14 examining witnesses and just pointing out some
15 holes in the Government's case. So having
16 listened to the earlier panel I thought I would
17 make that comment.

18 After leaving active duty I went in
19 the Reserves. I was an Assistant U.S. Attorney
20 in the District of Columbia, which is kind of
21 unique.

22 We are both, or were, I was, we are

1 both the local prosecutor and the federal
2 prosecutors, so we handled everything from simple
3 drug possession to international terrorism cases
4 and we had to indict all our cases, and we also
5 did preliminary hearings. I can discuss that a
6 little bit more later.

7 I have also served with a few other
8 different U.S. Attorney's Offices and at the
9 Counterterrorism Section at the Department of
10 Justice.

11 So I have been around to a few
12 different offices in different sized
13 jurisdictions and, for lack of a better term, I
14 have vicarious skin in this game.

15 I have two sons currently serving as
16 officers and one who has an officer girlfriend,
17 so the topics here seem particularly relevant.

18 Thank you.

19 MR. GARDNER: Good afternoon. My name
20 is Daniel Gardner. I am currently a trial
21 attorney at the National Security Division in the
22 Counterterrorism Section.

1 Prior to joining CTS a couple years
2 ago I was an Assistant United States Attorney for
3 around 13 or 14 years in the District and
4 Maryland as well as the Northern District of New
5 York.

6 Prior to that I was a Judge Advocate
7 General on active duty for around five or six
8 years stationed at Fort Bragg, I suppose soon to
9 be Fort Liberty.

10 I started out my career through the
11 DOJ Honors Program where I was assigned to the
12 INS, which didn't exist a couple years later, and
13 just rolled into DHS.

14 That is generally my career. I am
15 currently in the Reserves. I serve as a Civil
16 Affairs Officer and I am currently assigned to
17 the 308 Civil Affairs Brigade in Homewood,
18 Illinois.

19 MR. FITZ: My name is Victor Fitz. I
20 am the elected prosecutor in Cass County,
21 Michigan where I have served for the last 20
22 years as of May of 2023, so just coming up on

1 that anniversary.

2 I have served 40 years in prosecution.
3 That has been my professional career. It's been
4 in a variety of offices, all in Michigan, which
5 includes Muskegon, Michigan, Caro, Michigan, and
6 now Cass County.

7 Cass County is just due north of South
8 Bend and Notre Dame area, just to give you -- As
9 we at Michigan always show down at the bottom of
10 the palm.

11 I have done a lot of work in
12 prosecution, primarily for 15 years in Muskegon
13 as a trial prosecutor where I tried over 150
14 felony jury trials and 30-some misdemeanor jury
15 trials.

16 A large number of those were homicide
17 cases, capital offense cases, a number of CSC
18 cases, or in Michigan we call criminal sexual
19 conduct cases, which I am hopeful that I can
20 bring some insight on those cases to you here
21 today.

22 Also, we do have in Michigan the

1 preliminary examination in our practice, which is
2 a probable cause hearing, that I am sure we will
3 be talking about here today, where we basically
4 need to show the probable cause to show that a
5 crime occurred and who the person was that
6 committed that crime.

7 I will just mention briefly, also, in
8 regard to military background, I think I am
9 probably one of the few, if any, individuals in
10 the room with no military background whatsoever,
11 so I do feel a little bit like I am an outsider
12 in that regard, with a smile on my face.

13 Although we do have three members of
14 the military in our family, two Marines, and
15 Naval officers who married into the family.
16 Apparently the women in our family like military
17 guys.

18 And, you know, for those of you that
19 are in the Army, our apologies, hopefully one of
20 my nieces will find an Army guy here one of these
21 days before too long.

22 I am very proud to be here again and

1 I really respect what you have done. I would
2 note also I did have an Air Force member of our
3 family. I had an uncle who died during World War
4 II, so I certainly appreciate what you do. Thank
5 you.

6 MEMBER REDFORD: Vic is also the past
7 president of the Michigan Prosecutors
8 Association, so elected by his peers in the 83
9 counties in Michigan. He is a real leader in our
10 State in litigation.

11 MR. FITZ: Thank you, Jim.

12 CHAIR HILLMAN: It's a privilege to
13 have you with us. So we set out some general
14 areas of questions in investigation charging
15 decisions, the preliminary hearings or grand jury
16 proceedings.

17 So I am going to open it up for our
18 panelists here to ask any questions that they
19 have. I will just kick it off -- Do you want to
20 start for us here?

21 (Simultaneous speaking.)

22 MEMBER SCHRODER: I just thought maybe

1 I would start. I talked to all three of the
2 panel members before we got started. The reason
3 we kind of recommended Tom and Dan was because
4 they have the military background plus they have
5 years of experience working with a grand jury
6 that is binding.

7 So I think I wanted them to kind of --
8 Hopefully they might be able to compare and
9 contrast working within the two different systems
10 to give us some insight into that.

11 Then Mr. Fitz, Jim and I had kind of
12 had this discussion that Michigan is the only
13 State we know of where they do PC, I think
14 primarily, maybe that's not accurate, by a
15 preliminary hearing system, and so --

16 (Simultaneous speaking.)

17 MEMBER REDFORD: I think a lot of
18 States do, but we do have -- and Bryan and I --

19 MEMBER SCHRODER: Yes.

20 MEMBER REDFORD: -- were talking about
21 it offline and that's how the Colonel roped me
22 in. Well, offered me the opportunity to spend a

1 week with Bryan last week.

2 But, yes, so we're hoping to hear from
3 Vic about the preliminary hearing process, what
4 are the rights that a complaining witness has,
5 particularly in sexual assault cases, would be I
6 think interesting for the panel to understand,
7 and what's the review process if you are a
8 disappointed litigant, whether you are the
9 prosecution or the defendant, after a preliminary
10 hearing.

11 MR. FITZ: Very good.

12 MEMBER SCHRODER: So maybe if we start
13 with Tom, if you want to give us kind of some of
14 your impressions, especially as someone who did
15 work under the old Article 32 investigation
16 process.

17 MR. SWANTON: So in the District of
18 Columbia on the Superior Court side we have a lot
19 of serious felonies that come in as arrests.

20 Because mostly on the District Court
21 side, the federal side we try to avoid arresting
22 someone until we indict them because that way we

1 avoid a preliminary hearing.

2 We just have the indictment and then
3 usually a detention hearing and then we move on.
4 At the federal detention hearings we can proceed
5 by proffer, but we already have an indictment.

6 So switching back to Superior Court,
7 police come in with a case with an arrested
8 defendant, could be for a serious offense, we are
9 going to have to indict that defendant
10 eventually, but before that we are going to have
11 a preliminary hearing.

12 At the preliminary hearing there is
13 testimony usually from just a single detective,
14 but there is cross examination and it's very
15 thorough.

16 Some of the homicide preliminary
17 hearings can go on for days because the defense
18 is trying to suss out who our witnesses are and
19 we're trying to protect our witnesses identities
20 so they are not intimidated, which is a problem
21 in homicides in D.C. when we have actually lost a
22 few witnesses.

1 So after the preliminary hearing is
2 done we then go to indictment. The District of
3 Columbia had what was called the Rapid Indictment
4 Program for both District Court and Superior
5 Court, which were the simple gun possession, drug
6 possession cases, single witness cases.

7 In those cases, now that we have
8 bodyworn camera in the USA, you know, in the
9 Superior Court or District Court, at least in the
10 District Court we did, we review the bodyworn
11 camera, review the police reports, and just have
12 a one-witness indictment, you know, one witness
13 goes in the grand jury to indict a simple --
14 Basically it's a one-witness case.

15 On the Superior Court side we would
16 then have to go to indictment and that would be a
17 very thorough investigation for a non-rep type
18 case.

19 I have put in multiple witnesses on
20 cases and I've had to get immunity orders for
21 witnesses in grand juries, so we go through both
22 steps.

1 We do put all our victims -- Well, our
2 victims who are available, and what I mean by
3 available, like they can actually speak. We put
4 victims in the grand jury, including the victims
5 of sexual assaults.

6 That's very beneficial because you get
7 to see, you know, in quasi-friendly environment
8 how they behave under questioning and then the
9 grand jury right there.

10 We have pretty much open files
11 discovery now both in the Superior Court and
12 District Court. Grand jury transcripts are
13 usually held back until right before jury
14 selection and that's when we turn over the grand
15 jury transcripts.

16 I would like to let other people
17 speak. I do have something I would like to talk
18 about later with regard to investigations. I
19 think -- There was a term when I was over in
20 Afghanistan working on IEDs like left of boom,
21 like we're one step right before trial with the
22 Article 32.

1 We should be looking one step before
2 that because I think the bifurcation between the
3 Office of the Staff Judge Advocate and Army CID,
4 and that's been my experience has been CID, other
5 than when I worked on the Military Commissions,
6 but that was a whole other animal.

7 The damage you have with the grand
8 jury process, you are joined at the hip with the
9 investigator. They don't get their stat until
10 they get an indictment, so the arrest doesn't do
11 it, at least on the federal side.

12 So that's the extent of my comments
13 for now. Thank you.

14 MR. GARDNER: So the two districts
15 that I worked in as an Assistant United States
16 Attorney in Maryland and the Northern District of
17 New York the preliminary hearing was disfavored I
18 think is the right way to look at it.

19 In Maryland it was incredibly
20 disfavored. So we would sometimes proceed by
21 complaint, in particular in Maryland, but the
22 goal was always to avoid the preliminary hearing.

1 Those cases that I had go to a
2 preliminary hearing the objective was always to
3 make it, obviously, as limited as possible,
4 calling one witness, establishing probable cause
5 and moving on.

6 In both districts the vast, vast
7 majority of cases were presented at the grand
8 jury and indicted. Sometimes complaintive first
9 and then indicted, sometimes indicted, and we
10 move on from there.

11 You know, in my experience and my
12 opinion the grand jury is a much better vehicle
13 for charging cases than the preliminary hearing,
14 whether you are looking at the check it provides
15 on the prosecutor's office or just developing the
16 case and assessing the case.

17 The grand jury, as Tom brought up, is
18 a friendly environment, and there is positive and
19 negatives from that. I am a prosecutor so you
20 have to take what I say with a grain of salt, but
21 it's a secret proceeding.

22 So when you are dealing with, say you

1 are dealing with victims of sexual assault you
2 can have that conversation with them that this is
3 going to be a protected hearing and that unless
4 you go and tell somebody that you participated in
5 this hearing nobody is ever going to know or no
6 one is going to know about it unless we go to
7 trial and we have to turn over your testimony.

8 But as Tom alluded to, you get the
9 opportunity to view certain witnesses testify
10 under oath, whether that's a victim of sexual
11 assault or a cooperator or if your case relies
12 heavily on a particular witness, how are they
13 going to testify and how do they respond to your
14 questions, how cooperative are they or
15 uncooperative are they, and the grand jury is an
16 excellent place to suss that out versus a
17 preliminary hearing where they would be subject
18 to cross examination.

19 So I think the grand jury does a good
20 job of allowing prosecutors to, one, build their
21 case, but also test their case. Grand jurors
22 often ask very insightful questions that get to

1 the heart of the matter.

2 You will learn a lot about your case
3 through the grand jury process, both from
4 observing yourself but also from what the grand
5 juries ask, what evidence they are asking for,
6 what questions they are asking of the witness.

7 Obviously, you don't have that
8 conversation with them directly, what do you
9 think about this case, but the questions that
10 they are asking witnesses and the evidence that
11 they want to see will often tell you what a trial
12 jury might think of your case going forward.

13 I guess the last thing I will say and
14 then I'll move on, you know, talking about
15 victims of sexual assault in particular, I found
16 that in cases where it's appropriate, and it's
17 not appropriate in all cases, we have lots of
18 federal crimes involving like production of child
19 pornography where you would never call the victim
20 of the sexual assault to the grand jury because
21 the crime is depicted in some form or fashion and
22 you are often talking about very young victims,

1 but where it's appropriate, sex trafficking often
2 is a very appropriate case where you would want
3 to hear from the victim.

4 Again, it's a relatively safe space to
5 do that and you get a real preview for what the
6 trial will look like. I think in some cases it's
7 absolutely necessary to assess whether or not
8 it's a case that should go forward.

9 And without getting into specifics, I
10 certainly have had a couple of cases where I have
11 called victims in the grand jury and through that
12 process learned that they just weren't telling
13 the truth and ultimately decided not to proceed
14 with the charge.

15 I said that was the last thing I was
16 going to talk about, but one more real quick item
17 about the grand jury.

18 You know, the check that the grand
19 jury provides I think is not necessarily how many
20 cases get no-billed through the grand jury
21 process, but how many times the U.S. Attorney's
22 Office or whatever prosecutor's office goes

1 through the grand jury and decides at the end of
2 putting that case in that this is not right for
3 prosecution and choose not to charge once they
4 are done or have put in enough evidence in front
5 of the grand jury.

6 MR. FITZ: Again, Michigan is a State
7 where we have rarely used the grand jury. Well
8 over 99 percent of our charges or our cases in
9 criminal court come as the result of a warrant
10 request being brought to our office and our
11 deciding whether to charge or to decline the
12 request for charges.

13 In Michigan what happen -- And just
14 going back a little bit regarding grand juries,
15 we do have two types of grand juries in Michigan
16 that are infrequently used, one is a citizens
17 grand jury, which is 12 individuals who, again,
18 will do I'm sure what the jurisdictions that have
19 grand juries, I'm sure it operates very similar.

20 We also have a one-person grand jury
21 which is held where a Judge will convene the
22 grand jury. I have conducted three of those.

1 That has largely been replaced in Michigan by
2 what's called an investigative subpoena which
3 gives us the power of a grand jury without a
4 Judge being there.

5 It's an investigative tool that then
6 results ultimately with no charges or charges
7 through the complaint and warrant process.

8 I think we tend to be advocates of
9 what we are familiar with. When I listen to the
10 grand jury process I say, you know, to my fellow
11 members of this panel, gosh, I would not want to
12 go that route because I like our system a lot
13 better.

14 We don't have to go in front of
15 citizens and convince them of this charge. We
16 just get the warrant request, we make a decision,
17 and we charge.

18 So to us it's, to me at least, it
19 seems more efficient that way, but I guess there
20 is the other side of that which is what happens
21 after that occurs, which is the preliminary
22 examination.

1 In Michigan within 21 days you are
2 required to hold that hearing with an adjournment
3 only for good cause.

4 Prior to the preliminary examination
5 there is one meeting between the parties, it's
6 called a pre-preliminary examination hearing,
7 which is actually a very useful tool because we
8 find that through those discussions with defense
9 counsel, they are advocating for their clients
10 and so forth, a lot of our cases do get resolved
11 or get -- You know, they point out things, holes
12 in the case, there is negotiations that occur and
13 so forth.

14 So the preliminary examination is held
15 in the District Court, which is our misdemeanor
16 court, but that Judge will either bind over the
17 charge to Circuit Court, which is our felony
18 trial court, or deny the bind over.

19 I would note that as far as, for
20 instance in my county, I looked at the numbers
21 before coming here, in 2022 we charged about 864
22 felony counts, 864 different defendants. Only

1 660-some of those made their way up to Circuit
2 Court.

3 Roughly a fourth of them were resolved
4 between the charging of the offense and the
5 preliminary examination where we discussed with
6 counsel, we either pled it out to a misdemeanor
7 or on some occasions we've dismissed them and,
8 also, on a few occasions, probably about 5
9 percent or less, where the District Court
10 Magistrate declines to bind it over to Circuit
11 Court.

12 So that I think kind of in a nutshell
13 is what our system is about. We do call
14 witnesses, obviously, at the preliminary
15 examination. I can go through that as you would
16 request as far as the details of that.

17 I would note just a couple other
18 things in regard to our process. I didn't get a
19 chance to mention this to the members of the
20 panel, but I think there are about 19 or 20
21 States in the Union that do use a preliminary
22 examination process.

1 We went through preliminary
2 examination reform about five or ten years ago,
3 which is why I am familiar with that number.

4 Also, we do have clear case law and so
5 forth that indicates that it's not a discovery
6 process, it's just for the two basic things, did
7 a crime occur and is there probable cause to show
8 that this defendant is the person that committed
9 that crime.

10 Judges sometimes ignore the
11 expectation that it's only discovery. That
12 actually happens more often than it should.
13 Also, in regard to the check in the system, the
14 Judge does seem to be a robust check to
15 prosecutorial abuse in my opinion and sometimes I
16 think they go too far.

17 Finally, in regard to the grand jury,
18 which it's intriguing to hear, that, again, that
19 gives them a chance to hear their witnesses
20 without the pressure of a defense attorney, you
21 know, cross examining them and so forth, which
22 can be a real beat-down on your case when you got

1 up to Circuit Court and they nitpick the things
2 that were said at the preliminary examination.

3 However, what we do commonly is if we
4 have a case where we feel we need to talk to the
5 sexual assault victim or domestic violence
6 victim, or other victims, we'll bring them into
7 our office before the preliminary examination and
8 sit them down in the conference room and we have
9 fairly good success in assessing whether or not
10 this witness is going to be able to hold water
11 when it comes to having to testify.

12 That is in summary what our system is
13 like. I would like to just go back really
14 quickly to my introductory statements and just
15 thank Amanda Hagy. I haven't met her yet, but
16 she was very helpful in making sure I got here.

17 MEMBER REDFORD: She's behind you.

18 MS. HAGY: Thank you, sir.

19 MR. FITZ: Thank you very much,
20 Amanda. Thank you.

21 MEMBER REDFORD: Vic, as far as
22 numbers go, so in the county 840 charged cases,

1 about 600 get resolved by either plea or trial,
2 fair?

3 MR. FITZ: Yes.

4 MEMBER REDFORD: Okay. And you have
5 five attorneys in your office?

6 MR. FITZ: And maybe one
7 clarification, a good number of those, 200-some
8 that don't make it up to Circuit Court get
9 resolved with the pleas but they are pleas to
10 misdemeanor counts in District Court.

11 MEMBER REDFORD: Okay.

12 MR. FITZ: And then the others are
13 dismissed or denied by the --

14 (Simultaneous speaking.)

15 MEMBER REDFORD: Okay. So maybe 700
16 resolutions by conviction or acquittal?

17 MR. FITZ: Yes.

18 MEMBER REDFORD: Okay.

19 MR. FITZ: Probably closer to 750.
20 There are not too many that are dismissed.

21 MEMBER REDFORD: And you have five
22 lawyers?

1 MR. FITZ: Yes.

2 MEMBER REDFORD: Okay.

3 MR. FITZ: Okay.

4 MEMBER SCHRODER: In a -- You just
5 said, but I'm just trying to have a better
6 understanding, in sexual assault-type cases, and
7 a lot of the issues we are dealing with have to
8 do with sexual assault-type cases in the
9 military, do you regularly put the victims on at
10 a preliminary hearing?

11 MR. FITZ: We do. And, again, there
12 are some exceptions to that and that's evidence
13 based.

14 For instance, if you have evidence of
15 -- We try not to put the victim on, very frankly,
16 because, again, we don't want to have to expose
17 the victim repeatedly to having to testify.

18 Obviously, as we all know it can be a
19 pretty vexing thing for a victim to have to deal
20 with and there is also the reality of the
21 transcript that is used in Circuit Court to
22 impeach the witness, you know, and a skilled

1 defense attorney can use that to great effect
2 even if it's a minor discrepancy that we as
3 seasoned veterans of the system understand is
4 nothing big but a jury may not understand that.

5 So it's quite common that the victim
6 does testify. Again, there are exceptions. For
7 instance, if we have physical evidence that
8 clearly shows that a sexual abuse occurred and
9 there is a confession then we don't have to bring
10 the victim.

11 The defense counsel can still call
12 them, but the way we -- Usually the reality of
13 how we get around that is we just don't subpoena
14 the victim to the hearing and they don't want to
15 bother having to get an adjournment and get the
16 victim back and so forth, but technically they
17 can bring the person in.

18 We may also have the physical evidence
19 of, you know, the establishment of corpus delicti
20 through the physical evidence and then maybe
21 there is a medical exception where the victim
22 spoke with a medical professional, a nurse or

1 something, and we are able to get that statement
2 in lieu of the victim's testimony.

3 But I would say if a prelim is run
4 probably 80 to 90 percent of the time the victim
5 does testify.

6 MEMBER REDFORD: Vic, when you've got
7 biological evidence from either the state police,
8 county officers, or a SANE nurse, from when it's
9 collected from the scene or from the complaining
10 witness how long until you get the DNA results
11 back and where do you send them to?

12 MR. FITZ: Right. We send them to the
13 Michigan State Police and they do most of their
14 work but they do also farm some of that out to
15 some respected labs that perform the testing.

16 The testing, if they have enough
17 resources, and that's been a challenge in
18 Michigan, you know, hiring enough, having enough
19 in the budget to hire the needed number of
20 forensic scientists in that area, if they have
21 the luxury of, you know, working on the case
22 without a hundred other cases, two hundred other

1 cases, they can get us the results in as little
2 as two weeks, but that's not the norm, the norm
3 is many months, usually four to six months would
4 be my estimation.

5 They'll put a rush on it if it's
6 needed, but, again, the common theme would be
7 waiting four to six months.

8 CHAIR HILLMAN: I have some other
9 comparative questions really for all of you. So
10 from the time that an offense, and as Captain
11 Schroder mentioned, we are really reckoning with
12 a very high percentage volume of sexual assault
13 cases in military justice right now, so from the
14 time an offense is reported until it would reach
15 trial what is an estimate of how long that would
16 take, recognizing cases vary dramatically?

17 MR. FITZ: From reporting to trial in
18 Michigan would probably be a year and a half. If
19 I could just mention on that, you know, we focus
20 on these cases with great passion because,
21 obviously, they are, you know, extremely personal
22 cases and they need to be addressed aggressively,

1 and we do have a high degree of success.

2 I looked and in the last four years at
3 jury trial, and it hasn't been a lot of trials,
4 but about six or seven of the trials, and we
5 haven't lost any of them.

6 We generally, over the last 20 years
7 we've got over a 90 percent success rate in these
8 cases, but part of the reality is we don't charge
9 them as quickly as we do other cases because it's
10 extremely important before the charging to work
11 them up and make sure they are ready to go.

12 So that's a big part of the year and
13 a half is the delay in making sure the case is
14 ready to go.

15 CHAIR HILLMAN: To be clear, what you
16 mean by "success" is a conviction?

17 MR. FITZ: A jury trial, getting a
18 conviction on the case, is usually as charged.
19 Sometimes it's -- When I say a guilty verdict I
20 am talking about some or all of the felony
21 counts. Generally we get all of the counts, but
22 not always.

1 MR. SWANTON: One thing that would
2 drive that in the District of Columbia would be
3 the nature of the charge and whether or not a
4 defendant is detained or not.

5 So sometimes if they are not charged
6 with a certain -- If they are being detained we
7 have to get to trial within 100 days, so after
8 they have been arrested.

9 So that drives, actually will drive,
10 we'll get the DNA quicker then, too, except if
11 there was a problem with the lab. So if the lab
12 couldn't comply with that, the D.C. lab, we would
13 contract it out.

14 Sometimes things would go to the FBI,
15 but sometimes they get lost at the FBI. They are
16 so backed up at the FBI. They don't get lost,
17 but they are way backed up, so we end up having
18 to contract out to have DNA samples taken.

19 But usually like a Felony 1, so that's
20 what I would, you know, a very serious sexual
21 assault, a homicide, assault with intent to kill
22 while armed, those are going to be like in the 9-

1 month to year range from offense -- and
2 identification of the defendant.

3 And, of course, there are other types
4 of cases where we have the offense and we don't
5 know who did it. So we have to get DNA samples
6 and run them through CODIS and hopefully get a
7 match, so I would say that's about right, about a
8 year.

9 MR. GARDNER: Yes, I think the same is
10 for me in terms of my experience. Once a case is
11 charged about 12 to 18 months before resolution,
12 whether that's a plea or trial.

13 The investigation lead-up to charging
14 will depend on the nature of the case. If it's a
15 sexual assault-type of case, we have enticement
16 cases, and I mentioned production of child
17 pornography and things like that.

18 If we are talking about one victim,
19 you know, a shorter investigation. If we're
20 talking about sex trafficking victims or cases
21 where we have multiple victims that can be
22 longer.

1 Sometimes we've had, I've had, several
2 cases where, I had one case where we had 20-plus
3 child victims and that took many months before we
4 got to charging.

5 MR. SWANTON: Something I would like
6 to add, one reason for that in D.C. Superior
7 Court is there is such a backup. Felony 1
8 Judges, only certain Judges get to try Felony 1
9 cases.

10 Between the homicides, the sexual
11 assault cases, their calendars get backed up. I
12 haven't -- My understanding is I think they are
13 getting over their COVID backlog, but there was
14 definitely a backlog during COVID because they
15 weren't having jury trials.

16 MEMBER SCHRODER: I was just going to
17 ask Tom and Dan, one of the things we have been
18 also, you know, hearing about is statistics on
19 hearing cases in the military where there is
20 findings of no PC.

21 If you could each talk a little bit
22 about any cases you have been involved in with

1 the grand jury where, you know, you thought maybe
2 you were going down that path where you were
3 having issues with the grand jury or, you know,
4 maybe, most prosecutors I don't think on the
5 federal level would get surprised by a no true
6 bill completely, but maybe.

7 Maybe that's a case, but -- And how
8 you dealt with that. You know, if you've seen
9 problems coming with a grand jury on a case and
10 how you handle that.

11 MR. SWANTON: Well I don't think I
12 ever have encountered an out-of-control grand
13 jury. I mean there are stories about them.

14 When I was in Superior Court there was
15 one grand jury, luckily I did not appear in front
16 of, that they were having issues with.

17 That's the beauty of the grand jury
18 system from the way I see it. Like you begin to
19 see where you have holes in your case as you are
20 going through it.

21 I think I have been no-billed once or
22 twice and I have indicted hundreds of cases. You

1 just know when it's going to happen.

2 I want to piggyback on something Dan
3 said earlier, which is, you know, sometimes you
4 don't get that far. You just realize this case
5 is going nowhere.

6 Now another thing we do use the grand
7 jury for is to get witnesses locked into their
8 testimony before they can be intimidated, because
9 grand jury testimony can be used to impeach and
10 it's admissible substantive evidence, it's not
11 just impeachment evidence.

12 I have tried cases where I have had
13 witnesses and I have impeached them with their
14 grand jury testimony and then they were able to
15 argue to the jury the truth is what they said in
16 front of the grand jury.

17 That's before their memories fade,
18 which happens, or before they start getting some
19 intimidation from, you know, people in their
20 neighborhood, so it's good to get them in and get
21 their testimony recorded as early as possible.

22 Then the issue you run into is

1 sometimes if you're doing that very aggressively,
2 which I did in one case, you know, five months
3 later I am reading nothing but transcripts to a
4 new grand jury because you have to read all the
5 transcripts to the grand jury before you can
6 indict.

7 So in that case I had a cooperating
8 witness I wanted to put in last. I had put a
9 bunch of witnesses in up top, got their
10 transcripts, went to a new grand jury because the
11 old grand jury had expired, I wasn't shopping for
12 a forum, and then read the transcripts with the
13 cooperator's testimony and then got the
14 indictment.

15 So it's a great way to just really do
16 a very thorough investigation. On something Dan
17 said earlier, the questions from the grand jurors
18 are incredibly helpful.

19 You know, if nothing else they point
20 you in the right direction or maybe your witness
21 is not explaining something well, it's good to
22 have them, because those are the people that are

1 going to be on your jury pool, so I think it's a
2 great tool to work with. Thank you.

3 MR. GARDNER: Like Tom, and I don't
4 know the number, I have indicted hundreds of
5 cases, and I don't think I have ever had one no-
6 billed.

7 But because you just don't get to that
8 point, and, sir, to your point, certainly not
9 surprised by it. I think there are a couple
10 things going on, one, and I know the last panel
11 talked about this a little bit, but the standard
12 for which you approach a charging decision,
13 that's not probable cause.

14 So at the time that we charge a case
15 we have confidence that we are going to be
16 successful. Let me rephrase that, when we charge
17 a case we are confident that we can convince
18 jurors, a reasonable juror, that the defendant is
19 guilty, and so it's a much higher standard than
20 probable cause.

21 That's what the grand jury standard
22 is, so it doesn't change what the grand jury has

1 to find, they only have to find probable cause,
2 but from a U.S. Attorney's Office perspective we
3 are approaching it with a different lens.

4 And cases are, and I think we talked
5 about this a little bit, you know, some routine
6 cases can be put to the grand jury in 15 to 30
7 minutes. You know, we'll have a gun case, a
8 felony possession charge, which is probably
9 common throughout all U.S. Attorney's Offices.

10 A grand jury that has sat for a year
11 or 18 months they are going to hear dozens of
12 those cases and you can put them in very quickly.
13 Other cases take a much longer time and you will
14 go back to the grand jury multiple times over
15 months.

16 I have had cases that I have presented
17 over years that I had to pass from one grand jury
18 to the other. But as you are going through that
19 process, if it's a very complicated case, you are
20 constantly having internal discussions within our
21 office.

22 So the approvals you need within the

1 U.S. Attorney's Office could be multi-layered to
2 get the approval to charge a case and in some
3 very complicated cases the recommendation would
4 be made to have an indictment review committee,
5 which I have participated in both as for my case,
6 presenting my case internally to other members of
7 the U.S. Attorney's Office, but also sitting on
8 it and making recommendations.

9 So if a case is close, and when I say
10 "close" I don't mean if it's close to probable
11 cause or no probable cause, I mean a close call
12 in terms of do we think it's realistic that we
13 will get a guilty verdict when we get to trial,
14 are we close to being able to prove this beyond a
15 reasonable doubt or not, which there is a real
16 chasm in between those two questions.

17 But we'll have an indictment review
18 committee and really talk about the case and what
19 is this case going to look at trial, how did the
20 evidence go into the grand jury, how did the
21 cooperator sound, how did the victim sound, all
22 of those things.

1 So I don't -- So you often don't get
2 to that point where you would have a case that is
3 no-billed. I have certainly seen them, Tom has
4 had a couple, but you really just don't get to
5 that point because as you go through the grand
6 jury process you realize this is not a case that
7 we should charge.

8 MR. SWANTON: I would just like to
9 piggyback off that for a second. Those two cases
10 I had, if it even was two, it was like many years
11 ago it was a very low-level like local drug case,
12 one detective, and just the grand jury didn't
13 like it, but not any serious case.

14 Any serious case -- I have never had
15 a serious case no-billed because of the factors
16 we just discussed.

17 MEMBER BARNEY: Thanks very much for
18 being here with us. I wonder if we could just
19 kind of continue on the subject of what I am
20 hearing from each of you is a very low incident
21 rate of no-bill type cases.

22 Could you help us to understand by

1 taking a step back from there what actually is
2 going on in your approach to evaluating cases to
3 understand, you know, that you are not going to,
4 you are not likely to have a case go forward
5 because, you know, you would not be able to get
6 an indictment.

7 In particular, are there certain
8 aspects or characteristics of sexual assault-type
9 cases that lend themselves to not being amenable
10 to going forward for trial? Could I start with
11 you, Mr. Swanton.

12 MR. SWANTON: Well my direct
13 experience -- I have no direct experience or very
14 little with sexual assault cases, mostly with
15 violent crime, but we have a very robust sexual
16 offense section in the office in D.C. I work
17 closely with them.

18 I would say probably one thing that
19 slows down -- Well, first of all, it's a comment
20 I made earlier, you're doing the investigation
21 with the investigator.

22 It's not somebody dropping a case file

1 on your desk and then you presenting it to the
2 grand jury. So you are getting DNA samples,
3 you're getting cell phone records. I mean those
4 are just incredible, you're pulling video
5 surveillance.

6 Also, something, you're getting
7 medical records. You are building your case. A
8 lot of times we have checklists, like all the
9 things you need to obtain.

10 But cell phone records are phenomenal
11 because you get the cell site location, so now
12 you can put the assailant at least within a
13 certain perimeter.

14 So these investigative steps are
15 incredibly helpful with getting search warrants.
16 So I guess that's what you -- You build the case
17 that way.

18 Also, you talk to the victim. You
19 find out, okay, most times it's going to be a
20 woman, who did she tell, when did she tell them,
21 you go find those people, you put them in the
22 grand jury, because then you are locking in the

1 hearsay.

2 You make sure you get the medical
3 records, you interview the doctors and you review
4 the medical. That's how you -- I have built --
5 You get the 911 calls, those can be incredible.

6 I mean I had a very bad assault on a
7 police officer case, meaning I thought I was
8 going to lose it, and I got the 911 call, the
9 young girl calling about her father had assaulted
10 her, got her in, put her in the grand jury, and
11 I'll talk about something else with that in a
12 second, and now I have built a better case
13 because I investigated the case jointly with a
14 law enforcement investigator.

15 One of the benefits of being in the
16 office in D.C. is we have a very, very robust
17 victim/witness assistance unit. We have -- They
18 are all social workers with Masters, some would
19 go to Main Justice and come back to the office.

20 Some were from the FBI, they'd go back
21 to the FBI. The FBI has a phenomenal
22 victim/witness assistance unit. Those really

1 help you with your cases because, now I am a
2 middle-aged white guy, you know, dealing with
3 people from a different background, it's good to
4 have somebody else who can make them feel
5 comfortable. Thank you.

6 MEMBER BARNEY: Thank you. Mr.
7 Gardner?

8 MR. GARDNER: Yes, sir. So I think
9 that Tom hit on a lot of good points. I think
10 there is a couple of differences between the
11 federal approach and in State.

12 Tom talked about one of them. I think
13 the other is just our posture. I think we have
14 the luxury sometimes of being more deliberate and
15 taking more time that we don't have to be
16 reactive sometimes the way that the State does.

17 Some of that is because we have, our
18 jurisdiction is much more limited than the State
19 in a lot of instances and we can't take certain
20 cases.

21 But when we do take cases we are very
22 deliberate about it and often the State will

1 charge, and we'll let them charge and take it for
2 a while, and then when we're ready to charge we
3 step in. It's not very nice of us, but that's
4 what we do. We do it in collaboration with the
5 State.

6 So I think our posture is a little bit
7 different. I think we can be choosier about the
8 cases that we take so we are more confident by
9 the time we are at the grand jury process and
10 ready to indict.

11 Then the other difference I think
12 between the federal approach in some states, not
13 all states, is what Tom mentioned, and that's the
14 collaboration between the U.S. Attorney's Office
15 and the agents that are working the case.

16 I know some states, New York state for
17 instance, their investigators would work the case
18 from start until they thought that it was ready
19 to prosecute.

20 They'd take that and they'd walk over
21 and they hand it over to the State's Attorney's
22 Office and say if you would like to prosecute

1 here it is and then they would go from there.

2 It's the exact opposite for us. So
3 from the moment that, you know, whether it's the
4 FBI or HSI or DEA, if it's a sexual assault it
5 would be, or a child exploitation case, it would
6 be either HSI or FBI, but from the time that they
7 think they have any kind of case they are coming
8 to the United State's Attorney's Office and an
9 AUSA is being assigned to the case and from that
10 moment on the special agent and AUSA are joined
11 at the hip going forward.

12 It doesn't always work perfectly, but
13 it works really well in most cases where it's a
14 very collaborative process from the beginning all
15 the way until the end of the prosecution and we
16 get to really lean on each other's expertise
17 going forward.

18 And so all those things that Tom
19 mentioned that are challenging in those types of
20 cases where you have a sex assault victim, and
21 typically what we're dealing with is minors, but
22 the ability to corroborate, the ability to have a

1 fulsome investigation that allows you to make
2 those very difficult charging decisions I think
3 that helps out a lot.

4 I won't belabor Tom's last point, but
5 victim/witness entities within the U.S.

6 Attorney's Office and agencies, especially the
7 FBI, are outstanding and really help facilitate
8 investigation, protecting witnesses, and things
9 along those lines.

10 MEMBER BARNEY: Thank you, Mr.
11 Gardner. Mr. Fitz?

12 MR. FITZ: Yes. I think there is
13 going to be some repetition regarding what Tom
14 and Dan have spoke about, but maybe it's not bad
15 to hear that, but, again, our sexual assault
16 cases, you know, we do place a high priority on
17 those and that includes I usually try to have my
18 best attorney handle these cases.

19 I usually want a female attorney. I
20 have tried 15 cases and I have won all of those,
21 but I will say I think there is just,
22 particularly if your victim is female, there is

1 just a more natural fit and I think it's easier
2 for them to relate with the victim and also to
3 have success at trial.

4 So there are certainly many good men
5 that do fantastic on these, but that tends to be
6 our wheelhouse, so to speak. I think there is
7 the advantage that jurors know that these cases
8 are serious and so they take them seriously.

9 We have a great jury instruction in
10 Michigan, which you may have also, that says
11 that, again, if you have no corroboration, just
12 the victim's testimony, but you believe it,
13 that's enough to convict beyond a reasonable
14 doubt.

15 And, you know, we emphasize to our
16 newer attorneys take advantage of that, say you
17 want to emphasize to the jury I can convict just
18 on this witness's testimony alone, I don't need
19 anything else.

20 But, you know what, we've gotten more
21 than that and we've got corroboration, just like
22 Dan and Tom talked about, and corroboration I

1 think is very important in these cases.

2 We do have a similar ACT statute in
3 Michigan which allows us, it's presumed that
4 other victims can testify and that the victim
5 herself or himself can testify about the past
6 incidences and those are certainly very powerful
7 pieces of corroboration.

8 Also, we can use an expert witness, a
9 doctor who has experience in these cases and can
10 say that the reason why the victim is acting this
11 way, why she has had problems on her job, while
12 her grades have gone down, and so forth, these
13 are natural manifestations of someone who has
14 been sexually abused.

15 As mentioned before, social media,
16 electronics, pictures, video, other
17 corroboration, you know, excited utterance of the
18 victim, medical testimony that, yes, the injuries
19 you are seeing that's not just consensual sex,
20 that's, you know, a sexual assault on the person
21 beyond normal sex, you know, let's see, sexual
22 assault kits, we've talked about that.

1 We do have in our office a team
2 approach. The victim advocate, as was mentioned
3 here by Dan and Tom, you know, they are very
4 important for keeping our victims onboard and
5 they do a great job in that regard.

6 You may not have the luxury of this in
7 the military system, but we use support dogs when
8 the victims are testifying, even adult witnesses.
9 That seems to help them to be calm and it has
10 some -- For civilian jurors they are impacted by
11 that, too. I think there is just the reality
12 they like dogs, so that doesn't hurt.

13 Maybe just a couple other things, I
14 tell my attorneys that corroboration great or
15 small is very critical. It can be something
16 really small like another person in the house
17 hearing the same song on the radio as what the
18 victim heard when she was being molested.

19 Those little things, you know, will
20 help to bring credibility to your case. Also,
21 too, last, in regard to presentation, you want
22 your attorneys to have a passion for these cases,

1 which I suspect you have.

2 I can remember just a couple examples.
3 One time our victim came in and she had a rough
4 life. We had prepped her beforehand, but when
5 she came in she came in in a miniskirt and that
6 wasn't a good thing for going in front of jury
7 trying to say that, you know, that you were
8 assaulted, you know, because of the concerns that
9 it's consensual and so forth.

10 So for three days of trial my victim
11 advocate wore a miniskirt while the victim
12 herself wore the peasant dress that my victim
13 advocate had worn and so forth.

14 Another one, this happened to be a
15 young man, a case I tried, a Boy Scout, a troop
16 leader, I'm a Boy Scout myself so this is not an
17 indictment of the Boy Scouts, but he had molested
18 a number of the young kids that were under his
19 watch and this kid came in, he had long hair, he
20 had greasy hair, and so forth, even though we had
21 tried to prepare him for trial, so that morning
22 before trial my victim advocate again was washing

1 his hair in the sink, so it made him more
2 presentable.

3 But, again, the little things can make
4 a difference in these types of cases. A hundred
5 little things can result in a conviction.

6 MEMBER BARNEY: Thank you very much.

7 MEMBER REDFORD: Thank you for those.
8 Those are very insightful. You've talked about
9 that you have great success and your office does
10 in the conviction rate. What about your
11 declination rate?

12 Do you have situations where
13 complaining witnesses will come to law
14 enforcement -- what's the protocol in your
15 county? If I say I was sexually assaulted, I go
16 to the county deputies or the township police,
17 what happens to the case?

18 MR. FITZ: The deputies would do the
19 investigation. They'll look for the
20 corroboration we've talked about. Many times, as
21 we mentioned, we're having a terrible challenge,
22 as I think most states are, with not enough

1 police officers and so forth. You know, we just
2 are not getting the candidates.

3 So, we're in a real constant training
4 process with them and so forth. So, many times
5 when we get the warrant request, we have to send
6 it back and say hey, did you get the 9-1-1 tape?
7 Do you have this? Do you have that? You've got
8 officers with just very little experience.

9 So, we work on building that
10 corroboration before we charge it, but we do
11 sometimes have to have those tough conversations
12 with victims where we say look it, we believe it
13 happened, but there's just not enough right now
14 to charge it, and so we do have cases like that.

15 We do have a strong conviction rate
16 and part of that though, I think, is because we
17 also do, once the case is authorized, we make the
18 tough decisions. We say okay, this case is
19 strong, we're not going to offer much on this
20 thing, or this case, we've got some real
21 challenges with it.

22 The victim may not present well, there

1 are some inconsistencies and so forth, and those
2 are the ones that we will be negotiating more
3 aggressively to resolve them even at the
4 preliminary examination stage or sometime before
5 trial.

6 MEMBER REDFORD: Do you have any idea
7 numerically how many, what percentage of cases
8 your office is made aware of with sexual assault,
9 sexual misconduct type cases, the penetrative or
10 non-penetrative that you would decline, you know,
11 five percent, one percent, ten percent?

12 MR. FITZ: I would probably put it
13 between ten and 20 percent.

14 MEMBER REDFORD: Okay, thank you.

15 CHAIR HILLMAN: I want to check in
16 with our virtual members who have been with us
17 some of the day to just see if there's anybody
18 online. Is Colonel Morris or Colonel Osborn
19 online? Colonel Morris, any --

20 MEMBER MORRIS: No, thank you. I
21 don't have any questions.

22 CHAIR HILLMAN: Okay, General?

1 MEMBER EWERS: I have a question.

2 This is for Mr. Fitz. You're elected?

3 MR. FITZ: Yes.

4 MEMBER EWERS: How often are you
5 reelected?

6 MR. FITZ: Four years, every four
7 years.

8 MEMBER EWERS: Do you get what we
9 would call stakeholder complaints about the way
10 your office handles cases?

11 MR. FITZ: We do on occasion,
12 including a CSC case or sexual assault cases, and
13 the way I handle it is really, it's pretty
14 simple, two things, I guess.

15 The first thing is I tell, whether
16 it's, you know, prince or pauper, whoever the
17 person is in the community, you know, if somebody
18 is saying hey, you should have charged this case,
19 you know, this victim deserved it and so forth, I
20 say you know, look it, you don't have to worry.
21 In my county, you're going to be treated fair.

22 You're going to be treated just like

1 everybody else. You know, there's no exemptions.
2 We do what we feel is right, you know, come hell
3 or high water, and sometimes that's saying no and
4 sometimes it's saying yes.

5 And, you know, particularly if you're
6 dealing also with, you know, maybe somebody who
7 has got some stature in the community, who is,
8 you know, influential and so forth, I tell my
9 staff look it, you know, and it's a biblical
10 verse, but I say, you know, be as wise as
11 serpents and as innocent as doves.

12 You know, you got to do what's right.
13 You've got to be wise in what you do, but you got
14 to do the right thing. It doesn't matter, you
15 know, whether people are going to like you or
16 dislike you.

17 And we certainly have taken heat on
18 occasion for saying no and we've taken heat for
19 saying yes, but we do what we think is right and
20 we try to get rid of all of that other noise.

21 MEMBER ALDANA: Mr. Gardner, you
22 mentioned the indictment review committee. Can

1 you clarify a little more? Is that a full
2 process and formal within your office?

3 MR. GARDNER: The indictment review --

4 MEMBER ALDANA: Review committee and
5 who sits on them?

6 MR. GARDNER: Yeah, so we'll have
7 review committees --

8 CHAIR HILLMAN: Dan, would you turn
9 your mic on for us?

10 MR. GARDNER: Sorry, thank you.

11 Certainly, so we'll have review committees within
12 the office. It is an ad hoc thing. It's not
13 something that comes from the justice manual. In
14 both the U.S. Attorney's offices I've been in, we
15 did something like that.

16 I think it's very common within U.S.
17 Attorney's offices and it's just a way to bring
18 other smart minds to the case and make the best
19 decision possible like Victor was just saying.

20 We'll also frequently have trial
21 review committees. So, prior to trial, we'll
22 have AUSAs, especially younger AUSAs, come in and

1 present their case, go over the evidence that
2 they're going to present, talk about challenges
3 that they foresee, and maybe make them aware of
4 some challenges that the group sees as the case
5 is going forward. Sometimes we'll make them do
6 openings and closings and things like that.

7 You know, it's shortly before trial,
8 so it wouldn't be the case that we'd say okay,
9 let's dismiss the charge, but just to make people
10 as prepared as possible.

11 MEMBER SCHRODER: Just a little follow
12 up on that, Dan, and then I'd like Tom to address
13 it as well for the offices that you've worked in.
14 Was a -- did you generally prepare a pros memo as
15 part of that review process?

16 MR. GARDNER: Yes, so every case --
17 first of all, you know, nothing is ever charged
18 outside of the U.S. Attorney's office. So, the
19 U.S. Attorney's office is making all decisions on
20 charging. I know there are some states where
21 officers can charge and then hand the case over.

22 Complaints, indictments, that all

1 comes from the U.S. Attorney's office and every
2 U.S. Attorney's office will have a process to
3 receive approval. So, it's not an individual
4 AUSA making a determination about charging a
5 case.

6 All indictments are under the, are
7 signed under the U.S. Attorney's name, and so
8 there's an approval process within the U.S.
9 Attorney's office. Depending on the nature of
10 the charge, that approval could go all the way up
11 to the U.S. Attorney.

12 Typically, there is -- I served as a
13 deputy chief before I left Maryland. I could
14 approve certain charges, but other charges had to
15 go up to the criminal chief or even to the U.S.
16 Attorney.

17 The prosecution memo you mentioned is
18 typically the vehicle for how that moves through
19 the U.S. Attorney's office, and in my experience,
20 those are robust, and the more complicated the
21 case, the more robust the memo is in laying out
22 what the proposed charges are, the evidence.

1 Typically, you'll have a section on
2 suppression issues that may arise or you're
3 concerned about, but then other issues regarding
4 witnesses and things of that nature if you
5 foresee challenges with victim witness testimony
6 and things along those lines.

7 MR. SWANTON: Well, in the District of
8 Columbia, both on the superior court side and the
9 district court side, we do prosecution memos for
10 every felony indictment.

11 Even though the cases I referred to as
12 rips earlier, at least there was a memo that went
13 with that laying out the facts, the witnesses,
14 the evidence, and any evidentiary concerns.

15 My memory is fading now. It's been a
16 while, and the Eastern District of Pennsylvania
17 was we didn't do it for those types of cases. We
18 did not do prosecution memos. We did do them for
19 more complicated cases like robberies with
20 multiple cooperators like that.

21 So, and then with regard to actually
22 the question earlier about the indictment review

1 committee, it was very ad hoc everywhere I've
2 been. Usually, when you talk to the deputy
3 chief, if you're a line AUSA, they say okay, this
4 is a pretty complicated case. Before we indict
5 it, we're going to have an indictment review
6 committee, so, just to make sure everybody is
7 comfortable with what we're about to indict.

8 MEMBER SCHRODER: And Vic, obviously
9 you're a state prosecutor. You have to look at
10 everything that comes through the door. There's
11 more of a crush, but do you have a similar type
12 process on certain types of cases?

13 MR. FITZ: It's not as sophisticated.
14 We do have a portion on every warrant request
15 where we will write our theory, discuss the
16 strengths and weaknesses of the case, basically
17 what happened and so forth, and occasionally
18 there will be case law in there and issues that
19 you need to be aware of maybe, again on a high-
20 profile case or something like that, but not to
21 the degree they have. Occasionally, we will if
22 those issues are just very important, but it's

1 fairly informal.

2 CHAIR HILLMAN: So, maybe I'll close
3 with an open universe question. Is there
4 anything in particular you think we should keep
5 in mind as we think about how the military
6 justice system addresses the kinds of crimes it's
7 addressing most right now, but just works in the
8 environment that you have a good glimpse into
9 right now?

10 You know, our service members don't
11 come from Mars. They come from Michigan and the
12 District, and, you know, so anything you think we
13 should keep in mind as we face this down?

14 MR. FITZ: Yes, maybe just, you know,
15 I'll try not to cover anything I talked about
16 before, but, you know, with the preliminary
17 examination, the probable cause hearing, it
18 sounds like yours has gone primarily paper,
19 which, again, as a defense attorney, you probably
20 don't like that.

21 As a prosecutor, sometimes we would
22 like that because you don't have to put as much

1 evidence on and so for and, you know, expose the
2 victims to, you know, searing cross examination
3 and so forth.

4 But again, I will say our system does
5 allow us at the early stage really to ferret out
6 the cases that maybe don't need to go up to
7 circuit court and our feet are to the fire.

8 The only other thing I'd say in regard
9 to it is that we always remind our judges that
10 this is a statutory right, not a constitutional
11 right, the preliminary examination, and that's a
12 big difference.

13 So, we do have a couple of exemptions
14 carved out in Michigan, for instance, that you
15 might -- you know, actually there's active
16 discussions about doing this for sexual assault
17 victims as well.

18 For instance, a domestic violence
19 victim does not have to testify. The police
20 officer at the preliminary examination can
21 provide that testimony, and you can even use that
22 testimony at trial if you bring on a motion two

1 weeks in advance of trial and convince the judge
2 of it.

3 But I think for sexual assault
4 victims, I think that's a very advisable thing to
5 consider having because, again, it is so tough on
6 these victims to have to testify repeatedly and I
7 think, you know, we don't have --

8 You know, if you have an exception for
9 anything, you know, that's the rule, but again,
10 it's pretty limited in Michigan. I am hopeful in
11 Michigan they will give us an exemption also for
12 sexual assault victims so that we have the choice
13 to decide whether or not to put that victim on.
14 Thank you.

15 MR. GARDNER: Just, again, I don't
16 want to go over anything we talked about. I
17 think a lot of the conversation and the material
18 that I was provided, there's this question of
19 whether or not a preliminary hearing should be
20 binding and what the preliminary hearing should
21 look like in the military.

22 Certainly, as a prosecutor, the

1 changes that have been made to the Article 32
2 process from my point of view are a positive
3 thing. I remember going through Article 32
4 proceedings where, you know, I had to have a
5 victim testify in front of an investigating
6 officer. You know, that's challenging, and so I
7 think it's good that it has moved away from that.

8 I think the question is, and
9 everything is talking about that, is, you know,
10 how do we get at the purpose of what the
11 preliminary hearing is, should be, or in the
12 federal system, more of the grand jury, and
13 that's to provide a meaningful check on the
14 prosecutor's office.

15 And the question of whether or not the
16 preliminary hearing should be binding or not
17 binding, I certainly gravitated towards that it
18 be binding. Otherwise, it does become
19 meaningless. And even as a prosecutor, I don't
20 want to participate in a meaningless proceeding.

21 I do -- Dean Schwenk's last comment
22 though definitely stuck with me, that it needs to

1 be a meaningful check, and so if the preliminary
2 hearing is simply just putting paper on a desk
3 and walking away, maybe that's not meaningful
4 and, you know, not serving that purpose that the
5 preliminary hearing or grand jury proceeding
6 should.

7 And the only other thing I think I
8 would note, and we didn't really talk about it a
9 whole lot, is I know the old Article 32 process
10 was very beneficial for defense counsel because
11 it was a discovery, an opportunity to obtain
12 discovery, to explore the case, and there was a
13 lot of benefits along those lines for defense
14 counsel. I, obviously, didn't like that as a
15 prosecutor, as a trial counsel.

16 In the federal side, I would say that
17 the case law is very strong that pretrial matters
18 are not meant to be discovery expeditions,
19 whether it's a suppression hearing, a motions
20 hearing, or a preliminary hearing. That's not
21 the purpose.

22 Our discovery obligations don't change

1 whether we have a preliminary hearing or a grand
2 jury. Our discovery obligations are our
3 obligations, and so I don't know that that's a
4 terribly relevant factor from my point of view in
5 terms of what the scope of or what the
6 preliminary hearing process should look like.

7 I think it should be a meaningful
8 check on the prosecutor's office. I think that's
9 very healthy for the prosecutors and I don't know
10 that I have great advice beyond that about what
11 it should look like. Thank you.

12 MR. SWANTON: I'm going to reiterate
13 something I said earlier. I do think good
14 investigations bring good cases. I don't
15 understand -- I've never understood this
16 bifurcation between law enforcement and the SJA.

17 If the trial counsel is working with
18 law enforcement, they can work with each other
19 and then also collect and build the case
20 together, so then you're bringing a better case,
21 not having to either redevelop or expand upon an
22 earlier investigation.

1 And with regard to the Article 32, I
2 was shocked when I saw that they were doing paper
3 Article 32s. I mean, Article 32 investigating
4 officers are going to be members of your panel,
5 president of your panel.

6 It's good to have somebody take a look
7 at your case with a way of protecting victims.
8 We have to work something out to do that. I
9 agree with that 100 percent, but it's good to
10 maybe test drive your case besides inside your
11 SJA office or with CID, and I'm sorry to be so
12 Army centric, but that's been my life.

13 The other thing I was kind of -- this
14 is two prongs we hadn't discussed. I noticed
15 these new special trial counsel offenses include
16 murder, manslaughter, and sexual offense cases,
17 but not other what we would consider like felony
18 ones or serious felonies like robbery, robbery
19 while armed. It just seemed kind of an odd
20 bifurcation to draw there.

21 And the reason why I'm saying that is
22 something I also experienced as a JAG. For the

1 soldiers in the Army, before they go on a
2 deployment, they go through a combat training
3 center, some very intense training to get ready
4 to go do their jobs, and just like in the Navy,
5 they do work-ups before they deploy.

6 We don't do that with our lawyers. We
7 train them at the JAG school, at least for the
8 Army. We send them to the trial advocacy course
9 and the first case they may be trying may be a
10 sexual assault case or, you know, something very
11 serious.

12 So, maybe put more offenses -- I know
13 it kind of goes against the chain of command
14 view, that you're taking more things away from
15 the chain of command, but I'm not sure how an
16 armed robber --

17 I mean, if you've got a soldier doing
18 things like that, that's beyond a chain of
19 command problem. That's a real problem. He is a
20 criminal and maybe he should be tried. It's
21 usually going to be a he. He needs to be tried
22 and prosecuted by experienced attorneys because I

1 learned --

2 You know, in D.C., the nice thing is
3 you start off trying misdemeanors, superior court
4 misdemeanors. If you screw it up, you know,
5 sometimes victims are upset and you talk to them,
6 but, you know, relatively low stakes and you
7 build up. You know, you don't walk in and start
8 trying homicides. Experience is a great teacher.
9 You can only teach so much in a classroom. So,
10 thank you for your time this afternoon.

11 MR. GARDNER: I suppose I should just
12 add I'm not sure what to make of this, but my
13 first trial as a JAG was a staff sergeant that
14 had popped hot during a urinalysis.

15 I did well on that, and so I was
16 handed the Tim Hennis case, which was a triple
17 murder/rape case, and so my second big case there
18 was a homicide case, so I would echo what Tom
19 said.

20 You know, at the time, I thought I was
21 prepared and ready to handle something like that,
22 but I'm sure I would handle it differently now

1 than I did as very young prosecutor. Anyway, I
2 thought I'd share that.

3 CHAIR HILLMAN: Thank you for that
4 humility. I have to say it's not the first time
5 we've heard that today, that someone looking back
6 now at a responsibility they had earlier in their
7 career wonders whether it was wise for them to
8 have had that responsibility earlier in their
9 career.

10 Anyway, thank you for much for your
11 insight and your input. We really appreciate
12 your time. Take care.

13 MR. GARDNER: Thank you.

14 CHAIR HILLMAN: All right, we'll all
15 come back at 3:30.

16 (Whereupon, the above-entitled matter
17 went off the record at 3:23 p.m.)
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This is to certify that the foregoing transcript

In the matter of: Open Meeting

Before: MJRP

Date: 04-19-23

Place: Arlington, VA

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