

MILITARY JUSTICE REVIEW PANEL (MJRP)

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OPEN SESSION

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TUESDAY
OCTOBER 24, 2023

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The Military Justice Review Panel met
via Videoconference, at 2:45 p.m. EDT,
Dr. Elizabeth Hillman, Chair, presiding.

PRESENT:

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

MJRP STAFF:

Mr. Pete Yob, Director
Mr. Dale Trexler, Chief of Staff

Ms. Stacy Boggess, Senior Paralegal
Ms. Terry Gallagher, Staff Attorney
Ms. Nalini Gupta, Staff Attorney
Ms. Amanda Hagy, Senior Paralegal
Mr. Michael Libretto, Staff Attorney
Mr. Chuck Mason, Staff Attorney
Mr. Marguerite McKinney, Management & Program Analyst
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

PRESENTERS:

Lieutenant Colonel Michael Korte, U.S. Army
Colonel Brett Landry, U.S. Air Force
Lieutenant Commander Jordi Torres, U.S. Navy
Lieutenant Colonel Albert Evans, U.S. Marine Corps
Lieutenant Commander Nick Hathaway, U.S. Coast Guard

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

2 (2:30 p.m.)

3 CHAIR HILLMAN: Welcome back,
4 everybody, to the first public session of the
5 seventh meeting of the Military Justice Review
6 Panel.

7 Pete, I'll turn it over to you for our
8 session, the Trial Defense Counsel Session.

9 MR. YOB: Okay. We're happy to have
10 trial defense military personnel here with us
11 today. I'm going to turn it over to our lead
12 staff attorneys Michael Libretto and Meghan
13 Peters to introduce and set up this and share
14 your information with us.

15 MR. LIBRETTO: Good afternoon,
16 everyone. For this panel, we have brought
17 together senior military justice practitioners
18 from each of the service's defense service
19 organizations to provide their perspectives,
20 opinions, and recommendations on a number of
21 topics of interest to you in conducting your
22 comprehensive review of the military justice

1 system.

2 Joining us from the United States Army
3 is Lieutenant Colonel Michael Korte. From the
4 Navy we have with us Lieutenant Commander Jordi
5 Torres. Colonel Brett Landry is joining us from
6 the Air Force. The Marine Corps Defense Services
7 is represented by Lieutenant Colonel Louis Evans.
8 And Lieutenant Commander Nick Hathaway is with us
9 from the Coast Guard.

10 Each of them are going to be giving an
11 initial opportunity to introduce themselves and
12 highlight in their view the most significant
13 effect recent changes to military justice has had
14 on their ability to represent servicemembers and
15 whether that is a positive or negative impact
16 collectively.

17 Following their individual statements,
18 they are prepared to field your questions on
19 several of the topics of particular interest to
20 you, including: one, the expanded scope and use
21 of Article 30a pre-referral proceedings; two, the
22 use of Article 16(c)(2)(A) judge-alone special

1 courts-martial, also known colloquially as
2 special -- or "short-martials"; three, plea
3 agreements and how they compare as a practical
4 matter to the formal pre-trial agreements,
5 including the negotiation of a specified
6 sentence; four, the handling and processing of
7 charges relating to retaliation, domestic
8 violence, and sexual harassment allegations; and,
9 five, current sentencing procedures and
10 perspectives on reforming the current process to
11 one more similar to state and federal
12 non-adversarial proceedings.

13 Given the virtual presence of everyone
14 in attendance and the associated challenges with
15 that, for general questions posed to the panel as
16 a whole, I would ask that you direct your
17 questions initially to one of the panelists, and
18 they will then each be given an opportunity to
19 respond in a predetermined order, although all of
20 them may not respond to each question asked.

21 Because we have -- because we have a
22 number of topics to get through today, we will be

1 mindful of the time spent on each, and may be
2 required to move on to other topics before all of
3 the questions can be addressed. We will attempt
4 to reserve some time at the end to -- of the
5 two-hour block to circle back to some of those
6 questions if there are any.

7 But, with that, I will turn it over
8 now to Lieutenant Colonel Korte for his brief
9 statement, followed by the rest of the panelists.

10 LTC KORTE: Thank you very much. So
11 I am Lieutenant Colonel Michael Korte. I'm the
12 Chief of the Army's Defense Counsel Assistance
13 Program, or DCAP. So we organize training for
14 TDS attorneys worldwide. That's 15 to 20 courses
15 per year. We facilitate other training, Army and
16 non-DoD training, and we also provide
17 court-martial assistance primarily through our
18 civilian attorneys who are former Army judges.

19 We produce training materials and
20 provide updates to the field on military justice
21 law and reforms and emerging case law through
22 Deskbooks and other means.

1 So I have been in this role since July
2 of this year, having left the trial bench as the
3 circuit trial judge in Hawaii. So in that
4 capacity, over two years I presided over cases in
5 Hawaii; Fort Bliss, Texas; Fort Huachuca,
6 Arizona; Joint Base Lewis-McChord, Washington;
7 and Fort Irwin, California.

8 So before this, I served as the
9 special victim prosecutor in Hawaii for three
10 years. I have also been a government appellate
11 branch chief and a trial counsel. And so my
12 defense time is -- includes two separate tours in
13 TDS and two-and-a-half years in Defense Appellate
14 Division. So my perspective coming here is the
15 -- is from a long-time trial and appellate
16 practitioner, government and defense, newly
17 returned to the defense side.

18 Generally speaking, I have no major
19 issues with the current military justice system.
20 I believe it remains an incredibly thoughtful and
21 fair system for an accused. The impact, as I see
22 it, of recent changes is somewhat mixed. I'll

1 get into the pros and cons more as we
2 specifically discuss pleas and sentencing.

3 Generally, in my view, the recent
4 changes effected in 2019, there has been no major
5 change in the fairness of the proceedings, which
6 I believe remains strong, and there appears to be
7 a much more efficient practice, pre-trial
8 negotiations, and the trial itself.

9 The only downside I see is an
10 unintentional decline in advocacy skills
11 indirectly resulting from these changes. And I'm
12 speaking for Army defense, but I believe those
13 impacts are felt both with the defense and the
14 government. And so criticisms of the experience
15 level of Army litigators often point out the
16 declining number of courts-martial and how that
17 has declined steadily over the years for the
18 average litigator, and that appears to be true.

19 I will note that several recent
20 changes, including the reduction in advocacy in
21 preliminary hearings, and the narrowing of
22 sentencing ranges in plea agreements, tend to

1 have reduced advocacy opportunities for
2 litigators. So that's a -- to me at least, that
3 is kind of a hidden consequence of some recent
4 changes.

5 Overall, I do believe our system
6 remains strong and fair, something I've felt
7 throughout the last 18 years of practice.

8 With that, I'll yield the floor.

9 MR. LIBRETTO: Thank you.

10 Lieutenant Commander Torres, please.

11 LCDR TORRES: Thank you, sir. As
12 Mr. Libretto said, my name is Lieutenant
13 Commander Jordi Torres, and I currently serve as
14 the senior defense counsel for the Navy's Defense
15 Service Office North.

16 So just in case you're not familiar,
17 the Navy defense office are broken up into four
18 different commands, and ours covers the northeast
19 United States, the Midwest, Europe, and parts of
20 southwest Asia. And so my job is to supervise
21 the provision of defense services by our 17
22 defense counsel and 10 to 12 paralegals and

1 support staff as we represent sailors across that
2 area of responsibility.

3 Unlike Colonel Korte, I actually have
4 basically only been a Navy defense counsel for
5 almost the last 10 years. So I was a trial
6 counsel, a prosecutor, very briefly at the
7 beginning. I did a very little bit of SJA work,
8 but I've been essentially defending clients --
9 Marine, Coast Guard, and Navy clients -- in
10 courts-martial since about the early part of
11 2015.

12 Before this job, I was the Deputy
13 Director of the Navy's Defense Counsel Assistance
14 Program, so we're a little bit smaller than the
15 Army, but similarly help advise, train, provide
16 materials to Navy defense counsel across the
17 enterprise. And I also, as the junior person
18 there, the deputy, got to try some of our more
19 complex cases in the Navy.

20 Before that, I did serve briefly as an
21 aide to our commander, Naval Legal Service
22 Command, so I was able to see the enterprise from

1 there to some extent, but still trying cases as
2 defense counsel actually. And then I was a line
3 defense counsel in Mayport, Florida, before that.

4 I will say just briefly that the
5 changes to military justice are hard. As
6 somebody that has both implemented them
7 personally in the courtroom and had to train on
8 them and teach on them, it is difficult to
9 undergo significant substantial changes to the
10 process what feels like every year or two.

11 And if I have one central concern that
12 I can distill down in terms of how we represent
13 sailors and what the impact of the military
14 justice system is on this, on our sailors, on our
15 airmen, our soldiers and marines, and on the
16 commands, is that I think as we strive, probably
17 rightly, to mirror some best practices in the
18 civilian world, we lose the connection to what
19 makes military justice military justice and what
20 makes it acceptable and fair both for the
21 warfighters, the command, and the sailor who is
22 accused at a court-martial -- I will just use

1 sailor because that is my terminology -- but a
2 sailor at court-martial.

3 And I think what I mean by that, and
4 I'm certainly willing to talk about and happy to
5 talk about that with respect to sentencing in
6 particular, but as we -- but as we sort of put
7 the power in the hands of military judges, as we
8 sort of take away from the process, the court
9 members who are closest to the mission, closest
10 to the actual no-kidding good order and impact --
11 good order and discipline impact on the command,
12 I think it becomes a challenge for our sailors to
13 properly defend themselves, because what we
14 haven't been doing is changing the offenses to
15 make them more like the civilian world.

16 They still carry with them a lot of
17 military components, but what we're doing is
18 making sentencing more strict. We're making it
19 less about sort of good order and discipline and
20 that impact. And while I think sometimes we can
21 hear "good order and discipline" and think, hey,
22 that's the command's interest. That also

1 protects the sailor, because unfair sentences and
2 unfair punishments, unfair outcomes, affect the
3 sailors we represent.

4 So that's the general gist of sort of
5 where I have seen the changes go and my concerns.

6 But thank you for the opportunity to
7 speak with you all. I'm looking forward to
8 answering questions.

9 MR. LIBRETTO: Thank you, Lieutenant
10 Commander Torres.

11 Colonel Landry?

12 COL LANDRY: Thank you, Mr. Libretto.

13 Good afternoon to members of the
14 panel. I have noticed a couple of times my feed
15 has slowed down and picked up, so that may be
16 comm issues on my end. If you have trouble
17 hearing me, just please let me know and I will
18 repeat.

19 I have bene in charge of the Air
20 Force's Trial Defense Division for coming up on
21 about 16 months now. I've been on active duty in
22 the Air Force's JAG since 2004. In this job, I

1 supervise just under 200 personnel. That
2 includes our active duty defense counsel and
3 paralegals, as well as the senior civilian policy
4 advisor and a number of defense investigators as
5 part of our new defense investigator program that
6 has just been in effect for also about 18 to 20
7 months now.

8 We are responsible for the defense of
9 airmen and guardians facing adverse
10 administrative and military justice actions, up
11 to and including of course trial by court-
12 martial.

13 Prior to this assignment, as you've
14 seen in my bio, so I won't belabor the point, but
15 I have served among other assignments as military
16 judge, at the trial level as a staff judge
17 advocate, as the deputy chief prosecutor for the
18 Department of the Air Force, as deployed deputy
19 staff judge advocate, and as an area defense
20 counsel, among other jobs.

21 I would concur with the statements
22 that were previously made by Colonel Korte and

1 Lieutenant Commander Torres on the state of
2 military justice and trial defense. Those
3 statements are largely true of the Department and
4 of the Air Force as well.

5 I believe that overall trial defense
6 operations within the Department of the Air Force
7 remain robust and strong. We have a well-
8 resourced Trial Defense Division, and our
9 charter, regulations, and culture allow for
10 zealous advocacies within the boundaries of the
11 law.

12 Furthermore, I would say that
13 service's defense counsel within Department of
14 the Air Force is seen as positive in terms of
15 development as a litigator, an officer, and it
16 remains a key part of the JAG Corps' new Career
17 Litigation Development Program.

18 The recent additions of the defense
19 investigators' improvements and independent
20 access to trial resources is going to be a
21 significant positive for the capabilities of the
22 defense counsel.

1 I thought Commander Torres put it
2 well. The state of military justice I would
3 characterize as being in flux. I believe the
4 overall fairness of the system is not in
5 question. But as we've seen changes in law on
6 essentially an annual basis, or at least a
7 biannual basis, since 2016, and arguably five to
8 ten years before that, it has been difficult
9 sometimes to effectively maintain that cycle of
10 evaluating, fully implementing, and then judging
11 where additional change needs to be made.

12 So I look forward to, after the
13 standup of OSTC, hopefully a time period in which
14 we can undertake that cycle, and then when the
15 next set of changes comes forward, we really are
16 able to identify what, if anything, needs to
17 change at that point.

18 And that's all for now. Thank you.

19 MR. LIBRETTO: Thank you, Colonel
20 Landry.

21 And Lieutenant Colonel Evans?

22 LTCOL EVANS: Good afternoon,

1 everyone. By virtue of going last, I will be
2 brief. I echo what everybody else said.

3 But specifically what Lieutenant
4 Commander Torres said, and that the most
5 difficult thing about military justice for all
6 practitioners is the amount of changes that we
7 have undergone since I began practicing, I have
8 an entire shelf devoted to multiple MCMs.

9 And it is difficult for there to be a
10 subject matter expert when no one has been
11 practicing the same set of laws for, you know,
12 any long period of time due to consistent changes
13 in the law, the practice standards, and that
14 nature. So I believe that makes things difficult.

15 And I understand that it was a change
16 a long time ago, but one of the things that I
17 feel most passionately about is the watering down
18 of the Article 32 process. I believe that it is
19 an important speed bump in the justice process, a
20 check in the justice process. And the ability
21 for complaining witnesses not to participate or
22 the government just to put in paper at an Article

1 32 has diminished its importance, and it is
2 rarely exercised by the accused. It's normally
3 typically waived, just because there is very
4 little value.

5 And, furthermore, convening
6 authorities are just -- there is no value to them
7 to not going forward on a charge. It is
8 dangerous for them to say, "This charge doesn't
9 have probable cause," and, therefore, they just
10 go forward and let it proceed to a court-martial,
11 and then it is out of their hands.

12 So hoping that the Office of Special
13 Trial Counsel coming on board will create some
14 changes there, but that is certainly one of the
15 things that has been most difficult to watch as a
16 defense counsel over my time in the Marine Corps.

17 MR. LIBRETTO: Thank you, Lieutenant
18 Colonel Evans.

19 And we do have one more panelist, and
20 that is Lieutenant Commander Hathaway from the
21 Coast Guard.

22 LCDR HATHAWAY: Yes. Thank you,

1 Mr. Libretto, and thank you, everyone, for the
2 opportunity to be here today. Briefly, I am a
3 corps counsel at Defense Service Office North,
4 similar to Lieutenant Commander Torres, or should
5 I say Lieutenant Commander Torres is the
6 supervisor here at Defense Service Office North.

7 For those who are not aware, the Coast
8 Guard details defense counsel to the Navy Defense
9 Service Offices to represent both Coast Guard
10 members and Navy sailors at courts-martial and
11 administrative separation proceedings.

12 I certainly concur with much of what
13 has been said. I was also going to speak on sort
14 of the consistent changes, and the rapidity of
15 those changes, that have happened since I have
16 been here. Most of my time -- since I have been
17 practicing military justice, most of my time has
18 been spent on the government side as a
19 prosecutor, trial counsel, and then at both the
20 Coast Guard and the Navy appellate government
21 offices.

22 So I won't repeat that. I do think

1 that without allowing time to assess the
2 effectiveness or the at least intended reforms
3 that these changes are, you know, supposed to
4 create or their intended goals, it's difficult to
5 understand whether they are achieving those
6 goals, and then the continued reforms. They were
7 just never given the opportunity to understand
8 that.

9 Specifically what I will say, though,
10 I do want to comment on one favorable aspect I
11 think that the recent reforms have sort of given
12 us is with respect to sentencing and the ability
13 to reach resolutions -- I know we'll talk on this
14 more -- but as much discretion I think as parties
15 have to gain and to enter into favorable
16 resolutions for both sides, the more discretion
17 parties have, I should say, I think that is going
18 to allow for a more effective and sort of
19 consistent military justice system, which could
20 get to more of the sort of goals that Lieutenant
21 Commander Torres was talking about when we're
22 getting closer to, you know, staying within the

1 bounds of the traditional military justice system
2 of the achieving good order and discipline.

3 So that's all I have today. I'm happy
4 to answer any questions.

5 MR. LIBRETTO: Thank you, Lieutenant
6 Commander Hathaway.

7 Dr. Hillman, at this time, I turn it
8 over to the panel members to ask any questions.
9 If you'd like me to moderate and identify the
10 topics, but obviously it's not a script, it's
11 more of a guide. So I'll turn it over to you at
12 this point.

13 CHAIR HILLMAN: Thank you, Michael.
14 You've kicked us off to a great start, and I
15 appreciate the opening statements of each of our
16 service representatives. And thank you for your
17 service and your willingness to, you know, share
18 your insight and expertise, hard-won, with us
19 today.

20 I can see some nodding happening and
21 some responses to what your colleagues were
22 saying, too. I do want to give you a chance to

1 weigh in on that.

2 Mr. Libretto, if you'd just help me
3 make sure we get through the order of the folks
4 after I pose the question. I don't really have
5 anybody particularly to assign this question to,
6 so maybe you'll assign the question for me, and
7 then run through the -- our expert panelists for
8 us.

9 So I'll just start with the plea
10 agreements issue. If you'd share with us your
11 insight and understanding of the changes in plea
12 agreements, how you think they're being
13 administered in terms of fairness and efficiency
14 and comparison between the current regime and
15 previous ones, to the extent you've operated over
16 different regimes here.

17 MR. LIBRETTO: Thank you. So as I
18 mentioned earlier, we have identified sort of a
19 predetermined order. So we'll start with
20 Lieutenant Colonel Korte to kick it off.

21 LTC KORTE: Thank you. And thank you,
22 Doctor, for the good question. The old system,

1 the -- where the military judge does not know
2 what the quantum is and the maximum punishment, I
3 believe that the changes we've seen are
4 ultimately beneficial to both sides. There is
5 both good and bad.

6 I definitely see a narrowing of the
7 sentencing ranges, and it -- what it began with
8 was kind of an apprehensive wading into the
9 waters of the new rule and the new system. And
10 over time the floor, you know, the minimum
11 sentence in a plea agreement has started to rise,
12 and the kind of ceiling has started to shrink to
13 the point where we're getting closer and closer
14 and closer to specified sentences. I think we'll
15 get into that a little bit further later.

16 I do see a benefit to the government
17 and the defense. The defense obviously is
18 seeking to minimize potential exposure, and there
19 is something to be said for having a very clear
20 prediction of what the outcome will be at the end
21 of a trial when you have a plea agreement. So I
22 do see some positives and negatives.

1 Going back to my opening -- my opening
2 theme, as we narrow, I do see the loss of
3 advocacy opportunities for counsel. So another
4 panelist mentioned the downfall of the
5 preliminary hearing and how that used to be
6 basically a second trial or a first trial
7 opportunity for counsel. And the same concept
8 applies to these guilty pleas where there is a
9 narrow ceiling and floor.

10 So there is a big difference in the
11 preparation of counsel on both sides between the
12 old system where the maximum punishment could be
13 24 months and the new system where the -- being
14 it be 20 to 24 months.

15 What I'm seeing around the world is
16 when there is a very narrow range of sentencing,
17 the preparation has declined significantly. And
18 it's not unusual or even -- I mean, it actually
19 makes sense when you have to prioritize large
20 caseloads, but it is something we are seeing.
21 That would be the only negative, but I do see the
22 benefits and efficiency of having the system

1 change the way it did.

2 And with that, I'll yield.

3 LCDR TORRES: I think in our
4 predetermined order, I'll just -- I will just
5 jump in with one little addition to that, because
6 I think we've got that exactly right.

7 The one additional thing that I have
8 seen is that it appears now that sentences in
9 plea agreements, and the sentences that somebody
10 actually ultimately gets and what they negotiate,
11 are a lot less tied to, in my opinion, sort of
12 what the -- what the waterfront, what the
13 warfighter thinks is fair for a particular
14 sentence, and is much more now tied to what
15 lawyers think might be fair or might be doable or
16 might be winnable.

17 And I view that as a major loss to
18 military justice, because to the extent that we
19 accept the fact that we don't really have an
20 independent judiciary, we don't really have the
21 right to, you know, sort of a robust indictment
22 piece, we don't really have an opportunity -- the

1 same sort of opportunity that you do in civilian
2 courts to apply certain legal principles.

3 We accept that, and the thing that our
4 sailors and airmen and, you know, all of us get
5 in return is that we get to be judged by folks in
6 our position, and the convening authorities, and
7 then acting upon what that body, that court,
8 thinks is fair.

9 So in a plea agreement situation, it
10 is certainly helpful to be able to negotiate with
11 the convening authority about what the right
12 sentence is, and many times that has a benefit to
13 our client, sometimes it doesn't, but it does
14 make the convening authority more of a
15 prosecutor. And I think, in my experience, that
16 means that they take more of sort of the
17 direction of the prosecutors and the trial
18 counsel in terms of what's fair.

19 And so the downside that I've seen of
20 that is, apart from the advocacy piece, is that
21 the sentences are a lot less tied to what is fair
22 in military justice. And I think that people are

1 getting convictions, they're going out of town
2 and going to jail, and losing the connection to
3 military justice piece I think risks eroding the
4 whole point of this process.

5 Over.

6 CHAIR HILLMAN: Thank you, Lieutenant
7 Commander Torres. And thank you to Lieutenant
8 Colonel Korte. I was saying thank you on mute
9 when you ended there. Sorry about that. So --

10 MR. LIBRETTO: Lieutenant Colonel
11 Evans, anything to add to the other comments?

12 LTCOL EVANS: I do. The first thing
13 is I think that there is a pro in that a huge
14 benefit for clients in my experience is the
15 known. Not knowing is a big stressor for them.
16 Not knowing what they're going to get under the
17 old system, it was a much wider range, so they go
18 in there with the confidence of knowing kind of
19 what their sentence is.

20 However, I think that the cons
21 outweigh that. It was touched on before, but I
22 think the first thing is that commanders become

1 -- they supplant the role of the military judge,
2 and the commanders are not judge advocates. They
3 are not attorneys. And they're the ones deciding
4 the sentence, not a judge advocate. And they do
5 so with hopefully the input of a judge advocate,
6 but we'll get to the qualifications of those
7 judge advocates I think in a later answer.

8 And the final thing I think that is --
9 disincentivizes deals, because before the accused
10 could always beat the deal. It may be a stiff
11 deal where he's going to do four months, but he
12 says, you know, I can go in there and put on a
13 good sentencing case and I can beat that and only
14 get two.

15 But currently there is a case that I'm
16 on that the command is insisting on two to four
17 months of brig time for adultery, and we just
18 think that's significantly too stiff, so we're
19 going to a full contested case where the client
20 is guilty, has admitted he is guilty, and, you
21 know, to multiple people.

22 So there's -- it's just a litigate to

1 mitigate. So it's wasting time and resources for
2 a case where under the old system we would have
3 just beaten the deal. So that's the only thing
4 that I would add is that sometimes it
5 disincentivizes deals and creates unnecessary
6 litigation due to a force range that may be
7 unreasonable.

8 CHAIR HILLMAN: Thank you, Lieutenant
9 Colonel Evans.

10 LTCOL EVANS: Yes, ma'am.

11 MR. LIBRETTO: Colonel Landry?

12 COL LANDRY: Thank you. Without
13 repeating what any of the previous briefers have
14 said, I would simply foot stomp that within our
15 Air Force trial defense vision the feedback I
16 received is exactly what Lieutenant Colonel Evans
17 just said, that by and large our clients much
18 prefer the current system because of the
19 certainty it provides, or much closer to
20 certainty as compared to the old "beat the cap"
21 system.

22 It was kind of amusing in a way, I

1 guess you could say, keeping in mind the
2 seriousness of proceedings over -- in which we
3 represent clients, that many of the litigators,
4 myself included, who enjoy the challenge of being
5 in the courtroom, have a fondness for the old
6 system and the ability to potentially beat that
7 cap through litigation, your presentation of a
8 full and thorough sentencing case. But, by and
9 large the clients, who are the most important
10 people in those -- in that courtroom from our
11 point of view, do prefer the current system, at
12 least that's feedback from within the Air Force.

13 I will also say that one drawback to
14 how plea agreements are being administered, and
15 essentially the narrowing of discretion that
16 Colonel Korte referred to a moment ago, is that
17 while -- if a defense counsel is doing his or her
18 job, the transparency for the client should not
19 be affected. The client should, of course,
20 understand exactly the deal that's being entered
21 into.

22 The transparency for others in the

1 courtroom, which can be particularly important --
2 of particular importance in the military justice
3 system, not only fellow unit members of the
4 client, of family members of the client, other
5 people with knowledge of the case is reduced
6 under the current system when there is
7 essentially less to litigate for, as opposed to
8 the old PTA system in which on the table the
9 incentive was to put out every bit of evidence
10 and aggravation, pit it against every bit of
11 evidence and mitigation and extenuation to allow
12 the military judge, or panel member in certain
13 cases, to reach that individualized sentence.

14 That incentive has -- is being removed
15 in our guilty plea cases as the range gets
16 narrower. Not saying that overall it's a good or
17 a bad, but it's certainly a system of choice and
18 based on the updated regulation.

19 CHAIR HILLMAN: Thank you, Colonel
20 Landry.

21 MR. LIBRETTO: And Lieutenant Colonel
22 -- Commander Hathaway, if you have anything to

1 add.

2 LCDR HATHAWAY: Thank you. I
3 certainly will concur with everything that has
4 been said. Just one quick point to add. While I
5 agree that under some circumstances, you know,
6 with some convening authorities, you know, the
7 new system could cause a -- you know, could cause
8 certain clients to not want to go forward with
9 deals that the convening authorities are being
10 particularly unreasonable.

11 I do think with the narrowing of the
12 ranges and the certainty that has been spoken
13 about for clients, it can provide some clients
14 also some incentive and some view that entering
15 into this resolution is favorable, and
16 potentially causing more resolutions with the
17 convening authority and the client being able to
18 agree exactly what the punishment is.

19 So, again, this could be one of those
20 things where while the system will stay the same
21 going forward, the entity that will -- on the
22 government side that can enter into the

1 agreements will change. This can be one of the
2 things where we don't necessarily have enough
3 time to determine whether or not these new types
4 of resolutions will be more common or there will
5 be fewer -- well, I guess we do know there are
6 fewer contested cases going on now.

7 But I do think that ability to agree
8 on a specific sentence has the -- has incentive
9 for some clients to enter into a deal where they
10 otherwise might not have, given the uncertainty
11 of going into a guilty plea.

12 So nothing to add after that.

13 CHAIR HILLMAN: Thank you, Lieutenant
14 Commander Hathaway.

15 You know, I think I'd like to ask you
16 to talk about sentencing next, because it's so
17 connected to what you were just talking about
18 now, although it's -- you know, we're skipping
19 over a couple of topics we want to circle back
20 to.

21 You know, are there changes you'd
22 recommend to -- you mentioned the challenges with

1 having a distinct military justice system, and
2 changes that made it more civilian-like. There
3 is the possibility of those more civilian --
4 civilian criminal justice system-like sentencing
5 procedures as well, too, and we're curious as to
6 your thoughts about that.

7 First, are similarly -- to the extent
8 you see it, are similar situations being
9 adjudicated similar sentences? And would more
10 procedures and process -- what would help the
11 sentencing process operate more effectively given
12 this changed climate that you just described?

13 LTC KORTE: I'll start. Thank you,
14 Doctor. I believe that there is a wide variance
15 in sentences even for similar offenses. And I
16 think it's for the right reasons, at least in my
17 observation. So I think of it as a feature, not
18 a bug, as long as those differences are based on
19 the proper considerations. And they are all laid
20 out in previous -- you know, in the current
21 guidance.

22 I think that is one of the benefits of

1 the military justice system is that a soldier who
2 have outstanding evidence in pre-sentencing,
3 supporting them as a soldier, as a person, and
4 someone with the potential for rehabilitation,
5 that that actually plays into the sentence quite
6 significantly, and that obviously differs between
7 soldiers.

8 I saw that in a drug ring as a
9 military judge where there were I think at least
10 eight of them that I sentenced, and they were
11 widely different, and they have received
12 different sentences. And for the most part,
13 their offenses were quite similar, but they each
14 brought different things to the table as far as
15 rehabilitation and all of the things that we look
16 for when we do pre-sentencing.

17 I do think of that as a -- as a
18 feature of our system that I'd like to see stay.
19 I understand there are certain guidelines and
20 limitations, but I believe that judges can
21 explain those, while they would downward
22 departure on a sentence, that they are easily

1 explainable.

2 I'll yield. Thank you.

3 CHAIR HILLMAN: Thanks, Lieutenant
4 Colonel Korte.

5 LCDR TORRES: So, ma'am, to the extent
6 I think you're thinking about potential rule
7 changes or things that if we're going to -- if
8 we're going to switch to a more civilian-like
9 system where the judge is really just sentencing
10 and sort of comparing that to a pre-sentencing
11 report, it is -- some of the rules of evidence
12 that we're still sort of -- even though as the
13 defense we can relax them, sort of that
14 adversarial procedure is probably unnecessary to
15 some extent with the judge, right? Because, I
16 mean, there's really no reason to argue sort of
17 some of those things in front of the judge who is
18 hearing them anyway. So I think some relaxing of
19 some of those rules is probably -- is probably
20 for the best.

21 The other thing we don't have -- we
22 have have diversionary programs. We don't really

1 have a way for someone who is -- in fact, the
2 vast majority of our clients are first-time
3 offenders, people who are going into a courtroom
4 and going to get sentenced for something that in
5 my experience at least in the places, the
6 jurisdictions I practiced in, if they went into
7 civilian court, they either wouldn't go to a
8 court -- I was a special assistant U.S. attorney
9 actually for a little while, and, you know, it
10 would be for the prosecution.

11 And a lot of those things I think
12 would be in the best interest of the command and
13 the sailor, and we don't have those available to
14 us. So to the extent we're moving into a
15 direction of, hey, the judges are going to
16 determine a sentence, I think those tools could
17 be really, really helpful.

18 At least in the Navy side, I do think
19 that the judges have been relatively -- I would
20 say relatively consistent with sentencing. One
21 of the features of judge-alone sentencing as
22 opposed to member sentencing is that you see more

1 consistency. You can more easily predict the
2 range that the judge is going to adjudge.

3 That said, I think there has been
4 historically and is still a wide disparity
5 between what judges will sentence and what
6 members can and will sentence. The truth is, as
7 a defense counsel practicing, I would 100 out of
8 100 times prefer for my client to be sentenced by
9 members than a military judge.

10 And while that's not just because I
11 think the sentences are lower, obviously, it is
12 and of course that's in my client's best
13 interest, but those -- that members' panel I
14 think just -- and not because the judges aren't
15 great and aren't doing their job, but judges are
16 a little bit desensitized to the plight of
17 individual sailors, the circumstances of
18 defenses, and they're sort of -- they have to, of
19 course, I imagine -- I've never been a judge, but
20 I imagine you can't -- you know, you can't go to
21 deviate too far because you just sentenced
22 somebody on a similar offense yesterday, you're

1 going to have to sentence somebody on a similar
2 offense tomorrow.

3 And so the offense itself I -- I have
4 found, in my experience at least, doesn't always
5 really reflect the seriousness of the offense,
6 the quality of the servicemember, the impact to
7 the community.

8 And so the only thing I'll say about
9 sentencing procedures moving forward is I hope, I
10 wish -- as far as wishful thinking, I wish -- I
11 wish we weren't losing judge -- you know, member
12 sentencing because I think that's something the
13 civilian system could actually learn from, and
14 maybe make it a little bit of a more fair process
15 with perhaps lower sentences, especially as a lot
16 of folks consider sentences too high in the
17 civilian courts.

18 And so that's all I have to add on
19 that. Thank you.

20 CHAIR HILLMAN: Thanks, Lieutenant
21 Commander Torres.

22 LTCOL EVANS: Ma'am, I think that

1 looking at sentencing in the military is
2 different than the civilian world, and I would
3 encourage the panel, if they are going to
4 recommend something, that we take civilian
5 sentencing guidelines and apply them to the
6 military. That you should take some of the
7 things that sound silly and then apply them to
8 the military, such as like giving them credit for
9 their military service.

10 A lot of times when we take things
11 from the civilian world, we don't -- we only take
12 things that benefit the government and kind of
13 drop the things that, you know, benefit the
14 accused. Like Lieutenant Commander Torres said,
15 most of these are first-time offenders, so they
16 should be given credit for that in their
17 sentencing guidelines that are taken from the
18 civilian world. And we shouldn't just toss them
19 out because we say, "Well, they're all first-time
20 offenders."

21 And like Lieutenant Commander Torres
22 said, judges do get desensitized to this. And

1 members are especially important, and I don't
2 think they should be excluded from the military
3 sentencing process, because the purpose is good
4 order and discipline.

5 And it's really not the command --
6 it's the command -- the members come from the
7 command as convening the court-martial, and
8 they're the ones in the command that understand,
9 okay, this marine or sailor stole. To make it
10 right with the other marines in the barracks that
11 I live with, we need to do X sentence.

12 So they are the ones who better
13 understand what a fair sentence is. Kind of as a
14 final case in point, there was a recent NMCCA
15 case, Kerr, K-E-R-R, that came out in October of
16 this year where a military member was sentenced
17 to eight months and a BCD for larceny. And he
18 had served in Afghanistan and was blown up at
19 Abbey Gate, had significant valor. NMCCA
20 overturned the sentence for being too severe.

21 So that's a lack of understanding that
22 outside the military these things are, you know,

1 incredibly powerful in sentencing and should be
2 accounted for and cannot be discounted just
3 because other people in the military have similar
4 experiences. So I would encourage the panel to
5 take that into account.

6 CHAIR HILLMAN: Thank you, Lieutenant
7 Colonel Evans.

8 COL LANDRY: I concur that we do see
9 some relatively significant variance among --
10 even in member sentencing. While it's still
11 allowed among different commands and different
12 judges, I -- my personal feeling, and my practice
13 when I was a trial judge in my prior assignment,
14 was to attempt to in every case, in every
15 situation I was evaluating, apply the guidance
16 that we have, which is fairly limited under
17 RCM 1001, to come out with not the same sentence.

18 As a couple of the respondents have
19 already said, every situation is different, but
20 at least one that follows the same logical
21 parameters. Obviously, that's what sentencing
22 guidelines are going to attempt to do. I

1 couldn't agree more with Commander Evans that I
2 think that we are going to lose something when we
3 lose member sentencing.

4 But that ship has sailed, and we're
5 going to see what -- how those sentencing
6 parameters look. That will reduce some of the
7 variance in sentences. To the extent that's
8 viewed as a negative, it will "solve" that
9 problem.

10 But as a couple of other briefers have
11 already indicated, my review of that and reading
12 up on it in civilian practice, that is a ratchet
13 that often works one way, because it's
14 politically palatable and no one wants to really
15 take a hard stand on reducing minimum punishments
16 for individuals, the theoretical individual who
17 has proven to be a -- have committed an offense.

18 So I do believe it's going to take
19 away from individual consideration to some
20 extent, and it's going to be one of those things
21 that we'll respectfully have to review and
22 probably get back to you all and let you know how

1 it's working, hopefully in a year or two.

2 CHAIR HILLMAN: Thank you, Colonel
3 Landry.

4 MR. LIBRETTO: Lieutenant Commander
5 Hathaway?

6 LCDR HATHAWAY: Yes. Yes, sir. So I
7 would add that I concur with the other panelists.
8 The only thing I would want to comment on is what
9 Lieutenant Commander Torres also briefly
10 mentioned, and what was also provided in a
11 question I think that the panel made that I'm
12 interested in, is the lack of diversionary or
13 other provisional programs, rehabilitative
14 programs.

15 And so, obviously, we do have a sort
16 of wider variety of sort of types of sentences
17 and types of punishment that we in the military
18 can adjudge vice the civilian system. But we do
19 not have those diversionary or rehabilitative or
20 probationary programs, and I think that is a big
21 -- a big difference.

22 And that -- if that kind of thing were

1 in place, it could I think greatly enhance the
2 efficiency or the efficacy of a military justice
3 system. But I don't know if we're going to get
4 there at all. Obviously, that isn't coming soon.

5 But when those aren't in place, that
6 can obviously raise -- potentially raise the
7 level or the amount of confinement that someone
8 does receive, because, obviously, in the civilian
9 sector, civilian systems, you know, you get that
10 probationary period or diversionary period lieu
11 of a period of confinement, and the confinement
12 is suspended.

13 So I think that would be a great thing
14 to impose that can potentially save the careers
15 of members who go through the military justice
16 system. And then, if they were to go to a
17 diversionary or rehabilitative program, then
18 maybe would not end up being separated from the
19 military as so many of our clients often are.

20 But that's potentially something
21 that's well in the future, obviously not anytime
22 soon, but it's certainly something that I think

1 could be beneficial to the system writ large.

2 Over.

3 CHAIR HILLMAN: Thanks, Lieutenant
4 Commander Hathaway.

5 Judge Redford?

6 JUDGE REDFORD: Is there any
7 proscription from negotiating as a term of a plea
8 agreement a diversionary program? Such that you
9 would suspend whatever, you know, suspend the
10 discharge, suspend the period of incarceration,
11 conditioned on 18 months of performance with no
12 Article 15s, no whatever, you fill in the blank.
13 Is there any case law proscription or UCMJ
14 proscription from that as a term of a plea
15 agreement?

16 LTC KORTE: Your Honor, I haven't --
17 I haven't seen that put into plea agreements in
18 the Army. I don't think it's prohibited. I
19 think I would venture that a lot of these
20 diversionary programs could be obtained maybe
21 outside of an agreement where the defense, you
22 know, go ahead -- arranges for diversionary

1 programs, if possible, and then provides that as
2 part of negotiations.

3 But I haven't seen it put into the
4 agreements. But I'm not aware of anything that
5 prohibits such an arrangement.

6 I'll yield to the other services.

7 COL LANDRY: Sir, I believe the
8 enforceability of that provision would be
9 difficult. I agree with Colonel Korte that in
10 terms of -- I'm not aware of anything off the top
11 of my head that would prohibit its inclusion.
12 But if you -- currently, as our process is
13 structured, once the entry of judgment occurs,
14 the court loses jurisdiction over that particular
15 case.

16 And as such, the convening authority's
17 ability to go back and petition the court, or for
18 that matter the accused's ability to go back and
19 petition the court for redress for failure to
20 live up to the bargain reached as part of the
21 plea agreement would be limited.

22 So it would be doable. It would have

1 to be something I think that would require a
2 pretty significant change to regulations, at
3 least for the way we currently practice in the
4 Air Force, but my understanding is that would
5 also be an issue out here.

6 LCDR TORRES: And, sir, if I may, I
7 actually recently negotiated a version like that
8 in a plea agreement. So it used to be more -- it
9 used to be more common to do things like that
10 when a convening authority could agree to suspend
11 portions in a plea agreement in a different sort
12 of way. So there's no -- there's no bar, but it
13 is a little bit more complicated.

14 In my particular circumstance, the
15 convening authority didn't really want to say,
16 okay, we will execute a suspended sentence and
17 let you do that and see if you can prove
18 yourself, but we'll agree to allow -- we'll agree
19 to implement that if the military judge says so.

20 So, in our case, we put on a
21 sentencing case, the military judge did recommend
22 the suspended sentence, and then the convening

1 authority had to approve that suspension.
2 Unfortunately, for my client, he was -- he
3 committed a violation. We had to have a hearing.
4 But it worked. I mean, that part of it worked,
5 but I think what you're hearing about the
6 enforceability is a problem.

7 But, as is, we have created a system
8 -- and I don't -- I wish I could think of a great
9 rule change, but we've created a system where
10 when somebody goes to court-martial, if they are
11 convicted, we really haven't -- and this is more
12 administrative than UCMJ, we haven't really
13 created a vehicle for them to finish out their
14 sentence, complete a suspension, and go back into
15 service and continue to serve. And I think
16 that's the reluctance that you see in terms of
17 negotiating that. But it's certainly possible.

18 JUDGE REDFORD: Thank you to all the
19 respondents.

20 CHAIR HILLMAN: Thanks to Judge
21 Redford for the question, and everybody
22 responding.

1 Do any other panel members want to
2 sort of press on any of the issues that came up
3 in that first set of responses before we continue
4 down the list here? Any further questions just
5 now? Colonel Brunson, and then General Ewers.

6 COL BRUNSON: I don't know if you --
7 if there has even been enough time to have this
8 sort of data. But in your experience, any of
9 you, do you see -- let me back up. Several of
10 you have talked about the sentencing guidelines,
11 basically, the definite, you know, floor and
12 ceiling cap on the deals being -- it sounds like
13 a useful thing or a positive thing, which I find
14 kind of surprising because, you know, you went
15 from no punishment to maximum punishment being
16 your floor and ceiling, and now you have, you
17 know, two months to six months being your floor
18 and ceiling.

19 So my question is, do you think that
20 is affecting deals being turned down, like the
21 one case that was mentioned where servicemembers
22 want to go in and just, you know, naked plea and

1 take their chances, because they don't like the
2 floor? And also, do you see -- is it resulting
3 in a lower maximum cap, because you have the
4 floor and the ceiling, if that makes sense?

5 MR. LIBRETTO: Lieutenant Colonel
6 Evans, why don't we turn it over to you to start
7 this round.

8 LTCOL EVANS: Sure. I think it's a
9 fair question, and I think the biggest thing is
10 that -- sort of clarify that these accused
11 usually aren't going in and doing naked pleas
12 like you talked about. They're not going in and
13 pleading guilty. There is just no incentive to
14 do it, because the members don't understand the
15 process.

16 They just go in and plead not guilty,
17 and it's a fully contested case from the
18 government's perspective. And the defense just,
19 you know, doesn't object, and then when he's
20 convicted, you know, it's just a sentencing case
21 that you've been putting on all along with good
22 military character, character for truthfulness,

1 and things of that nature.

2 But, yeah, I think it disincentivizes
3 deals. I mean, I think over -- I think overall
4 it is a con. I agree with you and your points
5 made in your question that overall more deals
6 were to be had under the old system. You know,
7 while there are some pros to this new floor and
8 ceiling, overall it does disincentivize deals,
9 because I think the cap is too high often. SJAs
10 don't appropriately value cases or convening
11 authorities don't appropriately value cases due
12 to the lack of experience with the military
13 justice system.

14 MR. LIBRETTO: Colonel Landry?

15 COL LANDRY: Our experience or my
16 experience has been a little bit different from
17 what Lieutenant Colonel Evans said. I have seen
18 perhaps more of a willingness, to go back to the
19 question, ma'am, of what you said last, that
20 convening authorities are willing to lower the
21 cap in exchange for raising the floor.

22 And while I was also a little bit

1 surprised, as you stated, ma'am, by the response
2 that I got from the field when I asked about
3 clients' positions and clients being far more
4 positive on the certainty aspect, I suppose it
5 does make sense when I think about it that I
6 would be much more risk tolerant than my client
7 who I was representing when essentially it's not
8 my risk out there, and they are more looking for
9 certainty.

10 So I have seen more of a willingness
11 for convening authority (audio interference), and
12 that has been our experience and feedback I've
13 gotten from the defense counsel within the
14 Department of the Air Force.

15 MR. LIBRETTO: Colonel Landry, just to
16 let you know, we are having a little bit of an
17 issue with your feed. So there might be some
18 lost in translation, but we'll keep pressing.

19 COL LANDRY: Understood.

20 MR. LIBRETTO: Lieutenant Commander
21 Hathaway, anything to add?

22 LCDR HATHAWAY: Yes, just briefly.

1 Ma'am, I do -- I do want to concur. The caps I
2 think are coming down. As the floor gets higher,
3 from the convening authority's perspective, I can
4 only speculate that they are -- they are sure
5 they will get some, in their view, confinement,
6 again taking -- as Lieutenant Commander Torres
7 said, taking on sort of that prosecutor
8 viewpoint.

9 With respect to sort of the benefits
10 of the system, I mean, I think it just allows the
11 parties more discretion. I have certainly had
12 clients that agree to a very wide range for the
13 confinement, and you go in there and you put on
14 that full sentencing case as best as possible,
15 the government does the same, and the military
16 judge is allowed to, you know, maybe sentence
17 anywhere between a period of two years or
18 something like that.

19 But I think that can help get there,
20 because the parties maybe believe they're at a
21 different place for their own sentencing cases,
22 right, when they each believe they have a strong

1 sentencing case, so they are willing to go a wide
2 range. Or if maybe each side is a little
3 uncertain, they are willing to agree to a narrow
4 range in which they both think they are getting
5 some benefit.

6 So I think the discretion does help
7 reach a resolution, but it doesn't necessarily
8 mean that you're going to agree. And I think,
9 you know, there is -- of course there's always
10 option to, even with that wide discretion, to go
11 contested. So nothing else to add.

12 MR. LIBRETTO: Thank you.

13 Lieutenant Colonel Korte, anything to
14 add?

15 LTC KORTE: Yes. I see three main
16 factors in how the parties handle the floor. And
17 I think the military judge and how the parties
18 perceive the military judge in sentencing, there
19 are military judges in the Army whose floor is at
20 zero for a lot of the types of offenses. And so
21 the government insists on floors that are higher
22 than zero to account for that possibility,

1 depending on the military judge.

2 I think the crime itself, there are
3 certain I think -- yeah, I think domestic
4 violence is one in particular where the judges
5 are quite divergent in their -- in what their
6 floor is for domestic violence incidents. There
7 are other types of crimes where you have a much
8 higher floor, just naturally. But I think
9 domestic violence is one of those cases where
10 different judges have a vastly different
11 perspective.

12 And the parties account for that with
13 the floor, and I think the -- especially the
14 defense point of view on the mitigation and the
15 life circumstances and the soldier circumstances
16 of their clients goes way -- goes a long way
17 towards explaining how acceptable a floor is to a
18 defense counsel.

19 So I think I'm with Colonel Landry.
20 I'm that old school variety who I just want to go
21 in there and tell the judge about my client and
22 what an excellent soldier and person and family

1 member they are, with the hopes that I could sell
2 significant leniency below the floor of what that
3 offense is worth.

4 And sometimes you can do it, and
5 sometimes you can't. Sometimes it's the crime,
6 and sometimes it's the judge. But we're slowly
7 eroding our ability to make that case by having
8 these floors that are higher.

9 But I do agree, Your Honor, with the
10 other panelists that while the floors are
11 raising, the ceilings are lowering. And so that
12 is creating that narrow, more efficient to be
13 honest, sentencing range, taking away the
14 strategy which I didn't really appreciate as a
15 judge. But I understand why it has been put into
16 place.

17 I'll yield.

18 MR. LIBRETTO: Thank you.

19 Lieutenant Commander Torres, anything?

20 LCDR TORRES: Just real quick. I
21 don't want to leave Colonel Evans on an island,
22 because I agree with him, and maybe it's a sea

1 service thing, that the floors are generally
2 unhelpful to our clients in terms of reaching a
3 resolution.

4 Because it's not really -- the thing
5 is not so much, you know, is it zero to this
6 really high cap, because that really high cap is
7 kind of artificial, because there's a more
8 realistic cap. It's probably lower, actually, if
9 you're just going to go and contest the case with
10 members and get that from the members.

11 And so sometimes the cap yields for
12 the client, it is not so much like, well, I'm
13 taking the lower end at top or the higher end at
14 the bottom because they're also thinking, even if
15 I don't do any of this, I can just go in front of
16 a panel, and they're going to take my mitigation
17 case much more serious -- not -- "serious" is not
18 the right word. I know I'm talking to a lot of
19 former judges, former and current judges, not
20 "seriously." But they are going to invest in
21 that story. They are going to invest in that
22 sort of panoply of options I think much more

1 robustly.

2 Our sentencing instructions -- I'm
3 sure everyone has read them -- the sentencing
4 instructions of the panel really insist on
5 starting at zero. And so it's really common for
6 defense counsel to argue, right, well, what does
7 that mean? I mean, you, as an individual, what
8 does it mean to go from zero days to five days to
9 eight days?

10 A prosecutor came up and asked for
11 seven months. Well, what -- why? Why seven
12 months? And I think a panel is going to take
13 that very seriously, because they're not
14 comparing it to another sentence. They're really
15 thinking about each and every day.

16 And so for me and my clients, and my
17 experience in the Navy defense enterprise, I
18 think it disincentivizes plea agreements overall.

19 MR. LIBRETTO: Thank you.

20 Chair Hillman, I believe we had a
21 couple other members who might have had questions
22 in this -- on this topic?

1 CHAIR HILLMAN: General Ewers is up
2 next. Yes.

3 MG EWERS: Just a quick note about --
4 I mean, it occurs to me that the narrower the
5 distance between the floor and the ceiling, the
6 less incentive each side has to put on a robust
7 sentencing case, which the concern there I have
8 is transparency, which is something that we think
9 about a lot on this panel, because there are a
10 lot of people out there who think we're cooking
11 the books already, that we're either taking care
12 of victims or taking care of accused too much.

13 So I think the more transparency we
14 have the better, which is an argument to make
15 sure that that -- that there is some distance
16 between the top and the bottom of that window.

17 My question, though, is about
18 something else. One of you mentioned a -- I
19 think it was Lieutenant Commander Korey -- or
20 Lieutenant Commander Korte, excuse me -- about
21 the decline in advocacy skills due to changes.
22 And I'm curious to know how dire you think it is,

1 each of you think it is, what the cause is, and
2 what you think the fix is.

3 LTC KORTE: Yes, sir. So I believe
4 that there are three main, I don't know, events
5 in a litigator's path that creates this
6 experience that we have -- the boards of inquiry,
7 which I know are not in your purview; the
8 Article 32 preliminary hearings, which were
9 discussed earlier; and the advocacy within guilty
10 pleas because they're more common than contested
11 cases.

12 I think all of those are decreasing
13 significantly. I think the preparation in a
14 guilty plea for both sides, I would say more with
15 the government side, they are preparing a lot
16 less for a case where there is a 20- to 24-month
17 deal versus a zero to 24-month deal.

18 And it's significant and, I mean, if
19 we're thinking about how we were and how much
20 preparation we've put in 15 to 18 years ago
21 versus what we're seeing today in practice, I
22 think those three things are huge factors, I

1 mean, along with the decline in number of
2 courts-martial.

3 But I think those opportunities to
4 advocate during sentencing, to really make a case
5 when there's no floor, to get that floor down to
6 zero with the military judge, I think that is a
7 huge advocacy opportunity that's lost as you
8 lower and raise that floor and have these very
9 specific sentences.

10 And I understand completely what the
11 other services are saying about how their clients
12 prefer to have it that way, but I think the
13 significance in the advocacy loss is -- I don't
14 know if it's quantifiable, but it's definitely
15 present, because they are just not putting as
16 much emphasis on either side.

17 And witness preparation during
18 sentencing, putting forth documentary evidence
19 during sentencing to show the military judge the
20 whole person, which goes into all of these
21 sentencing factors, when sentencing has been
22 eroded over the last few years, and I think

1 overall advocacy goes along with that, if you can
2 make the -- I think the advocacy and the passion
3 you put in for an accused during a guilty plea
4 sentencing for leniency, despite having been
5 convicted of federal crimes, I think that passion
6 translates into everything we do.

7 And I think it has unquantifiable, you
8 know, undocumented detriment to the practice.

9 And so I'll yield to the -- I'll yield
10 to the others for further --

11 MR. LIBRETTO: Thank you.

12 Lieutenant Commander Torres?

13 LCDR TORRES: Yes, sir. So definitely
14 I think in the Navy we have seen less experience.
15 You will have less -- fewer opportunities to go
16 into court and advocate, and that is certainly
17 true. We talked about alternative resolutions
18 that we don't have.

19 One thing I do see more frequently now
20 perhaps than when I started practicing as a
21 defense counsel is these separations in lieu of
22 trial or these resolutions that don't resolve in

1 court. And, really, the reality of those is not
2 so much that the sailor doesn't feel they have a
3 case to make and doesn't feel, you know, that
4 they may actually have some issue with what
5 they're being accused of. It's more that -- it's
6 more the link to a criminal conviction and the
7 collateral consequence of that.

8 So to the extent that the panel -- and
9 I think this goes to transparency, too, right?
10 Those things all happen kind of in secret at the
11 Pentagon or in the commands, like on paper. To
12 the extent we're interested in having, you know,
13 a more robust practice in terms of more counsel
14 or more experience, one consideration might be to
15 sort of explicitly state that perhaps no BCD,
16 special courts-martial and maybe even regular
17 special courts-martial are not criminal
18 convictions in the civilian sense, right?

19 And for a lot of reasons that would --
20 that would make sense. They don't have a lot of
21 the same protections. And I think that would
22 allow more opportunity for -- and then, in

1 thinking about clients, but I think also in terms
2 of preparation of counsel, more opportunities for
3 people to actually go and plead their case and
4 see what happens.

5 And maybe there's punishment, maybe
6 there's something to be had, but that aligns it
7 more with good order and discipline and perhaps
8 increases an opportunity for counsel to get the
9 experience they need to then try the kind of more
10 serious felony-level type cases that maybe were
11 lacking experience.

12 MR. LIBRETTO: Thank you.

13 Lieutenant Colonel Evans?

14 LTCOL EVANS: I think they've hit the
15 point very eloquently. I don't have anything
16 further on that point.

17 MR. LIBRETTO: Okay. Thank you. Col
18 Landry?

19 COL LANDRY: I wouldn't characterize
20 the lack of experience as dire, to go to the
21 original question. But, I would agree with the
22 other briefers, that it is certainly lower as our

1 percentage of, well, our numbers overall of
2 courts martial go down.

3 And, LTC Korte again, makes a great
4 point in terms of the reduced opportunity to
5 litigate during the full litigated sentencing
6 proceedings.

7 One of the things I would highlight
8 though, is I do think it's a boon to our
9 experiences compared, and many of the panel
10 members probably know this, so I apologize if I'm
11 telling you something you already know.

12 But, as compared to many similarly
13 situated, civilian litigators is, in terms of the
14 percentage of litigated cases that our defense
15 counsel are a part of, based on my admittedly
16 limited experience practicing in the civilian
17 sector.

18 But, certainly having a lot of friends
19 and acquaintances who are currently practicing
20 criminal law in various civilian jurisdictions, I
21 would say that my defense counsel who I currently
22 supervise, spend a lot more of their cases result

1 in not guilty pleas and are fully litigated.

2 So, I do think our experience and
3 skill level in the military services compares
4 favorably to that of most civilian defense
5 counsel on the outside.

6 So, I wouldn't characterize that as
7 dire. But, it certainly merits as something to
8 keep an eye on, particularly as the number of
9 courts seem to be continuously decreasing and
10 other opportunities as discussed, such as
11 litigated sentencing somewhat go by the wayside.

12 MR. LIBRETTO: Thank you, sir. LCDR
13 Hathaway, anything to add?

14 LCDR HATHAWAY: Nothing. I concur
15 with Bill's. Thank you.

16 MG EWERS: Thanks to all of you.
17 Appreciate it.

18 CHAIR HILLMAN: Okay. Not seeing
19 other panel members. Anybody -- anyone want to
20 follow up there?

21 If not, we'll move onto -- just give
22 them a moment. All right. We'll move onto,

1 change gears here to pretrial judicial authority.

2 And, if you could share your
3 experience with the Article 30a changes, the pre-
4 referral proceedings. Whether that's
5 appropriately skipped right now, how you think
6 it's -- how you think it's been working.

7 MR. LIBRETTO: Col Landry, if you want
8 to kick this one off?

9 COL LANDRY: Be glad to. Most of my
10 experience and, again, won't answer for my fellow
11 briefers.

12 But, most of the, what you're going to
13 hear from us is related to experience either on
14 the prosecution side, or in my case, as military
15 Judge in which at least within the Department of
16 the Air Force, our Judges are assigned to make
17 rulings or issue orders, I should say, on the
18 submission of Article 30a pretrial, pre-referral
19 proceedings submitted, usually by the Government
20 in terms of pre-referral subpoenas.

21 And, that's just something that as it
22 goes along, Judges and practitioners are becoming

1 more comfortable with. And, you're seeing it
2 more and more as part of our system.

3 I think by in large, the incorporating
4 authorities are there. In doing a little bit of
5 background research and talking to my team prior
6 to talking to all of you today, one of the things
7 that came up is the need for a more clear path,
8 potentially to mirror some civilian jurisdictions
9 for trial defense counsel.

10 And, this would, of course, normally
11 be post-referral. So, it doesn't squarely follow
12 under Article 30a or Rule for Court Martial 309.

13 But, for trial defense counsel to have
14 a path to obtain certain evidence ex parte, which
15 is not available right now through the subpoena
16 process.

17 That still has to be worked for the
18 most part through trial counsel to have issued
19 that subpoena to obtain evidence that is not
20 (audio interference) -- in Government possession.

21 Be able to allow for certain pre-
22 referral motions to be made, we've seen that be

1 made effectively in terms of requesting relief
2 for clients who are placed in pretrial
3 confinement.

4 And, various other motions on behalf
5 of our clients that were made that pre-referral,
6 the pretrial confinement one first and foremost.
7 We've just recently had an individual released
8 from pretrial confinement.

9 So, I'd say it's moving in the right
10 direction. But again, most of my experience in
11 that regard is not in the trial defense side.

12 MR. LIBRETTO: Thank you. LCDR
13 Hathaway?

14 LCDR HATHAWAY: Yes, sir. So,
15 obviously given the nature of the 30a
16 proceedings, you know, we don't know about them
17 until we're provided discovery either after
18 preferral or referral, depending.

19 And so, it's a little hard for us to
20 have any ability to influence those, unless it's
21 later when we file some motion to suppress or
22 some other motion for relief.

1 But, I did just want to second what
2 Col Landry brought up. And, is that we have very
3 few opportunities, we have no opportunities, I
4 believe, to obtain evidence outside going through
5 like compulsory process outside of going through
6 the trial counsel.

7 And, you know, that's different in
8 civilian jurisdictions all across the country.
9 But, that's certainly something that I think the
10 defense counsel would allocate for, as more
11 authority is being given to the government.

12 And, we are sort of left up to the
13 mercy of revealing any trial strategy or any
14 potential avenues of investigation by requesting
15 things through the government.

16 And so, it's -- that's a little bit of
17 an unfair advantage there. So, I think an
18 expanded authority is to obtain that through some
19 compulsory process for the defense counsel
20 outside the present knowledge of the government
21 would be extremely helpful in sort of leveling
22 the playing field.

1 MR. LIBRETTO: Thank you. LTC Korte?

2 LTC KORTE: I guess I agree with the
3 comments before. I do believe that the rules are
4 properly scoped.

5 But, I'm very much convinced by the
6 argument that defense should have those abilities
7 to go ex parte and gather evidence like the
8 Government does.

9 So, that was very convincing by LCDR
10 Hathaway. That's all I have. It was very non-
11 controversial in my last two years as a military
12 Judge handling pre-referral. They were usually
13 pre-preferral orders, subpoenas, forms and
14 whatnot.

15 So, those did not result in litigation
16 during my time. They were relatively simple and
17 straightforward. Over.

18 MR. LIBRETTO: And LCDR Torres,
19 anything to add?

20 LCDR TORRES: Nothing to add other
21 than I think the subpoena issue is a good one.

22 MR. LIBRETTO: Okay. And, LtCol

1 Evans?

2 LTCOL EVANS: Yes. I would like to
3 expand further on the subpoena issue and why it's
4 such a problem.

5 I think the first is that there's a
6 tremendous amount of disparity in power and
7 experience, like a First Lieutenant or Second
8 Lieutenant trial counsel can subpoena things,
9 whereas a Colonel defense counsel cannot.

10 And, I think it leads to problems in
11 cases that are complex. For example, I'm on a
12 murder case where the alleged murder occurred in
13 March of 2022. And, we're just getting to
14 arraignment. I'm planning to arraign her on
15 Thursday.

16 And, during that time, a tremendous
17 amount of evidence, exculpatory and inculpatory,
18 was lost because the trial counsel did not feel
19 obligated to, you know, preserve evidence or, you
20 know, submit subpoenas that we would want.

21 So, just phone records, the brain of
22 the child was lost in transit, it has not been

1 able to be, you know, -- you can't conduct an
2 autopsy on that.

3 So, I think that there are ways and
4 mechanisms that fall short of subpoena power that
5 allows defense to speed up the process early on,
6 but also to preserve evidence favorable to both
7 sides.

8 And, those two suggestions are first
9 that perhaps the government are compelled to
10 respond favorably to defense preservation
11 requests.

12 So, they -- if defense requests
13 something to be preserved, so just phone records
14 or forensic evidence that the government is, you
15 know, compelled to do so.

16 Or two, that the defense has perhaps
17 a limited subpoena power that is limited to items
18 that are within the control of the military.

19 So, it is not an external subpoena
20 power, but an internal subpoena power that allows
21 the defense to prepare their case in a timely
22 manner so that it's ready to go.

1 And, I know that one of the biggest
2 complaints of both victims and accused alike, is
3 the amount of time that these take.

4 And, if the defense is able to get
5 these documents earlier, or be assured that
6 they've been preserved and, you know, look at
7 them immediately upon referral, then it will
8 speed up the process to make a fairer process for
9 everybody.

10 So, those are my two suggestions to
11 level the playing field with regard to subpoenas
12 and making sure that access to evidence is equal
13 across the board.

14 CHAIR HILLMAN: Thank you all for
15 those responses. Judge Redford has a follow up.

16 JUDGE REDFORD: Thank you, Dr.
17 Hillman. As it relates to the subpoenas, the
18 pretrial subpoenas that are obtained ex parte by
19 the government, is the defense made aware of
20 them?

21 Do you receive a copy of the subpoena
22 or of a motion giving rise to the subpoena?

1 CHAIR HILLMAN: Just a note that you
2 got the more difficult to understand Judge
3 Redford that we don't always have.

4 Did you all actually get that? You
5 got it? Okay.

6 So, I actually -- I -- we're all
7 getting a little bit accustomed to that. It's a
8 tech feature here.

9 Anyway, so go ahead, Mr. Libretto.
10 Did you want to line everybody up here?

11 MR. LIBRETTO: Sure. We'll start with
12 LTCOL Evans this time.

13 LTCOL EVANS: No, sir. We are only
14 seeing those after referral and the discovery
15 obligations kick in, in my experience.

16 MR. LIBRETTO: Col Landry?

17 COL LANDRY: I concur with some very,
18 very limited exceptions. That would be applied
19 by other portions of the law that would require
20 contemporaneous notification if the government
21 does not request specifically that such
22 notification be delayed in accordance with

1 whatever information is being -- is being
2 collected.

3 But otherwise, I concur with Col
4 Evans.

5 MR. LIBRETTO: Okay. LCDR Hathaway,
6 anything to add?

7 LCDR HATHAWAY: Nothing to add. I
8 concur with both of them about the referral. The
9 fact that they were even done after referral.

10 So, nothing to add. Over.

11 MR. LIBRETTO: LTC Korte?

12 LTC KORTE: I concur, although I will
13 say within the Army primarily the defense will
14 get the full disclosure of discovery preferral,
15 rather than waiting until referral.

16 It's just the best practice that's
17 been spread amongst the Army for the most part.
18 Although they don't necessarily have to.

19 The defense typically does get that
20 same material along with everything else at
21 preferral. But, otherwise I agree with all.
22 Over.

1 MR. LIBRETTO: Thank you. And, LCDR
2 Torres?

3 LCDR TORRES: No. Concur. Nothing to
4 that, we're seeing it after referral.

5 JUDGE REDFORD: Okay. Thank you.

6 MR. LIBRETTO: I don't believe there
7 are any other hands raised. All right.

8 CHAIR HILLMAN: Then we'll move onto
9 -- thanks Mr. Libretto. We'll move onto
10 processing retaliation, domestic violence, and
11 sexual harassment allegations.

12 So, these are new offenses. And,
13 we're curious about your experience actually.
14 Are they -- are they being -- are you getting
15 these -- are they appropriately, do you have a,
16 let's see, how do phrase this?

17 Do you have suggestions for how we
18 might improve the reporting investigation and
19 disposition processes for these new offenses,
20 sexual harassment, retaliation, and domestic
21 violence?

22 MR. LIBRETTO: LCDR Torres, why don't

1 we start with you this time.

2 LCDR TORRES: All right. Yes, sir.

3 And, ma'am, I wish I had more to add on that
4 topic.

5 But, as a defense counsel, you might
6 imagine, we don't really see it from that
7 perspective too often. I do think we're seeing
8 some of those.

9 Retaliation is not one that I see that
10 often. Although we do advise, so I mean, the big
11 area where this links is that we do advise
12 sailors and coast guardsmen in a personal
13 representation capacity.

14 So, folks can come and sort of explain
15 to us that their command is retaliating against
16 them. And so, we do advise people on how to
17 address that. And, how to make complaints.

18 I would say the biggest challenge we
19 face in advising people on how to do that, is
20 that, at least on the Navy side, the sort of the
21 mechanism you would use to your greatest benefit
22 is hard, really hard to determine.

1 There's not, I don't think, a clear
2 thing we can point the sailor to, to say hey,
3 okay, well, if you feel like your command, you
4 know, if -- the command is easy.

5 The command is easy. The UCMJ has a
6 provision for complaining about your command. If
7 it's just somebody else who's taking action
8 against you, retaliatory action, the Inspector
9 General process is really hard.

10 And so, to the extent that you all are
11 considering some other mechanism for that kind of
12 thing, particularly retaliation, either -- and
13 reprisal or protected communication or something
14 like that, some more clear mechanism would be
15 helpful in advising these folks to be able to
16 avail themselves.

17 CHAIR HILLMAN: Thank you.

18 MR. LIBRETTO: LtCol Evans, anything?

19 LTCOL EVANS: We haven't seen a
20 tremendous amount of change. I mean, these were
21 always charges that were chargeable under
22 different Articles.

1 The one thing I will say is that it's
2 gotten Commanders' attention and I think in both
3 a good way. But, there is an unintended negative
4 consequence.

5 And that is, that Commanders when
6 they're -- when there's something new and they
7 know that it's important, they get scared of it
8 and they overreact.

9 In a lot of these case, you'll see
10 them doing extrajudicial things like putting
11 MPOs, military protective orders in place that
12 say hey, you can't go see your wife, you know, or
13 your divorced spouse, unsupervised.

14 And, that then interferes with child
15 visitation rights that have been granted by a
16 state court in a divorce court. So, it has
17 unintended consequences that we have no mechanism
18 of disputing or fighting.

19 And then end up, you know, becoming a
20 fight in cross examination or in sentencing in
21 terms of motive or, you know, well, you haven't
22 seen your father in six months, so, you know, you

1 haven't heard his side of the story. Things of
2 that nature.

3 So, I just want to highlight that
4 unintended consequence of, you know, calling --
5 foot stomping these charges for Commanders. But,
6 they were always prosecutable.

7 CHAIR HILLMAN: Understood. Thank
8 you.

9 MR. LIBRETTO: Col Landry, anything to
10 add?

11 COL LANDRY: Only that we have seen an
12 uptick if you look at the last five years with an
13 impetus on retaliation and reprisal.

14 But, to foot-stomp LtCol Evans point,
15 these certainly have been prosecuted just
16 essentially under different Articles before.

17 And, I've both prosecuted and defended
18 allegations of sexual harassment that made it to
19 a special court martial forum but, previously
20 would have been under Article 92 for a regulatory
21 violation as opposed to Article 134 now.

22 So, we do provide the full spectrum of

1 trial defense services to individuals who are
2 facing those allegations.

3 Where we've seen the uptick though is
4 Commanders facing formal allegations raised
5 through either the Inspector General process or
6 other processes for reprisal or some type of
7 alleged retaliatory action taken for a protected
8 report made by an individual.

9 And again, that hasn't been a
10 substantial uptick. It doesn't -- we don't have
11 a significant amount of clients facing those
12 types of allegations.

13 But, that was something that I didn't
14 see a lot of five, seven years ago that I do now.

15 CHAIR HILLMAN: Thank you.

16 MR. LIBRETTO: LCDR Hathaway, anything
17 to add?

18 LCDR HATHAWAY: I concur with the
19 group on that.

20 MR. LIBRETTO: Okay. LTC Korte?

21 LTC KORTE: I think for disposition of
22 those types of offenses, we're always going to

1 see the domestic violence go -- well, not always,
2 but, where we see those in courts martial.

3 Usually, if you see a sexual
4 harassment in a court martial, it's usually
5 accompanied by a physical assault or even a
6 sexual assault.

7 And, if you see a retaliation in a
8 court martial, it's probably along with a
9 maltreatment or a physical assault allegation.

10 As a standalone, I just think they're
11 a lot rarer. And, more likely to be just those
12 administratively, for a variety of reasons, one
13 of which is which agency actually does the
14 investigation.

15 So, when something is investigated by
16 CID or its sister service equivalent, then it's
17 most likely to take a criminal path, whereas if
18 something done at an IG or a 15-6, you know,
19 investigation, or some sort of admin
20 investigation, it's more likely to continue on an
21 administrative path rather than a court martial.

22 So, it usually takes some sort of

1 enhancement to step it up to a court martial
2 level. But, domestic violence is the exception
3 to that.

4 That's always, we've always had a
5 charge for that. It just changes from year to
6 year. But, we've always got that done before.

7 CHAIR HILLMAN: LTC Korte, let me just
8 follow up. Are defense counsel representing
9 service members at the separation proceedings
10 that the, you know, that they are?

11 LTC KORTE: They are. Yes, ma'am.
12 Yes, ma'am.

13 CHAIR HILLMAN: Thank you. Okay. Did
14 we miss anybody, Mr. Libretto, in responding to
15 that one?

16 MR. LIBRETTO: We did not, ma'am.
17 That's all of them.

18 CHAIR HILLMAN: Okay. Then just a
19 second here. I'm going to raise one more topic
20 and then we'll open up to panel members for
21 anything else they want to ask before we free
22 everybody here.

1 So, the last topic we have are those
2 Short Martials, that 16(c)(2)(A), Special Courts.
3 Have you all represented accused, or have your
4 teams represented accused in these?

5 And, when are they being used?

6 MR. LIBRETTO: LCDR Hathaway, why
7 don't we start with you on this one.

8 LCDR HATHAWAY: Yes, thank you. So,
9 I personally have not. And, I have seen them
10 being used, seen them not being used very often
11 at all.

12 For whatever reason, I think
13 Commanders don't see, they get a great benefit to
14 referring a case to a trial martial or a special-
15 special, whatever that new service calls it.

16 I think from their perspective, well,
17 if you have it in the proceedings, you won't have
18 to convene a court. And, that is a significant
19 reduction of a burden for them.

20 And, to lead up to the whole process
21 is really not, and the whole court martial
22 outside that is just the same.

1 So, I'm not sure that they see a great
2 benefit to it. So, I don't think we're seeing
3 that much with the Coast Guard.

4 And, I'll just leave the other
5 services to answer on their behalf. Thank you.

6 MR. LIBRETTO: Okay. Thank you. LTC
7 Korte?

8 LTC KORTE: So, I've seen them as a
9 military Judge for the last two years. And, I've
10 had three contested short martial.

11 And, I enjoyed them very much as a
12 Judge. They're usually interesting fact
13 patterns.

14 The two varieties of those types of
15 cases where one of them would be, this is the
16 level that we refer to in the course of having a
17 plea agreement.

18 And, that's to be where you do, it's
19 basically it's just lower speed, maximum
20 punishment. And so, it's a regular plea but with
21 lower stakes.

22 But, for the contest, I saw three of

1 them in Hawaii as a military Judge. And, you
2 know, I would hold them over one day. One day
3 only, usually a Friday.

4 And, we would just do those, it didn't
5 matter when they ended. I found them to be
6 positive. They were typically done as a result
7 of Article 15 turn-downs.

8 And, the primary detriment to them
9 from a command is that they want a punitive
10 discharge. They want the soldier gone at the end
11 of the -- at the end of the trial.

12 And so, because that doesn't allow
13 that, I usually see these, we call them short
14 martials, I usually see them accompanying an
15 administrative separation that's already in
16 motion.

17 So, there will be -- they'll initiate
18 separation administratively. There will be an
19 Article 15 that's turned down. And, while the
20 separation is pending, they do this short
21 martial.

22 Because, they know even at the end of

1 it, the Judge can't issue a punitive discharge.
2 However, they're going to be discharged anyway.
3 And, we want to set the tone.

4 All three of them were very specific,
5 very morale-eroding types of offenses where
6 something needed to be done.

7 So, the act of turning down an Article
8 15 was a defiant act to the command and they
9 needed to, you know, they needed to enforce
10 discipline.

11 So, this was their tool. They knew
12 that a summary court martial was turned down.
13 So, they wanted today, okay, this is where you're
14 going to be and with the understanding of the
15 limitations.

16 But, since they already had an
17 administration separation in motion, they took
18 away that one concern the commander still had.

19 So, it's rare, but we used it in
20 Hawaii. I thought it was pretty effective.
21 Over.

22 MR. LIBRETTO: Thank you. LCDR

1 Torres, your experience?

2 LCDR TORRES: So, this is actually
3 topical for me. And, I am trying a no-BCD
4 special starting tomorrow at the Navy Yard.

5 So, and, I would say this one is a --
6 you know, the one we're trying tomorrow, that
7 it's a pretty good example of probably what it's
8 designed for.

9 It was, in fact, a mast and NJP
10 refusal. And, the command -- and, you know, in
11 at least in our documentation the commander
12 himself there was a demand for a court martial.

13 And, I think in this case the command
14 viewed it that way. And they say, will you
15 dispute whether you in fact were negligent in the
16 performance of this duty? We think you were.

17 Let's go see what the Judge has to say
18 about it. And, we'll -- and you're taking the
19 risk that the punishment will be higher.

20 And, I think -- and, in my particular
21 case, the thing he's accused of isn't even really
22 an offense for which you can be separated. It's

1 not a basis for separation in the Navy.

2 And so, he will go back to his command
3 either having been convicted of this No-BCD
4 special. Or, he will have performed some -- he
5 will have had some amount of punishment.

6 And so, it's a really good tool in
7 that sense. But, when I was at DCAP, and this
8 was being rolled out, we would see them, you
9 know, maybe a coup -- a few a year.

10 But, it's true what LCDR Hathaway
11 said, which is that the commands, they really are
12 only going to use that if they see this sailor as
13 sort of redeemable. They can take him back to
14 the command.

15 Because otherwise, there's really no
16 point. I mean, just to give him a little bit of
17 extra punishment or a criminal conviction then
18 you're going to have to have an AdSep Board and
19 fully litigate whether this person's going to be
20 in the Navy or not.

21 And so, I think unfortunately, because
22 of the administrative world in which we've been

1 operating in terms of commands want to get rid of
2 sailors who they believe committed misconduct, we
3 don't -- didn't use it very much, because that's
4 not a mechanism to do that.

5 But, in a world where we get back to
6 military justice, is intended to adjudicate
7 disputes, punish sailors, but get them back out
8 to the fight.

9 Then, it can be a really, really
10 useful tool, because this last case is a good
11 example of, we went from arraignment to trial, it
12 was, you know, less than 55 days.

13 So, it actually, it worked. And, it
14 works in that sense and it's fast. So, it's a
15 mixed bag. But, that's my experience with it.

16 MR. LIBRETTO: All right, thank you.

17 And, LtCol Evans?

18 LTCOL EVANS: Yes, ma'am. I think
19 that rehabilitation like LCDR Torres was touching
20 on, is that there's really not an incentive to
21 rehabilitate in the Marine Corps. I'm not going
22 to speak for the other services.

1 But, the incentive for a commander is
2 to get rid of the Marine either at an absent or
3 lower charges or in a special court martial with
4 BCD-eligible for higher charges.

5 You see that through a lack of
6 deferment programs, a lack of programs in the
7 brig for rehabilitation. There's just not a big
8 focus in the military on, and currently under our
9 current structure of military justice of bringing
10 these sailors, marines, guardsmen, airmen back as
11 productive members of the military.

12 And, I think that the special short
13 martial is there for that and is available. But,
14 it's just not something commanders are interested
15 in at this time.

16 MR. LIBRETTO: Thank you. And,
17 finally, Col Landry?

18 COL LANDRY: Very similar to what the
19 other services said. We -- (audio interference)
20 -- see them relatively rarely, usually in
21 response, occasionally as part of a plea
22 agreement, you'll see withdrawal and referral to

1 a special-special court martial since that's the
2 nomenclature I've heard most often in the Air
3 Force.

4 MR. LIBRETTO: Okay. Thank you.

5 CHAIR HILLMAN: Thank you.

6 MR. LIBRETTO: I think that captures
7 everybody's responses to that one.

8 CHAIR HILLMAN: Thank you. And, let
9 me just see if anybody has particular questions
10 about that.

11 I'll just say, the lack of interest in
12 rehabilitation seems at odds with the recruiting
13 environment at the moment.

14 And, so you've been, you've been
15 working during this period of time, you've been
16 serving during a period of time that it's become
17 increasingly difficult to attract and retain
18 service members.

19 And yet, you don't see any turn
20 towards a rehabilitative goal among those that
21 you're -- those accused folks that you're working
22 with.

1 General Ewers?

2 MG EWERS: Yeah Lou, I love you like
3 a brother. But, I've got to call you on that
4 one.

5 I mean, you don't remember the world
6 before OIF when we used to be BCD strikers at the
7 cycle grate. And, there was absolutely no
8 interest whatsoever.

9 We now have, we take care of our
10 rehabilitated people by sending them to NJP.
11 And, the problem with -- the problem with the
12 short martial is it fills a need that's not
13 there.

14 If you're going to keep somebody
15 around, maybe you don't want them to go to the
16 brig for more than 30 days. You want them back
17 in the unit getting rehabilitated.

18 So, I -- we can talk about that at
19 some other time. I just wanted to make sure
20 that, I mean, I think that it's compared to what?
21 Is really what I'd say.

22 You know, compared to the last 20

1 years, maybe not so much. But, compared to, you
2 know, the history of the military justice
3 application in the Marine Corps, we're a heck of
4 a lot more rehabilitative than we used to be.

5 CHAIR HILLMAN: So noted.

6 MG EWERS: I'm standing by for your
7 response, Lou.

8 LTCOL EVANS: Well, sir, I think that
9 if you look at a long -- I'm taking a long term
10 view, including, you know, World War II, in terms
11 of hey, this is this guy's third court martial,
12 but we'll get him back out there to the line.

13 We're just not doing that anymore.
14 You know, it's a -- you know, rarely do you see a
15 Marine with two NJPs. You can't reenlist with an
16 NJP.

17 There's just not a lot of interest in
18 rehabilitations, kind of a zero defect service
19 mentality. And, I won't speak for the other
20 services.

21 But, you know, once -- I mean, the
22 Commandant said recently, your career is like a,

1 like a glass ornament. Once you drop it, it's
2 over.

3 And, I don't agree with that. But,
4 that's what General Smith said. And, it's out
5 there. And, I think that's what commanders are
6 using as their guidelines.

7 MG EWERS: I've heard him say worse.
8 Okay. Thanks.

9 LTCOL EVANS: Yes, sir.

10 MG EWERS: We'll talk about it later.

11 CHAIR HILLMAN: I thought -- thank you
12 both. I thought maybe General Kenny wanted to
13 get in there.

14 Do you have a question for our
15 panelists on this note? Okay.

16 Okay. We're open for any additional
17 questions on any of these topics from the experts
18 that we have with us right now, really senior and
19 experienced, thoughtful defense counsel.

20 COL GUNN: Yes, I believe it was LtCol
21 Evans that raised the issue about Article 32s.
22 And the, which proceed as a lack of utility, lack

1 of usefulness.

2 And, I'd be interested in hearing
3 whether your colleagues share that view? And if
4 so, what suggestions would you have for
5 improving?

6 LTCOL EVANS: Thank you, sir. I do
7 know across the Marine Corps it's a widely
8 accepted view.

9 A lot of defense counsel, I know
10 they'll call me and they say hey, I'm thinking
11 about waiving this 32. And, I'll say, well, what
12 are you going to get out of it?

13 You know, do you think you've got a
14 chance of killing the charges? No, there's
15 probable cause. There's just a low standard.

16 Is the government going to call any
17 witnesses? No. They're just putting in
18 documents.

19 Then why are you doing it, you know?
20 Just all you're doing is letting someone else see
21 the government's charge sheet, letting them
22 perfect it, especially if you think the

1 government's made an error in charging.

2 Just waive it. So, certainly in the
3 Marine Corps, it's very pervasive. I think that
4 the biggest thing would be to bring back
5 witnesses to the 32.

6 Certainly, be liberal with
7 unavailability. But, you know, witnesses are
8 important to test, you know, NCIS types up a
9 statement, let the -- test the veracity of the
10 witness.

11 It doesn't have to be, you know, full
12 on trial. But, you know, see the witness, hear
13 them testify and engage their credibility.

14 MR. LIBRETTO: Col Landry, would you
15 like to provide some perspective?

16 COL LANDRY: I would. Thank you. I
17 agree with that. The 32 in its current iteration
18 has very little utility as a tool for the -- to
19 inform the appropriate exercise of prosecutorial
20 discretion.

21 This is something that I and, I
22 believe, perhaps a couple of the other service

1 panel members on this or their supervisors
2 discussed with the -- (audio interference) --
3 DAC-IPAD in a lesser.

4 But, sorry. It looked like I froze
5 for a moment there. I think I'm back.

6 But, the -- a couple of the
7 suggestions there were in addition to what LtCol
8 Evans just said, in terms of bringing back live
9 witness or at least some requirement for live
10 witnesses.

11 And, an Article 32 were to have a
12 binding recommendation as opposed to the current
13 non-binding recommendation made by the
14 preliminary hearing officer at the 32.
15 Obviously, the government would have to have some
16 recourse to be able to revisit, to reexplore with
17 additional evidence.

18 But, by in large, my advice to my team
19 when they approach me as to what to do at an
20 Article 32 is either to sit silently and listen,
21 or to simply waive the 32.

22 There's not a whole lot of utility

1 there for our clients. And, I believe more
2 importantly for the health of the system, to
3 inform convening authorities or referral
4 authorities with standup of OSTC.

5 MR. LIBRETTO: Thank you. LCDR
6 Hathaway, any comments?

7 LCDR HATHAWAY: Yes, sir. Thank you.
8 I'll just second what Col Landry said. You know,
9 there are -- I think we probably all had cases
10 where the Article 32 officer said, hey, there's a
11 probable cause, but there's no chance of success
12 at trial.

13 Or, even certain development cases
14 where the 32 officer says, hey, there's no
15 probable cause here and yet the case is still
16 referred before the trial convening authority.

17 So, you know, certainly from our
18 perspective, that -- we would like some chance to
19 advocate for potentially the case not going
20 forward if it is really that weak.

21 And so, that would put sort of the
22 advocacy back into the Article 32 as well as the

1 ability to have sort of an independent check on
2 the, on whoever is referring the case to the
3 court martial.

4 So, that would be a good way to sort
5 of have -- (audio interference) the 32 go
6 through this. Over. Thank you.

7 MR. LIBRETTO: Thank you. LTC Korte?

8 LTC KORTE: In addition to everything
9 that's been said, there's even one more detriment
10 to a defense not waiving the Article 32.

11 And so around 2016 and prior to that,
12 when they started putting Judge Advocates as the
13 preliminary hearing officers, what we started to
14 see is the addition -- the adding of charges that
15 weren't there prior.

16 So, a Judge Advocate would review the
17 charges, review the evidence and decide hey, you
18 actually have this, this, and this in addition to
19 what you've charged.

20 And so, things became not just neutral
21 to where it was kind of a waste of time for the
22 defense, but actually a detriment where charges

1 were then added that didn't exist before to
2 literally perfect the government's case.

3 And so, we continue to have Judge
4 Advocates as the preliminary hearing officer, so
5 that problem or detriment to the defense
6 persists. Although I agree with everything
7 that's been said before this.

8 So, everybody who practiced before
9 2013 knows that the preliminary hearing used to
10 be basically a mini-trial. We had the alleged
11 victim on the stand and we would -- we had all
12 the key witnesses.

13 And, they would be there and it was a
14 way that the government could determine really
15 what their case looked like. So, if you're
16 looking at it from a trial counsel's perspective,
17 they don't really know exactly what the case
18 looks like until trial now.

19 But, before they used to know a lot
20 sooner, the strength of their case. And it could
21 cause a lot of cases that shouldn't go to trial
22 to be dismissed or withdrawn for alternative

1 disposition.

2 But, a lot of times, because of the
3 lack of witnesses and, you know, having a JAG
4 perfect the 32, there could have been cases that
5 could have been resolved a lot sooner rather than
6 finding out at trial the case was not very good.

7 And, that's good for everyone if those
8 cases get dismissed sooner. Over.

9 MR. LIBRETTO: Thank you. And
10 finally, LCDR Torres?

11 LCDR TORRES: I concur with everyone
12 generally. The one thing I would add, if you're
13 considering, you know considering sort of changes
14 and rules at the risk of giving an inch and
15 losing a mile.

16 You know, we have a process to ask for
17 witnesses on the defense side now under RCM 405.
18 And, the application of that is frequently
19 diminished by what I think is a widespread
20 interpretation of what kind of evidence is
21 cumulative.

22 And so, sometimes we're not even able

1 to call our own live witnesses because the
2 hearing officer will determine well, your live
3 witness who's going to touch on the topics that
4 are in this unsigned, unsworn statement that you
5 can't ask questions to, is cumulative.

6 And so, to the extent that maybe
7 smaller rules are more palatable to people, that
8 would be one, one just small thing. These
9 witnesses would be a great idea for all the
10 reasons everyone has said.

11 MR. LIBRETTO: Okay. Thank you.

12 CHAIR HILLMAN: Thank you all. Let's
13 go to Capt Barney.

14 CAPT BARNEY: Thank you, Dr. Hillman.
15 And, thank you to our panelists for this
16 discussion.

17 I want to continue on with Col. Gunn's
18 question about the Article 32 process. And, ask
19 you a really more pointed question.

20 That is, does the defense bar desire
21 that the pre-2014 preliminary investigation
22 should be returned?

1 And, if it were to be returned, which
2 would give the defense additional discovery
3 opportunities, how do you respond to the concerns
4 that put us in this position?

5 That is, that witnesses were being
6 subjected to very significant examination and
7 cross examination on matters that were -- that
8 were not considered to be particularly relevant
9 to the 32 process.

10 So, I'm really kind of giving you the,
11 you know, giving you the floor. Do you want a
12 32?

13 What should it look like, and how do
14 we protect against excesses? Thank you.

15 MR. LIBRETTO: Col Landry, why don't
16 we begin with you.

17 COL LANDRY: Happy to. And I
18 appreciate the question, Capt Barney. I think
19 the -- to answer that questions, if you were
20 asking the defense bar, the answer is a
21 wholehearted yes.

22 Of course, in representation of our

1 client's, obviously the more due process that is
2 attached, the more right to confrontation that is
3 attached at an Article 32 hearing, the better in
4 our current positions.

5 However, I'm sure you'd find that
6 certainly with me. And, I do feel comfortable
7 saying for the other service members speaking to
8 you today, that we all also have an enterprise
9 view.

10 If we step back from our current jobs
11 and help assist in an understanding that there
12 were some meritorious critiques of the Article 32
13 process and it's not necessary for constitutional
14 due process or anything else to have two full
15 trials in order for the government to sustain a
16 conviction.

17 So, therefore, sir, in my perfect
18 world, what I would see is something along the
19 lines of tying, making the PHO's recommendation
20 more binding upon the government.

21 As a first cut that would force the
22 government to obtain from someone, a trained PHO,

1 and possibly have the opportunity, or certainly
2 have the opportunity to come back.

3 In the case of a finding of no
4 probable cause, to meet that very low threshold
5 to serve as a better check or informing the fact
6 for prosecutorial discretion.

7 As it pertains to witnesses, it's
8 something that I probably would love to sit down
9 and talk about for a long time. But, I do
10 believe there would have to be some type of
11 limiting factors built in.

12 Obviously in most grand jury settings,
13 defense counsel are not present. There is no
14 right to cross examination.

15 But, at the very least, those
16 witnesses are questioned by prosecutors to some
17 extent, with hearsay being admissible in most
18 jurisdictions and heard.

19 But, there is some ability to gauge
20 credibility and the overall strength of the
21 evidence as opposed to just evaluating a cold
22 paper record that often consists of summaries.

1 So, while I don't think it's
2 reasonable to ask for a full return of all rights
3 present in that previous Article 32, I do believe
4 that the pendulum swung too far the other way.
5 And, what we have now just provides little
6 utility to anybody.

7 MR. LIBRETTO: Thank you. And, LCDR
8 Hathaway, your comments?

9 LCDR HATHAWAY: Yes, sir. I would
10 certainly concur with everything said. It's most
11 definitely beneficial to findings to have that
12 process to go through.

13 With the changes, with changes and
14 whether it's, you know, the 2014 or older
15 process, were not making some sort of finding
16 actually binding on the convening authority.

17 The comment about, you know, sort of
18 how alleged victims were treated in the process,
19 I mean, obviously there are certain restrictions
20 no on the types of evidence that you can bring up
21 at Article 32s, you know, while some of the
22 rules, or most of the rules let it go by,

1 certainly the privilege of five.

2 And the PHOs, if we wanted to bring it
3 back with some restrictions, can certainly be
4 letting in the evidence they can order produced.
5 It's always that way to some extent now.

6 Or, certainly topics could be a little
7 complicated. But, we could find a way to limit
8 questions on specific subject matters.

9 I think being able to present maybe an
10 alleged victim with an inconsistency in a
11 previous statement or some other bias, some other
12 fabricated type of evidence, is going to be
13 extremely useful for an Article 32 officer to
14 consider whether or not we go into maybe previous
15 sexual behavior or something like that.

16 But, the credibility of the witness
17 can still be judged by the Article 32 officer.
18 And, that would be certainly beneficial to the
19 entire system before, you know, doing that for
20 the first time at a contested trial, so. Over.

21 MR. LIBRETTO: Thank you. LTC Korte?

22 LTC KORTE: Okay. I think that we

1 took several years and several changes to get
2 where we are now, where we all, or where the
3 defense bar believes the pendulum has swung too
4 far.

5 But so, I think we can get it back
6 that way in a phased way perhaps. But, to answer
7 your question, I believe that the example that's
8 set forth to the changes was so extreme that I
9 don't -- it would be far less likely to occur
10 today with a combination of Judge Advocates as
11 the PHOs and special victims counsel representing
12 the alleged victims who can make relevant
13 objections during the hearing, which would at
14 least raise, you know, which would bring that
15 issue to the forefront and get it stamped out
16 before it became.

17 I believe that example case, the
18 several days of testimony and it was extremely
19 intrusive, it was a true outlier. I don't think
20 any of us have ever seen anything like that or
21 anything even close to that.

22 But, special victims counsel

1 representing the alleged victims in combination
2 with Judge Advocates, those two together, plus a
3 reasonable trial counsel who is properly trained,
4 I think that would be far more, that would be a
5 rarity.

6 And so, that would -- that would calm
7 the fears of bringing that back if we're to
8 eventually take steps to return the Article 32
9 back the way it was.

10 I don't think we're going to be able
11 to do that any time soon. But, if it was a slow
12 process, I think we could bring it back. And, it
13 would be back to the way it should be before that
14 outlier case. Over.

15 MR. LIBRETTO: Thank you. LCDR Torres?

16 LCDR TORRES: I actually -- you know,
17 I actually was here at the Navy Yard for that
18 case. I was a brand-new counsel and my future
19 boss was the one who was doing that questioning
20 that sort of led to where we are.

21 I do think that the 32 at this point
22 has, it's detrimental. The way it exists now is

1 detrimental to the perception of fairness in the
2 system.

3 Because the minute you have a
4 proceeding that you've seen here, people sort of
5 identify as like not having any real teeth, not
6 having any real meaning. That sort of, that
7 infects the whole rest of the process.

8 So, to the extent we're concerned
9 about the perception of fairness in the system, I
10 think is a major problem that it's sort of widely
11 understood that this isn't a proceeding that most
12 accused really feel is fair.

13 I do think you can get much closer to
14 that old system and retain sort of some of the
15 protections that caused the changes in the first
16 place. But, some of them have been identified.

17 But, just generally taking out, it
18 doesn't need to be discovery anymore. I mean, as
19 much as I would like that, and I think that that
20 would be great for my clients, and it doesn't
21 need to be discovery.

22 But, it can still be limited to the

1 purposes of the hearing, right, to determine
2 whether there's probable cause and the
3 appropriate disposition.

4 So long as we, you know, have some
5 sort of requirement that hey, somebody actually
6 has to come and swear to some kind of testimony,
7 even if it's hearsay, even if it's based on
8 secondhand knowledge.

9 So that at least as the accused
10 person, you have a chance to at least challenge
11 the underlying basis of the offense.

12 Right now, there's no requirement
13 really that documents be authentic, that you get
14 a chance to really challenge them. So, even just
15 that little thing, right.

16 And sort of the most akin thing I can
17 think of, and, you know, I used to do these
18 probable cause hearings in Boston. You know, you
19 call a witness, right.

20 It would just be the investigator or
21 somebody. But, you at least question, I mean,
22 you didn't offer this person, you didn't offer

1 that person. You didn't really look into this.
2 You didn't really look into that.

3 And, that at least gives a better
4 picture, even though you're not going all the way
5 to actually cross examining all those witnesses
6 and putting on all that evidence.

7 You're at least painting the picture
8 of like, you know, maybe there's not really
9 probable cause here yet. Maybe you could get
10 there, but you're not there yet.

11 And, that would at least give us
12 something to work with. Which I think would be
13 better.

14 MR. LIBRETTO: Thank you. And finally,
15 LtCol Evans, if you have anything to add.

16 LTCOL EVANS: Just briefly. I think
17 that the most important thing to do would be to
18 give more powers to the PHO, to keep the Article
19 32 limited.

20 Right now, they have very limited
21 powers, if any. And also, I would agree that
22 that, the case that everybody kind of held up as

1 an outlier.

2 All my experience with pre-2014
3 Article 32s is either as a trial counsel where
4 there was no VLC, or as an actual PHO.

5 And, in all of those cases, I saw the
6 defense counsel be very cordial with any victims.
7 And, asking open-ended questions because they
8 don't want to put them off.

9 And, they want to have them answer as
10 voluminously as possible so that there's more
11 there for prior inconsistent statements or more
12 to cross examine on.

13 So, you know, I think that it is an
14 outlier. I think that generally the strategy is,
15 you know, to treat with kid gloves and to get as
16 much information as possible.

17 But, certainly empowering the PHO
18 would help keep any Article 32 limited to
19 relevant evidence that is properly before the
20 Article 32 hearing.

21 CAPT BARNEY: Thank you, gentlemen for
22 your views on that one. I appreciate it.

1 CHAIR HILLMAN: Okay. I think the
2 last call for any additional questions from any
3 panel members?

4 (No response.)

5 CHAIR HILLMAN: Thank you all for
6 joining us. We really appreciate your service.
7 I wish we could thank you in person if you were
8 not in person today.

9 But, I'm grateful for the time you
10 spent with us this afternoon. Folks are joining
11 you from our panel from as far away as Korea.

12 So, and I appreciate everybody's
13 attention to these critical issues. We'll keep
14 thinking about them.

15 So, with that, I think we'll conclude
16 this public session. So, Pete, is there anything
17 else that you want to say about that?

18 MR. YOB: No. I appreciate the
19 attendees coming and this great session. Thank
20 you so much.

21 (Whereupon, the above-entitled matter
22 went off the record at 4:16 p.m.)

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