

## UNITED STATES DEPARTMENT OF DEFENSE

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DEFENSE ADVISORY COMMITTEE ON INVESTIGATION,  
PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT  
IN THE ARMED FORCES (DAC-IPAD)

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## PUBLIC MEETING

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FRIDAY  
NOVEMBER 15, 2019

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The Committee met in the Monument View Room, DoubleTree by Hilton Crystal City, 300 Army Navy Drive, Arlington, Virginia, at 9:00 a.m., Ms. Martha Bashford, Chair, presiding.

## PRESENT:

Ms. Martha S. Bashford, Chair  
MG Marcia M. Anderson, U.S. Army (Ret.)  
Hon. Leo I. Brisbois  
Ms. Kathleen Cannon  
Hon. Paul W. Grimm  
Sgt. James "Jim" Markey (Ret.)  
Dr. Jenifer Markowitz  
CMSAF Rodney J. McKinley, USAF (Ret.)  
Brig. Gen. James R. Schwenk, USMC (Ret.)  
Ms. Meghan A. Tokash  
Hon. Reggie B. Walton

**STAFF:**

Col. Steven Weir, USA, Staff Director  
Ms. Julie Carson, Deputy Staff Director  
Mr. Dale Trexler, Chief of Staff  
Mr. Dwight Sullivan, Designated Federal Official  
(DFO)  
Ms. Theresa Gallagher, Attorney-Advisor  
Ms. Amanda Hagy, Senior Paralegal  
Ms. Patricia Ham, Attorney-Advisor  
Mr. Glen Hines, Attorney-Advisor  
Mr. Chuck Mason, Attorney-Advisor  
Ms. Marguerite McKinney, Analyst  
Ms. Meghan Peters, Attorney-Advisor  
Ms. Stacy Powell, Senior Paralegal  
Ms. Stayce Rozell, Senior Paralegal  
Ms. Terri Saunders, Attorney-Advisor  
Ms. Kate Tagert, Attorney-Advisor

**ALSO PRESENT:**

Mr. Don Christensen, President, Protect Our  
Defenders

**\*Present via teleconference**

CONTENTS

Welcome and Introduction . . . . .	4
Protect Our Defenders' Perspective on . . . . .	.11
Military Sexual Assault Prosecution and Sentencing	
Committee Final Deliberations and Vote on . . . . .	.33
the DAC-IPAD's Sexual Assault Case Adjudication Report for Fiscal Years 2015 - 2018	
Case Review Working Group Presentation . . . . .	.36
and Deliberations	
Policy Working Group Presentation. . . . .	128
Committee Deliberations Regarding the . . . . .	132
Services' Responses to DAC-IPAD Request for Information (RFI) Set 11 and Testimony from the August 23, 2019 DAC-IPAD Public Meeting	
Collateral Misconduct Report Status Update . . . . .	142
2020 Military Installation Site Visit. . . . .	266
Update	
Court-Martial Observations Update. . . . .	293
Public Comment and Meeting Wrap-up . . . . .	304

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

2 9:04 a.m.

3 MR. SULLIVAN: Good morning. I'm  
4 Dwight Sullivan. I'm the Designated Federal  
5 Officer for the Defense Advisory Committee on  
6 Investigation, Prosecution, and Defense of Sexual  
7 Assault in the Armed Forces. This meeting is  
8 open.

9 CHAIR BASHFORD: Thank you, Mr.  
10 Sullivan.

11 Good morning. I'd like to welcome the  
12 members, everyone in attendance today to the  
13 fifth public meeting of the Defense Advisory  
14 Committee on Investigation, Prosecution, and  
15 Defense of Sexual Assault in the Armed Forces, or  
16 DAC-IPAD.

17 We're going start by taking  
18 attendance.

19 General Anderson?

20 MG ANDERSON: Present.

21 CHAIR BASHFORD: Judge Brisbois?

22 HON. BRISBOIS: Here.

1 CHAIR BASHFORD: Ms. Cannon?

2 MS. CANNON: Here.

3 CHAIR BASHFORD: Ms. Garvin is going  
4 to be joining us on the telephone. She'll be  
5 joining us later.

6 Judge Grimm?

7 PARTICIPANT: His backpack is present.

8 (Laughter.)

9 CHAIR BASHFORD: I think Mr. Kramer  
10 and Ms. Long are not here.

11 Mr. Markey?

12 SGT. MARKEY: Present.

13 CHAIR BASHFORD: Dr. Markowitz?

14 DR. MARKOWITZ: Present.

15 CHAIR BASHFORD: Chief of McKinley?

16 CSMAF MCKINLEY: Here.

17 CHAIR BASHFORD: General Schwenk?

18 BGEN SCHWENK: Here.

19 CHAIR BASHFORD: Dr. Spohn is not able  
20 to join us.

21 Ms. Tokash?

22 MS. TOKASH: Here.

1 CHAIR BASHFORD: And Judge Walton?

2 HON. WALTON: Here.

3 CHAIR BASHFORD: So, we have 12  
4 members present today. We have a quorum.

5 The DAC-IPAD was created by the  
6 Secretary of Defense in 2016, in accordance with  
7 the NDAA for fiscal year 2015 as amended. Our  
8 mandate is to advise the Secretary of Defense on  
9 the investigation, prosecution, and defense of  
10 allegations of sexual assault and other sexual  
11 misconduct involving members of the Armed Forces.

12 Today's meeting is being transcribed,  
13 and the complete written transcript will be  
14 posted on the DAC-IPAD website.

15 I see Judge Grimm has joined us. I  
16 think your backpack was here before.

17 We will begin today's meeting with  
18 comments from Mr. Don Christensen, President of  
19 Protect Our Defenders, regarding his  
20 organization's perspective on military sexual  
21 assault convictions, sentencing, and victim  
22 access to materials relating to a court-martial.

1                   Following Mr. Christensen's remarks,  
2                   the Committee will vote whether to approve the  
3                   DAC-IPAD standalone court-martial adjudication  
4                   data report covering fiscal years 2015 through  
5                   2018. The information contained in the report  
6                   was presented to the Committee by the DAC-IPAD's  
7                   Data Working Group and deliberated upon at its  
8                   August 23rd, 2019 public meeting.

9                   Next, the Committee will receive a  
10                  presentation from its Case Review Working Group  
11                  and conduct deliberations regarding the  
12                  observations and findings of the Working Group  
13                  after having reviewed over 2,000 investigative  
14                  case files for penetrative sexual assault  
15                  investigations completed in fiscal year 2017.  
16                  The Committee's deliberations on the case review  
17                  project will be reported to Congress and the  
18                  Secretary of Defense in the DAC-IPAD's March 2020  
19                  Annual Report.

20                  After a break for lunch, the Committee  
21                  will receive a presentation from the DAC-IPAD's  
22                  staff regarding issues related to Articles 32,

1 33, and 34 of the Uniform Code of Military  
2 Justice. These issues were recommended to the  
3 Committee for review by its predecessor, the  
4 Judicial Proceedings Panel, but also by the  
5 Department of Defense General Counsel in a June  
6 2019 letter addressed to me as the DAC-IPAD  
7 Chair.

8 At the October 19, 2018 public  
9 meeting, the DAC-IPAD unanimously agreed to have  
10 a working group look at these issues. At the  
11 August 23rd, 2019 public meeting, I requested  
12 that members of the Committee who wished to  
13 examine these issues in depth notify the staff of  
14 their interest. On November 1, 2019, I assigned  
15 the Article 32, 33, and 34-related issues to the  
16 existing DAC-IPAD Policy Working Group in a  
17 memorandum to the Committee and advised that the  
18 members who volunteered to examine these issues  
19 would become Policy Working Group members. This  
20 was done in accordance with the Working Group's  
21 terms of reference. The seven DAC-IPAD members  
22 who will be serving on the Policy Working Group



1 and undertaking the study are General Schwenk,  
2 Judge Grimm, Ms. Cannon, Ms. Garvin, Dr.  
3 Markowitz, Ms. Long, and Mr. Kramer.

4           Following the Policy Working Group's  
5 2020 overview, the Committee will deliberate on  
6 the military Services' written responses and  
7 testimony on sexual assault conviction and  
8 acquittal rates, sexual assault victim  
9 participation in the military justice process,  
10 and the court-martial referral process for sexual  
11 assault allegations. The results of these  
12 deliberations will be presented in the DAC-IPAD's  
13 March 2020 report to Congress and the Secretary  
14 of Defense.

15           The DAC-IPAD Staff Director will then  
16 provide an update on the Department of Defense  
17 response to the Committee's letter providing our  
18 analysis and recommendations regarding the  
19 Department's September 2019 report to Congress on  
20 sexual assault victim collateral misconduct.

21           Finally, the DAC-IPAD staff will  
22 provide updates on the Committee's 2020 military

1 installation site visit plans and member  
2 observations of sexual assault courts martial.

3 Each public meeting of the DAC-IPAD  
4 includes a period of time for public comment. We  
5 have received no additional requests for such  
6 comment for today's meeting. During the meeting,  
7 if a member of the audience would like to make a  
8 public comment on an issue before the Committee,  
9 please direct your request to the DAC-IPAD Staff  
10 Director, Colonel Steven Weir. All public  
11 comments will be heard at the end of the meeting  
12 and at the discretion of the Chair. Written  
13 public comments may be submitted at any time for  
14 Committee consideration.

15 So, that's an ambitious agenda, and  
16 we're scheduled to end at 3:30.

17 I thank everybody for being here.

18 And, Mr. Christensen, we are ready for  
19 your remarks. Thank you for coming.

20 MR. CHRISTENSEN: Chair, thank you so  
21 much for allowing me to come and talk to this  
22 great group about a couple of issues I think that

1 you've been wrestling with and that I think have  
2 been a weakness in the military justice system;  
3 specifically, in sentencing reform, the  
4 prosecution/conviction rates, and access to  
5 discovery materials for victims and their  
6 counsel.

7 Sentencing reform, I think it's time  
8 for us to have bold solutions in 2019. We have a  
9 sentencing process that is virtually unchanged  
10 since George Washington headed the Continental  
11 Army. We've gotten rid of flogging and we've  
12 gotten rid of branding, but most of the other  
13 punishments are the exact same.

14 In my written remarks, I point out I  
15 looked at six months of court-martial results  
16 that the Air Force used to put out. I guess  
17 they're no longer putting them out as of June of  
18 this year; at least there's nothing new.

19 Just looking at the convictions and  
20 the results, there were 33 cases where somebody  
21 was convicted of a non-consensual sex assault.  
22 Ten of those cases, that offender found guilty,

1 walked out without any time in confinement, not  
2 one single day. That tells me that there's  
3 something wrong there. I'm not saying  
4 confinement is necessarily the answer to  
5 everything, but, as a society, we recognize  
6 confinement as one of the most critical steps in  
7 punishment for those who commit sex offenses and  
8 violent offenders.

9           When I was a prosecutor, in Europe I  
10 prosecuted a man who was convicted of rape. And  
11 this was under Article 120, which at that time  
12 was sexual intercourse by force and without  
13 consent. He was facing life in prison. We  
14 argued for confinement. The defense conceded  
15 confinement was appropriate. It was a question  
16 of how much. The members came back with 30 days  
17 restriction. How do you explain to a rape victim  
18 that those court members did not believe that the  
19 sanctity of her body was worth that man spending  
20 a single day in jail?

21           I think that this is really a question  
22 of the process versus arrogance or ignorance of

1 the court members. The process is unlike any  
2 other process in this country. And I think the  
3 federal model is the model we should be looking  
4 at, that the military should be adopting. It's  
5 been around since the '80s.

6 If you look at it before that, we've  
7 had all this judge-alone sentencing for many  
8 years. But Congress said, because of the  
9 problems of sentencing without any kind of  
10 guidelines, we have a wide disparity in  
11 sentencing. And that occurs, too, in the  
12 military. And that disparity may inure to the  
13 benefit of the accused, but often it also is a  
14 detriment to them. So, you will see similarly-  
15 situated people, people who have committed the  
16 same exact crime, and one gets 10 days  
17 restriction and a reduction and the other goes to  
18 jail for three years and gets a dishonorable  
19 discharge. That's not justice.

20 And for sex assault offenders and  
21 violent offenders, there's absolutely no way to  
22 ensure that they get treatment before they're

1 released back into society. In my written  
2 statements, I talk about the Devin Kelley case.  
3 And for those who aren't familiar, he is the  
4 individual who had been court-martialed for  
5 abusing his child and his wife and holding a  
6 loaded gun to her head on multiple occasions,  
7 threatening his commander. He was sentenced to a  
8 year in confinement. He had already served about  
9 five months in pretrial confinement. So, he was  
10 out of jail about five months later.

11 The day he walked out of confinement  
12 there were no restrictions on him. He did not  
13 have to attend any kind of violent offender  
14 treatment. There were no restrictions on his  
15 movements, no ability to monitor him. And we  
16 know that he purchased a weapon illegally and  
17 slaughtered 26 people.

18 There are real consequences to our  
19 sentencing process, and it's time for the  
20 leadership of the military to recognize there are  
21 real consequences to the punishment process. I  
22 would suggest that this Committee look at

1 potentially adopting what the federal system  
2 does: judge-alone sentencing that has a wide  
3 range of tools for a judge to put restrictions on  
4 supervised release.

5           When a military member serves their  
6 sentence, they are just done; in the federal  
7 system that is not the case. If you have  
8 committed an offense -- let's say child  
9 pornography -- that judge has an ability to say  
10 you will not access the internet; you will not  
11 have any pornography in your possession; you will  
12 not own a computer. And, oh, by the way, I can  
13 also say you're subject to search at any time we  
14 want for a supervised period of time, and you're  
15 going to get treatment. That is something that  
16 protects society from them. The military simply  
17 does not have that. It's really, really time for  
18 bold solutions.

19           As far as prosecution and conviction  
20 rates, I'm not saying that there's an ideal  
21 conviction rate. Who knows what that is? But I  
22 can say, as you have had testimony before you,

1 that a conviction rate of penetrative offenses of  
2 less than 30 percent and of contact offenses of  
3 around 14 percent, I can say something's wrong  
4 there.

5 As I said in my written statement, if  
6 anything else that the military did had an 80  
7 percent failure rate, it would be unacceptable.  
8 Heads would roll. People would be held  
9 accountable. We would be looking to change how  
10 we do things.

11 But, for whatever reason, an 80  
12 percent failure rate appears to be fine with the  
13 military. Their only response, if they're even  
14 pressed on it, is, well, we take tough cases to  
15 trial. Lots of civilian jurisdictions take tough  
16 cases to trial. And as we all know from looking  
17 at the data, when 95 percent of the cases aren't  
18 going to trial, I don't know how well that  
19 argument really stands, because they've weeded  
20 out all those alleged weak cases and this is all  
21 we're left with.

22 So, why are we failing so much? Well,



1 when you look at just a three- or four-year look  
2 at the data, in 2015, when there were fewer  
3 cases, fewer allegations, the military got 255  
4 convictions. This is from the SAPR report.  
5 Fiscal year 2018, it was down to 108. That  
6 should be setting off alarm bells among people,  
7 why are we failing?

8 I think there's a number of things.  
9 I practiced for 23 years in the Air Force. I had  
10 the unique opportunity to do almost all of that  
11 in military justice and maintain my litigation  
12 abilities throughout my career. The way the  
13 military treats military justice -- if you are a  
14 sports fan, I hope this analogy makes sense to  
15 you -- if you think of Tom Brady as a military  
16 litigator, somebody at the height of his career.  
17 Obviously, Tom Brady has taken his Patriots to  
18 nine Super Bowls and won six of them. If he were  
19 an Air Force JAG, when he was getting ready while  
20 warming up for his first Super Bowl in 2003, I  
21 believe it was, or 2002, instead of playing in  
22 that game, the coach would have come over, the

1 military could have come over and said, "Tom,  
2 you've done enough. Time for somebody else to  
3 take over. We've got this guy on the bench that  
4 needs some experience. We need to broaden your  
5 career. We need help on concessions. Why don't  
6 you put an apron on and go sell some nachos?"  
7 It's absurd. Tom Brady wouldn't have won nine  
8 Super Bowls because his skill set was taken away  
9 too early. And that's what we do in the  
10 military. We take people out of the courtroom  
11 entirely too quickly.

12 My best appellant counsel, when I was  
13 the head of the Appellant Government Division,  
14 amazing litigator, was working on a capital  
15 appeal. He had been in the assignment for two  
16 years. He was supposed to have another year,  
17 which isn't enough. He was taken out of that  
18 assignment early, not to go to another litigation  
19 job, not to go fight in the deployed location.  
20 He was taken out early to become what we called  
21 the "Party JAG," the party planning JAG in the  
22 JAG corps, the guy who runs the social calendar

1 for the TJAG and sets up the Christmas party,  
2 right? He was on capital litigation, but for the  
3 Air Force it was more important that his skill  
4 set was used to make sure that the napkins were  
5 folded right at the TJAG's dinner. That is not a  
6 smart use of our resources. We have to have  
7 sustained experience.

8 I think it's obvious to everybody in  
9 this room who has great experience -- and we have  
10 judges; we have very experienced prosecutors --  
11 there is a value to having experience. I was  
12 better at my job at year 23 than I was at any  
13 time before that. I was better because of the  
14 experience.

15 Sexual assault, as you have all heard  
16 and many of you know, is a very, very difficult  
17 case to prosecute. We need to have people who  
18 have the experience. And look at this, too. The  
19 accused can hire a civilian counsel, and they  
20 often do, especially for sexual assault. And so,  
21 if you take the Air Force typical Special Victims  
22 Prosecutor, they've been at a base level. Maybe

1 they got to do four or five trials. Maybe two of  
2 those were litigated. And then, maybe they got  
3 to be an ADC. Maybe they got to do 10 trials.  
4 Maybe a couple of those were litigated. Now  
5 they've become a Special Victims Prosecutor, and  
6 they're there for two years before they pull them  
7 out to do something else. And maybe they get to  
8 do 20 trials, 25 trials during that time. Maybe  
9 10 of those are litigated.

10 He can go up or she can go up against  
11 a civilian counsel who's been doing this for 20,  
12 30, 40 years, who has 500 cases under their belt.  
13 I'm not saying that the quality or the skill  
14 level of that military attorney isn't great.  
15 I've always been very impressed about the quality  
16 of the people we have. But the experience makes  
17 a difference. And that, I think, is part of the  
18 reason we have such an abysmal prosecution or  
19 conviction rate.

20 So, we have to value experience and it  
21 has to be done through legislation. We cannot  
22 leave it to the heads of the Judge Advocate Corps

1 to do this because every time somebody new comes  
2 in, they can change whatever policy the last one  
3 had.

4 We've seen in the Air Force where at  
5 one time we had circuits. And then, suddenly, in  
6 2006, I believe it was, circuits were bad and we  
7 broke up the circuits, and all our Special  
8 Victims' Counsel or our senior trial counsel were  
9 dispersed across the Air Force. And then, we get  
10 a new TJAG and circuits are good, and they're all  
11 brought back in.

12 The reason I say that is because we  
13 have to have legislation. We cannot rely on the  
14 goodwill of the current Judge Advocate General.  
15 We have to have legislation. And what's  
16 concerning is that Congress has twice passed  
17 legislation saying you must have career  
18 litigation tracks. And I have talked to the  
19 sponsors of this legislation and I know what they  
20 mean by that. They mean that someone like myself  
21 is not an anomaly. There's not been another  
22 colonel prosecute an Air Force case since I

1 retired five years ago. They expect our most  
2 difficult cases to be handled by our most senior  
3 people with the most experience. I think that's  
4 what the expectation of Congress is. I think  
5 it's what the expectation of the American people  
6 would be.

7 And we cannot rely on the goodwill of  
8 Judge Advocate Generals to do that because  
9 they've shown they don't want to do that. And  
10 so, Congress needs to make it clear. I need,  
11 hopefully, you to advise Congress -- you need to  
12 make it 100 percent clear this isn't a joke; you  
13 need people to be able to prosecute and defend  
14 for a career.

15 What's the other thing that does for  
16 us? That sets up a better quality of judge, both  
17 at the trial judge and the appellate level. Our  
18 trial judges -- I was a trial judge -- our  
19 appellate judges -- I was selected to be an  
20 appellate judge -- are, by and far, very good  
21 people, very smart. But what they usually do not  
22 have is a lot of actual in-courtroom experience.

1 And again, they just rotate in and out of those  
2 positions. I was a trial judge for two years.  
3 That's it.

4 To put that in perspective, Judge  
5 Baker, who used to be the Chief Judge of the  
6 Court of Appeals for the Armed Forces, said it  
7 took him at least three years before he was  
8 comfortable doing what he was doing as a judge.

9 If you look at the Air Force Court of  
10 Criminal Appeals, which was created in 1969, if  
11 you look at it through today, the average judge  
12 on the Air Force Court of Criminal Appeals  
13 doesn't even make up to two years. If you look  
14 at 2016, when it got down to the summer  
15 assignment cycle, if you look at the makeup of  
16 the Air Force Court of Criminal Appeals, one  
17 judge had been on the Court one year. One judge  
18 had been on less than a year. Seven were brand-  
19 new judges. You would not find another appeal  
20 court anywhere in this country that has such  
21 limited experience, and it's important that they  
22 have experience. And so, if we have a cadre of

1 litigators that make a career out of this, that  
2 is who you pick those judges from.

3 And then, again on judges, we can't  
4 have judges rotating in and out. Congress has  
5 tried to make that clear again to the Judge  
6 Advocate Generals, but we still have judges on  
7 the bench a year or two years and then, gone. I  
8 would suggest that Congress should look at  
9 requiring that the judge jobs at a trial level be  
10 for at least for five years and for the appellate  
11 level 10 years. That does only make sense. For  
12 the Court of Appeals for the Armed Forces, that  
13 is a 15-year service. And I just think we need  
14 to do the same.

15 And then, finally, when it comes to  
16 victim access to discovery, yes, I represent  
17 victims in my current position. I'm denied  
18 discovery because I was a civilian, not military.  
19 The military SVC had the evidence, but was  
20 specifically told she could not share it with me  
21 because I was a civilian. That can't happen.

22 We would never accept that for our



1 accused, that their civilian defense counsel  
2 didn't have the same access to documents that the  
3 military defense counsel has. It has to be  
4 equal. We have to get over this idea that the  
5 Privacy Act is a bar to a victim to have access  
6 to her own statements. FOIA is not a solution to  
7 discovery. We've been in litigation with the  
8 United States Department of Defense for two years  
9 trying to get discovery, not on a sex assault  
10 case. But you can't have that kind of delay if  
11 you're trying to represent your client.

12 And the other area we have real  
13 difficulty getting is the results of forensic  
14 tests, DNA tests, SANE exams, digital analysis of  
15 their cell phones. A victim needs to have that.  
16 It's critically important for a Special Victims'  
17 Counsel. How do we adequately and properly give  
18 advice to our client whether they should go  
19 forward with this, whether they should be pushing  
20 if the government has shown hesitation or the  
21 government has said, "We're not going to  
22 prosecute."? How do we give them appropriate

1 advice if we don't know what the evidence is?

2 This is just ridiculous.

3 And I understand. I've been a  
4 prosecutor and a defense counsel and a judge. I  
5 understand that you don't just turn everything  
6 over to the victim. But, at a minimum, they need  
7 to have as routine complete access to anything  
8 that they have said and it has been recorded by  
9 the United States Government.

10 So, with that, I would be happy to  
11 take any questions.

12 CHAIR BASHFORD: We have about seven  
13 minutes for questions.

14 Judge Grimm?

15 HON. GRIMM: So, could you help me?  
16 You've commented upon the results of court-  
17 martial prosecutions in terms of whether or not  
18 the sentence of confinement is imposed or not.  
19 Sentencing can be done in the military by either  
20 a military judge alone or by a panel.

21 MR. CHRISTENSEN: Right.

22 HON. GRIMM: And there's some election

1 process going in there. Does the concern that  
2 you have with regard to a failure to impose  
3 confinement consistently upon conviction of  
4 sexual assault offenses apply equally to  
5 sentences imposed by military judges alone, or is  
6 the problem, as you see it, when members who  
7 might be swayed by the amount of time that  
8 someone has served and concerns about what a  
9 confinement sentence would be, that would not be  
10 looking at the kind of factors that a judge would  
11 be looking at in terms of sentencing?

12 MR. CHRISTENSEN: Yes. Well, if you  
13 look at the numbers in where we have a protector  
14 and a defender, doing a deeper dive with like a  
15 longer period of time to look at this, but at the  
16 sixth month numbers, of those 10 that resulted in  
17 no confinement, eight were from court members;  
18 two were from a judge. So, I have a concern with  
19 both.

20 I have a greater concern with the  
21 court members. I think making these judge-alone  
22 sentencing, which was proposed legislation in

1 2015 and '16, is a better solution than having  
2 court members. I can tell you, as somebody who  
3 has argued in front of many court members about  
4 what an appropriate punishment is, and as a judge  
5 who has instructed them and watched the blank  
6 stares as you are giving them their sentencing  
7 instructions, and they're like, what are we  
8 supposed to be doing with this, that it's not  
9 fair to court members to try to have them come up  
10 with a sentence.

11 First, we're very limited in what we  
12 can tell them about the sentencing process.  
13 Second, they don't understand the consequences of  
14 what they're sentencing a person to. Third, it's  
15 very hard, as a judge, I think even as a judge  
16 sometimes, to sentence people. And what we're  
17 seeing is just, especially with member sentences,  
18 sentences all over the place.

19 But I would point out that the reason  
20 Congress created the reform in the federal  
21 process is because of the wide disparity that  
22 they were seeing even with judge sentencing. And

1 so, one of the things I really point to is that,  
2 if federal judges, who, as we all know, go  
3 through a much more rigorous process and most of  
4 them have much greater experience than what a  
5 military judge has, if they have to have guidance  
6 to get appropriate sentences, then why would we  
7 ever think that military members can come up with  
8 appropriate sentences without any guidance?

9 So, I hope that answered the question.  
10 I know it was a long answer, but it's concern  
11 with both, but a greater concern with court  
12 members.

13 HON. GRIMM: Thank you.

14 HON. WALTON: We were briefed on one  
15 of the panels that looked at this issue, and they  
16 concluded that one of the reasons sentencing  
17 guidelines could not be adopted is because there  
18 was no empirical proof that there is disparity in  
19 these type of offenses. You seem to take  
20 exception with that.

21 MR. CHRISTENSEN: Yes. Well, I think  
22 anybody who has done this and is being honest

1 with you will say, look, I've prosecuted people  
2 or I defended people, and these are two Airmen,  
3 the same background, been in a couple of years.  
4 One goes to a jail a long time; one gets  
5 restriction. Those things are happening.

6 We can look at just the results that  
7 were in that six-month period of time. Ten  
8 people didn't go to jail; one guy went to jail  
9 for 30 years. Now it's difficult because we  
10 don't know the details behind all those, but we  
11 do know that 10 people didn't go to jail, despite  
12 the fact they're going to have to register as a  
13 sex offender, and other people are going to jail  
14 for very lengthy periods of time.

15 And when we look at the ranks, we see  
16 that the ranks are all over the place on the  
17 people who were sentenced that didn't get jail,  
18 and we also see the same for people who did go to  
19 jail. But I don't think the American society, if  
20 they understood that we have people convicted of  
21 -- and two of those offenses were child sex  
22 offenses -- these people aren't going to jail. I

1 just don't think they would believe that.

2 But if you look -- I mean, anybody can  
3 go to the Air Force website and just start  
4 looking through the results up until May of this  
5 year, and again, I don't know why they're not any  
6 more current than that, and look at the  
7 sentences. Look at the convictions. Look at the  
8 sentences. And you will see they're all over the  
9 place. And you could see it with drug offenses.  
10 You can see it with any other kind of offenses.

11 I have prosecuted and defended people  
12 who were convicted of child abuse cases, shaken  
13 baby cases, and the sentences go anywhere from  
14 six months to 28 years. It's just all over the  
15 place.

16 CHAIR BASHFORD: Time for one last  
17 question. Ms. Tokash?

18 MS. TOKASH: So, from a comparative  
19 perspective, the federal civilian system  
20 sentencing heavily involves the United States  
21 Probation Office.

22 MR. CHRISTENSEN: Yes.

1 MS. TOKASH: Including a comprehensive  
2 interview of the convicted defendant, including a  
3 complete and comprehensive presentencing report  
4 that's available to the parties and to the  
5 judges. Do you think that the military has the  
6 manpower and capability to stand up a U.S.  
7 military probation office of sorts to mimic the  
8 federal civilian system?

9 MR. CHRISTENSEN: I'm not going to  
10 speak for the federal system, whether or not they  
11 could take on this responsibility was well, but  
12 it seems to me they could. I mean, we're down to  
13 less than 2,000 courts a year. I don't think  
14 it's necessary for every offense that someone's  
15 convicted of. I'm looking at violent offenses  
16 and sex offenses. I think those are appropriate.

17 But, yes, I think that -- look, this  
18 is a priority issue. I've said this before at  
19 the JPP, I believe it was. There are 300  
20 enlisted persons who work for general officers  
21 whose sole job is to cook their food and iron  
22 their uniforms and wash their clothes, right? I



1 think it's much more important that we do have  
2 more Devin Kelleys -- because I believe that if  
3 that process that you just talked about had been  
4 in place, Devin Kelley wouldn't have had the  
5 opportunity to murder 26 people -- than it is for  
6 general officers not to have to cook their own  
7 damn breakfast.

8 And so, I think it's a priority issue.  
9 The military spends lots of money -- we have  
10 bands all over the world, hundreds of bands. Is  
11 that more important than making sure that we  
12 don't have violent sex offenders released back  
13 without any supervision?

14 CHAIR BASHFORD: Mr. Christensen,  
15 thank you so much for coming and sharing your  
16 thoughts with the Committee. We appreciate it.

17 MR. CHRISTENSEN: Thank you, Chair.

18 MR. MASON: Thank you, ma'am.

19 So, this morning we're going to be  
20 going just quickly -- I'm looking for your  
21 approval, please, of the data report that was  
22 presented to you at the last meeting. You saw

1 all of the tables and charts at that point. We  
2 have printed out a copy. You received it two  
3 weeks ago, and then, an updated version this past  
4 week. We have printed out basically the body of  
5 the report for you. I have the full report with  
6 the 100 pages for the appendix, if you would like  
7 to see it.

8 But what we need from you, please, is  
9 a motion to accept the report and to publish it.  
10 And then, we will get it published and posted.  
11 And the 2018 fiscal year data will be, then,  
12 released to the public.

13 CHAIR BASHFORD: Is there a motion?

14 SGT. MARKEY: So, I'll make a motion.

15 DR. MARKOWITZ: I second.

16 CHAIR BASHFORD: The motion is made  
17 and seconded. Are there any people against  
18 publishing it?

19 Hearing none, you have permission.

20 MR. MASON: We will get it taken care  
21 of and published and get copies out to everybody.

22 The second thing that I would like

1 your support on this morning, please, is we would  
2 like to send out a Request for Information for  
3 the fiscal year '19 cases. We have not done that  
4 yet.

5 Sort of how in the past we modified  
6 our RFI and we were getting information, we're  
7 going to modify it one more time this time in an  
8 attempt to assist the Services. We're asking for  
9 all cases with a preferred charge under the  
10 Uniform Code of Military Justice, not limited to  
11 just sexual assault. And once we receive that  
12 list, and then, request the charge sheet that  
13 goes with that, we will be able to determine what  
14 are the responsive cases and then, ask for the  
15 documents related to sexual assault, rather than  
16 the Services trying to report to us, and then,  
17 having a response rate like we had with the Army  
18 at 60 percent. We think we can help them by  
19 asking for the right cases rather than them  
20 trying to figure out what we're looking for.

21 So, I would just ask if you would  
22 endorse that proposal going forward, so that we

1 can send the RFI out.

2 SGT. MARKEY: So moved.

3 HON. BRISBOIS: Second.

4 CHAIR BASHFORD: Any opposition?

5 Seeing none, you have your permission  
6 for the RFI.

7 MR. MASON: We will get both of those  
8 done. Thank you very much, ma'am.

9 CHAIR BASHFORD: We're a little ahead  
10 of schedule, which is always good. The Case  
11 Review Working Group is next.

12 BGEN SCHWENK: We will take that being  
13 ahead of schedule as a challenge on the Case  
14 Review Working Group and try to make sure we get  
15 behind schedule.

16 (Laughter.)

17 Okay. Good morning, everybody.

18 The staff is going to be coming up, so  
19 they can answer all your hard questions. The  
20 members will take all the easy questions.

21 Okay. Good morning, everybody.

22 The Case Review Working Group has

1 completed its review of adult penetrative sexual  
2 assault investigative case files resulting in  
3 initial disposition decisions and the subsequent  
4 case actions, if any, for cases that were closed  
5 in FY17. It has also inputted about two-thirds  
6 of the resulting data into a database for  
7 analysis by our criminologist, Dr. Wells.

8 The Committee members and staff  
9 reviewed a total of 321 out of approximately  
10 2,000 cases. The staff alone reviewed the  
11 remaining cases. The reviewed documents included  
12 the entire investigative case file provided by  
13 the Services and in preferred cases the charge  
14 sheet, the preliminary hearing report, the result  
15 of trial, and any victim input that was  
16 available.

17 The commanders and staff analyzed  
18 detailed case records in order to better  
19 understand judicial command decisions,  
20 characteristics of both the victim and subject,  
21 and other case characteristics. One objective of  
22 the CRWG is to provide a standalone report to the

1 DAC-IPAD sometime in 2020 which will provide the  
2 following:

3 It will provide descriptive data by  
4 Service from penetrative sexual assault  
5 investigations from 2017.

6 It will provide bivariate and  
7 multivariate analyses of case factors that may be  
8 predictive of whether charges would be preferred  
9 or no action would be taken in a given case.

10 Additionally, the criminologist will  
11 be analyzing whether there are any similar  
12 characteristics in cases that result in no action  
13 and acquittals.

14 And finally, it will provide  
15 subjective determinations on command decisions  
16 based on the Committee members' expertise.

17 For purposes of the CRWG's objectives,  
18 subjective assessments, as well as the reported  
19 dispositions, they were made only in relation to  
20 penetrative sexual assault. For example, if a  
21 report of penetrative sexual assault was  
22 investigated, but the accused was court-martialed

1 for a sexual contact offense, the case was  
2 reviewed as no action, in our perspective,  
3 because no action was taken on the penetrative  
4 sexual assault. Initial dispositions of the  
5 cases were categorized as follows: no action;  
6 charges preferred, or administrative action was  
7 taken.

8           Although the DAC-IPAD will later be  
9 given an opportunity to deliberate on the  
10 completed data and make future findings and  
11 recommendations based on the CRWG's completion of  
12 the project, the CRWG -- easy to say for me --  
13 wants to brief you today on its initial  
14 impressions based not on the data collected, but  
15 on the members' impressions from reading so many  
16 investigative case files and related case  
17 documents. The CRWG hopes this briefing will  
18 help the DAC-IPAD prepare for site visits in 2020  
19 by developing questions based on these findings  
20 and observations.

21           Okay. Now we're going to hear three  
22 findings and nine observations. For the three

1 findings, we recommend that the DAC-IPAD approve  
2 the CRWG continuing to explore each of those  
3 three findings. For the nine observations, we're  
4 going to recommend that the DAC-IPAD Chair  
5 approve the CRWG forwarding the nine observations  
6 to the Policy Working Group for their  
7 consideration and action they deem appropriate.  
8 And we've made the division because the three  
9 findings were in areas we thought clearly fell  
10 within the cognizance of the CRWG, but the nine  
11 observations, we're talking about Article 32,  
12 Article 33, Article 34, which now is under the  
13 province of the Policy Working Group.

14 For each observation and finding, a  
15 CRWG -- this is a real treat for you guys -- a  
16 CRWG member will explain the issue. Other CRWG  
17 members will comment, and then, the entire  
18 DAC-IPAD will have an opportunity to ask  
19 questions and raise their own comments for the  
20 CRWG or the Policy Working Group to consider in  
21 the future.

22 We will proceed one at a time. To



1 brief you on Finding No. 1, Mr. Markey.

2 MS. GALLAGHER: Before you start, if  
3 I may, if the members -- it is at tab 4.

4 BGEN SCHWENK: As I said -- yes.

5 MS. GALLAGHER: Sorry. It is at tab  
6 4. In tab 4, you also have your individual  
7 copies of the slides that are up there, but you  
8 also have another document that has relevant  
9 bullets containing observations in support of the  
10 findings.

11 Sorry. Please, Mr. Markey.

12 SGT. MARKEY: Well, thank you. Thank  
13 you, General Schwenk, Chair Bashford, and the  
14 DAC-IPAD.

15 First of all, I want to kind of  
16 express our gratitude for staff and for the Case  
17 Review Working Group. This is not an easy lift.  
18 If anybody has ever done investigative case  
19 review or any type of review of files, you  
20 realize that coding data and reading through  
21 reports is very time-consuming and tedious. And  
22 I think the Case Review Working Group did an

1 outstanding job in going through this information  
2 and trying to identify trends/patterns within  
3 these case files as best as we could.

4 I don't know if everybody has access  
5 or can see Proposed Finding No. 1. I will  
6 briefly read it, so everybody is aware.

7 "Statements of sexual assault victims  
8 taken by military criminal investigators often  
9 lack sufficient detail and appropriate follow-up  
10 questioning by the investigator. The lack of  
11 detail and follow-up questioning in these  
12 statements made it difficult to properly assess  
13 an appropriate disposition for the case." And  
14 that was from the Case Review Working Group's  
15 observations and findings. It kind of has two  
16 ramifications.

17 One is, if we're finding it difficult  
18 through the lack of clarity or the lack of  
19 follow-up with statements -- or in some instances  
20 there was no statement that we could find within  
21 the case file, and yet, a decision authority is  
22 trying to determine whether they should take

1 action or no action in a case -- we found that  
2 very difficult for somebody without appropriate  
3 documentation information to actually make a  
4 sound decision about the case and whether it  
5 would move forward or not.

6 The other side, which I noted in Mr.  
7 Christensen's written statement, is about the  
8 investigation. And that is these investigations  
9 are not stagnant. So, there is not a statement  
10 and the investigation is over. There's  
11 continuing to be investigative follow-up,  
12 questioning of witnesses, identification of  
13 evidence and information that comes into the  
14 investigation.

15 When a statement is taken originally,  
16 sometimes there's information that's developed  
17 through the investigation that requires  
18 clarification or have the victim an opportunity  
19 to respond to some of the information that's  
20 developed in this case file. We did not see that  
21 occurring. It seemed like the initial interview  
22 with the victim was a one-time investigative

1 questioning, and there appeared to be little, if  
2 any, follow-up.

3           There also appears to be perhaps in  
4 some of the cases additional documentation that  
5 may be important in making a decision on these  
6 cases, whether they move forward or not, and  
7 that's through the availability of potential  
8 recordings of these interviews. And so, one of  
9 the questions would be, does the decision  
10 authority have access to those recordings to  
11 maybe clarify some questions? Or maybe some  
12 information was not documented in the report that  
13 might be in the recorded interview that would be  
14 important for them to try to make a more decisive  
15 or a better decision in the process.

16           And so, those are some of the  
17 observations and the findings that we had in  
18 relation to Finding 1.

19           BGEN SCHWENK: Others here, CRWG  
20 members or staff?

21           CHAIR BASHFORD: One of the things we  
22 noted, there were occasionally more than one

1 interview. But, by that time, there was almost  
2 always a victim legal counsel. Some made the  
3 victim available for the interview. Others said,  
4 send me written questions and I will pose them to  
5 my client and send you back. That's just not a  
6 very good method of developing information.

7 And I noted in one of our comments  
8 here there was rarely an attempt, once the  
9 suspect had been interviewed and gave usually a  
10 different version, there's was never an attempt  
11 to try to go back and see what the response was.  
12 And it's hard to know whether there simply wasn't  
13 an attempt to do it or whether the attempt was  
14 rebuffed under the theory that we don't want,  
15 they don't want the client to have to answer  
16 questions over and over again.

17 HON. WALTON: Are these interviews  
18 being conducted by trained, experienced sex  
19 offense investigations, as is the case in most  
20 well-developed police departments? I mean, it  
21 takes special skills in order to appropriately  
22 question individuals who have been subject to

1 sexual assault. So, if that's not happening,  
2 then I would suspect that that may be  
3 contributing to the problem.

4 SGT. MARKEY: I would answer that in  
5 two ways. One, yes, MCIOs are conducting these  
6 interviews. Two, we don't know the experience,  
7 training, skill set that those investigators  
8 might have when they're conducting the  
9 interviews. Three -- I said two; I'm going to go  
10 to three -- we don't know the directives that  
11 these investigators are given as far as what sort  
12 of interview process they're being asked to  
13 complete. So, there's a lot of unanswered  
14 questions that we would like to, obviously, look  
15 at further. But we believe that MCIOs are  
16 conducting these interviews. We just don't know  
17 to the degree of experience or skills that they  
18 may have.

19 If anybody else has --

20 BGEN SCHWENK: I know that previous  
21 advisory committees have looked into the skill  
22 level, and MCIOs say they have clear policies

1 that in a sex assault case it has to be a sex  
2 assault-trained investigator that's doing the  
3 investigation under supervision of the local  
4 office. But we will follow up on that when we do  
5 the interviews with people out in the field and  
6 we do the panels in the future with the MCIOs,  
7 and be able to have in our report back detailed  
8 information on exactly that issue of the training  
9 and experience.

10 I know Colonel Christensen, one of his  
11 written comments on experience being a problem  
12 didn't just talk about prosecutors and defense  
13 counsel, but also talked about investigators.  
14 So, we'll definitely look at that.

15 One thing, when you look at these  
16 findings, the findings were, as careful as the  
17 CRWG can be, carefully crafted to only talk about  
18 our perception, our observation, that we felt  
19 strongly enough to say, to recommend the finding  
20 without going into what questions we should ask  
21 as a result, what issues we should look at, and  
22 where we might come up with possible

1 recommendations to answer the finding.

2 So, today, if you have thoughts, just  
3 like Judge Walton did, of things we should talk  
4 about, this is a great place to say, look into  
5 this; look into that; this might be a reason, or  
6 this might be something worth looking at.

7 CHAIR BASHFORD: General Schwenk, are  
8 you asking the Committee's approval for the Case  
9 Review Working Group to continue looking at this  
10 finding?

11 BGEN SCHWENK: Yes, I am.

12 HON. GRIMM: I move that.

13 DR. MARKOWITZ: Second.

14 CHAIR BASHFORD: Any opposed?

15 (No response.)

16 CHAIR BASHFORD: It's back to you.

17 BGEN SCHWENK: Okay. Finding No. 2,  
18 and Ms. Tokash?

19 MS. TOKASH: Proposed Finding No. 2  
20 was that investigators need more direction --  
21 excuse me -- discretion to tailor the  
22 investigation to the specific facts of the



1 complaint. There needs to be a mechanism early  
2 in the investigation for assessing complaints for  
3 closure, where appropriate.

4 And then, we had four subcategories to  
5 this proposed finding, and those were:

6 That the investigation and resolution  
7 of sex assault complaints frequently take longer  
8 than the facts necessitate;

9 (b) All complaints receive the same  
10 level of investigation without the investigation  
11 being tailored to the allegation;

12 (c) In some cases, investigations  
13 continue, irrespective of the victim's  
14 preference, even when the victim asserts there  
15 was no sex assault or where the elements of a sex  
16 assault were not established.

17 And then, finally, (d) our review of  
18 investigative case files leads us to conclude  
19 this practice of untailored investigations is not  
20 an effective use of time and resources, and it  
21 confirms our previous finding from March 2019,  
22 which is listed below, which was based on

1 testimony from military investigators.

2           So, this proposed finding really was  
3 borne out of our deep dive into these cases. And  
4 I have experienced as recently as yesterday, it  
5 was a delayed report case that I reviewed, and  
6 half of the NCIS investigative file included a  
7 photo packet, a very detailed photo packet of the  
8 crime scene that at this juncture was three and a  
9 half years old. And there were new residents  
10 living in the facility. So, perhaps there could  
11 have been a better use of time for the  
12 investigators rather than go out and take  
13 pictures that, according to their documentation,  
14 took over seven and a half hours with probably  
15 little to no evidentiary value, at least from  
16 what I could see, based on my review. And that's  
17 not a standalone case.

18           We were finding that in many of the  
19 cases that we reviewed that, if a victim said, "I  
20 was not sexually assaulted," from a prosecutor's  
21 perspective, that's a probable cause threshold.  
22 If a victim is saying, "I was not sexually

1 assaulted," an element of the crime is not being  
2 met. And so, one would think that the  
3 investigation could be wrapped up and closed.  
4 However, what our review has seen is that the  
5 investigation continues, irrespective of the  
6 victim's preference and irrespective really of  
7 the needs of that particular investigation.

8 I almost liken it to -- and maybe Dr.  
9 Markowitz would appreciate this -- but if you go  
10 to a doctor and say, "My head hurts," but, then,  
11 the doctor completes a full body examination and  
12 is focusing on tendinitis in another part of your  
13 body, while that may be troublesome, you're  
14 really there because your head hurts.

15 We're finding that these  
16 investigations are not being tailored to the  
17 particular crime, and it's this broad brush  
18 stroke, and we're finding that resources are not  
19 really being adequately put where they should be.

20 And we were really backed up by the  
21 panel of military investigators that we heard  
22 from who said, "I've been doing this for decades,

1 and yet, I don't have the discretion from my  
2 headquarters to say this is a wrap; I can close  
3 this case." They're being made or forced to  
4 continue down the road of continuing fruitless  
5 investigations just to check blocks that their  
6 commands are requiring them to check.

7 BGEN SCHWENK: This is sort of like  
8 "Back to the Future," as Ms. Tokash said. The  
9 investigators told us that. They told previous  
10 panels that. Nothing seems to be done, has been  
11 done thus far -- well, I guess some minor things  
12 have been done. But we want the opportunity to  
13 take a deeper look at it and go out and ask some  
14 specific questions on solutions, not just  
15 understanding the scope of the problem, but  
16 figuring out, is there something we can propose  
17 that might help alleviate the concern that the  
18 investigators have and the resulting adverse  
19 effect on the entire rest of the process by  
20 dragging things on so long? And so, that's why  
21 we're asking the panel's approval to continue to  
22 work on this.

1                   CHAIR BASHFORD:  Another thing we saw  
2                   is, because it seems to be checklist-driven, that  
3                   one of the early stages is sort of canvassing  
4                   fellow soldiers about both the victim's and the  
5                   suspect's behavior/character, which would never  
6                   -- it's not going to lead to admissible evidence.  
7                   And what it really has the tendency to do is  
8                   that, if there were people who are unaware of the  
9                   allegation, they're now aware of the allegation  
10                  because they've been asked, "What do you know  
11                  about this one" or "What do you know about that  
12                  person?"; things I never see in the civilian  
13                  world, going to ex-girlfriends, ex-wives, ex-  
14                  boyfriends and asking about, "What was your  
15                  relationship like with this person?"  It's very,  
16                  very common in these investigations and it is  
17                  very time-consuming, and it doesn't advance the  
18                  investigation at all.

19                  HON. GRIMM:  Just a question to Ms.  
20                  Tokash and for our Chair.  And the reason for  
21                  that, as supplemented by the testimony of the  
22                  investigators themselves, is that this checklist

1 system, this do all these things in all cases, no  
2 matter whether they seem to make sense or will  
3 provide evidentiary value at all, is because  
4 there are directives from the top-down saying, in  
5 each case you have to do this?

6 MS. TOKASH: Yes.

7 HON. GRIMM: And that, then, supplants  
8 the individual judgment of an experienced  
9 investigator as to what is required in this  
10 particular case?

11 MS. TOKASH: That's what their  
12 testimony was, yes.

13 HON. GRIMM: And that seems to be  
14 borne out by what you were seeing?

15 MS. TOKASH: Yes.

16 CHAIR BASHFORD: We did not ever have  
17 the impression that the investigators thought --

18 HON. GRIMM: That was the way to  
19 really do it?

20 (Laughter.)

21 CHAIR BASHFORD: Or taking pictures of  
22 a --

1 HON. GRIMM: A few years later?

2 CHAIR BASHFORD: -- of a house  
3 sometimes seven, eight, nine years later was very  
4 terribly value. And we saw many cases where the  
5 current occupants wouldn't let them in. And so,  
6 there's pictures of the front door of the house  
7 and the outside of the house.

8 (Laughter.)

9 CHAIR BASHFORD: And it's well  
10 meaning, but they're doing it because they have  
11 to do it.

12 MS. TOKASH: Right.

13 MS. TAGERT: Just for clarification,  
14 the direction of the checklist, or where that  
15 comes down from, it's not at the top levels of  
16 the MCIOs. They clarified that with us after a  
17 previous meeting. However, we see checklists in  
18 the majority of the case files. So, we're not  
19 sure where the direction to have the checklists  
20 comes from.

21 CHAIR BASHFORD: And just in contrast,  
22 civilian investigators often have checklists, but

1 they use the portions of the checklist that apply  
2 to the particular facts or incident at issue.  
3 So, just because it's a checklist, you don't have  
4 to check everything off. You check off the  
5 relevant things.

6 SGT. MARKEY: Chair Bashford, just one  
7 comment. I understand the principle behind  
8 contacting ex-girlfriends, ex-wives, if you go  
9 with the premise or the principle that a lot of  
10 these offenders are serial offenders and you may  
11 get other disclosures from those folks. So, I do  
12 see the value on a limited basis of identifying  
13 potentially other victims that may not have come  
14 forward, but have information.

15 But we also saw previous commanding  
16 officers, previous platoon, military folks that  
17 they worked for asking about, "Was this person a  
18 nice person?", "Was this person well-behaved?",  
19 "Did you see other attributes that were  
20 concerning about their behavior towards other  
21 people?" in even years previously.

22 And so, I think there has to be a



1 balance, and I think that comes with maybe  
2 training and experience and knowledge and skill  
3 sets and direction for the investigators.

4 CHAIR BASHFORD: So, General Schwenk,  
5 are you asking for the Committee's permission for  
6 the CRWG to continue investigating this finding?

7 BGEN SCHWENK: I am.

8 HON. GRIMM: So moved.

9 SGT. MARKEY: Second.

10 CHAIR BASHFORD: Any opposed?

11 (No response.)

12 CHAIR BASHFORD: It's back to you  
13 General Schwenk.

14 BGEN SCHWENK: Okay. On to Proposed  
15 Finding 3. And Proposed Finding 3 is Ms. Cannon.

16 MS. CANNON: Thank you.

17 With regard to Proposed Finding 3, we  
18 found that, immediately following an allegation  
19 of sexual assault, the subject's command  
20 routinely imposes some form of administrative  
21 action, including, but not limited to, suspension  
22 of security clearances, administrative holds

1 prohibiting favorable personnel actions such as  
2 promotions, educational opportunities, moves, and  
3 awards. These actions have negative personal and  
4 professional impact on the subject.

5 And when you look at the relevant data  
6 regarding this finding, you see that a  
7 significant percentage of the cases result in no  
8 action taken. And yet, action has been taken  
9 against the suspect. In an average of 180 days  
10 before the no action is taken, that suspect is  
11 going through these problems that arise on the  
12 initial accusation being filed.

13 So, some of this occurs, and a lot of  
14 it, before the process, which would be comparable  
15 to due process. I come from state. And in the  
16 State practice in California, if an investigation  
17 is going on and there's no formal complaint and  
18 process beginning, a person's life isn't  
19 derailed. When they're arrested, they could post  
20 bail, but it's still not necessarily derailed.  
21 Whereas, in the military, it can truly have deep  
22 effects on the accused.

1                   And not only the freezing in place or  
2                   the flagging that's referred to, the fingerprints  
3                   and DNA being submitted, what happens is, let's  
4                   say no action is taken, which is what we're  
5                   concerned about here. No action is taken in a  
6                   significant number of these cases. Now that  
7                   Serviceperson is supposed to go back to their  
8                   life, but their life has been put on hold or  
9                   negatively impacted. So, they're no longer  
10                  really promotable in comparison to their peers.  
11                  They no longer have the ability to increase their  
12                  earnings, retirement. All kinds of things are  
13                  impacted. And what often happens is they leave,  
14                  and you lose valuable members of the Service  
15                  because of a process that doesn't really protect  
16                  them in the beginning.

17                  There are some suggested areas to look  
18                  into. Can we distinguish more serious cases from  
19                  less serious, so that these kinds of early  
20                  actions against a suspect could be avoided in the  
21                  less serious? Would that be something to look  
22                  at? And maybe waiting until probable cause

1       determinations are actually imposed. So, those  
2       were some of the ideas that we were proposing as  
3       areas to look into.

4                   CHAIR BASHFORD: One of the things,  
5       there's simply absolutely nothing analogous in  
6       the civilian world that, before an arrest is  
7       made, so before somebody decides there's probable  
8       cause and an arrest is made, there's nothing that  
9       happens to somebody's who's being investigated.  
10      And a lot of times somebody investigated has no  
11      idea they've ever been investigated if no charges  
12      are going to be brought.

13                   The other thing we saw is that the  
14      fingerprints and DNA are often taken and sent  
15      out, DNA to CODIS, fingerprints to the FBI,  
16      before any decision has been made to bring  
17      charges. Again, there's nothing analogous to  
18      that in the civilian world. If you want DNA from  
19      an uncharged person you're investigating, you  
20      have to get judicial approval. Sometimes you  
21      have to get counsel assigned. But it's not just  
22      somebody says, "Okay, I think we have probable

1       cause," and off it goes.

2                   And again, coming from the civilian  
3 world, I don't think -- certainly I did not have  
4 any understanding of how serious and sometimes  
5 permanent missing promotion opportunities while  
6 the investigations go on, missing chances to go  
7 to certain schools, and the fact that your career  
8 can be on hold for that period of time -- and  
9 again, the six months was an average; some are  
10 longer -- can completely derail a career. And  
11 that was something that certainly is not  
12 immediately obvious to me, but we heard a lot of  
13 testimony about that.

14                   CSMAF MCKINLEY: One of the things I'm  
15 concerned about is the impact on the accused and  
16 also, the victim, is retainability in the  
17 military. When we go out and we recruit members  
18 to our military, by the recruiting process until  
19 the time we get them to the basic training or  
20 officer training, and then, we get them to their  
21 first day of duty, actual duty, we've probably  
22 spent hundreds of thousands of dollars on that

1 person. Who haven't gained a day of work from  
2 that person yet, other than the training, and so  
3 forth, they went through.

4 And we've asked this before from each  
5 one of the Services in these meetings. When we  
6 have a victim, once the victim goes through  
7 trial, whether or not the accused is convicted or  
8 not, what is the retainability of the victim?  
9 And no Service tracks that. And also, for the  
10 suspect.

11 The Chair says that many things impact  
12 that person's career from minute one. You can't  
13 go to professional military education. You can't  
14 carry a weapon. Can't do a permanent change of  
15 station. All these things, and this could go on  
16 for a couple of years. And we do not track the  
17 retainability of those suspects.

18 So, each member of our military from  
19 the time we go out and recruit them and train  
20 them, they're a valuable, valuable member to our  
21 military. But, yet, for these cases, we don't  
22 track the retainability of how many people just

1 choose to get out because they don't like the  
2 system; they don't like how they were treated.  
3 So, I think it's really important that each  
4 Service come up with a way to track the  
5 retainability of our victims and, also, the  
6 suspects who have been found innocent.

7 CHAIR BASHFORD: And I think the  
8 restrictions and flagging have to be looked at in  
9 connection with the fact of -- it's in the data  
10 -- how many of the sexual assault complaints  
11 resulted in no action being taken, not an  
12 acquittal at a court-martial. I mean, that can  
13 happen, but no charges were ever preferred. And  
14 we've got to look at it in that context, too, I  
15 think.

16 BGEN SCHWENK: And just for the  
17 public, because I don't think they have -- do  
18 they have these, the numbers? No? Their honor  
19 sheets? No? The numbers range from the 60s to  
20 the 70 percent that result in no action cases.  
21 So, we're not talking about a small, you know, 5  
22 percent, which we would still worry about. But

1 when you're talking about 60 to 70 percent of all  
2 the people that are, suspects that are placed in  
3 this situation, end up with no action at the  
4 other end, it definitely got my attention.

5 And so, yes?

6 MS. TAGERT: I would just add that  
7 it's not just no action. These are cases where a  
8 judge advocate has found that there's no probable  
9 cause for indexing. So, there has been an  
10 attorney weighing-in on the probable cause for  
11 the penetrative sexual assault.

12 BGEN SCHWENK: So, Ms. Bashford, we  
13 recommend --

14 CHAIR BASHFORD: Are you asking the  
15 Committee's approval for the Case Review Working  
16 Group to continue to explore this issue?

17 BGEN SCHWENK: Yes, I am.

18 HON. WALTON: So moved.

19 MS. TOKASH: Second.

20 CHAIR BASHFORD: Any opposed?

21 (No response.)

22 BGEN SCHWENK: Okay. Now things are



1 going downhill on the quality of our briefers.

2 (Laughter.)

3 BGEN SCHWENK: Ms. Bashford?

4 (Laughter.)

5 CHAIR BASHFORD: Okay. Now we were  
6 starting out with observations. So, Article 30  
7 of the UCMJ directs that commanders and convening  
8 authorities determine what disposition should be  
9 made of charges in the interest of justice and  
10 discipline.

11 Our review of investigative files,  
12 Article 32 reports, Article 34 advice, and the  
13 disposition action of commanders and convening  
14 authorities found, in cases where there was an  
15 indication of the rationale for the disposition  
16 decision, consideration primarily of the  
17 following factors:

18 We saw consideration of probable  
19 cause, sufficiency of the evidence, multiple  
20 victims, victim preference, and the declination  
21 of other jurisdictions to prosecute. These  
22 factors seemed to be considerations concerning

1 the interest of justice, but we didn't see  
2 considerations, at least articulated, concerning  
3 the interest of discipline.

4 So, people had very different views of  
5 this. Some thought that it was a subjective and  
6 vague standard that should not be used, and 180-  
7 degree different, that it sounded right, and what  
8 other standard would you use?

9 So, I think we want to refer this to  
10 -- and we'll do this at the end -- to the Policy  
11 Working Group to see what should this mean. Does  
12 it mean that there's probable cause? Does it  
13 mean that there's sufficient admissible evidence?  
14 Really, what does the best interest of justice  
15 and discipline entail?

16 BGEN SCHWENK: Yes, we understood that  
17 the purpose of military justice is not solely  
18 justice, but it is also good order and  
19 discipline. And so, it's pretty apparent that in  
20 the interest of justice and discipline means in  
21 the interest of justice and good order and  
22 discipline.

1           But what was I guess perplexing to me,  
2           in particular, was, when we saw the case  
3           disposition reports and they wrote down, as Chair  
4           Bashford said, the reasons for the disposition,  
5           they all went to the justice side. They were all  
6           legal considerations. And rarely -- I mean I  
7           never saw one, so I'll say rarely; maybe somebody  
8           wrote it down -- that adverse effect on the  
9           command of some specific was never written down.

10           So, I'm not sure what exactly it  
11           means. And so, even though I'm the one that  
12           said, because the purpose is justice and  
13           discipline and military justice, it sounds like a  
14           good standard to me, I don't know what the  
15           standard really means. And so, I thought since I  
16           didn't have to do it CRWG, it was worth having  
17           the Policy Working Group put it on their list of  
18           issues to look at.

19           CHAIR BASHFORD: Judge Grimm?

20           HON. GRIMM: It seems to me that this  
21           is a fundamental issue. Because this whole  
22           process of these committees has come in when

1 criticisms were rendered five-ten years ago about  
2 the way in which the military was handling these.  
3 The suggestion was, well, let's remove sexual  
4 offense from the jurisdiction of the military  
5 court-martial system; let's give it to civilians  
6 who have the investigators who have the  
7 discretion to do more than check the box. Let's  
8 give it to prosecutors who have spent a whole  
9 career prosecuting this. Let's give it to  
10 defense attorneys who know how to defend. Let's  
11 have the protections of due process. Let's get  
12 people who can provide therapy and treatment for  
13 the victim. Let's just take it away.

14 And the response from the military  
15 was, oh, no, we need this; we can do it; we can  
16 do better. And when you look at the dedication,  
17 the development of all of these systems, the  
18 special victims' system, extraordinary effort put  
19 on there. When you look at the sincerity of the  
20 people who have testified before us who have been  
21 trained and are committed to doing the right job,  
22 but, then, when you look at it in the notion of a

1 year and a half as a prosecutor, a judge for 12  
2 months, you look at investigators who have to  
3 check the box, and you ask yourself, why is it  
4 that if you're going to have three or four of  
5 these advisory committees recommend that things  
6 be done, and they are not done, then why is it  
7 that the military should be allowed to continue  
8 to prosecute this tranche?

9           And it's particularly important, it  
10 seems to me, if they can't articulate why the  
11 good order and discipline, which is the  
12 justification -- the military justice system not  
13 only prosecutes things that are offenses in the  
14 civilian community, such as assault or theft or  
15 sexual assault, but it also prosecutes for  
16 disrespect or disobedience of an order or AWOL or  
17 failure to repair, things that are unique to  
18 maintaining discipline.

19           And if there is no ability to be able  
20 to articulate how it is that the prosecution of  
21 these cases contributes to good order and  
22 discipline, as opposed to justice, then why is it

1 that the military should continue to have these  
2 cases? That's existential as far as I am  
3 concerned. It seems a fundamental question to  
4 me.

5 CHAIR BASHFORD: But one thing we also  
6 observed is there were a number of cases we saw  
7 where there was dual jurisdiction between the  
8 civilian authorities and the military. And at  
9 least of the ones that I saw, sometimes the  
10 civilian authorities would take it for a couple  
11 of days, and then, say, "Back to you." And  
12 sometimes the civilian authorities would say,  
13 "It's yours" from day one. I certainly didn't  
14 see a great appetite from civilian prosecutors  
15 for taking these cases.

16 BGEN SCHWENK: Any other comments from  
17 anybody on Observation 1? And we'll hold the  
18 recommendation on the observations until we get  
19 to Observation 9.

20 (No response.)

21 BGEN SCHWENK: Okay. Observation 2,  
22 and if experience makes people better, then

1 here's another chance to excel for Ms. Bashford.

2 (Laughter.)

3 CHAIR BASHFORD: That was a very  
4 amorphous one.

5 Our second observation is that, "In  
6 many cases the victim's preference as to  
7 disposition seems to receive more weight by  
8 convening authorities than the consideration of  
9 whether admissible evidence will likely be  
10 sufficient to obtain and sustain a conviction in  
11 a trial by court-martial. The Article 33 non-  
12 binding disposition guidance may not give  
13 appropriate weight to the sufficiency of the  
14 evidence factor."

15 What we saw was that the complainant's  
16 preference seemed to be binding on the  
17 authorities. And that's certainly appropriate in  
18 most cases. When there is a declination to go  
19 forward, I could envision some horrific case  
20 where you would want to spend a lot of time  
21 trying to change that declination for safety  
22 purposes to the general community. But wanting

1 to have a trial shouldn't be the only thing  
2 that's being looked at.

3 So, we thought that, if you don't have  
4 enough evidence to obtain and sustain a  
5 conviction, you shouldn't pass go. But, since  
6 these are just sort of a lumped menu of factors  
7 that can be considered, it's very hard to know  
8 which factors were considered. Sometimes the  
9 convening authority did say which ones were  
10 considered, but there was never any weighting of  
11 them. And what we saw was that the victim  
12 preference seemed to be the most heavily weighted  
13 of any of them. And we heard that certainly from  
14 the Air Force testimony last time, that if the  
15 victim wanted to go forward and they had probable  
16 cause, then off they went.

17 We just think that saying that you  
18 have admissible evidence to sustain a conviction  
19 should be given equal weight. Because if you  
20 don't, then what are you doing?

21 DR. MARKOWITZ: Chair Bashford, are  
22 you saying that in your review you saw that



1 across all of the Services? Or are you saying  
2 that, in response to what we heard from testimony  
3 last time, this is your recommendation, that none  
4 of the Services -- that all of the Services  
5 should be considering this as the standard?

6 CHAIR BASHFORD: We saw most of it as  
7 declinations, I think.

8 DR. MARKOWITZ: Okay.

9 CHAIR BASHFORD: But I think you  
10 absolutely have to look at what evidence you have  
11 available to you in weighing these, as opposed to  
12 this being given the most weight.

13 DR. MARKOWITZ: Got it. Thank you.

14 BGEN SCHWENK: From my perspective, I  
15 mean, when I started looking at the low acquittal  
16 rate and wondering why is there a low acquittal  
17 rate, there obviously can be many --

18 CHAIR BASHFORD: High acquittal. High  
19 acquittal.

20 BGEN SCHWENK: Oh, high acquittal  
21 rate. Sorry. Thank you.

22 High acquittal rate, there are

1 obviously many reasons, but one of the reasons I  
2 thought was, how important is considering the  
3 likelihood of success of conviction at trial?  
4 And in looking at that, boy, you would see the  
5 Article 34 advice letter where you think it might  
6 be raised, and it's a checklist letter. It's  
7 just not even discussed.

8           And the answer, of course, from the  
9 panels we had is it's discussed in private with  
10 the convening authority, but it's not written  
11 down. And that made me think I'm not sure what  
12 they're considering, and I'm not sure that the  
13 current system of having likelihood of conviction  
14 given the same weight as all the others and not  
15 pulled out, when you're talking about a court-  
16 martial, makes sense. Maybe it does, but I  
17 wasn't sure it did. And so, I thought that was a  
18 good observation and one that we ought to forward  
19 to the Policy Working Group.

20           MS. TOKASH: And I think we have to  
21 also think about -- this is Meghan Tokash -- the  
22 message that it sends to victims. From being a

1 former Army Special Victim Prosecutor, when  
2 something was referred to court-martial, the  
3 victims that I interfaced with as the prosecutor  
4 felt confident in my ability, that they were  
5 going to seek justice via a conviction.

6 And I think we have to be cognizant of  
7 the fact that we might be setting victims up for  
8 failure or creating this great expectation that  
9 just might not come to fruition because we just  
10 don't know how a panel is going to receive the  
11 evidence and deliberate on it, and ultimately,  
12 vote.

13 So, it's something that certainly I,  
14 as a case reviewer, had in the front of my mind  
15 while reviewing these cases, you know, that that  
16 should be something -- the ability to obtain and  
17 sustain a conviction has a direct correlation to  
18 how we treat victims really and how we service  
19 them.

20 HON. GRIMM: The distinction being,  
21 from your point of view, that probable cause  
22 being a much lower threshold than beyond a

1 reasonable doubt, which is what you need for  
2 conviction? That somehow the difference between  
3 those two standards is lost in the value to  
4 process it?

5 MS. TOKASH: Right, and especially, I  
6 mean, the Air Force was very overt about it.  
7 They said, "We just need probable cause and a  
8 victim preference, and then, we're a go." It  
9 seems problematic, not only from the case files  
10 that we reviewed, but also from victims that  
11 we've heard testify before us, and then, also,  
12 from my comparative experience now. It could be  
13 harmful.

14 CHAIR BASHFORD: And just to be clear,  
15 we're not suggesting in any way that only cases  
16 you think you're going to win should go forward,  
17 because there are many cases where you have  
18 sufficient evidence to sustain a conviction and  
19 you think, boy, this one is going to be really,  
20 really tough and I very well may not prevail, but  
21 it should go forward. But that's because you  
22 believe you have the evidence to meet that

1       burden.

2                   MS. TOKASH: Uh-hum, uh-hum.

3                   MS. GALLAGHER: If I may interject,  
4 with regards to the Article 33 non-binding  
5 guidance, the Case Review Working Group was  
6 certainly aware that that was not in effect until  
7 January of this year. However, the observation  
8 itself is irrespective of the non-binding  
9 guidance. It deals with the sufficiency of the  
10 evidence and the victim's preference, which came  
11 across clear through the materials that they did  
12 review.

13                   And the observation is that, going  
14 forward, the Policy Working Group should look at  
15 how Article 33 is factoring that in, now that it  
16 is in effect. And many of the Services did  
17 respond in the RFIs that practice is not  
18 necessarily going to change, based on the Article  
19 33 non-binding guidance factors because they were  
20 already observing those in practice.

21                   BGEN SCHWENK: Okay. Well, since Ms.  
22 Tokash has got her voice warmed up, we'll let her

1 do Observation 3.

2 MS. TOKASH: Observation 3, "While  
3 judge advocates often provided investigators  
4 advice on probable cause for submission of  
5 fingerprints" --

6 BGEN SCHWENK: Could we get the  
7 slide --

8 MS. TOKASH: Oh, sorry.

9 BGEN SCHWENK: -- for Observation 3,  
10 please?

11 MS. TOKASH: Sorry about that.

12 "Probable cause for submission of  
13 fingerprints and DNA to federal databases. It is  
14 unclear what, if any, advice on appropriate  
15 disposition factors, including advice on probable  
16 cause, judge advocates provided to the initial  
17 disposition authority."

18 So, from our review of the case files,  
19 it was unclear in the materials that we reviewed  
20 when and how initial disposition decisions were  
21 made, whether commanders received advice, whether  
22 there was any discussion of probable cause, and

1 if probable cause was met. It was very hard to  
2 understand whether there was a system for  
3 initiating and/or declining prosecution. It  
4 seemed that the PC requirement comes a lot  
5 farther down the road instead of at the initial  
6 disposition.

7 Some of the members of our  
8 subcommittee found that or believed that judge  
9 advocates should make written probable cause  
10 determinations, and that if there is no probable  
11 cause, the investigation should be closed.

12 From a comparative perspective, as I  
13 was reviewing these, I considered the initiation  
14 and declination of cases requiring a probable  
15 cause requirement with the U.S. Attorney's  
16 manual; and that, if there is a failure to  
17 establish probable cause, that is an absolute bar  
18 to prosecution. And based on the review of our  
19 cases, we were seeing some preliminary hearing  
20 officers saying there's no probable cause, and  
21 then, a staff judge advocate recommending that a  
22 case going forward, and the convening authority

1 accept that. And that seems to be problematic  
2 from where I sit as a practitioner, if you have a  
3 judge advocate saying that probable cause was not  
4 established.

5 CHAIR BASHFORD: One other thing,  
6 again, there's just nothing analogous in the  
7 civilian world to this determination, the  
8 decision to go forward pre-preferred, of taking  
9 fingerprints and DNA. And we've seen cases where  
10 the complainant's statement simply didn't  
11 articulate a crime. And yet, there's a PC  
12 determination made a week later for the DNA and  
13 the fingerprints, and then, ultimately, the  
14 decision is there's no PC even for a case.

15 So, there seems to be multiple  
16 standards of probable cause floating around.  
17 We're not really sure who's making them. You  
18 have some of the findings and recommendations  
19 from 2019 here. So, certainly we saw a lack of  
20 clarity in how that was made.

21 I saw one where there's a PC for  
22 fingerprints, but no PC for DNA from the same



1 case.

2 So, I think everybody was a little bit  
3 confused about what that means, the practitioners  
4 as well.

5 Are there any questions of Ms. Tokash?

6 (No response.)

7 BGEN SCHWENK: Okay. On to  
8 Observation No. 4, and this one is back to Mr.  
9 Markey.

10 SGT. MARKEY: Thank you, General  
11 Schwenk.

12 You know, I just realized that case  
13 progression, we're working downstream farther and  
14 farther with each one of these observations and  
15 findings, which is interesting, like you would  
16 work through a case.

17 So, No. 4 Observation, "The initial  
18 disposition authority often did not identify  
19 which factors were considered significant in the  
20 disposition decision and currently is not  
21 required to do so. This created, or appeared to  
22 create, some impact or effect on the credibility,

1 consistency, and transparency of how these  
2 decisions are being made, which lends itself to  
3 the fact of questioning how the process is  
4 working or not working when decisions, hopefully,  
5 we believe, are being made on sound legal  
6 principles."

7           But we don't know because those  
8 decisions being made are not documented in a  
9 majority of the cases. And so, there is a  
10 presumption on the part of the review team that  
11 -- our presumption is, you know, experience and  
12 experts in the various fields -- was that these  
13 decisions were being made based on sound legal  
14 principles.

15           But I think the observation is that we  
16 need to bring that out, so that credibility, so  
17 that transparency, so the rationale behind these  
18 decisions is visible to everybody. And that  
19 would kind of take that cloak of unsure on how or  
20 why these decisions are being made, and is there  
21 bias being applied to how these decisions are  
22 occurring? And I think it would be helpful for

1 the military, the general public, and those  
2 questioning the process if that would occur.

3 One of the recommendations from 2019  
4 as well was to establish a set of standard  
5 options, whether that's something to consider or  
6 not, but that's at this point one of the  
7 recommendations for commands' disposition and how  
8 they document.

9 So, I know we've talked a lot about  
10 checklists, on considering would we create  
11 another checklist, right? I don't know if that's  
12 exactly what we would like to do, but it's a  
13 consideration. Because do some of the  
14 disposition authorities, are they unsure on how  
15 to describe how they made the decision or what  
16 factors that they should be considering? And so,  
17 that was part of the questioning and the  
18 observation that we had.

19 BGEN SCHWENK: Yes, from my  
20 perspective, we're sitting there; we're looking  
21 at the case investigative file, and now we're  
22 looking at the initial disposition decision. And

1 I'm asked the question on the form, was the  
2 initial disposition decision reasonable? And so,  
3 I make my own assessment, but, then, I'd like to  
4 know why they did whatever they did. And  
5 sometimes there's a report. In some of the  
6 reports you get a pretty good answer and you can  
7 say, oh, okay, I understand why and I still agree  
8 or disagree, or it might cause me to reconsider  
9 how I evaluated it when I see how they evaluated  
10 it. But sometimes you just don't have a clue and  
11 you're left with, well, I know what they did, but  
12 I don't know why and I'm not sure now what they  
13 did was reasonable. I sure wish I knew why, and  
14 you ring it up as unreasonable.

15 Now I don't want to give the  
16 impression that I or any of the other members or  
17 the staff found initial disposition decisions  
18 were unreasonable in any large number because we  
19 actually didn't. We overwhelmingly found they  
20 were reasonable. But the fact that you can't get  
21 the why answer was a problem.

22 CHAIR BASHFORD: I really want to

1 stress that we -- overwhelmingly is almost an  
2 understatement -- found these decisions to be  
3 reasonable. We spent hours looking through every  
4 investigative file to come to that conclusion.

5 Certainly, in transparency, if there  
6 was a little bit more of an explanation for why  
7 the commander made that decision, because not  
8 everybody's going to have access to go through  
9 the whole file, it would be helpful just for  
10 transparency.

11 BGEN SCHWENK: Okay. Anything else on  
12 that one?

13 (No response.)

14 BGEN SCHWENK: All right. Moving on,  
15 as Mr. Markey said, as we move to Observation 5,  
16 we've moved to the Article 32 world. Observation  
17 5 says, "Detailed Article 32 preliminary hearing  
18 reports containing a summary of the facts  
19 supporting the elements and the preliminary  
20 hearing officer's analysis and conclusions are  
21 useful to SVCs, VLCs, and defense counsel in  
22 advising their clients and SJAs and convening

1 authorities in rendering advice and making  
2 decisions on the charges, probable cause,  
3 jurisdiction, and dispositions."

4 Okay. We were mindful that, although  
5 we were looking at 2017 cases, and these were our  
6 impressions coming out, that the requirements now  
7 under Article 32 say that the preliminary hearing  
8 officer is supposed to do a more detailed  
9 analysis. And so, obviously, based on our  
10 observation, we think that's wonderful.

11 The question that I think this raises  
12 is, is the details that are now going to be in  
13 the Article 32 preliminary hearing reports  
14 sufficient for the purpose? From my perspective,  
15 one of the issues is likelihood of success on the  
16 merits. The preliminary hearing officer is going  
17 to have to make a recommendation of disposition.  
18 Hopefully, the preliminary hearing officer  
19 considers all the non-binding factors, even  
20 though it only says "should consider," instead of  
21 "shall consider". But, nonetheless, hopefully  
22 they do. And if they do, I hope they give what I

1 consider to be appropriate weight. But I think  
2 the Policy Working Group should look at it and  
3 see whether all that's true.

4 But there was no doubt that, when you  
5 saw the old check-the-box Article 32 report, you  
6 had a sinking feeling of not knowing why any of  
7 those boxes were checked, especially the ones on  
8 probable cause and disposition decision. And  
9 now, when you picked up your next case and you  
10 went through it, in there was somebody who  
11 actually did what we called detailed, which we  
12 really mean a careful, analytical explanation of  
13 the reasoning. It was wonderful. I mean, you  
14 could agree or disagree, but at least you  
15 understood. And so, that's what we're thinking  
16 of and that's why we made the observation.

17 CHAIR BASHFORD: Certainly, when we  
18 saw the detailed reports, they were very  
19 thoughtful and clearly took a lot of time to  
20 prepare. They were very, very helpful.

21 One of the things -- and this is no  
22 reflection on the PHOs themselves -- but you

1 would sometimes see almost a "Well, good luck  
2 with this."

3 (Laughter.)

4 CHAIR BASHFORD: Yes, there's PC, but  
5 there are serious credibility issues, again,  
6 evident just from the paperwork itself. But the  
7 PHO is like, but that I have to push down. Even  
8 though I think there are serious credibility  
9 issues, that's really not my job. And so, the  
10 thing goes downstream again, which also seemed to  
11 be -- which we'll get to in some of the later  
12 observations.

13 Any other comments?

14 CHAIR BASHFORD: Any other comments on  
15 that?

16 (No response.)

17 CHAIR BASHFORD: All right. On to  
18 Observation No. 6, and that is Ms. Cannon.

19 MS. CANNON: Yes, tailing into or off  
20 of the last, we're now in the deep dive of the  
21 Article 32 hearings. Observation 6, we found  
22 that, "Based on reviews of the investigative



1 files and Article 32 reports, the CRWG noted that  
2 sufficient evidence for a probable cause  
3 determination is not always presented at the  
4 Article 32 hearing. The Article 32 preliminary  
5 hearing officer should be presented with  
6 sufficient evidence to support a probable cause  
7 determination at the Article 32 hearing where it  
8 is subject to be challenged by the defense."

9           And by that, what we're talking about  
10 is make it a real hearing, not a paper depository  
11 of some of the investigation and holding back on  
12 others, but a true hearing that has heft and  
13 weight, where there's testimony, live testimony,  
14 of victims and there's true challenge to the  
15 evidence, and it's a vetting process, an  
16 adversarial process of determining whether there  
17 is sufficient probable cause, and giving the  
18 hearing officer the discretion and the power to  
19 make a binding decision.

20           And where it's just a somewhat limited  
21 to almost empty process, kind of an  
22 administrative process, as opposed to having any

1 kind of constitutional due process, it doesn't  
2 have the effectiveness that we could see it  
3 having. What we saw with some of the cases, and  
4 the data bears it out, is where hearing officers  
5 made a finding that there was not sufficiency to  
6 go forward, the SJA would make a decision  
7 overriding that and based on information that  
8 wasn't presented, or information that was  
9 obtained later.

10 And subsequently, the case was found  
11 to not be viable and the action was no longer  
12 taken, which kind of reinforced the finding of  
13 the preliminary hearing officer. And all of that  
14 could have been avoided, had the preliminary  
15 hearing or the Article 32 had the sufficient  
16 weight to carry the day.

17 In the comparable civilian world that  
18 I'm in, a preliminary hearing is a critical stage  
19 of the proceedings. That's a term of art that  
20 basically gives all the constitutional weight and  
21 power to all those involved, including the  
22 defense, and all the rights are there.

1           And the power of a preliminary hearing  
2 officer to look at all of the evidence, and then,  
3 say either it's not good enough or, as indicated,  
4 it may meet these very low threshold, but "Good  
5 luck, counsel, and here are the areas you're  
6 going to have a problem with." That will help in  
7 determining whether the prosecution really wants  
8 to go forward.

9           So, the question we have is, should we  
10 look at the binding ability of preliminary  
11 hearing officers? Will it affect the proper  
12 disclosure of discovery and the fairness and due  
13 process of the entire process? And should it be  
14 comparable to the civilian world where the  
15 binding authority is still subject to -- it's not  
16 without prejudice. If there's new evidence, it  
17 can be another hearing or it's subject to appeal.  
18 So, it's not the end of the story if there's  
19 other things to look at.

20           So, that's kind of the basis.

21           HON. BRISBOIS: So, this strikes me  
22 as, should we go back to the way we were doing

1 things in the '80s? Because, anecdotally, Judge  
2 Grimm and I, we were prosecutors/trial counsel in  
3 the late '80s. And the Article 32s at that time  
4 were adversarial hearings, and there were  
5 detailed recommendations and findings based on  
6 the evidence that the government had a burden of  
7 putting on, and the defense had the opportunity  
8 to impeach.

9           Somewhere we've had testimony that  
10 along the way there were changes to the rules of  
11 court-martial, and that, basically, eliminated  
12 the role and the purpose of Article 32, as we  
13 knew it as judge advocates. And it has created  
14 problems which the Case Review Working Group has  
15 now identified. Those changes appear not to be  
16 doing anything to help the process, but they're  
17 creating new problems in the process. And so,  
18 maybe an observation isn't even necessary.

19           I think we've had enough testimony.  
20 We've got enough experience with prior systems,  
21 current systems. I mean, we could almost ask the  
22 Case Review Working Group and the Policy Working

1 Group whether or not it should be a  
2 recommendation to put the substance back into  
3 Article 32. I don't know how much more work we  
4 need to do. We know it's not working.

5 HON. GRIMM: It's an interesting issue  
6 because, if you analyze it in the civilian  
7 context, which is where our experience and advice  
8 is supposed to be brought in to try to make  
9 intelligent recommendations, in the federal  
10 system the indictment process, there is no  
11 preliminary hearing. There is no evidentiary  
12 presentation at the point to decide whether  
13 there's probable cause, and that's all done  
14 before a grand jury in secrecy with the  
15 prosecution there and not the defense. So, it's  
16 non-adversarial. Once that charge is made, if  
17 additional evidence is developed, they'll go back  
18 in to the grand jury and either supersede to add  
19 charges or remove charges.

20 In the civilian community, in some  
21 context there are preliminary hearings unless  
22 there is an indictment. If you talk to any

1 prosecutor who is given their druthers, they will  
2 indict before there's a preliminary hearing  
3 because they don't want to have to go in at a  
4 stage when their preparation is far less complete  
5 than it would be a week before trial and roll the  
6 dice on having testimony from witnesses who they  
7 may not give -- and the timing the way this is,  
8 to be able to have the opportunity to prepare the  
9 way they would prepare before trial.

10 And if that circumstance occurs, you  
11 can understand why a prosecutor would say, "Well,  
12 I'm not ready. I haven't had the opportunity to  
13 be with my witness. I haven't prepared my  
14 investigator," who may be over here and I don't  
15 have access to him. So, let's just go with a  
16 paper file and put it all in there and let it go.  
17 But it's undermining what it is that the purpose  
18 of this investigation is supposed to be doing.

19 And that's a tricky thing because I  
20 think we get that in the federal system as well  
21 when we're trying to enforce discovery  
22 obligations of the federal government and saying,

1 under the Rules of Criminal Procedure, the  
2 defense has a right to have knowledge of tangible  
3 documents and things that are going to be  
4 introduced in the case-in-chief. And you know  
5 that when you've indicted. And the prosecutors  
6 will say, well, yeah, but we don't really tighten  
7 that up until a week, two weeks, three weeks  
8 before trial because of all the other cases that  
9 we have.

10 So, there's this dynamic there about  
11 whether or not there is an incentive at that time  
12 to have the best information available, whether  
13 it is available, whether there's been the  
14 preparation necessary to be able to provide to  
15 the Article 32 officer the information to be able  
16 to make not just simply probable cause, but that  
17 forecasting as to whether you should take it  
18 forward. They seem that they could be working at  
19 cross-purposes.

20 CHAIR BASHFORD: I just want to  
21 clarify one thing. Our observation is that the  
22 preliminary hearing officer should have

1 sufficient evidence presented to him or her to  
2 support a probable cause determination. Our  
3 observation doesn't include what form that  
4 evidence should take.

5 HON. GRIMM: Right.

6 CHAIR BASHFORD: And in the civilian  
7 world, again, I believe at least for federal  
8 grand juries the agent testifies as to what they  
9 learn. So, it's hearsay. In my jurisdiction,  
10 it's an indictment has to be based on non-hearsay  
11 evidence. So, you have to call the witnesses.

12 So, right now, it doesn't seem to be  
13 working. I think we've heard a lot of testimony  
14 about that. But how it can be improved I think  
15 still needs to be looked at, you know, mindful of  
16 having a victim testify more than once is to  
17 increase the trauma and, also, depending --  
18 although I don't think this is really an issue --  
19 the Article 32 does not seem to come right on the  
20 heels of the actual incident. In the old days,  
21 at least in New York State, you had six days.  
22 So, for a preliminary hearing, you would have to



1 have your victim testify within six days of being  
2 assaulted. These seem to be happening months and  
3 months and months later, but still we're mindful  
4 of the trauma that could be involved.

5 BGEN SCHWENK: I looked at this  
6 observation from a narrower standpoint, I guess.  
7 It says exactly what the previous speakers have  
8 said. There ought to be sufficient evidence for  
9 probable cause if you're going to bother having  
10 an Article 32.

11 And yet, in case after case, the PHO  
12 says no probable cause, and you sit there and  
13 think, how can that -- I sit there and think from  
14 my warped perspective, how is that possible? Why  
15 do you have the 32? You have the 32 because  
16 you're thinking of going to a court-martial,  
17 where, as Judge Grimm said, the standard is  
18 beyond a reasonable doubt. How can you be at the  
19 32 and not at least have probable cause?

20 So, then, I think, well, nowadays,  
21 since the -- in the old days, the Article 32  
22 investigating officer got to call for evidence.

1 And if the Article 32 investigating officer  
2 didn't get the evidence that the person wanted,  
3 the evaded the proceedings, you know, and the  
4 government had two choices: get another Article  
5 32 investigating officer or cough up the  
6 evidence.

7 But now they can't. The preliminary  
8 hearing officer is stuck with what's given. So,  
9 I have no idea whether trial counsel are playing  
10 some kind of game and saying, "Well, okay, I've  
11 got this pile of stuff. How little can I give in  
12 order to get probable cause without the rest of  
13 the stuff?" I have no idea what they're doing.  
14 But it's beyond my imagining that I could ever,  
15 as a trial counsel, walk in there and not be  
16 absolutely sure I have probable cause. What am I  
17 even doing there?

18 So, I looked at this observation from  
19 that narrow perspective: what is going on? And  
20 I'm going to submit questions to that effect to  
21 hear what the people in the field have to say  
22 when we go out this summer.

1 Any other comments on Observation 6?

2 (No response.)

3 BGEN SCHWENK: I see we're being  
4 prompted to move on to Observation 7.

5 MS. TAGERT: Well, I think 6 and 7  
6 were covered together, but if you want to put  
7 Observation 7 formally on the record --

8 BGEN SCHWENK: Okay. Well, we'll see  
9 what Ms. Tokash says about that.

10 (Laughter.)

11 BGEN SCHWENK: Observation 7.

12 MS. TOKASH: I actually have a lot to  
13 say about Observation 7.

14 So, that is "The lack of a binding  
15 probable cause determination by the preliminary  
16 hearing officer, allowing the staff judge  
17 advocate to come to a different conclusion on  
18 probable cause without explanation, reduces the  
19 usefulness of the Article 32."

20 We also had some relevant data to look  
21 at, including from fiscal year 2018 and fiscal  
22 year 2017. And in fiscal year 2018, 20 cases --

1 so, the convening authority still sent 20 cases  
2 where the preliminary hearing officer said no  
3 probable cause forward to a court-martial. In  
4 fiscal year 2017, convening authorities sent 32  
5 cases forward where a preliminary hearing officer  
6 said no probable cause.

7 And I think that if there's anyplace  
8 for a checklist -- I know we were joking about it  
9 -- but this would be the place for a checklist.  
10 And again, sitting where I am, now having  
11 comparative experience as both a former Army  
12 Special Victim Prosecutor and now a federal  
13 prosecutor and a United States Attorney, the  
14 Justice Manual I think provides the best  
15 guidance. And it's really, I think, the easiest  
16 guidance to look at to really determine whether  
17 you should initiate or decline prosecution. And  
18 that's 9-27.200. So, this is the initiating and  
19 declining prosecution. That's the probable cause  
20 requirement.

21 And this is made at the stage where I  
22 have an FBI agent or a Homeland Security agent

1       come to me, brief the case. We might want to  
2       throw up a wire. We might want to get a couple  
3       of search warrants out, sealed search warrants.  
4       But that case agent is going to brief me on the  
5       facts.

6                   And based on that, if I determine  
7       there's probable cause -- and the comments in the  
8       Justice Manual make it clear that the judgment is  
9       left up to the attorney for the government. Now  
10      I might consult with a supervisor or my criminal  
11      chief, but, in large part, probable cause is a  
12      determination that, hopefully, every lawyer  
13      should be able to make. If I determine there's  
14      probable cause to initiate a prosecution, I  
15      should task my agent with either further  
16      investigation or I should start or recommend  
17      prosecution by opening a case jacket, or decline  
18      prosecution, refer it to another jurisdiction, or  
19      decline prosecution and recommend pretrial  
20      diversion or some form of non-criminal action, or  
21      decline it without action. And if I decline it,  
22      I'm required, also by the Justice Manual, in

1 writing to specify why I found there was no  
2 probable cause, why I believe that the case  
3 should be declined.

4 And the comment section of that  
5 portion of the Justice Manual says, "The probable  
6 cause standard is the same required for issuance  
7 of an arrest warrant," or anytime I go in front  
8 of a magistrate to get a criminal complaint  
9 signed or any type of a search warrant.

10 And again, as I said before, the  
11 Justice Manual states in the comments that,  
12 "Failure to establish probable cause is an  
13 absolute bar to prosecution." And I think that's  
14 what I find most troubling about the cases that  
15 we've reviewed and the testimony that we've  
16 heard, including from a sitting AUSA -- that was  
17 Kate Buzicky -- who follows this guidance in her  
18 day-to-day practice as well.

19 You know, the most troubling thing is  
20 we're seeing cases where you're at the Article  
21 32. Charges have already been initiated. And  
22 there's no probable cause. And then, on top of

1 that, at least in fiscal year 2017, 32 of those  
2 cases, and in 2018, 20 of them were sent forward  
3 for referral.

4 SGT. MARKEY: Ms. Tokash, it's my  
5 understanding -- correct me if I'm wrong -- that  
6 now the Article 32 officers are judge advocates  
7 and usually majors or lieutenant colonels? Is  
8 that right?

9 MS. TOKASH: That's my understanding.

10 SGT. MARKEY: So, these are not  
11 inexperienced people who are looking at that  
12 evidence and making these determinations?

13 MS. TOKASH: That's my understanding  
14 from what the staff has briefed us on. When I  
15 was practicing, that was not the case.

16 And then, the second component of the  
17 checklist is 27.220. That's grounds for  
18 commencing or declining prosecution. And that's  
19 the next step that says I have to make sure that  
20 the conduct constitutes a federal offense and  
21 that there is admissible evidence sufficient to  
22 obtain and sustain a conviction. That comes in

1 very close proximity to my case agent briefing me  
2 and deciding are we going to charge by criminal  
3 complaint or am I going to go into the grand jury  
4 to start laying down my investigation.

5 But, again, like Ms. Bashford said,  
6 the military and civilian systems are so  
7 different, in that you don't see what's coming if  
8 you are target in a federal civilian prosecution.  
9 I mean, you know what's coming when your  
10 indictment is unsealed or you're being placed in  
11 handcuffs. But when those things are happening,  
12 you know that you have probable cause. And if  
13 it's an indictment, I am charged with making sure  
14 that I have evidence admissible that's sufficient  
15 to obtain and sustain a conviction, unless  
16 there's no federal interest or unless it could be  
17 prosecuted in another jurisdiction. And again,  
18 the comment to that portion of the Justice Manual  
19 is that the discretion, even for grounds for  
20 commencing or declining prosecution, is left to  
21 the attorney for the government.

22 So, it was very interesting in



1 reviewing these cases and seeing, thinking back.  
2 Like I'm not sure how I did this when I was a  
3 judge advocate. I mean, I basically was  
4 following the NDAA's checklist of things to  
5 consider for a prosecution, and I would write  
6 this in a memo with my pros memo, and was told,  
7 "Stop writing those things. Just stop putting  
8 those things in writing."

9 But it helped me, as a prosecutor, to  
10 understand what my left and right guides are.  
11 And from the review of these case files, I saw  
12 nothing, nothing in the case file, where there  
13 was any evidence of any discussion of a probable  
14 cause determination at the initiation or  
15 declination phase. And that's troubling, in my  
16 opinion.

17 CHAIR BASHFORD: Just to put those  
18 numbers in some sort of statistical thing, it  
19 seems like, in fiscal year '18 and '17, 40  
20 percent of the cases where the PHO said no PC  
21 were, then, overridden by the SJA and commander  
22 to send them on to court-martial. So, 40 percent

1 is a fairly high number.

2 SGT. MARKEY: We looked at those  
3 numbers yesterday in the Working Group, and I  
4 think that a significant number of those that  
5 went to trial over a finding of no probable cause  
6 resulted in acquittals.

7 CHAIR BASHFORD: Almost every single  
8 one, yes.

9 DR. MARKOWITZ: So, we do have  
10 outcomes on those cases?

11 SGT. MARKEY: Yes.

12 DR. MARKOWITZ: Okay. Interesting.

13 BGEN SCHWENK: Yes, I think we're  
14 going to hear about the review of the preliminary  
15 hearings this afternoon.

16 SGT. MARKEY: And then, just one more,  
17 and then, I apologize for interrupting.

18 BGEN SCHWENK: No.

19 SGT. MARKEY: And I guess it goes back  
20 to the documentation and rationale, sound legal  
21 rationale, why a decision would be made. And  
22 then, in cases where the decision of no probable

1 cause at the 32 was made by, what we presume, an  
2 experienced, knowledgeable, and skilled advocate,  
3 and an SJA overturned that, we almost never or  
4 rarely saw the rationale as to why that was  
5 overturned. Maybe there was additional  
6 information that we were not privy to as to why  
7 they decided not to follow that advice, but that  
8 is never documented or is rarely ever documented,  
9 as to why that decision was overturned and moved  
10 forward anyway. And I think it would be helpful  
11 in transparency and understanding how these  
12 decisions are being made, that it's not being  
13 made because of discipline, right, or order, but  
14 it's legal foundation.

15 MS. TOKASH: The only staff judge  
16 advocate recommendation that I saw in the cases  
17 that I reviewed that was completely transparent  
18 and actually a breath of fresh air was when the  
19 victim's preference changed. So, it was an Air  
20 Force case. It had been referred to court-  
21 martial, and the victim decided that he or she  
22 did not wish to participate.

1                   At that point, the staff judge  
2                   advocate in writing to the convening authority  
3                   listed all of the problems with the case now,  
4                   which were all of the problems with the case  
5                   prior to the victim deciding that he or she no  
6                   longer wanted to participate, but they only came  
7                   to light when now the SJA had to advocate to the  
8                   convening authority as to why a dismissal is  
9                   appropriate in this case.

10                   SGT. MARKEY: And I think consistency,  
11                   right? You have one SJA that's doing that, and  
12                   it's excellent, and others that are not. So, why  
13                   are they not consistent? And that begs the  
14                   question, is the system not consistent in how  
15                   they're making these decisions? And I think it's  
16                   a bigger picture of the results.

17                   MS. TOKASH: Well, I think the bigger  
18                   picture was, in seeing that written SJA advice, I  
19                   don't know whether they didn't have the moral  
20                   courage, or whatnot, to advise the convening  
21                   authority of that prior to a referral decision.  
22                   Because based on that very articulate, written

1 explanation, if I were the convening authority, I  
2 would not have referred it to trial, of if I were  
3 the staff judge advocate, I would have advised  
4 the convening authority that we don't have the  
5 evidence to obtain and sustain a conviction.

6 We could be harming victims by setting  
7 up an unrealistic expectation of sending a case  
8 that was that problematic, that I would never  
9 have seen as a Case Review Working Group unless  
10 and until the victim changed his or her  
11 preference. And now, the SJA had to advocate in  
12 writing to do a 180. It was a very interesting  
13 case to review.

14 CHAIR BASHFORD: I think one of the  
15 things we also heard from the panel of defense  
16 attorneys was the idea that the SJA developing  
17 further evidence, they certainly did not think  
18 that actually happened, but if it did happen,  
19 they weren't privy to it. They were privy to  
20 what happens at the 32, but if there's a no PC  
21 finding there and there is additional evidence  
22 presented to the commander, they're not --

1           MR. HINES: I think where this really  
2 reveals, this issue really reveals itself, when  
3 we did the case reviews -- and I'll just speak  
4 for myself -- is when you get a case and you know  
5 beforehand this was a preferred case that went to  
6 a court-martial. And so, you began, from the  
7 beginning of the investigation, you start to go  
8 through it and you develop the impression this is  
9 a weak case. This doesn't look a lot different  
10 than a no action case. So, you start to  
11 formulate these questions: what were the reasons  
12 this went forward?

13           And then, if you have the Article 32  
14 report and you see what we're talking about, a  
15 detailed analysis, this is a weak case, no  
16 probable cause, or probable cause, but this is a  
17 loser case, and then, you see what comes out the  
18 other end, it gets referred to general court-  
19 martial and it's a full acquittal.

20           And you start to ask, where is the  
21 disconnect? What happened here? Everyone is on  
22 the same track. I agree with the investigator.

1 I agree with the prosecutor maybe. I agree with  
2 the preliminary hearing officer. And then,  
3 there's this black hole at the Article 34 advice  
4 letter, which Ms. Bashford is going to get into  
5 here in a minute. Those are my terms. But  
6 there's not much there. The 34 advice letter  
7 just has to get three -- and then, you get the  
8 result on the end.

9 The question that you have is, what  
10 happened here? And what was the advice that was  
11 given to the convening authority? Why did he or  
12 she go ahead, despite all of this, and send this  
13 to a panel of members? We're not surprised by  
14 the result.

15 So, it just raises the question, where  
16 is the breakdown? Or why did the SJA give advice  
17 that contradicted what everyone else is saying  
18 and what you saw, as the reviewer in the case?  
19 That's when it really revealed itself to me.

20 And so, why is that important? Well,  
21 we keep hearing that we have a very low  
22 conviction rate. And maybe that's one of the

1 reasons.

2 And that's just my impression. I  
3 don't know -- I'm not as familiar with the data  
4 as everyone else, but I saw that in quite a few  
5 cases.

6 BGEN SCHWENK: One of the things when  
7 we were looking at this that struck me was, when  
8 you look at Article 32, it gives the preliminary  
9 hearing officer two categories of jobs. One is  
10 make a determination, and one is make a  
11 recommendation.

12 So, the recommendation one is  
13 disposition because, obviously, the convening  
14 authority will make the decision on disposition.  
15 But, on the determinations, which would certainly  
16 give you the impression I'm making a  
17 determination for a reason, it's probable cause,  
18 you know, jurisdiction and proper form of the  
19 charges. But it's a determination, but a  
20 determination with no effect. So, why isn't it a  
21 recommendation like everything else?

22 I mean, if that's how the system wants



1 it to be, it would seem to me you make a  
2 recommendation on whether there's probable cause,  
3 on whether there's jurisdiction over the accused  
4 and the offense, whether the things are in the  
5 right order, and what you think ought to be done  
6 with the case.

7 And it's all recommendations. To make  
8 it really clear, the PHO has a limited advisory  
9 role. He's just another in a long list of  
10 advisors. And so, right away, the language  
11 itself can give you the impression that we're at  
12 a disconnect of making determinations with no  
13 effect, other than advisory.

14 But, anyway, my attitude on this is  
15 this raises an option of what might be done in  
16 tinkering with Article 32, and it's well worth  
17 something for the Policy Working Group to  
18 consider.

19 Anything else on 7?

20 If not, we have really enjoyed hearing  
21 from the Chair on our Working Group.

22 CHAIR BASHFORD: This is a long one.

1           BGEN SCHWENK: And so, since we have,  
2 we let her have the honor of having three of the  
3 observations, just to show we do not give  
4 preferential treatment based on position.

5           CHAIR BASHFORD: This is sort of an  
6 overlap, but our observation was that, "Many  
7 sexual assault cases are being referred to courts  
8 martial when there is insufficient evidence to  
9 support and sustain a conviction."

10           There's four subcategories there. (a)  
11 is "The Article 32 preliminary hearing officers  
12 do not consistently include in their reports an  
13 evaluation of whether there is sufficient  
14 admissible evidence to support a conviction.  
15 Such an evaluation would be helpful to  
16 subordinate commanders, convening authorities,  
17 and SJAs."

18           (b) "Article 34 requires SJAs to  
19 provide convening authorities a binding  
20 determination of probable cause as the standard  
21 for referring a case to trial. Probable cause  
22 may not be the appropriate standard for referring

1 a case to trial."

2 (c) "Staff judge advocates rarely  
3 provide an evaluation of the sufficiency of the  
4 evidence to support a conviction in the Article  
5 34 pretrial advice, and they are not required to  
6 do so. Including such an analysis, as well as  
7 the SJA's conclusion as to whether there is  
8 sufficient admissible evidence to obtain and  
9 sustain a conviction in trial, the court-martial,  
10 would be helpful to convening authorities."

11 And finally, "Many cases did not seem  
12 to afford consideration of the sufficiency of  
13 evidence to obtain and sustain a conviction, the  
14 same deference accorded in the U.S. Attorneys'  
15 Manual."

16 So, the data in the case files that  
17 resulted in contested courts martial that we've  
18 analyzed, for cases that resulted in conviction,  
19 the members overwhelmingly found that the ability  
20 to obtain and sustain a conviction was possible  
21 based on the file analyzed. So, there was a  
22 great deal of concordance in our assessment of

1 the evidence, our assessment of the  
2 investigation, and the actual result of the  
3 court-martial.

4 For cases that resulted in acquittal,  
5 the members found that there was evidence  
6 sufficient to obtain and sustain a conviction in  
7 approximately one-half of the files. So, you had  
8 much less concordance there, which, again, leads  
9 to what is happening there, since about half the  
10 cases we thought there was sufficient evidence,  
11 and nonetheless, there was an acquittal.

12 Some of the observations from the  
13 Working Group members was that the referral  
14 standard should not be probable cause, which is  
15 the minimum, that that's too low of a standard of  
16 proof for taking a case to trial; that we should  
17 think of likelihood of conviction. And again,  
18 that does not mean slam-dunk cases only. It's  
19 that you have enough evidence that, if everything  
20 falls as you hope it will, you can get a  
21 conviction there, but it shouldn't just be, oh,  
22 this is a winner or that's a loser in a sort of

1 subjective way.

2 One thing we saw, also, is that the  
3 Article 32 officers don't feel they can take  
4 credibility into account when making a PC  
5 determination. And so, they have made finding  
6 probable cause, even though they will say in the  
7 report, serious doubts as to credibility of some  
8 of the witnesses.

9 Another observation by a Working Group  
10 member was, given the large number of acquittals,  
11 you might conclude that the SJAs are not  
12 correctly advising the convening authorities  
13 because too many weak cases are going forward to  
14 court-martial. It's just hard to know, given the  
15 lack of transparency and the advice, what's  
16 happening.

17 And then, one thing was people were  
18 concerned that having the SJA really do a candid  
19 assessment of the evidence would somehow tip  
20 their hands for the defense. Prosecutors know  
21 the weaknesses in their cases, and defense  
22 attorneys know, hey, this is what the

1 prosecutor's case is, without having to have it  
2 written out for them. We're well aware of that.

3           Again, we just thought that the advice  
4 was being based on probable cause and not looking  
5 ahead to what the sufficiency of the evidence  
6 would be. And that's very, very different, as  
7 Ms. Tokash has said. And I know in my own  
8 practice we bring cases forward where we believe  
9 we have evidence sufficient to prove guilt beyond  
10 a reasonable doubt. Sometimes we're disappointed  
11 and a jury disagrees with that assessment. We  
12 have made that assessment before we move a case  
13 forward.

14           MS. TOKASH: And the Justice Manual  
15 addresses that also, the difficult cases. I  
16 think it's in the comments section of 9-27.220  
17 where they give an example, where in your  
18 district if there is a very popular political  
19 figure who is indicted and the prosecutor thinks  
20 that he or she doesn't stand a chance because the  
21 jury is going to have this love for that  
22 particular defendant, nonetheless, the Justice

1 Manual says, if you have the evidence to obtain  
2 and sustain a conviction, you should go to trial,  
3 and that would be appropriate.

4 So, it's not that we don't take hard  
5 cases in the federal system. I just prosecuted a  
6 sex trafficking case in September where all my  
7 victims were prostitutes, drug-addicted  
8 prostitutes, and we got a conviction. And it was  
9 a hard case to take to trial, and it's one that  
10 needed to be taken to trial, but we knew that we  
11 had evidence to obtain and sustain a conviction  
12 before we really threw down and said, okay, we're  
13 going to trial.

14 BGEN SCHWENK: I think we sort of got  
15 this observation from looking at the acquittal  
16 rate problem and the fact that, as we were  
17 looking at these case files, and then, the  
18 related documents, you would sort of make a  
19 judgment on your own of is this a winner. You  
20 know, what's the likelihood of success at the  
21 trial? Because I think everyone in the Working  
22 Group independently arrived at that's the

1 standard that I'm going to start with, and then,  
2 I'll go from there on what I think should be  
3 done.

4           Whether the convening authority's  
5 referral was reasonable or dismissal was  
6 reasonable, what's the likelihood of success?  
7 And as I looked at the likelihood of success, I  
8 found several times that this is not even close.  
9 There's no likelihood of success. There may be  
10 probable cause, but, as somebody said earlier,  
11 there's a chasm there between probable cause and  
12 beyond a reasonable doubt.

13           And then, I'd look and "referred".  
14 And then, I'd read the results of trial,  
15 acquittal. And after that happened several  
16 times, I started thinking maybe it's more than  
17 experience. Maybe it's more than, you know,  
18 whatever, you know, experienced investigators,  
19 experienced prosecutors. Maybe there's an  
20 insufficient consideration of likelihood of  
21 conviction.

22           And that's, previous comments, when



1 you start wondering whether it should be just one  
2 of the non-binding factors to consider or it  
3 ought to be elevated to some other level. And  
4 so, I think that's how we ended up saying that we  
5 need, well, the Policy Working Group needs to  
6 consider all the things that are in this  
7 observation as they try to decide what's the  
8 solution to what I think most people recognize as  
9 a dilemma on how to make better use of that and  
10 of the investigative process.

11 CHAIR BASHFORD: It's like an  
12 upstream/downstream. Mr. Christensen's comments  
13 about the length of time prosecutors and judges,  
14 that would be a downstream problem, I would say.  
15 And cases that are being set for, pushed forward  
16 without sufficient evidence, is more of an  
17 upstream problem. And I really look forward to  
18 the Policy Working Group telling us about it and  
19 solving this problem.

20 (Laughter.)

21 BGEN SCHWENK: Get in the middle of  
22 the stream.

1 CHAIR BASHFORD: Yes.

2 BGEN SCHWENK: Okay. Moving on to  
3 Observation No. 9, which we'll refrain from  
4 showing my age by making any Beatles "No. 9".

5 (Laughter.)

6 BGEN SCHWENK: But, nonetheless,  
7 Observation No. 9, "Currently, Article 34  
8 prohibits convening authorities from referring  
9 charges to a general court-martial unless the SJA  
10 provides written advice that the specification  
11 alleges an offense, that there is probable cause  
12 to believe the accused committed the offense, and  
13 that jurisdiction over both the person and the  
14 offense exists. Additionally, the SJA must  
15 provide a written recommendation as to the  
16 disposition to be made in the standard, in the  
17 interest of justice and discipline," as we've  
18 talked about previously.

19 "The SJA's Article 34 pretrial advice  
20 to the convening authority often consists of  
21 conclusions without explanation. These  
22 unexplained conclusions are not useful in

1 assessing factors relevant to a referral  
2 determination. The Article 34 pretrial advice  
3 would be more helpful to convening authorities if  
4 they included detailed explanation for the SJA's  
5 conclusions."

6 Okay, I think most people would go  
7 along with everything except the last sentence  
8 where I think the military justice people that  
9 spoke to us would say, no, that's all taken care  
10 of behind closed doors with the convening  
11 authority, so it doesn't have to be in the 34  
12 advice letter.

13 But our observation is it would be  
14 more helpful if it were in the 34 advice letter.  
15 And we thought that this observation should be  
16 considered carefully by the Policy Working Group.

17 Contrasting a really detailed Article  
18 32 report with a bare-bones, check-the-box  
19 Article 34, the reaction has to be, who's helping  
20 the convening authority there? One is checking  
21 the box, so you can proceed. You know, I said  
22 PC; you can go. And that's it. The other one

1 actually helps you understand and get into the  
2 case.

3           Clearly, those discussions are  
4 happening behind closed doors. The question for  
5 the Policy Working Group is, why in the world  
6 can't they be reduced to writing and made  
7 available?

8           I think the JPP recommendation was,  
9 well, it should be reduced to writing and be in  
10 there, but, then, it becomes some kind of work  
11 product and shouldn't be released until after the  
12 trial to the defense.

13           I'm mindful of something Chair  
14 Bashford said. You know, what do you think, the  
15 defense counsel are idiots; they can't figure  
16 this stuff out? I don't think she said it that  
17 way, but the intent was you're spilling the beans  
18 on what? These people are intelligent. They  
19 know what they're doing. They can figure out the  
20 case. And so the last sentence stands as part of  
21 our observation.

22           Some of the comments people made:

1           "The Article 34 advice seems to have  
2 evolved into a check-the-box form, not useful.  
3 If the SJA is going to provide a written  
4 conclusion about whether the case should or  
5 should not be referred, the SJA should provide an  
6 explanation for the decision, and the explanation  
7 should be substantive and detailed, not just  
8 insufficient evidence or victim problems."

9           Another one, "I don't like the 34  
10 advice memo without explanations for its findings  
11 or recommendations. We can assume explanations  
12 are provided orally, but the better practice is  
13 to provide explanations in writing and further  
14 explain orally when/if necessary."

15           And the last one, "I hate the bare-  
16 bones, check-the-box Article 34 advice letter.  
17 It should explain why and include sufficiency of  
18 the evidence."

19           So, it's a unanimous verdict from the  
20 CRWG that there's a problem and it needs to be  
21 fixed.

22           MS. CANNON: You know, one of the

1 things that comes up is what Chair Bashford had  
2 said earlier as to another item. It's about  
3 transparency. Because it's not that there wasn't  
4 a discussion with the commander, that there  
5 weren't things said, but why does it have to be  
6 in darkness? What's going on behind the closed  
7 doors that they don't want to put in writing? I  
8 mean, sometimes it's we don't have to, but  
9 sometimes it's we don't want to. Why not? And  
10 it affects fairness, due process, as well as  
11 transparency, and I think that's what's  
12 important.

13 BGEN SCHWENK: Other comments from  
14 folks? If not --

15 CHAIR BASHFORD: Working Group Chair,  
16 are you asking me to --

17 BGEN SCHWENK: Take all these hard  
18 issues and send them to the Policy Working Group  
19 -- far away from the CRWG.

20 (Laughter.)

21 CHAIR BASHFORD: I'm asking the Policy  
22 Working Group to continue to explore the issues

1 associated with Observations 1 through 9. And I  
2 think all of these things we have a great  
3 opportunity in the site visits to further explore  
4 them in a less formal method. And I think we'll  
5 get some very good input from a variety of people  
6 at a variety of installations as to what they  
7 think.

8 BGEN SCHWENK: And I concede back the  
9 remainder of my time, 25 minutes or whatever it  
10 is.

11 (Laughter.)

12 CHAIR BASHFORD: We're actually ahead  
13 of time. We were scheduled to go to 11:45. It's  
14 11:20. I'm going to ask, do we have something  
15 else we want to do right now?

16 COL. WEIR: I think we can do the  
17 briefing after lunch right now --

18 CHAIR BASHFORD: Okay. Great.

19 COL. WEIR: -- that was scheduled for  
20 15 minutes.

21 CHAIR BASHFORD: Policy Working Group.

22 BGEN SCHWENK: Okay. Good afternoon.

1 Well, do you want to wait for Meghan  
2 to get back or do you want to roll on, Chair  
3 Bashford?

4 CHAIR BASHFORD: Well, you can start.

5 BGEN SCHWENK: Okay. Good afternoon.  
6 Or good morning.

7 I am the Interim -- that's a capital  
8 I, capital N, capital T -- Interim Chair of the  
9 Policy Working Group. Our purpose here today is  
10 to brief you briefly -- I like the way I did  
11 that, "brief you briefly" -- on the Policy  
12 Working Group mission, actions to date, and our  
13 plan for the future.

14 We're then going to discuss some of  
15 the Article 32 investigation data that the staff,  
16 Meghan and Terri, put together on FY17 and FY18  
17 preliminary hearings, some of which we referred  
18 to earlier in the previous briefing.

19 And the good news is we have no  
20 findings; we have no observations, and we have no  
21 recommendations at this point because we haven't  
22 really gotten too far down the track.



1 CHAIR BASHFORD: Can you just hold up  
2 what we're supposed to be looking for? I've got  
3 so many papers here.

4 BGEN SCHWENK: Oh, we're at tab --

5 MS. SAUNDERS: Tab 5 is the Article 32  
6 information, the Article 32 data.

7 BGEN SCHWENK: Five. Okay.

8 MS. SAUNDERS: I think you also had a  
9 copy of the slides in front of you, Policy  
10 Working Group updates.

11 SGT. MARKEY: And is the spreadsheet  
12 as well?

13 MS. SAUNDERS: That as well.

14 BGEN SCHWENK: It's one of these and  
15 the spreadsheet, right. It's this thing and the  
16 spreadsheet. And tab 5 has a more detailed --

17 MS. SAUNDERS: Does everybody have the  
18 Policy Working Group slides in front of them?  
19 Okay. I just see the little circle, spinning  
20 circle on the computer. So, I'm thinking maybe  
21 we're having a few computer issues. So, we can  
22 press ahead just with the slides that you have in

1 front of you.

2 But I'm sorry, go ahead, General.

3 BGEN SCHWENK: And so now, the staff  
4 -- I've done the hard work, now they have to  
5 explain the rest of it.

6 (Laughter.)

7 MS. SAUNDERS: Okay. First of all,  
8 we'd just like to thank the Case Review Working  
9 Group for sending us more work. So, thank you  
10 very much for that.

11 (Laughter.)

12 BGEN SCHWENK: You're welcome. We're  
13 happy to do so. And if we find more, we'll send  
14 it your way.

15 MS. SAUNDERS: So, again, we're  
16 looking at tab 5 of your material. It has the  
17 Article 32 data that we'll be going through in  
18 just a minute. But, then, the slides in front of  
19 you, we'll just talk about the first slide, which  
20 is on page 2. It's just some of the background,  
21 and Chair Bashford actually went through this  
22 pretty extensively this morning, about the

1 formation of the Working Group and the tasks that  
2 we are undertaking.

3 So, moving on to page 3, the update,  
4 we have our Working Group. We've already met.  
5 We had one teleconference in October to discuss  
6 the way ahead and how we're going to approach the  
7 Article 32 issue, as well as the referral  
8 process.

9 The Working Group elected to begin its  
10 work by looking at Article 32, and then,  
11 following that, conduct a review of the entire  
12 referral pretrial process from preferral to  
13 referral.

14 And then, the next slide on page 4 is  
15 the ultimate goal of the Working Group is to  
16 gather additional evidence on Article 32 as well  
17 as the referral process, to include going out on  
18 installation site visits next year and asking  
19 questions of the appropriate parties about what  
20 their sense of these issues is. And then,  
21 gathering all this information up together and  
22 reporting back out to the DAC-IPAD for inclusion

1 in the 2021 report.

2 CHAIR BASHFORD: Your pages aren't  
3 matching ours.

4 MS. SAUNDERS: Oh, I'm sorry.

5 CHAIR BASHFORD: We've got two slides  
6 per page. So, I think we were just --

7 MS. SAUNDERS: Oh, okay, I'm sorry  
8 about that. My bad.

9 CHAIR BASHFORD: That's okay.

10 BGEN SCHWENK: If you could just say  
11 what slide you have.

12 MS. SAUNDERS: Slide, okay. Oh, I'm  
13 good. I'll just go by the slide number. How  
14 about that?

15 So, going on to the Article 32 data,  
16 the data you have at tab 5 is what we're going to  
17 be going through, but I've actually prepared a  
18 summary of that data, which is in the slides  
19 here.

20 So, looking at tab 5, the Article 32  
21 methodology, this came up at the August meeting.  
22 One of the members had had a question about, how

1 often does it occur that the Article 32  
2 preliminary hearing officer finds there's no  
3 probable cause for a sexual offense? And then,  
4 how often do those offenses, then, get referred  
5 to trial, and either result in acquittal or a  
6 conviction?

7 So, we decided to take a look at that.  
8 Using the DAC-IPAD database, we looked at all of  
9 the cases that had an Article 32 for fiscal years  
10 2017 and 2018 in which the most serious offense  
11 charged was a penetrative offense, there was an  
12 Article 32 hearing, and the preliminary hearing  
13 officer found there was no probable cause for one  
14 or more penetrative offenses. And we, then,  
15 followed those offenses through to their  
16 conclusion.

17 I will note that, in some of these  
18 cases that we looked at, there may have been  
19 multiple penetrative offenses charged, some of  
20 which the preliminary hearing officer found  
21 probable cause for; others that they did not find  
22 probable cause for. We followed only the no

1 probable cause offenses. So, the ones for which  
2 they did find probable cause may have gone on to  
3 court, gotten a conviction or an acquittal, but  
4 we did not follow those particular offenses. We  
5 were only looking at the no probable cause  
6 offenses. So, we followed them through to their  
7 ultimate dispositions.

8 In those instances where we had a  
9 case, which is pretty frequent, where you would  
10 see an offense being charged in the alternative  
11 under different legal theories, in any case in  
12 which the preliminary hearing officer found  
13 probable cause under one legal theory, but not  
14 under another legal theory, we did not count  
15 those cases in our data.

16 So, looking at the actual data itself  
17 on slide 6, this, the way it's presented here, is  
18 the top two rows are the fiscal year 2018 data  
19 and the bottom two are the fiscal year 2017 data,  
20 so that you can compare. And what this shows, in  
21 the blue row, it's the total number of Article  
22 32s held in penetrative cases. And then, on the

1 green row right below that, it's the total number  
2 of those cases in which the Article 32  
3 preliminary hearing officer found no probable  
4 cause for at least one penetrative offense in  
5 those cases.

6 So, you can see, in 2018, about 16  
7 percent of cases where the preliminary hearing  
8 officer found no probable cause for at least one  
9 offense. And that was about 22 percent for 2017.

10 Slide 7. I don't know if mine just  
11 don't have numbers or I'm not seeing them.

12 But, going on to slide 7, this shows,  
13 the two columns on the right -- or excuse me --  
14 on the left are 2018, and the two on the right  
15 are 2017. This breaks it down, the number of  
16 cases in which the preliminary hearing officer  
17 found no probable cause, and then, how many of  
18 those cases were dismissed prior to referral and  
19 at what level.

20 So, when you see "GCMCA" and "SPCMCA,"  
21 what that means is General Court-Martial  
22 Convening Authority dismissed the charges or the

1 Special Court-Martial Convening Authority  
2 dismissed the charges in that case.

3 Just as a little bit of background,  
4 the Special Court-Martial Convening Authority is  
5 the individual who orders that the 32 hearing be  
6 held. Once that 32 is complete and the report  
7 actually goes back to the Special Court-Martial  
8 Convening Authority, that person has the option  
9 of either dismissing the charges or sending the  
10 case forward to the General Court-Martial  
11 Convening Authority for disposition.

12 So, as you can see from these numbers,  
13 for example, in 2018, in the majority of cases  
14 overall, the charges for which the preliminary  
15 hearing officer found no probable cause were  
16 dismissed. And most of them were dismissed at  
17 the Special Court-Martial Convening Authority  
18 level. The exception to that is in the Army, in  
19 which it's the opposite, where most cases were  
20 actually referred to court rather than dismissed.

21 So, going on to slide 8, this is the  
22 flip side of the slide you just looked at. We



1 just looked at the cases that were dismissed.  
2 Now we're looking at the cases that were actually  
3 referred to court-martial.

4 So, you can see, on the left, 2018, a  
5 total of 18 out of 52 cases were referred to  
6 court-martial, the offenses were referred to  
7 court-martial, despite the preliminary hearing  
8 officer finding no probable cause for them. And  
9 you can see the breakdown of what actually  
10 occurred.

11 Honing-in on that a little bit more,  
12 you can see, when you take the Army cases out of  
13 it, really only seven cases were referred to  
14 court-martial. And of those seven, three were  
15 actually dismissed after being referred. But  
16 when you add in the Army cases, it jumps to 18.  
17 And of those cases, 11 ultimately went to a trial  
18 and eight were found not guilty; two were found  
19 guilty of the probable cause offenses, and one  
20 was a mixed bag with some being found guilty and  
21 some not.

22 Looking at the FY17 cases, it's,

1 again, 32 out of 80 were referred to court-  
2 martial, despite the preliminary hearing  
3 officer's determination of no probable cause.  
4 When you take out the Army cases, it falls down  
5 to 16.

6 On slide 9, which is we just put some  
7 observations in here. I've talked about a few of  
8 these, but just the percentage of cases in which  
9 the preliminary hearing officer finds no probable  
10 cause. And you can look at those numbers and  
11 decide for yourselves whether that's high or not  
12 high.

13 And then, the staff judge advocates  
14 and convening authorities acted consistently with  
15 the probable cause hearings or probable cause  
16 determinations of the preliminary hearing officer  
17 in most cases, with the exception of the Army.  
18 And I say "acting consistent with" because we  
19 don't know by looking at the files in front of us  
20 that the convening authority made his or her  
21 decision based upon the probable cause  
22 determinations of the Article 32 preliminary

1 hearing officer. There are other factors at play  
2 there. The trial counsel may have weighed-in.  
3 The staff judge advocate may have weighed-in.  
4 So, we just said they "acted consistently with".

5 Looking at slide 10, this is, again,  
6 some of the numbers that you just saw, which is  
7 34 out of 52 cases in fiscal '18 were dismissed,  
8 consistent with the no probable cause  
9 determinations by the preliminary hearing  
10 officer. When you take out the Army cases, that  
11 jumps to about 82 percent were dismissed and 70  
12 percent in 2017.

13 Going on to slide 11, this just  
14 discusses the numbers of guilty versus not guilty  
15 verdicts for each of those cases. One thing we  
16 did know, we did want to look at the breakdown of  
17 the rank of the preliminary hearing officers and  
18 whether that had any effect on whether or not  
19 those cases were referred to court or dismissed,  
20 in accordance with the determinations of the  
21 hearing officer. And we determined that really  
22 had no effect. Most of them were O-4s and O-5s,

1 I think as has been mentioned already. A few  
2 O-3s, some O-6s, but most of them, the vast  
3 majority fell in the O-4 and O-5 range. And the  
4 rank did not seem to be a factor in whether or  
5 not the convening authority acted consistently  
6 with their determinations.

7 Looking at slide 12, this was our  
8 observation. So, it was actually three of us  
9 that looked at all of these 32 reports. Patty  
10 Ham did as well as Meghan and I looked at these  
11 32 reports for these two years.

12 For most of the Services, almost  
13 without exception, they were really well-  
14 developed Article 32 reports with factual  
15 summaries and really great analysis. And you  
16 know how they came to their determinations.

17 The Army was a little bit more of a  
18 mixed bag. On one end of the spectrum, you had  
19 just the form, a one-page form -- I think it's a  
20 two-page form -- with a block checked for either  
21 probable cause or no probable cause with nothing  
22 else to guide you whatsoever. On the other end

1 of the spectrum, even within the Army, there were  
2 some Article 32 reports that were great that had  
3 really well-developed analysis and factual  
4 summaries. So, it kind of ran the gamut in the  
5 Army.

6 And I will note that, under amendments  
7 to the Article 32 process, beginning back in  
8 January of this year, the preliminary hearing  
9 officer is now required to provide analysis. So,  
10 we'll see when we get the 2019 data. Probably  
11 half will fall under the old system and half will  
12 fall under the new, but we would expect to see  
13 more well-developed analysis for all the reports  
14 that we see.

15 And then, just a side observation that  
16 really doesn't have a lot to do with the no  
17 probable cause piece is we were just struck by  
18 the fact that, despite the population, the  
19 active-duty population sizes of the Air Force and  
20 the Navy being very close, there were  
21 significantly more Article 32 cases, so  
22 presumably significantly more preferrals, in the

1 Air Force than the Navy, more than twice. So, we  
2 just found that interesting.

3 Are there any questions on the data?  
4 Again, as soon as we are able to get some of the  
5 2019 cases in, we can replicate this for that  
6 year as well.

7 Okay. Any questions?

8 Okay. Well, that concludes my  
9 briefing.

10 CHAIR BASHFORD: Are we going over  
11 this one as well?

12 MS. PETERS: No, ma'am. I think that  
13 was the Policy Review Group's data for the update  
14 presentation.

15 CHAIR BASHFORD: Uh-hum.

16 COL. WEIR: Madam Chair?

17 CHAIR BASHFORD: Yes?

18 COL. WEIR: I can do the Collateral  
19 Misconduct Report Status Update now --

20 CHAIR BASHFORD: Great.

21 COL. WEIR: -- which is for about five  
22 minutes. And then, that will bring us closer to

1 lunch and knock one more thing out of the  
2 afternoon's agenda.

3 CHAIR BASHFORD: Wonderful.

4 COL. WEIR: So, I just wanted to give  
5 you a quick update on what's going on with the  
6 collateral report that you all worked on and  
7 approved in September at the telephonic public  
8 meeting we had.

9 So, on September 16, 2019, I submitted  
10 on behalf of the DAC-IPAD, the final misconduct  
11 report. Along with the report was a request that  
12 the Secretary of Defense provide the DAC-IPAD a  
13 written response with his approval or disapproval  
14 of the DAC-IPAD recommendations by November 1st,  
15 2019.

16 On October 2nd, 2019, the DoD General  
17 Counsel, Mr. Paul Ney, responded in a letter to  
18 the Chair explaining that the requested response  
19 would not be able to be provided by November 1st,  
20 2019. Mr. Ney forwarded the DAC-IPAD report to  
21 the Joint Services Committee on Military Justice  
22 for its analysis. And that's the Committee

1 that's made up of Service members that review  
2 issues that have to do with military justice and  
3 other issues. So, Mr. Ney has asked the Joint  
4 Services Committee for their recommendations by  
5 March 13th, 2020.

6 So, at that point, I expect it will go  
7 back to Mr. Ney, and then, they'll go through the  
8 Department. And then, we'll get some response  
9 back sometime late March. But that's where it is  
10 right now.

11 Also in Mr. Ney's letter, he was very  
12 appreciative to the Committee. Clearly, he could  
13 see the hard work that was done putting together  
14 that report that went back to the Secretary of  
15 Defense. So, he was appreciative that you  
16 actually got involved and did the hard work and  
17 provided a very thorough, complete report for the  
18 Secretary and his Department to review and make  
19 some policy determinations or recommendations  
20 based on that.

21 As you will recall -- and this is an  
22 ongoing requirement -- I think the next one is



1 due in 2020. So, more to follow on that. But I  
2 just wanted to give you a quick update on what's  
3 going on. Sometimes we get a sense that you  
4 would like to know what's happening with it.

5 So, that's where it is right now. And  
6 once we get a response back, I'll release that to  
7 you at the next public meeting after that.

8 Any questions?

9 BGEN SCHWENK: I have two comments.  
10 One is on the way the staff handled that. I  
11 thought that was exceptionally well done. I  
12 think I wrote you something on that.

13 But the way you worked with the  
14 Services, the way you got them to cooperate in  
15 explaining what they did and why they did it, and  
16 identified inconsistencies and issues within the  
17 documents that they had prepared that could  
18 mislead or misrepresent what they really meant,  
19 and then, tried to smooth it all out and come up  
20 with ideas for them to use in the future, I  
21 thought that was really terrific. And the more  
22 of that kind of relationship with the Services

1 you have, the easier it will be for the members  
2 to get through. So, congratulations.

3 And the other thing I wanted to say is  
4 Dwight would be disappointed if I did not say  
5 that, in reading the letter -- I'm sure he wrote  
6 this just so I could say this -- I noted that one  
7 of the reasons they're just too darn busy over  
8 there at the JSC is because they have their day  
9 jobs keeping them busy. And so, I will say once  
10 again that it astounds me to no end that here we  
11 are 60 years past the UCMJ, or whatever it is,  
12 and we still try to run a military justice system  
13 with part-time people in the Joint Service  
14 Committee. And I will once again recommend that  
15 maybe they think about carving up a few billets  
16 and putting them full-time on it, so that they  
17 can do things without killing themselves working  
18 all night and weekends because they've got their  
19 day job, and then, they do the JSC, and there's  
20 only so many hours in a day.

21 You're welcome, Dwight.

22 COL. WEIR: Would you like that to be

1 a finding and a recommendation?

2 (Laughter.)

3 BGEN SCHWENK: I told one of the  
4 groups yesterday that, if I can find a way to get  
5 that in there, I'm going to try.

6 HON. GRIMM: We're trying to get  
7 General Schwenk to cook his own breakfast.

8 (Laughter.)

9 BGEN SCHWENK: Here's the story on  
10 that. So, when I was a lieutenant, I came home,  
11 and my dad was a general. And so, when I was a  
12 lieutenant, I came home and I immediately went  
13 out with friends, and it was -- I don't know --  
14 3:00 in the morning when I got back. And I went  
15 into my room in this new set of quarters that my  
16 parents had, and I went into bed, and I put my  
17 foot down and right through the sheet, because  
18 the steward had decided to be, a gunnery  
19 sergeant, had decided to be funny and welcome me  
20 back by short-sheeting my bed.

21 So, the next morning I said, okay, and  
22 I woke them all up early. There were three of

1       them. I mean, this was in the old days. But we  
2       had three guys for my mother and my father, you  
3       know. But, anyway, I woke them all up, put them  
4       in formation, and took them for a run at 5:00 in  
5       the morning or something.

6                   And so, that night they had guests.  
7       I don't even remember who it was, but they had  
8       guests and I had to eat with them. So, I sat  
9       there, and every time they served, as I went to  
10      take whatever it was, they moved it. And I  
11      dropped everything all over my side of the table.

12                   And so, there's a good thing that they  
13      don't cook my breakfast and I cook my own.

14                   (Laughter.)

15                   CHAIR BASHFORD: Okay. So, let's  
16      adjourn until 12:45, when we will begin with the  
17      deliberations regarding RFI Set 11. And then,  
18      we'll move on to the military installation site  
19      visit update, the court-martial observations  
20      update, and then, public comment/meeting wrap-up.

21                   (Whereupon, the above-entitled matter  
22      went off the record at 11:42 a.m. and resumed at

1 12:47 p.m.)

2 CHAIR BASHFORD: So, written responses  
3 to requests for information. Take it away.

4 MS. PETERS: This afternoon's session  
5 is designed to gather your thoughts, your  
6 impressions and your comments on information the  
7 Committee has received to date.

8 Since the Committee has begun  
9 receiving information around several topics --  
10 the Article 32 preliminary hearing; Article 33,  
11 non-binding disposition factors; Article 34,  
12 advice required prior to referral; the DAC-IPAD's  
13 conviction and acquittal rate data and victims'  
14 decisions to decline participation in the  
15 investigation and prosecution of sex assault  
16 cases, we wanted to set aside some time to stop  
17 and not necessarily make findings and  
18 recommendations, but have a discussion to gather  
19 the Committee members' impressions of the written  
20 RFI responses that the Committee received this  
21 summer and the testimony from the last meeting  
22 from Military Justice Division chiefs, Special

1 Victims counsel, and Defense Organization chiefs,  
2 about these substantive topics.

3 To guide today's session, I'll direct  
4 you to Tab 6 of your folders. In Tab 6 is just a  
5 printout of the PowerPoint slides I'll be using  
6 to refer to periodically throughout the  
7 discussion.

8 And probably more importantly is a  
9 stapled document that says, overview of  
10 information received by the DAC-IPAD at the  
11 August 23rd meeting and the Service's written RFI  
12 responses.

13 What this does is try to in one page  
14 sort of distill the highlights from the testimony  
15 from the last meeting and the written RFI  
16 responses on those substantive topics. It's  
17 organized loosely by topic and by presenter, and  
18 it's really there to jog your memory about what  
19 you heard previously, and what the Committee  
20 received in writing from the Services. And so,  
21 I'll be referring to that from time to time as  
22 needed.

1           Lastly, I think at Tab 6 you should  
2           have a copy of Articles 32, 33 and 34 of the UCMJ  
3           as written, just for your reference.

4           And as a reminder, these topics came  
5           to us because the Judicial Proceedings panel had  
6           highlighted that the Committee should -- or it  
7           urged the Committee to consider whether  
8           preliminary hearing officer determinations should  
9           be given more weight.

10           And to further that we brought you the  
11           testimony, the written RFI responses, and in  
12           response to some questions by members of the last  
13           meeting, the staff has generated the Article 32  
14           data regarding no-probable-cause case  
15           determinations that you just heard before lunch.

16           So, we ask that if you have any  
17           additional questions, or if you can find a way  
18           that that factors into your observations about  
19           what you've heard thus far, please go ahead. I  
20           think that's highly relevant to the discussion.

21           I think the topics that we're talking  
22           about there's obviously some overlap with the

1 morning session. This morning you heard a  
2 different source of information, that being the  
3 Case Review Working Group's observations from  
4 their review of investigative files and  
5 prosecution files for a large set of cases.

6 And this is now, again, a lot of  
7 subject matter overlap, but it's a different  
8 source. We received information directly from  
9 the Services and we do want to know what you  
10 think about it.

11 Because these topics are broad, you  
12 can go in a lot of different directions. But one  
13 thing that we hope to glean from this is to  
14 identify some specific research questions.

15 What is it about -- what would help  
16 you understand, let's say how to -- or whether to  
17 suggest any reform to Article 32? Is there  
18 something further that we can give you? Is there  
19 somebody you want to hear from? Are there  
20 specific questions that you want to know the  
21 answer to?

22 Are there specific tasks that the



1 Policy Working Group can undertake, the  
2 understanding that they have?

3 We have initiated that discussion  
4 within the working group and briefed that to you  
5 all earlier.

6 That said, the more discussion, the  
7 more thoughts we have, certainly the better. The  
8 more experience we can bring to bear on those  
9 issues, the better.

10 In addition, we want to leverage the  
11 military installation site visits in 2020 to  
12 answer the questions concerning these substantive  
13 topics.

14 So, if something from the last meeting  
15 or the RFIs brought up an issue that for you, you  
16 would like to see addressed with maybe certain  
17 roundtable discussions at the site visits, this  
18 is a good time to bring that up.

19 Staff can then take that feedback and  
20 appropriate it into the proposed questions for  
21 you all to take on the site visits.

22 And lastly, if there are any

1 observations that you already would like to  
2 make -- at the last meeting, for example, there  
3 was a remark about the sense that the Military  
4 Justice Division and the Trial Defense Organiza-  
5 tion chiefs had given testimony.

6 They said -- well, the impression was  
7 from at least one or more members, that there was  
8 a lack of trust between the two and it resulted  
9 in both sides giving testimony to the effect that  
10 they were holding their cards close to their  
11 chest, relatively speaking, to use sort of a  
12 summary term to describe what their testimony  
13 was.

14 But that was a good observation, as  
15 was the observation that certain Article 32 data  
16 would be useful in understanding its  
17 effectiveness in providing a procedural safeguard  
18 or assisting in the referral decision. So then  
19 the Staff went and undertook that research and  
20 brought it back to you today.

21 So, we hope to glean some additional  
22 observations along those lines from you today.

1 And then the Staff and the policy working group  
2 can take that and understand how to move forward.

3 So, I will start with just, again,  
4 some very broad highlights about what we have  
5 heard on these topics. And that is that as --  
6 generally speaking, as a result of Congress's  
7 changes to Article 32, Article 32 hearings are no  
8 longer a comprehensive review of available  
9 evidence.

10 More preliminary hearings are waived  
11 after the FY14 NDAA changes than beforehand. We  
12 heard that victims rarely testify at the  
13 Article 32 preliminary hearing.

14 More sometimes, I think, depending on  
15 the Service, no witnesses are testifying at the  
16 hearing. And that we heard -- and I think we've  
17 seen in the rules -- the preliminary hearing  
18 officer cannot compel evidence at the hearing.

19 So, the question from the Staff for  
20 you all is, is any of this a problem to you and  
21 why, or why not.

22 CHAIR BASHFORD: It's after lunch.

1 (Laughter.)

2 MS. PETERS: The testimony from the  
3 Defense counsel was that yes it is a problem, in  
4 that they don't feel it is a procedural safeguard  
5 for the accused, in that even though it's  
6 considered an adversarial process, they don't  
7 feel that there is -- several defense counsel, I  
8 think, testified that they didn't feel there was  
9 much purpose to putting on a case.

10 In addition, I think RCM-405, now in  
11 2019, even limits the amount of evidence or the  
12 type of evidence that the defense could even  
13 bring out at the Article 32, so that there's less  
14 opportunity to even present defense and  
15 mitigation evidence, unless maybe it's relevant  
16 to the recommendation as to disposition.

17 CHAIR BASHFORD: Can you remind us of  
18 the percentage of the Article 32s that are being  
19 waived?

20 MS. PETERS: Yes. The figures from  
21 the court-martial adjudication report --

22 CHAIR BASHFORD: Again, at that

1 hearing?

2 MS. PETERS: All right, I have --  
3 FY18, I have -- this is for all offenses, not --

4 CHAIR BASHFORD: All sexual?

5 MS. PETERS: All sexual assault  
6 offenses, penetrative and contact. In FY18, out  
7 of the cases eligible for an Article 32,  
8 70 percent of the time an Article 32 hearing was  
9 held. And 21 percent of the time -- or really  
10 almost 22 percent of the time in FY18 -- an  
11 Article 32 was waived.

12 And that is roughly the same as it was  
13 statistically in 2017 and 2016. It's just that  
14 overall numerically the number of Article 32s  
15 have been steadily shrinking.

16 CHAIR BASHFORD: I would be interested  
17 in understanding why -- so, if there's very  
18 little utility to them anymore, why more of them  
19 aren't being waived, or what considerations are  
20 in play, the 20 percent where the counsel elects  
21 to waive the Article 32 -- what do they think  
22 they're gaining strategically by doing that?

1 MS. PETERS: And that's a question for  
2 the defense counsel, most appropriately. The  
3 testimony, interestingly, at the last meeting was  
4 also that the Article 32 still provides a forum  
5 for the defense to present available evidence.

6 It was just that I think the defense  
7 counsel had different testimony that it didn't  
8 seem like there was really an advantage or a  
9 point to doing so.

10 And it seemed to run into the issue of  
11 the PHO not being able to compel evidence, so if  
12 the defense wanted production of a witness, even  
13 if the PHO found the person was relevant and not  
14 cumulative, that person's production may just not  
15 happen. And nobody can make it happen.

16 CHAIR BASHFORD: The prosecutors  
17 thought it was a benefit to the defense. The  
18 defense did not think so.

19 (Laughter.)

20 MS. PETERS: I think one issue that  
21 the Staff had also identified is that because the  
22 2019 changes will require a more robust analysis

1 in the field reports, there remains to be seen  
2 how helpful they will be to convening  
3 authorities.

4 And when we posed the question in the  
5 RFIs to the Services, how has that changed for  
6 the requirement for a more robust report?

7 It hasn't had an effect on things.  
8 And everyone said at least because it was late  
9 summer 2019, that it was just too early to tell.  
10 So, maybe by 2020 we'll be able to ferret that  
11 out.

12 BGEN SCHWENK: I think one of the  
13 issues that we need to look at is what's the  
14 purpose of the Article 32 preliminary hearing.  
15 And the fundamental question of why do we have  
16 them, and what should be the -- if we're going to  
17 have one, what should its purpose be.

18 If you can answer the purpose question  
19 and how it fits in with what preceded it and then  
20 what comes after -- you know, the 34 advice and  
21 referral decision -- then I think you can go  
22 about trying to figure out who should do it, what

1 authority should they have, what is the due outs  
2 from them, determinations, recommendations -- you  
3 know, their determinations, are they binding or  
4 are they just recommendations?

5 So, I think one place to start is  
6 what's the purpose of the Article 32.

7 HON. GRIMM: And to that point, I'd  
8 like to add that the current version of  
9 Appendix 2 you gave us, that the four things that  
10 the 32 officer is limited to determining,  
11 alleging an offense, probable cause, not likely  
12 to have success and sustained, and then finally  
13 the recommendation.

14 But one of the things that presumably  
15 this group could do if they believe that that was  
16 not well-serving, the purposes for which these  
17 cases should be prepared, prosecuted and defended  
18 and investigated, a recommendation that  
19 Article 32 be changed.

20 And so, I agree that the first thing  
21 is, is what is its proper function. And then,  
22 once its proper function is determined, what



1 would it do, and in light of what the data has  
2 suggested.

3 When you look at what these  
4 recommendations are and they're not followed and  
5 you see what the results of trial are, it  
6 suggests that there is a price that is paid for  
7 not following what the recommendation is.

8 So, it seems to me that identifying  
9 what the proper purpose is, even if it would  
10 requirement amendment of what Article 32 says, is  
11 a proper function of this Committee to evaluate.

12 MS. TOKASH: And along with that  
13 proper function, should the proper function be a  
14 more comprehensive analysis of evidence  
15 admissible to obtain and sustain a conviction?

16 Because I would hope, as General  
17 Schwenk noted, you're at a 32, you better have  
18 probable cause at that point. I mean, that's  
19 offensive from a constitutional standpoint if  
20 you've already preferred charges against somebody  
21 and you don't even have probable cause.

22 That should raise the hackles of every

1 citizen in the republic, not just defense bar in  
2 the military justice system. So, perhaps it  
3 needs to be viewed through those lenses.

4 Why are we even talking about whether  
5 probable cause exists when the more proper  
6 function might be, do we have evidence to obtain  
7 and sustain a conviction. Because I hope to God  
8 there's probable cause when you have preferred  
9 charges against somebody and you're sitting at a  
10 32.

11 MS. PETERS: What was your impression  
12 of -- and this is to everybody -- of the data  
13 that we presented earlier, that showed 16 to 20  
14 percent of the Article 32's were finding no  
15 probable cause in a penetrable sexual assault  
16 offense?

17 This question may sound overly  
18 simplistic. Is that low? Is that high? I don't  
19 know how that strikes --

20 BGEN SCHWENK: That's about 20 percent  
21 too high. There should be zero cases that don't  
22 have probable cause. I mean, as Megan just said,

1 we're talking about whether to go to a court-  
2 martial -- beyond a reasonable doubt. Not  
3 whether we're going to put fingerprints in a  
4 database. It's probable cause.

5 HON. GRIMM: To Ms. Tokash's point,  
6 which I think is, again, a fundamental point, the  
7 probable cause standard is not a difficult  
8 standard, nor is it a standard that is typically  
9 hard to apply in an individual case.

10 You can ask what value an Article 32  
11 has to the whole process of convening authority  
12 to a defense of prosecution if all they're  
13 allowed to do is say probable cause. Because  
14 probable cause does not speak to the likely  
15 outcome of the case.

16 If instead the factor was, what would  
17 be applicable to prosecutors certainly in the  
18 federal system, and also in the civilian system,  
19 of ability to obtain and sustain a conviction,  
20 then that would be a much more helpful  
21 recommendation.

22 Regardless of whether you're going to

1 say it's binding or not, that would be a much  
2 more useful recommendation, particularly given  
3 the fact of where it comes in the life cycle of  
4 an investigation leading to a charge.

5 When charges have been preferred,  
6 that's the responsibility of the military justice  
7 lawyers -- the SJA -- of the investigators.

8 And so, in terms of adding something  
9 to the process that is useful, and having  
10 sufficiently senior people doing it with  
11 experience and judgment, with legal training and  
12 knowledge, with the requirement of explaining,  
13 maybe with or without the ability to call  
14 witnesses and determine what evidence is presided  
15 so that it's a real inquiry, and what value does  
16 simply saying probable cause add to the system,  
17 as opposed to looking at what really is  
18 significant, which is obtaining and sustaining a  
19 conviction, particularly when that is viewed as  
20 sort of the bellwether test in the non-military  
21 aspects of the application of the criminal  
22 justice system.

1                   CHAIR BASHFORD: In some ways though,  
2                   that's -- and I agree, but it's imposing a  
3                   different standard on the same source material if  
4                   you're still just looking at an investigative  
5                   file.

6                   And the case review working group has  
7                   noted some of the deficiencies -- I don't want to  
8                   say deficiencies in the investigation, because  
9                   they're very thorough, they're just not focused  
10                  necessarily.

11                  You're asking somebody again to read  
12                  through these papers and now make that decision.

13                  HON. GRIMM: You're exactly right.  
14                  But what I'm saying is, I think General Schwenk  
15                  is exactly right. What should it do?

16                  If you decide that that's what it  
17                  should do, then you have to make a judgment  
18                  about, well, can they do that on a paper file?

19                  And certainly the experience was, as  
20                  was pointed out back in the day when the  
21                  Article 32 officer could call witnesses, bring  
22                  them in there and put them on there.

1            Obviously, you can make a judgment  
2            call you cannot compel the victim to -- that's  
3            what Article 32 says now, if the victim doesn't  
4            want to be heard, but have that opportunity, call  
5            the witnesses, get them in there.

6            Then, if the determination is made  
7            that it would be helpful to make a recommendation  
8            as to whether you can obtain and sustain a  
9            conviction, then you would want to make sure that  
10           they had available the information that would  
11           allow them to do that in the degree of  
12           particularity that you want, in a way that would  
13           be helpful.

14           And that might then say they should  
15           have the ability to control what evidence is  
16           heard.

17           If you make a decision that, well,  
18           just simply saying probable cause on a record is  
19           helpful, then you can say, well, that's what's  
20           being done right now.

21           And if you look at the results in  
22           terms of conviction rates and in terms of

1 outcomes when the convening authority doesn't  
2 agree, then you can ask yourself whether that's  
3 proving out by the numbers. And you can question  
4 whether that is.

5 MS. CANNON: In my world of California  
6 state court, a preliminary hearing is a probable  
7 cause hearing. And the idea is for it to be  
8 heard relatively early on.

9 It's within ten days by statute, but  
10 is usually for more serious cases like this  
11 continued. It could be up to a few months or  
12 longer.

13 But the idea is that it should be  
14 tested. It shouldn't just be up to the  
15 prosecution to set something to trial. There  
16 should be something before that. And the  
17 defendant should have whatever is necessary to  
18 provide a defense that meets constitutional  
19 muster in the right to cross-examine a witness  
20 and discovery, and things like that, in order to  
21 do it effectively through counsel.

22 And a lot of that is reflected in

1 here. That's a lot of what is reflected in the  
2 Article 32 as it's reflected in the latest  
3 appendix 2. And I think it's still valuable for  
4 that.

5 The other thing that it adds here is  
6 a recommendation as to disposition, which I think  
7 addresses -- you know, it may be good enough to  
8 get by me, sir, but it's weak. And that should  
9 be a directive, but -- or a recommendation.

10 But to say there's no probable cause  
11 shouldn't happen in most of the cases. So, Ms.  
12 Tokash is right. It shouldn't happen in most of  
13 the cases, but it's going to happen where cases  
14 are weak, and they're too weak and it needs to be  
15 called by somebody early on.

16 Or maybe some of the charges, some of  
17 the allegations, that cleans it up and make sure  
18 that -- I'm just worried, if we make the standard  
19 too high, then it's not going to happen.

20 HON. GRIMM: In California, what -- is  
21 the preliminary hearing done by a judicial  
22 officer?



1 MS. CANNON: Yes.

2 HON. GRIMM: And what happens if that  
3 judicial officer determines no probable cause.  
4 Do they dismiss the charge?

5 MS. CANNON: Dismissed. As to  
6 whatever charges are determined to lack probable  
7 cause, and as here stated under 832, if other  
8 charges are reflective that didn't get charged,  
9 the prosecutor can add those charges, for  
10 purposes of the information.

11 HON. GRIMM: But the distinction  
12 between what the current system is here and what  
13 you've described, is that if the Article 32  
14 officer could do just that -- dismiss the ones  
15 for which there are no probable cause, say there  
16 is probable cause for these and make a  
17 recommendation, then you wouldn't have that  
18 situation that Ms. Tokash has talked about, where  
19 the ultimate decision is being made by a  
20 convening authority -- not an attorney -- on  
21 recommendation that is not explaining the  
22 justification or rationale for the

1 recommendation. And then, produces results with  
2 low conviction rates -- especially in those where  
3 they don't follow the recommendation.

4 I mean, one other alternative would be  
5 to say, all right, keep it with probable cause  
6 but give greater power to the Article 32 officer  
7 to get rid of those that they find is not, and to  
8 identify those that do.

9 BGEN SCHWENK: You think having --  
10 Ms. Cannon, do you think having a time frame to  
11 get started and then having to ask for a  
12 continuance for delays, whatever you want to call  
13 them, helps move the process along? Because one  
14 of the other underlying concerns we have is, it  
15 takes forever to get wherever you're going.

16 So now, I'm thinking that maybe  
17 another issue the PWG ought to look at is, what's  
18 the efficacy of having some kind of an initial  
19 time frame, and then the PHO can grant delays or  
20 something, whatever the system is.

21 MS. CANNON: I think that's a good  
22 idea. Like I said, with us it's ten days. And

1 if you have -- it can be continued for good  
2 cause.

3 BGEN SCHWENK: You'd still be trying  
4 to get the SVC to come in to -- so a ten days  
5 before -- yeah.

6 MS. CANNON: And it can be done by  
7 hearsay of what a qualified investigator  
8 testifying to what a complaining witness might  
9 have said, or what another witness may have said.

10 But you kind of get left with the  
11 evidence you've presented if you're a prosecutor,  
12 and if it's not compelling because they can't  
13 assess credibility, and maybe the defense creates  
14 enough of a question.

15 But oftentimes the prosecutor wants to  
16 present that evidence because they want to vet  
17 it. They want to see how good is it.

18 They see it as a tool in my  
19 jurisdiction. They see it as a tool. They could  
20 go by way of indictment with a grand jury and  
21 everything in secret and defense not involved.

22 They actually put it all out there.

1       Because they don't want to go the distance if  
2       they don't have to. And it's a good vetting  
3       process, I think.

4                   CHAIR BASHFORD: In my jurisdiction,  
5       we do grand jury and it's non-hearsay. But if  
6       the grand jury no-true-bills the case, in order  
7       to go back in and present additional evidence,  
8       you have to get a judge's permission to do that.

9                   You can't just ignore what the grand  
10       jury said and say, well, I'll have somebody else  
11       just say go ahead. So, I mean, to me that is the  
12       big difference is a PHO says, no PC, and there's  
13       no -- you're not going back to the same person  
14       who made that decision.

15                   You're sort of -- I don't want to say  
16       an end run. I don't mean to be pejorative in  
17       that way. It's just somebody else is then  
18       vetoing that decision.

19                   MS. PETERS: What we heard in the way  
20       of the Service's take on different potential  
21       reforms of Article 32 highlighting some of  
22       the -- in response to some of the -- I think the

1 problems, or potential problems, or complaints  
2 that had been brought to them, in RFI questions  
3 and testimony, was to either consider the  
4 ramifications of making the Article 32 binding,  
5 and the other was to potentially reform the  
6 procedures themselves, give the hearing officer  
7 more power.

8 And the RFIs also ask them to consider  
9 creating an alternative where, when the PHO says  
10 no probable cause and the SJA disagrees, the SJA  
11 has to actually justify that independent  
12 determination in writing, because they would have  
13 to -- they would have to justify in writing that  
14 independent determination.

15 The Services weighed in on that and I  
16 have that -- I think some of the testimony in the  
17 RFI responses highlighted on a few different  
18 pages here, where topic 2 is the advisory nature  
19 of Article 32.

20 You heard that the Military Justice  
21 Division chiefs were not in favor of making it  
22 binding. Some of the reasons given were the SJA

1 is well-positioned to make an independent  
2 probable cause determination, the convening  
3 authority is as well, and they should be imbued  
4 with the power to make their judgment in the case  
5 in the interests of good order and discipline and  
6 justice. And those are just some of the reasons.

7 And the other is, given the current  
8 format, they felt that the preliminary hearing,  
9 because it's not a sufficient vetting of the  
10 evidence, that's not where the dispositive  
11 decision on the case's sufficiency should be  
12 made.

13 HON. GRIMM: There should be no  
14 surprise if prosecutors don't think it should be  
15 changed, and like it that way that it is. I  
16 mean, that should surprise absolutely no one.

17 MS. PETERS: And likewise, that the  
18 defense favored making it binding.

19 HON. GRIMM: Absolutely. That's like  
20 the punchline of the joke about the advice from  
21 accounts, it's 100 percent correct and totally  
22 useless.

1 MS. PETERS: So, I guess the question  
2 is, what sort of changes -- how would you sort of  
3 categorize the types of changes that you think  
4 are worthy of consideration, in light of that  
5 testimony?

6 And is there more information that we  
7 can bring to bear on the potential ramifications  
8 of a binding 32, whether it becomes judicial in  
9 nature, or remains quasi-judicial. But I think  
10 there might be more information to gather there.

11 But is there something -- is that  
12 something that you want to consider, or is that  
13 too great a change and we should focus on more  
14 targeted, procedural changes to Article 32 and  
15 its implementing rule?

16 HON. WALTON: Is that determination  
17 binding, regardless of whether additional  
18 information comes forward that would provide a  
19 basis now for maybe a new followed upon  
20 determination?

21 MS. CANNON: That's probably a  
22 question.

1 HON. WALTON: Yeah, that's a question.

2 COL. WEIR: That may be a discussion,  
3 in that it would be similar to a search warrant.  
4 The affidavit comes in, it doesn't contain enough  
5 information for the magistrate to authorize a  
6 search authorization.

7 But the officer can go out and gather  
8 more evidence, and then come back to the  
9 magistrate with that additional information to  
10 get over that probable cause hurdle. And it  
11 wouldn't be binding and never return again with  
12 more evidence.

13 Which counters the argument that the  
14 SJA receives evidence after the 32 that forms his  
15 ability to make a better probable cause  
16 determination.

17 PARTICIPANT: Go back to the 32.

18 MS. TOKASH: So, I -- this is Meghan  
19 Tokash. I found this is interesting in looking  
20 on topic 2, the bullet point handout that we  
21 have, the overview of information received  
22 regarding the written RFIs.



1                   When you look at RFI 11 responses,  
2 Military Justice Division chiefs, from a case  
3 review working group standpoint, bullet one is  
4 just what General Schwenk was talking about.

5                   The convening authority needs adequate  
6 flexibility to make decisions regarding cases, in  
7 order to maintain good order and discipline.

8                   Well, the cases that we reviewed  
9 didn't show that that was anywhere in any of the  
10 cases that we reviewed.

11                   The second bullet point, the PHO  
12 determination should not be binding, because 32s  
13 are not a comprehensive review of available  
14 evidence.

15                   Any of the cases I've reviewed, I even  
16 see some end-of-case file -- hold on, here's  
17 brand new evidence that just came to light -- or  
18 any evidence if the case was referred to trial,  
19 that there was new evidence that was brought  
20 before the convening authority.

21                   And then, the third one, the binding  
22 PHO determinations are unnecessary, because the

1 data indicates commanders' disposition decisions  
2 are reasonable.

3 Those are no-action dispositions.

4 Those are -- and I think that that's really  
5 important. We've found that a declination of  
6 prosecution was reasonable, not a commence  
7 prosecution decision was reasonable.

8 And then finally, their point about a  
9 binding Article 32 hearing could erode a victim's  
10 right to be heard.

11 A binding Article 32 hearing could  
12 erode a defendant's due process rights,  
13 especially in those 20 cases in fiscal year 2018  
14 that were sent for referral, regardless of the  
15 fact that a lawyer said there was no probable  
16 cause. And that's a problem.

17 So, I just find that the sentiments  
18 from the Military Justice Division chiefs just do  
19 not comport with the actual case files that we  
20 had our hands on and were reading and absorbing,  
21 and looking at and listening and analyzing, and  
22 talking to each other about.

1           And so, I just find that their reasons  
2           are disingenuous regarding whether the Article 32  
3           preliminary hearing officer's determination  
4           should be binding.

5           The probable cause determination I  
6           think should absolutely be binding. If the 32  
7           changes in its shape or nature, where one of the  
8           things they have to come to a determination  
9           encompasses the ability to obtain and maintain a  
10          conviction, that I don't think should be binding  
11          at all.

12          That is something that's open for  
13          discussion. And I think an SJA and a convening  
14          authority could say, I hear you, PHO, but I  
15          disagree. This is a righteous prosecution and  
16          should be sent forward to a court-martial panel.

17          But for the probable cause  
18          determination, I think it should absolutely be  
19          binding. And I found that the testimony given by  
20          the Military Justice Division chiefs and some of  
21          the trial counsel just did not bear out in the  
22          actual cases, and what we saw them doing day in

1 and day out as military justice practitioners  
2 inside the case files.

3 COL. WEIR: To go to Ms. Tokash's  
4 fourth bullet, she mentions about it erodes the  
5 ability of the victim to participate or testify  
6 in the Article 32.

7 I believe you guys ran the stats on  
8 that. I think it was 314 Article 32s, and the  
9 victim testified in seven. So, when you're  
10 talking about eroding, I don't know what that  
11 percentage is; I'm a lawyer, not a doctor. But  
12 that's fairly low.

13 BGEN SCHWENK: Thank God.

14 (Laughter.)

15 CHAIR BASHFORD: Meghan, when you're  
16 saying that the PC determination should be  
17 binding, are you only talking about the negative  
18 PC, no PC, or positive, "yes, there's PC" as  
19 well?

20 MS. TOKASH: Yes to both. That once  
21 a lawyer has made a probable cause determination,  
22 that it should be a binding determination

1 regarding the commencement of a prosecution.

2 CHAIR BASHFORD: But binding on whom?

3 Yes, there's a PC. So, I get it with the  
4 negative. There's not -- you know, a  
5 determination's been made, there's no PC. But a  
6 determination's been that there's a PC, does the  
7 SJA have to --

8 MS. TOKASH: I see what you're saying.

9 CHAIR BASHFORD: -- you know? Okay,  
10 now we're locked into going forward no matter  
11 what? That doesn't seem right.

12 HON. BRISBOIS: But the analogy is, if  
13 it's binding both negatively and positively, it  
14 works. Because in my federal court, if the grand  
15 jury says there's probable cause, the defense  
16 can't come to me in pretrial motions and say, I  
17 want to challenge the indictment on the basis of  
18 probable cause. That's not something they're  
19 allowed to do.

20 If the grand jury says there's no  
21 probable cause, then it's binding on the  
22 government as a not-a-true-bill, and they've got

1 to go through steps to get their evidence and  
2 start over. So, it works both ways.

3 And then, if it's binding both ways,  
4 then the recommendation part of whether it has a  
5 chance of success on the merits or not, this is  
6 going to be a tough case, but then the convening  
7 authority can make the decision of whether we're  
8 going to go ahead with the politicians as a  
9 defendant case, or as a convening authority.

10 But to have a probable cause  
11 determination prior to preferral, have a new  
12 probable cause determination at an Article 32 or  
13 34 probable cause and determination, none of  
14 which gels in any sort of way, makes an  
15 Article 32, as it currently sits, an entire waste  
16 of time for everybody.

17 CHAIR BASHFORD: But I just want to  
18 make sure we're not saying that if a PHO says,  
19 yes, there's PC, that the SJA and the convening  
20 authority are now locked into, "we must go  
21 forward" --

22 HON. BRISBOIS: Well, that's just

1 probable cause.

2 CHAIR BASHFORD: Right.

3 HON. BRISBOIS: Because the U.S.  
4 Attorney can plead out to something less or  
5 dismiss entirely, even though the grand jury has  
6 said that there's probable cause.

7 But the defense can't come to me -- or  
8 to Judge Grimm or to Judge Walton -- and say  
9 we're going to challenge the indictment by re-  
10 litigating the probable cause determination.  
11 Once it's done, it's done. And then, you move  
12 off to the next stages.

13 MS. CANNON: There are challenges that  
14 can be made legally, and sufficiency of the  
15 evidence. But those are going to be rare.

16 HON. BRISBOIS: But it's because of  
17 false evidence --

18 MS. CANNON: Right.

19 HON. BRISBOIS: -- or lying, or  
20 something like that. But just the nature of, I  
21 disagree with the probable cause determination,  
22 you can't do that. And that's what's in place

1 right now is, we've got three or four different  
2 places where somebody can say, I've got other  
3 reasons why I want to go forward, so I'm going to  
4 come up with a different probable cause  
5 determination.

6 BGEN SCHWENK: So, if the -- under  
7 this option, if the preliminary hearing officer  
8 said no probable cause, the case is done for the  
9 moment -- or maybe done forever, but done for the  
10 moment for sure -- and back in the ballpark of  
11 the investigator, the special court-martial,  
12 convening authority, the trial counsel, what are  
13 we going to do now, and they do whatever they do.

14 If the decision is, there is probable  
15 cause, then I suppose we would ask the PHO, if  
16 you find probable cause then, given the  
17 evaluation of likelihood of conviction, whatever  
18 the correct word is --

19 BGEN SCHWENK: That's the recommenda-  
20 tion.

21 HON. BRISBOIS: And then the  
22 recommendation for disposition. So, that would



1 give them the option of saying, now these are  
2 just recommendations -- an evaluation, and then a  
3 recommendation. Low likelihood of conviction.  
4 Recommendation, some lesser action of some kind,  
5 or whatever it is.

6 MS. TOKASH: And that's where you  
7 would want to be in discourse with your SJA and  
8 you would want to say, is this the hard case that  
9 is a righteous prosecution, and despite some of  
10 its warts, should still go forward.

11 HON. BRISBOIS: Or do we look at a  
12 title 10 in lieu of court-martial.

13 MS. TOKASH: Right. Or some other  
14 disposition.

15 HON. BRISBOIS: Instead of discharge.

16 BGEN SCHWENK: So then, if you do  
17 that, then you go back to who? And now, we would  
18 ask the question, who is the person, what special  
19 training, if any, does that person need? I don't  
20 know whether you have --

21 MS. TOKASH: You're talking about the  
22 PHO?

1                   BGEN SCHWENK: Yeah, the PHO. You  
2 know, a three-day certification course to be a  
3 PHO, you know, that people go through, where they  
4 do scenarios and do whatever they do, or one day  
5 or online, or whatever it is, some kind of a  
6 program so that they have a certain amount of  
7 experience, a certain grade level, and they've  
8 done whatever this stuff is.

9                   And so now, we're looking at the who,  
10 and then the authority. So now, we've decided  
11 what their mission is, and who they are and what  
12 authority. And I would assume you go back to the  
13 old days where they have the authority to compel  
14 evidence, and so that they know that they've  
15 thoroughly looked at it before they make their  
16 decision and the recommendations.

17                   And if we go back to that, then that  
18 brings us up to the issue of, what about victims,  
19 and how do you handle compelling witnesses. But  
20 that's something that policy working group can  
21 look at in more detail. I'm not sure what I  
22 think at the moment and maybe somebody has the --

1                   CHAIR BASHFORD: It would be  
2 interesting to see the data. Because in the last  
3 two years, when the PHO said no PC, about  
4 60 percent of the time the SJA and the convening  
5 authority agreed and we did not refer it out to  
6 general court-martial.

7                   But 40 percent of the time they  
8 didn't. And I just wonder if there's any -- why  
9 40? Why 60? Like, what is the difference  
10 between those cases? So, they're not referring  
11 everything to court-martials.

12                   So, they're not saying, I don't feel  
13 that I can accept a no-PC finding. But  
14 40 percent is a big chunk to overturn, I think.

15                   BGEN SCHWENK: Yeah. It will be  
16 interesting when we see the CRWG info, because a  
17 lot of that is captured, plus the reviewer's  
18 assessment of whether the referral made sense  
19 based what's in the investigative case file and  
20 if you happen to have the 32 PHO report in front  
21 of you or not.

22                   A lot of the ones I reviewed, we

1 didn't have them, for some reason.

2 MS. PETERS: To that end, when the  
3 Staff did the data project for the 32s, we noted  
4 when we presented it, that the information we  
5 don't have is, what was the victim's view as to  
6 disposition at referral?

7 That could have changed after the 32,  
8 and not all 32 documents noted their  
9 willingness -- some commented on their  
10 willingness to participate in the court-martial;  
11 some didn't.

12 And some referral documents noted that  
13 there was a change. If there was a no, it went  
14 to a yes, or a yes went to a no. Or it stayed  
15 the same. But in many cases we didn't have what  
16 the victim's preference was. And we don't know,  
17 I think, what the testimony of the August meeting  
18 we were at was that sometimes the trial counsel,  
19 they've done additional interviews.

20 They have additional insight into the  
21 strengths and weaknesses in the case and we don't  
22 have that information that they probably put into

1 a prosecution merits memo, or a case analysis  
2 memo. And then they made the SJA aware of that.

3 So, I think that some of the  
4 testimony, it was difficult to sort out in  
5 August. But in reviewing the transcript, trying  
6 to hone in on things that might take an  
7 Article 32, no probable cause, to an SJA, says  
8 yes, there is probable cause, and refer, or a PHO  
9 just recommended against referral, given the  
10 likelihood of success being low, and the SJA  
11 agreed even with that recommendation.

12 The testimony, again, was a little bit  
13 difficult to parse out, but I threw some of the  
14 reasons up on the slide and put them in topics 3  
15 and 4, just as to what kind of information an SJA  
16 might be privy to, that the Article 32 hearing  
17 officer didn't have. And again, this is just  
18 based on their testimony. And we can always go  
19 back to the Services for more detail or  
20 information, or even comment today from the  
21 Service representatives.

22 But the things they tried to highlight

1 were any interviews, or the trial counsel has  
2 done beyond the initial law enforcement  
3 interview, that's all the PHO has in many cases.

4 We were told the results of digital  
5 forensic examinations sometimes come in after the  
6 32, and then the government has that information  
7 to help them assess the meritoriousness of the  
8 case or the merit of the case.

9 And then anything -- and so, another  
10 prosecutor said that sometimes the defense raises  
11 issues after the Article 32, or brings witnesses  
12 to light, or evidence to light. And that changes  
13 the calculation potentially, somehow, between the  
14 32 and the referral decision.

15 So, that was an interesting issue to  
16 parse out. And I wanted to take a point to  
17 clarify that there were a couple of different  
18 things going on in the last meeting.

19 There was a discussion of Article 32  
20 post-hearing submissions. There's a discussion  
21 of what is the SJA privy to that the hearing  
22 officer might not be privy to?

1           And then, there was, what information  
2           could a victim or her counsel be providing to the  
3           referral, to the CG, to the convening authority,  
4           that is not being provided to the hearing  
5           officer?

6           When they went back into the testimony  
7           and the RFIs, it boiled down to those items on  
8           the part of the government that the SJA might be  
9           aware of.

10          But separately, we don't have a lot of  
11          information yet on the written procedure  
12          following an Article 32. It's new for the 2019  
13          MCM, that the defense, the government and the  
14          victim have a day or two after the 32, to provide  
15          written materials on what they think the  
16          recommendation as to disposition should be.  
17          Whatever they think is relevant. That's a  
18          written submission.

19          The PHO is supposed to comment on  
20          that, wrap that up into the new report, and give  
21          it to the special court-martial convening  
22          authority, and then to the SJA.

1           So, we need to see what effect that  
2           has. But I think the testimony also bore out,  
3           and the RFIs also bore out, that any information  
4           from the victim post-32 largely regards their  
5           preference. It's not generally substantive ex-  
6           parte information to the SJA and convening  
7           authority that's influencing the decision.

8           And I invite any commentary from the  
9           Services on that. But I think that's what the  
10          testimony of the folks in August ultimately came  
11          down to.

12          But sometimes we were talking about  
13          all those things at once and it was difficult to  
14          parse out. We as a Staff wanted to go back and  
15          kind of comb through the testimony piece by  
16          piece, just to make those three things clear -- a  
17          written submission after the 32, the SJA's  
18          consultation with his prosecution team, and what  
19          whatever fruit that bears towards the assessment  
20          of the case, and then the victim's right to  
21          express a preference as to disposition, which  
22          will come usually in writing to the prosecution



1 team, and then to the SJA prior to a referral  
2 decision.

3 Those are sort of the three things at  
4 work between the 32 and referral. So, I just  
5 wanted to add that clarification in there.

6 CHAIR BASHFORD: The one thing that  
7 struck me is on victim preference, particularly  
8 declination. I mean, the military has thousands  
9 of forms. And it was like pulling hens' teeth to  
10 try to find what the victim's preference was in  
11 these files.

12 There might be some reference to it in  
13 the investigator's notes, it might be something  
14 from the SVC/VLC. But it would be very easy for  
15 the staff --

16 BGEN SCHWENK: Not a form. It would  
17 just be a memo that they type --

18 CHAIR BASHFORD: Just a "I do not want  
19 to participate in this process." It would be  
20 nice and clean. You could know when it happens.  
21 Maybe post-32 it's in writing. But it was --  
22 given the weight it has, it's so badly

1 documented.

2 COL. WEIR: CID has a Form 570-E, I  
3 believe is the name of it. In most of the Army  
4 files, in the declination, there was that form  
5 was signed, or it was done telephonically and the  
6 agent would say, look, I don't think the rest of  
7 the Services have an actual form they use. And  
8 so it was just, like you said, trying to figure  
9 out what happened along the way when the victim  
10 no longer participates.

11 MS. PETERS: There was testimony at  
12 the last meeting that something that also makes  
13 it more difficult to track is when -- and this is  
14 arguably the case, there isn't verification --  
15 but arguably, when there's discussions between  
16 the victim's counsel and the defense counsel  
17 about an alternate resolution, whether that  
18 dovetails or overlaps with the decision not to  
19 participate in a court-martial.

20 But because the victim has to be heard  
21 on any proposed alternate resolutions, the  
22 defense and the victim are coordinating ahead of

1 time to sort of negotiate that and bring it  
2 forward to the government or to the CG.

3 So, that was one complicating factor.  
4 And noting clearly of -- getting a victim  
5 declination read, a date, a reason, whatnot.

6 MS. CANNON: You know, when you were  
7 asking what kinds of information do we need to go  
8 forward, because we did already do a lot of  
9 hearing from different people on this question,  
10 but the issue of time limits is a good one,  
11 because as I said, if there's a statutory, or  
12 some kind of regulation, that sets a certain time  
13 limit that would require good cause or such in  
14 order to put it over, that might create more  
15 pressure to get things done in a more timely way.  
16 And what effect would that have? I'd be curious  
17 what the --

18 CHAIR BASHFORD: How time looks on the  
19 investigation? Or time limits --

20 MS. CANNON: I'm sorry. For the  
21 setting of the Article 32. That you have to have  
22 an Article 32 hearing within -- maybe you could

1 set a range or some timetable, as is done in the  
2 state, and if you're not ready, good cause must  
3 be shown to justify putting it over, and how long  
4 do you need and why.

5 So, it creates kind of an overview or  
6 some oversight over letting these things just  
7 kind of take a back burner too long and something  
8 else is more important, and meanwhile people's  
9 lives are being affected on both sides.

10 BGEN SCHWENK: What's the trigger for  
11 the ten days in California?

12 MS. CANNON: What's the trigger? The  
13 arraignment. I'm talking the old-fashioned  
14 arraignment. You're arraigned within 48 hours  
15 of -- or 72, depending on the charges -- and ten  
16 days -- ten court days are essential bond time  
17 for the investigation, before anything -- there's  
18 no real trigger -- other than filing a complaint,  
19 there's no real triggering mechanism.

20 HON. GRIMM: The charge, whatever form  
21 the charge is, then triggers a period of time  
22 before the arraignment. The arraignment is

1 before a judicial officer, who advises of rights  
2 and take a plea, and that's when the clock starts  
3 for the preliminary hearing, ten days from that.  
4 Yeah.

5 MS. CANNON: Correct. And it's not  
6 hard to get a continuance if you have X number of  
7 people to still interview and you're waiting for  
8 test results, and this, that and the other thing,  
9 and you can give a reasonable 45-, 60-day  
10 request.

11 But it requires you to address that  
12 and stay with it.

13 HON. GRIMM: So, one of the issues  
14 that comes up on my mind on this, is that when  
15 you compare it to the civilian analog, is that in  
16 the preliminary hearing, as done in the civilian  
17 community, you have a judicial officer who hears  
18 that.

19 That judicial officer is going to be  
20 in that jurisdiction then and, unless they retire  
21 or have an illness, or aren't elected, or  
22 whatever it is, they're going to be there for a

1 foreseeable period of time. And if they're not  
2 there, there will be some other judicial officer  
3 that will do it.

4 In the context of what we're talking  
5 about here where you have all these people  
6 rotated in and out of various schedules where you  
7 don't know, if you were going to re-imagine an  
8 Article 32 where a no-probable cause was  
9 binding -- unless you went back to an Article 32  
10 officer with more evidence and they found it --  
11 you would either be going back to a different  
12 Article 32 officer -- which then gets into the  
13 issue of who appoints the Article 32 officer --  
14 if it's a special court-martial convening  
15 authority who does that, where are they taking  
16 them from?

17 Are they appointing somebody who's a  
18 prosecutor in the Justice Department? Are they  
19 appointing a defense attorney? Where are the  
20 qualifications?

21 And then, if that person is not there  
22 and you go before a new Article 32 officer, then

1 there's that whole forum shopping issue comes up  
2 as well.

3 So, part of the problem that we have  
4 in terms of imagining how this process works,  
5 happens within the context of a military where  
6 people are being transferred in and out all the  
7 time.

8 MS. CANNON: Well, that's true. And  
9 the courthouses too. Judges don't stick around  
10 in one particular -- we have a large county.  
11 So -- and people retire, or people visit and do a  
12 vacation for somebody.

13 HON. GRIMM: But they're judges doing  
14 it. So --

15 MS. CANNON: There are judges doing  
16 it.

17 HON. GRIMM: And then some of the  
18 data that we looked at, military judges were  
19 acting as Article 32s. I mean, if you wanted to  
20 say that only a military judge could do it, then  
21 you would have a barrier that would be a barrier  
22 between how you pick someone and what their

1 qualifications were in order to do it.

2 So, they're just -- there are  
3 complications in terms of how you take a system  
4 and manage it within the military system, where  
5 you have --

6 MS. CANNON: So, you're saying, who  
7 does it is one thing.

8 HON. GRIMM: Sure.

9 MS. CANNON: Who are you going to have  
10 do it? And then, the other issue is, if it's  
11 finding dismissal but you want to revisit it,  
12 there should be a transcript of the proceedings.

13 HON. GRIMM: Mm-hmm.

14 MS. CANNON: And anyone can pick it up  
15 and say, does this affect that? Sure, it does.  
16 That's how it would happen in my world. It's not  
17 really that difficult.

18 HON. GRIMM: So, I think -- go ahead.

19 HON. BRISBOIS: Well, I mean, for  
20 purposes of this discussion, we're trying to  
21 formulate what are we going to ask? What are we  
22 going to find out at our site visits?



1           And I think whether it should be  
2 binding or not is the threshold question.  
3 Because if it's not binding, then who does it  
4 really isn't quite as important as if it's going  
5 to be binding or not.

6           And the more I think about whether  
7 it's binding or not, it doesn't -- we've been  
8 talking about the federal system and the state  
9 system.

10           Probable cause determination is  
11 binding in both systems. We have a grand jury in  
12 the federal court system. California, the state  
13 of Minnesota, they don't use grand juries except  
14 for very limited circumstances.

15           So, the preliminary hearing is, in  
16 fact, the equivalent of the federal grand jury  
17 system. No probable cause, the case is dismissed  
18 unless you can meet the test to come back.

19           Our military justice system is  
20 completely removed from that. We have -- and so  
21 it is an existentially foundational question to  
22 the continued existence of Article 32 or not,

1 whether it's going to be binding or non-binding.

2 If it's not going to be binding, one  
3 of the other questions we should be asking then  
4 is, let's get rid of it.

5 SGT. MARKEY: Two ways to do it.

6 Yeah. And I don't disagree with that. I'm  
7 looking at three things. What's the utility of  
8 the Article 32?

9 So, decision would be, leave it as it  
10 is -- because I don't think any of us take this  
11 lightly, right? This is a huge part of the  
12 process. And there's already been some reform.  
13 So, do we leave Article -- do we ask the question  
14 do we leave Article 32 as it is?

15 Do we take Article 32 and try to look  
16 at areas that could improve the process? And I  
17 think part of the issue with that is, what I took  
18 away from the testimony from some of the panels  
19 was, quite frankly, the disrespect for the  
20 process.

21 I don't think anybody respected the  
22 Article 32 process because they were basically

1 playing games with it -- both sides.

2 And so, if there's no respect for the  
3 process and we don't ensure that that process is  
4 being done the way Article 32 is designed, then  
5 what would be the purpose of Article 32 is nobody  
6 really respects how it operates. We're just  
7 going to play games with it.

8 We're going to give this information,  
9 not information. And I don't know if that's a  
10 result of the previous reform, but that has  
11 happened, because we've seen the changes occur.

12 And the other part is, how do we  
13 ensure quality control and oversight that  
14 Article 32 is not being misused, abused, ignored,  
15 disrespected? That it is a meaningful part of  
16 the process in the military justice system?

17 So, keep it, throw it out, or look at  
18 it and identify those areas within the current  
19 Article 32 that we want to address to improve the  
20 process. And then, ensure that the users of that  
21 system respect that process.

22 HON. BRISBOIS: Which gets back to

1 what's its function and purpose, and then the  
2 answer to that question, whether it's binding or  
3 non-binding.

4 Grand juries, preliminary hearings,  
5 the purpose of the that is not to help the  
6 government perfect its case in the sense that  
7 we've been hearing the testimony about.

8 It, at its core, is a check and  
9 balance on prosecutorial overreach. I mean, the  
10 purpose of the grand jury is, we're not going to  
11 let you take a defendant to trial for political  
12 reasons where there's no probable cause.

13 The reasons for preliminary hearing,  
14 the county attorney or the city attorney prefers  
15 a charge, and would I again let you take someone  
16 to trial for non-meritorious reasons where  
17 there's no probable cause. It's a check and  
18 balance on excessive prosecutorial action.

19 Right now, that Article 32 is not  
20 serving that function. And so, it doesn't do  
21 anything in terms of its analog with the justice  
22 systems, in the state and federal level,

1 everywhere else in the country.

2 So -- and maybe that's too much of a  
3 deep dive for the site visits. I don't know,  
4 because the people in the field are going to be  
5 dealing with that case at that time on that --  
6 that's right in front of them.

7 But I think for our group -- for the  
8 policy working group for the larger DAC-IPAD, I  
9 think ultimately we're going to come back to --  
10 we need to come back to not just tinkering with  
11 Article 32, we need to really decide what is it  
12 going to be, or what are we going to recommend  
13 it's going to be, going forward, from a  
14 substantive, how-does-it-serve-an-analog func-  
15 tion, and yet also provide a tool for good order  
16 and discipline.

17 But right now, from everything I've  
18 heard from all the testimony, all the questions  
19 that we're raising among ourselves, it's kind  
20 of -- we keep coming back to what are we doing?  
21 Why are we doing it?

22 And if that's the recurring answer or

1 question to our questions, that raises a giant  
2 red flag about the continued utility of  
3 Article 32 in its current form.

4 HON. WALTON: Let me just ask, is  
5 Article 32 also designed to provide a process to  
6 assess whether someone should be detained pending  
7 trial?

8 HON. BRISBOIS: That's a separate  
9 process.

10 HON. WALTON: It's a separate process.

11 HON. BRISBOIS: Mm-hmm.

12 MS. PETERS: Which also requires  
13 finding probable cause to the way an offense was  
14 committed and the accused committed it. So --

15 HON. GRIMM: So, one thing -- and  
16 we're trying to design what questions we should  
17 be asking and decide that it's -- I think what we  
18 found is that when we heard from the  
19 participants -- from the criminal justice  
20 participants, the trial counsel, who expressed  
21 what their opinions were -- and everyone has  
22 opinions and they're based upon whatever they're

1 based upon -- but I suspect that none of them  
2 have done anywhere near the kind of analytical  
3 review that was done by what the case review  
4 committee did, in terms of getting these things  
5 and looking at them and mapping all the way  
6 through.

7 I'm sure that in retrospect it would  
8 have been good to hear from them after that to be  
9 able to ask them, well, how many hundreds of  
10 cases have you reviewed to support that  
11 conclusion? What's that based upon?

12 I suspect it's based upon just  
13 anecdote and experience and the position that  
14 they hold. So, if we are informed by information  
15 that we have received through the hard work of  
16 our Staff being daunted and getting that  
17 information, and the extremely hard work by the  
18 people on that committee by looking at all that  
19 and the time that the spent, then I think that  
20 the kinds of things that we should want to try  
21 and get from these field visits are data that can  
22 help us make these decisions.

1                   Certainly, attitudes are helpful on  
2                   that, but attitudes informed by a lack of  
3                   information are less helpful than those formed by  
4                   having done the work that was done by the case  
5                   review committee.

6                   CHAIR BASHFORD: The one thing though  
7                   is, if the 32s are as useless as the defense bar  
8                   is essentially saying -- Meghan, you're saying  
9                   they're only being waived about 20 percent of the  
10                  time.

11                  MS. TOKASH: Yeah.

12                  CHAIR BASHFORD: So, it's either  
13                  inertia -- it's easier to go ahead rather than to  
14                  waive it -- or you would think there has to be  
15                  some perceived benefit for people to go through  
16                  with it eighty percent of the time.

17                  MS. TOKASH: It will also be  
18                  interesting I think to ask trial counsel in the  
19                  field when they make their probable cause  
20                  determination. Because I have a feeling it's a  
21                  lot earlier than before the Article 32.

22                  But if it is, it's not being



1 documented anywhere. And I think that would make  
2 us as Committee members feel better. It would  
3 certainly make me feel better knowing that that  
4 analysis is being done at the front end, and if  
5 it is, then why does it need to be done at the  
6 Article 32?

7 If a lawyer has already made that  
8 determination and advises a commander, I believe  
9 there's probable cause that an offense was  
10 committed, and that this particular soldier --  
11 sailor, airman, or Marine -- committed the  
12 offense.

13 So, commander, you have a green light  
14 to go ahead and prefer charges. By the time you  
15 get to a 32, that's one less thing that you have  
16 to worry about.

17 HON. GRIMM: You know, the whole --  
18 it's fine because we got copies of some law  
19 review articles that talked about the historical  
20 origin and development of the Article 32.

21 There was a time in the military  
22 justice system when you could be a defense

1 attorney or a prosecutor without even being a  
2 lawyer.

3 And they had law officers who would  
4 advise the various people, who had to be a  
5 lawyer. Then, the 1969 change, the Manual for  
6 Courts-Martial came in. And that was the largest  
7 change, the Manual for Court-Martial, just before  
8 I came in, in the early '70s.

9 And that operated. And then you had  
10 to be -- in order to be a defense attorney, you  
11 had to be a lawyer. You didn't have to be a  
12 lawyer to be a prosecutor. And I was a non-  
13 lawyer prosecutor.

14 While I was going to law school and I  
15 was on active duty, I tried 40 cases -- special  
16 court-martial cases -- between my first and  
17 second year of law school into the Excess Leave  
18 Program, and wasn't even a lawyer.

19 But to be a defense attorney, you had  
20 to be a lawyer. And they had the whole  
21 certification process.

22 And so what's happened is, is that the

1 Article 32 existed at a time when you had a lot  
2 of non-lawyers involved in the process of  
3 bringing in prosecuting and defending courts-  
4 martial.

5 And so, as a result of that, that is  
6 what that function was. When you had that  
7 function, then there was some point to be made  
8 about having a lawyer advise someone to do an  
9 investigation, and then give advice to the  
10 convening authority.

11 As the system progressed where you had  
12 lawyers involved in all of these critical  
13 phases -- SJA being a lawyer, defense counsel  
14 being a lawyer, prosecutor being a lawyer --  
15 then, there is this decision, well, we really  
16 don't need to have the preliminary hearing be a  
17 full evidentiary thing. They just can do a test.

18 So, it's almost as though the  
19 underlying need for what an Article 32 is to  
20 function as. There were tinkers with it as the  
21 system itself changed going forward, with  
22 increased professionalism, with lawyers involved

1 in all critical phases, and investigators being  
2 specially trained, but never this reexamination  
3 of, in this system the way it is now, what does  
4 this do and is it appropriate?

5 So again, it gets back to is it like  
6 your appendix? Is it something that's part of  
7 the body corporate but subject to it getting  
8 infected and having to be taken out, it doesn't  
9 really do all that much.

10 So, maybe we should try to get a sense  
11 of, in terms of how the process operates, when  
12 should the probable cause determination be made,  
13 who should make it, and that's the one that you  
14 stick with going forward one way or the other.

15 Because I wonder about whether or not  
16 you've had this thing that has a purpose that  
17 made a lot of sense at the time, that it was  
18 designed for what it did, that was outlived --  
19 the need for that purpose as lawyers became more  
20 prevalent and involved in the process from there  
21 going forward.

22 MS. CANNON: But it reminds me of one

1 of the questions that was asked. We got a  
2 response to this question of due process was  
3 raised.

4 HON. BRISBOIS: There's a difference  
5 between --

6 (Simultaneous speaking.)

7 MS. CANNON: Military has a different  
8 due process than the United States -- the rest of  
9 the United States. And I don't think that's  
10 true.

11 And I think that's why if all the 32  
12 is about is to be another set of eyes, then I  
13 agree its usefulness is nothing.

14 But if it is considered kind of a  
15 constitutionally charged oversight of the  
16 prosecution and a protection against the accused  
17 being wrongfully taken up into all of this way  
18 too long before an acquittal, then I think we  
19 should seriously consider strengthening it.

20 CSMAF MCKINLEY: I personally would  
21 like to see the Article 32 strengthened and have  
22 a lot more teeth in it. When I think about good

1 order and discipline of the military, I think a  
2 lot of the military members out there -- officer  
3 and enlisted -- don't have a whole lot of faith  
4 in the system we currently have.

5           There's not a lot of confidence when  
6 they see cases that are carried on for two years  
7 and there's no teeth in it at the end and  
8 everything's dropped. But in the meantime,  
9 you've lost morale in your unit, you've lost  
10 personnel from the unit for work, you've wasted  
11 enormous amount of money, and at the same time  
12 you have to still complete the mission that your  
13 unit has to do.

14           But if we put more teeth in the  
15 Article 32 and we can determine then whether or  
16 not to dismiss the case or go on, it's better for  
17 the victim -- that victim will be able to decide  
18 where they want to go with their future -- and  
19 it's definitely better for the suspect, because  
20 they're going to find out whether or not they  
21 have to strengthen their case where all those  
22 flags that we talked about are going to be

1 dropped and they have a chance to go on with  
2 their military career.

3 But to carry these things out and just  
4 carry it out just for the sake of, well, we'll  
5 take it as far as we can, good order and  
6 discipline goes by the wayside.

7 We need to put more strength in the  
8 32. And if there's not a case, then we need to  
9 drop it and get back to work.

10 BGEN SCHWENK: Judge Brisbois raised  
11 the issue of how we can get the most constructive  
12 comment in the time that we have with people in  
13 the field, rather than just off-the-cuff  
14 comments.

15 And one of the thoughts I had was, if  
16 the policy working group could come up with some  
17 strawmen options, and we could then send them out  
18 to whoever is being selected at all these places  
19 we're going, so they could look at it ahead of  
20 time and tell us, I like this about this because,  
21 I don't like this about this because, and I could  
22 care less about this because I think it's a waste

1 of time.

2 Then, there'd be something they could  
3 prepare and something they could actually latch  
4 on that's sort of concrete. And we've already  
5 talked about a bunch of different options.

6 We can come up with three different  
7 options or whatever. And then collect that data,  
8 come back and see if we can amalgam that into one  
9 thing that everybody things is a good idea.

10 SGT. MARKEY: General, I think like  
11 minds think alike. I'd written notes about that.  
12 So, a research-based survey tool. And we have  
13 Bill Wells. I don't know if we could write  
14 something up where we would do a preliminary  
15 questionnaire or survey tool that we could  
16 validate with information. And then go into the  
17 field based on the responses.

18 Because we really want to know what  
19 the end users, what they're doing with the  
20 Article 32, before we really can make a decision.  
21 We've heard panels testify about things. But  
22 again, I find when we do like type work, when I'm



1 in a group and somebody's telling me one thing,  
2 when they're driving to the airport they're  
3 telling me something else.

4 So, that's the reality is when I'm  
5 going to the airport, oh really? But in settings  
6 like this, right or wrong, you're going to get  
7 filtered information. And I think maybe a survey  
8 tool. But I don't know if we would need to do  
9 that anonymously, or we identify people and  
10 follow up with those people that would be willing  
11 to participate.

12 MS. CANNON: Or make it optional.  
13 Because I think you're going to have the car  
14 thing if you must put your make down. Nobody  
15 like to put anything in writing.

16 HON. GRIMM: Yeah, you're right. It's  
17 not for attribution anyway.

18 DR. MARKOWITZ: It would certainly be  
19 helpful, though, to have conversations with  
20 people where we're not talking to them in front  
21 of say their rater, or what have you. So if we  
22 can make sure we are having conversations with

1 folks in the field where we have set it up in a  
2 way that allows people to speak as freely as  
3 possible within a group setting, and certainly I  
4 think it will allow us to have the best  
5 information possible, understanding that it's  
6 still going to be filtered. But I think being  
7 mindful of how we structure those conversations  
8 will allow us to get better information if we're  
9 not having a conversation that has the SJA and  
10 the entire trial counsel sitting there at the  
11 same time. I mean, that's the kind of thing that  
12 would probably be best to avoid.

13 HON. GRIMM: And if that's so, we  
14 should probably be prepared to think about what  
15 we tell these folks about what we will do with  
16 their information. I mean, there's an  
17 understandable reluctance to say my name is  
18 Captain so and so and I'm a this or that, but  
19 it's helpful to know the perspective of the  
20 person who's on the trial counsel and the Defense  
21 Counsel. I've been a preliminary hearing  
22 officer. I can tell you right now I was a

1 special court-martial to be in authority, now I'm  
2 a general court-martial convening authority.

3 When I was there, I wish I had known this, that  
4 and the other, so that we should be prepared to  
5 tell them up front what we think we can commit  
6 to, how we will use this information and I think  
7 we will get their information if we protect the  
8 identity of the people who are giving it.

9 CHAIR BASHFORD: JPP anonymized them.

10 GEN. SCHWENK: They did it by panels,  
11 so all of the trial counsel sat in the room with  
12 a couple of the members and some people to take  
13 notes, and all we put down is Captain, trial  
14 counsel, Camp Lejeune. That's all we know.

15 SGT. MARKEY: They're no longer in the  
16 military, but they served in those roles? So  
17 there is no longer that supervision. And I'm  
18 asking, clearly we want to know what worked, what  
19 didn't work, what would you suggest as far as  
20 improving the process?

21 MS. PETERS: We can certainly work  
22 with that thought, always keeping the goal of

1       anonymity in mind. And to that point, I think  
2       I'm also hearing that while you don't want  
3       necessarily the trial counsel and the SJA  
4       together, those might be two separate groups that  
5       you want to hear. And we can go back and have a  
6       conversation with you and maybe talk to the  
7       Services about the best way to get those kinds of  
8       perspectives, whether a site visit is that.  
9       Because there's usually in a place there's one or  
10      two SJA's, so as you get higher in rank there's  
11      fewer and fewer of those folks that are easier to  
12      identify. But because we've been talking about  
13      the purposes of the 32 and the idea that -- in  
14      some respects the 32 in its report is supposed to  
15      assist the SJA, we can make a lot of tie-ins to  
16      the SJA's interaction with the 32 information and  
17      the referral process at site visits. We can  
18      definitely work with that.

19                   GEN. SCHWENK: The last time we had  
20      panels, all Defense Counsel, all trial counsel,  
21      and another panel would come in victim advocates,  
22      and then another panel would come in and we'd

1 talk to SJA's, we met a couple convening  
2 authorities individually in their offices. We  
3 tried to talk to judges but they had Judge  
4 Ephraim approach and they talked about it. And  
5 so we talked about lots of other stuff, but not  
6 what we were there for. So my concern was you  
7 get all trial counsel, they're all young, they're  
8 all aggressive, they're all going to be looking  
9 at each other and they're only going to give you  
10 the trial counsel view. Not so, they had no  
11 trouble disagreeing with one another. When the  
12 Defense Counsel came in, same thing. They were a  
13 lot more candid than I had expected. Obviously,  
14 when I grew up as a lieutenant and a captain, I  
15 was a lot more mealy-mouth than these people  
16 were. They were willing to speak their mind, so  
17 it was interesting.

18 COL. WEIR: That's a great point,  
19 General, which goes to the point about sending  
20 out questions ahead of time.

21 GEN. SCHWENK: Somebody write that  
22 down; that's the first time he's ever said that

1 to me.

2 COL. WEIR: Now once you've sent out  
3 questions ahead of time to people, somebody's  
4 boss gets it and show what the answer's going to  
5 be. So I would just be leery about sending out  
6 something to all the trial counsels are going to  
7 show because their SJA's will go what's these  
8 questions -- well, you know how to answer that.  
9 You know, so I think just getting the panel armed  
10 with the questions and just hit them with it at  
11 that time. It's the free flow and they don't  
12 say, oh shit, the SJA took the article --

13 GEN. SCHWENK: You said shoot, that's  
14 what I heard.

15 MG ANDERSON: That's right. Shoot.

16 GEN. SCHWENK: Well, it wouldn't be a  
17 question because more of opinions, attitudes and  
18 feelings, so more of a survey as opposed to they  
19 knew we're going to ask those same questions, but  
20 we're going to get a landscape view of what the  
21 end users are doing. That was my thought process  
22 on it. And keeping it as anonymous as you can, I

1 think that's key as well.

2 MG ANDERSON: I have a question. So  
3 General Schwenk, maybe you know the answer to  
4 this --

5 GEN. SCHWENK: No.

6 MG ANDERSON: Maybe it's an  
7 opportunity when there's some professional  
8 development conference for us to get a hold of a  
9 critical mass of some of these folks to address  
10 the issue of there being locations of where you  
11 may have one or two and they could be easily  
12 identifiable. That also might be an opportunity  
13 to have a survey tool be distributed and have  
14 people fill it out. Now, I don't know if the  
15 Services would agree to that and I don't know how  
16 the professional development training is done for  
17 that, but it's just a thought.

18 GEN. SCHWENK: I mean, that's worth  
19 looking to see when they have their conferences  
20 and how many people show up. The JAG schools we  
21 have people coming and going on a regular basis,  
22 pretty large numbers. So it wouldn't be too hard

1 to get down to them, the Taj Mahal and the really  
2 cool building in Charlottesville.

3 HON. GRIMM: They got a new building?

4 GEN. SCHWENK: And then the dump up in  
5 Newport.

6 DR. MARKOWITZ: It's still a nice  
7 place to go.

8 GEN. SCHWENK: Oh, okay. Thank you.

9 MS. PETERS: So a couple of the other  
10 topics, I'm going to pivot from Article 32 -- we  
11 can always come back to it -- but you heard in  
12 the RFI's and the testimony about the Article 33  
13 disposition guidance. Now, Case Review made some  
14 observations about that. The guidance also we  
15 should note effective 1, January 2019. That  
16 doesn't mean that just because the Services know  
17 it's out there and have already had similar  
18 guidance, more informally in effect similar  
19 considerations to go to in the rules for court-  
20 martial for quite some time. But now they have  
21 Article 33 disposition guidance and that was  
22 discussed in the RFI's and testimony.



1           The kind of responses when we asked  
2           what weight is the ability to obtain a condition  
3           given, and this goes to the RFI's. We heard  
4           things like, it is a given, it is one factor to  
5           consider among many, it is one of the most  
6           important factors, certainly, but so is the  
7           victim's preference as to disposition. And there  
8           were a few comments I think I'm repeating; the  
9           Air Force had a specific standard that when  
10          there's probable cause and a credible,  
11          cooperating victim, they lean towards referring  
12          to court-martial. That was in the RFI responses  
13          and the testimony, and the testimony of the other  
14          Services really wasn't that far apart when they  
15          sort of spoke to it.

16                 And in the RFIs we tried to drill down  
17                 on that further by asking what are some reasons  
18                 that you would refer a case to court-martial and  
19                 if the chance of conviction appears low. And  
20                 they talked about the interest of good order and  
21                 discipline around having an accused who is in a  
22                 certain position of seniority or special trust

1 where it's a difficult case but that case is high  
2 visibility or there's a lot of potential  
3 ramifications to the unit and to the military  
4 community around the conduct at issue, and so  
5 that might be a case where the interest of good  
6 order and discipline weigh in favor of taking a  
7 case. But you might win, you're not sure, but  
8 you take that case to court.

9           They also mention the safety of the  
10 community and then honoring the victim's  
11 preference to have their day in court for the  
12 reasons given; largely I think a RFI is discussed  
13 a little bit, but why refer a case when the  
14 chance of conviction is low. And I think while  
15 the specific -- and we were asking people who've  
16 been practicing in 2019, so I think given what we  
17 heard and what you read, do you want to ask or  
18 can you make any observations initially about  
19 whether you think that disposition guidance is  
20 clear and effective.

21           Based on that information I know Case  
22 Review has already made some observations along

1 those lines. But are there issues that you see  
2 with the disposition guidance, what kind of  
3 questions do you have about its implementation  
4 going forward. We really don't have a lot of  
5 information still in 2019, but certainly by the  
6 time we get the site visits we'll have some more  
7 time and they'll be in effect for more than a  
8 year at that point, a little over a year.

9 So do you think it's clear and  
10 effective, do you think you want to explore ways  
11 that it should be tweaked based on what you  
12 heard, what are some issues, if any, that you  
13 noted with the disposition guidance. And that's  
14 -- you have Article 33 definitely as a reference  
15 in front of you. And I'm not sure that you'll  
16 have Appendix 2.1 from the manual in there as  
17 well. Can you check?

18 GEN. SCHWENK: Yes.

19 MS. PETERS: Okay, so Appendix 2.1 is  
20 where the actual guidance is in there.

21 And the considerations around  
22 disposition are actually in this section.

1                   GEN. SCHWENK: So number one, I think  
2                   it's important that they have Appendix 2.1  
3                   somewhere -- and right now it's in the appendix.  
4                   Maybe that's the right place or not, but we  
5                   should look into whether that is correct.

6                   The other thing is I appreciate full  
7                   well that one of the efforts by the department is  
8                   to maintain the independence of judgement by the  
9                   convening authority and not to try to appear in  
10                  any way to be swaying the command authority one  
11                  direction or the other. So with that said, I  
12                  don't like the fact, and I think that we should  
13                  look at why it says in the appendix "should  
14                  consider" these factors. I think it should say  
15                  "must consider" these factors. We're not telling  
16                  them how much weight to give to the factor; some  
17                  factors might not be in a given case. But why  
18                  have it when it's a "should"?

19                  Why not say, look these are factors  
20                  you must consider, consider them. Give them  
21                  whatever weight you want, but go down the list  
22                  and make sure you consider them, and then you can

1 consider anything else you want. So the issue  
2 there for me is "should" or "must."

3           And then the question is what do you  
4 do with that, and I think that the -- I don't  
5 know about the 32, we'll see where we go on the  
6 32, but for sure the 34 advice letter, if I'm the  
7 commanding general or the admiral -- the 34  
8 advice that's the thing on top of the package  
9 that lands on my desk with whatever cover sheet  
10 they have on it, and I'd like to have something  
11 there that the relevant stuff I need to know, the  
12 explanation I need to know, it's all there. So  
13 on the relevant factors I'd like to see, my  
14 assessment of the why the SJA's assessment of  
15 likelihood of conviction is and an explanation.  
16 I'd like to know what the victim's preference is.  
17 I'd like to have that in there.

18           And I think the Policy Working Group  
19 and the DAC-IPAD at large should look at what  
20 things should be in there from that list that  
21 makes it easier on the convening authority to get  
22 a one-stop shopping feel of things before they

1 start -- if they do diving through Enclosure 1,  
2 the PHO Report, Enclosure 2, whatever it is, on  
3 down through the end. So those are my thoughts.

4 MS. PETERS: JPP's tasks also advise  
5 that Article 33's implementation be looked at to  
6 assess its affect, if any, on the referral of  
7 sexual assault cases in particular. I don't know  
8 if the testimony is helpful in that regard, maybe  
9 site visits would be, but to ask practitioners  
10 how this new guidance is affecting their  
11 calculation on the referral decision. But are  
12 there any other ways you would like to get at  
13 that issue or are they closely related enough to  
14 assess referral rate and disposition guidance.  
15 Does anyone have any comments on sort of how we  
16 should look at that issue that was in the JPP  
17 task?

18 SGT. MARKEY: I think that's a great  
19 question to ask the practitioners in the field  
20 and end users. First of all, do you know about  
21 the non-binding guidance form? Have you seen  
22 any?

1 GEN. SCHWENK: Right, exactly.

2 MS. PETERS: Which is the first  
3 question.

4 SGT. MARKEY: Are you familiar with  
5 it, definitely. What training or information  
6 have you received about this document, and do  
7 you feel -- and again, it could be arbitrated,  
8 discretionary if you feel the guidance is clear  
9 and effective in allowing you to make decisions  
10 and do your job, right, complete the process. So  
11 I think this is really important. And that's  
12 going to lead to whether they feel like we wish  
13 it was more binding, we wish it was more shall as  
14 opposed to kind of this milquetoast goes to  
15 "Well, you can if you want," or, "If you don't  
16 want to, don't."

17 GEN. SCHWENK: We wish we knew about  
18 it.

19 SGT. MARKEY: Yes, this guidance.

20 GEN. SCHWENK: Yes.

21 CHAIR BASHFORD: I think still  
22 underlying all of this, the high acquittal rates,

1 the overriding of the PHO when they say no PC,  
2 it's still the perception that you're never going  
3 to get into trouble by sending a case to court-  
4 martial. You might get in trouble if you don't  
5 send it on, if you don't float it downstream  
6 further.

7 And I think underlying really kind of  
8 informs some of these decisions; why would you  
9 overturn a no PC, because you can send it down  
10 the way. Why aren't the acquittal rates  
11 troubling? It seems some of that is underlying a  
12 lot of this without being specifically said, and  
13 we've heard it some panels have mentioned that  
14 that's still a consideration for the convening  
15 authority. It'd be nice if we could see to what  
16 extent that perception is still held.

17 MS. PETERS: There was testimony at  
18 the last meeting by the higher echelon review by  
19 the Service secretary, if someone does not refer  
20 a case -- I think the statement was just the  
21 presence of that higher echelon review is in  
22 effect to check on the convening authority's



1 discretion, the statute that says if you do not  
2 refer contrary to -- well, given certain pre-  
3 conditions it will be reviewed, essentially.

4 CHAIR BASHFORD: If you didn't refer  
5 contrary to your SJA's advice, you have to go the  
6 secretary of the -- and that zero cases have ever  
7 done that, so.

8 MS. PETERS: Right. Yes, ma'am. I  
9 think that was the testimony. That's exceedingly  
10 rare that no one was aware of any instance or  
11 that it happened. The JPP had looked at that a  
12 few years ago and there were maybe one or two  
13 where it just went up to the next level GCMCA,  
14 the three or four star, but not up to the Service  
15 secretary was the information that we had  
16 received.

17 CHAIR BASHFORD: Right.

18 MS. PETERS: So was there any sense  
19 that the Services or any concern that the  
20 Services we're applying Article 33 disposition  
21 guidance differently when you compared them next  
22 to one another that our Service, cultural

1 differences or attitudes okay? Is that a problem  
2 or is that -- or could you even tell whether any  
3 Service was really gelling around one perspective  
4 or attitude about the disposition factors, or  
5 another? One case is the Air Force, but there  
6 were other Services that still used, seemed to  
7 have the same rate of dismissal after the Article  
8 32. There's arguments to be made on both sides  
9 of that.

10 CHAIR BASHFORD: Since very few  
11 documents said which of these factors they relied  
12 on, it's hard to know.

13 MS. PETERS: Mm-hmm.

14 GEN. SCHWENK: A bridge too far.

15 MS. PETERS: Okay.

16 SGT. MARKEY: I think what we're  
17 hearing testimony from practice, there's a large  
18 disparity on how decisions were made and what  
19 process they use to make those decisions. And I  
20 think one of the things we tried to look at is  
21 the consistency across the different Services, so  
22 everybody using the same standard, go back to

1 we're all under UCMJ, right. Yet other  
2 different, it appeared through testimony  
3 different branches were considering different  
4 things in their decision process. And maybe  
5 that's a personal thing, individual, commander  
6 SJA or something individually, but it didn't  
7 reflect the entire Army or Navy. That's what I  
8 had a tendency to see.

9 MS. PETERS: Do you want to get a  
10 greater sense from convening authorities whether  
11 the information and advice they've provided is  
12 helpful? And is the current Article 32, or would  
13 certain changes help them make the referral  
14 decision? Because there was a lot of testimony  
15 about what's available in writing, what's not  
16 available in writing and why, what matters to --  
17 or what is helpful to convening authorities. But  
18 overall -- or can we bring in more testimony on I  
19 guess on the information and advice that is  
20 brought to convening authorities? Because  
21 arguably that is one purpose of the Article 32 is  
22 to help develop information for the referral

1 decision.

2 CHAIR BASHFORD: Really?

3 MS. PETERS: Right, okay.

4 GEN. SCHWENK: One of the problems  
5 with convening authorities is they have turnover  
6 also and we show up, and in the past there's been  
7 occasion to show up and talk to the new convening  
8 authority who never convened or dealt with a  
9 sexual assault case.

10 So you start talking to them and then  
11 the conversation is, "Well, I think in my  
12 training I got, or I remember talking to so and  
13 so, or --" they're just -- we may get lucky and  
14 we may find a convening authority at some place  
15 and, one, has time and is willing to talk to us;  
16 and two, has actually done a couple of cases, so  
17 they have some valuable perspective. But we'd  
18 have to check on that with the local SJA's to see  
19 if it's worth going to. I mean, a courtesy call  
20 to say hi is one thing, but to get into the  
21 substance other than, how are you doing in the  
22 sexual assault world and what you think is

1 important and what don't, that's always valuable,  
2 but kind of specific ones, they need to have  
3 handled some cases.

4 SGT. MARKEY: I personally don't know  
5 what information or advice they're getting based  
6 on most of the files that I review. I know we  
7 heard testimony from some of the CO's about they  
8 can handle it, we got it from here, so we don't  
9 know what that conversation is, it's not being  
10 documented, when they make a decision that's not  
11 being documented.

12 So I'd be curious to find out in  
13 reality what is that looking like and what are  
14 some gaps or challenges you're having as a  
15 convening authority to make those decisions and  
16 what would you like to see. Kind of approach it  
17 from, we're from the government, we're here to  
18 help.

19 GEN. SCHWENK: I'm sure that's the  
20 approach.

21 (Laughter.)

22 MS. PETERS: I think that JPP had

1 those similar considerations in mind when -- the  
2 recommendation that was forwarded said consider  
3 whether the Article 34 advice should be protected  
4 from disclosure to defense and also whether the  
5 case analysis or the Prosecution Merits Memo  
6 should be protected from disclosure with the view  
7 towards sharing that information with the  
8 convening authority to facilitate a frank and  
9 thorough discussion, that that was the issue  
10 before the JPP or the issue the JPP put forward.

11 When we send out RFIs and ask the  
12 Services what they thought about whether that  
13 would be helpful, I think that generally it was  
14 that any additional information and advice --  
15 some said in theory that's helpful but it's not  
16 necessary because a lot of the advice goes on in  
17 person in an oral exchange of information. So  
18 there was some opposition to it, where as those  
19 who favored it favored the transparency in  
20 reflecting the true nature of the decision-making  
21 process and the decision.

22 So we did get a little bit of

1 information in the written RFI's about that, but  
2 I don't think there's a whole lot of discussion  
3 about it at the last meeting. And the site  
4 visits might be a better way to continue the  
5 dialogue about how the convening authorities  
6 advised about the case and the decisions.

7 GEN. SCHWENK: It's pretty apparent to  
8 me from looking at the 34 advice letters, it's  
9 virtually all done orally. The 34 advice letter  
10 was to check the box that we gave a 34 advice  
11 letter and what 34 said, so it can't be  
12 challenged. But you can challenge a 34 advice  
13 letter for insufficiency. So therefore, write a  
14 one-pager, check the boxes. I didn't see any  
15 where it wasn't check the box, one page 34. I  
16 never saw one that talked about the victim's  
17 preference in the 34 advice letter.

18 MS. PETERS: There were some cases  
19 that mentioned what the report of the 32 said and  
20 there were some SJA advices that didn't mention  
21 it, and it doesn't mean it wasn't communicated  
22 because it has to accompany the referral. There

1 are definitely different practices in how  
2 thorough the SJA advice was.

3 Just due to time considerations, I can  
4 shift to Topic 7 which is Page 7 of the handout,  
5 which is the idea that the JPP put forward that  
6 conviction and acquittal rates that you all have  
7 been assessing the annual court-martial  
8 adjudication reports are potentially valuable for  
9 your assessments of reforms to military justice  
10 system. So the RFI's that we sent out, and some  
11 of the August testimony talked about what is the  
12 value of conviction and acquittal rate or the  
13 tasks that you have before you. Some of the  
14 things that you did hear in August were that --  
15 and we asked folks to give the pro and con of  
16 each position; if you think that they're  
17 valuable, why are they, or could you see the  
18 argument on the opposite side. So we tried to  
19 have a thorough discussion of this, and just some  
20 take-aways from the comment in writing or the  
21 meeting were that conviction rates alone are not  
22 very useful to evaluating the health of the



1 system.

2 I think other perspectives were that  
3 -- that said, I think especially the defense said  
4 the media could be useful for assessing something  
5 more specific, like high acquittal rates could be  
6 indicative of too many cases being referred or  
7 too many cases being preferred. That's not  
8 necessarily a comment on the overall health of  
9 the system, but it might be a sign or a symptom  
10 of some more specific issue.

11 Let's see -- when we were asking the  
12 Services again what is the value of conviction  
13 and acquittal rate, what is it theoretically  
14 useful for, I think we got comments that says  
15 that acquittals do not help or hinder the  
16 maintenance of good order and discipline.

17 The acquittals can demonstrate that  
18 the process is fair and just in certain cases,  
19 and that just the effect of acquittals or the  
20 acquittal rate, the effect of those statistics on  
21 good order and discipline, or the effect on  
22 acquittal and good order and discipline is

1 something that's very difficult to measure. And  
2 I think two of the Services suggested better  
3 measures of effectiveness of the system would  
4 focus on process rather than result, such as  
5 whether certain procedural rights, motions or  
6 findings related to whether the procedural rights  
7 of the defendant or victim were granted and there  
8 were violations found, those sort of procedural  
9 issues might be better data to collect. But that  
10 was all said in the discussion by the Services.

11 We asked what factors would  
12 contribute, what factors they thought contributed  
13 to the conviction and acquittal rates that you  
14 observed -- we fed them the DAC-IPAD data when we  
15 asked them that question -- some of the answers  
16 back were the use of alcohol and its effect on  
17 victims' and witnesses' memories, basically  
18 answers around the facts of these cases. Factors  
19 that contribute to the conviction rate for sexual  
20 assault include the alcohol factor, a prior  
21 relationship between the victim and the accused,  
22 delayed reporting, counterintuitive behavior and

1 the presence or absence of digital evidence, and  
2 impeachment evidence or character or truthfulness  
3 evidence.

4 The presence of these factors, or the  
5 absence of these factors one Service said will be  
6 more closely related to the likelihood of  
7 conviction. And one Service --

8 CHAIR BASHFORD: Those factors are  
9 just as prevalent in civilian world cases.  
10 Alcohol is present in a huge number of cases as  
11 with all the attendant things with memory, and a  
12 prior relationship between 80 and 90 percent of  
13 the cases we have are prior relationship or  
14 intimate partner cases, counterintuitive  
15 behavior, there's something else happening  
16 because we see this exact same thing in the  
17 civilian world and you do not have a 20 percent  
18 trial conviction rate in the civilian world.

19 MS. PETERS: To that end, another  
20 Service answered that the standard -- the reason  
21 -- one explanation for the conviction rate is  
22 that the standard of proof for conviction is

1 beyond a reasonable doubt, which is much higher  
2 than the standard required for preferral or  
3 referral. So that was actually brought out by  
4 one of the Military Justice Division offices.  
5 And just I think they also wanted to note that a  
6 relatively high percentage of sex assault cases  
7 involve contested trials rather than guilty  
8 pleas, obviously guilty pleas up the conviction  
9 rate.

10 We did not get a lot of feedback on  
11 whether the Services internally were able to  
12 readily assess the conviction rate for sex  
13 assault compared to the conviction rate for non-  
14 sex offenses. One or two Services commented they  
15 thought that non-sex offenses generally had a  
16 higher conviction rate, it wasn't remarkable, it  
17 wasn't too surprising.

18 Let's see -- answers from the defense  
19 regarding conviction and acquittal rates, they  
20 tended to be that -- that's where you got the  
21 answer, that conviction and acquittal rates could  
22 be a way to expose improper preferral and

1 referral of meritless cases. And that from the  
2 defense perspective the factors that contribute  
3 to the conviction rate were weak cases sent to  
4 court-martials due to fears that doing otherwise  
5 would result in criticism from the complainant,  
6 Congress and the media. One defense answer was  
7 that it's a feeling that victims must be  
8 believed, if that prevails above the evidence you  
9 can be seeing the conviction rates that you all  
10 were seeing. And another defense note was that  
11 sexual assault complaints are not thoroughly  
12 investigated or vetted by law enforcement or  
13 prosecutors. So those were the defense  
14 explanations for the conviction rate.

15           And I think that calls for not just  
16 maybe your reaction to the testimony, but also  
17 does the committee feel that there is an  
18 appropriate comment to make on the military's  
19 conviction and acquittal rates? Not necessarily  
20 in comparison to the civilian world, but just  
21 internally is that something that the committee  
22 would like to make an observation on moving

1 forward, whether you ascribe a descriptor to it  
2 like "high," "low," "indicative of a problem," or  
3 just "fine." Is there something, and I don't  
4 know what that is, but is there something the  
5 committee would, or any member would like to say  
6 about the data in the court-martial adjudication  
7 report? We now have four plus years of  
8 conviction rate data for sexual assault offenses  
9 in the military.

10 CSMAF MCKINLEY: Meghan, have you had  
11 info on some reasoning of why the enlisted court  
12 members, why the acquittal rates have skyrocketed  
13 with enlisted members?

14 MS. PETERS: I don't have a reason  
15 necessarily behind that, but I think the numbers  
16 that we can build into our relative numbers of  
17 the trends for how many people are choosing panel  
18 of members versus judge alone -- and we'll look  
19 at those acquittal rate trends. I can actually -  
20 - obviously it's right at my fingertips here, but  
21 it'll take me a moment to get back on it. But it  
22 won't explain the why.

1 CHAIR BASHFORD: The rates are fairly  
2 similar between member or judge; it's just if the  
3 judge doesn't convict you of the penetrative  
4 assault, he's going to convict you of something.

5 MS. PETERS: Yes, the non-sex offense.

6 CHAIR BASHFORD: Probably a non-sex  
7 offense. The member panels, if you don't  
8 convince them of the penetrative offense, they're  
9 not going to convict you of a non-sex offense.  
10 You're going to be done, kind of. The outright  
11 acquittal rate was substantially higher for the  
12 members, but the top count was very similar and  
13 about 20 percent.

14 MS. PETERS: Yes, so is it appropriate  
15 to make a comment on whether you think that is  
16 high or low, or problematic or not, or is there  
17 any better way or a better comment, if any, to  
18 make on these statistics?

19 SGT. MARKEY: Those numbers are out  
20 there, so I honestly think they're important to  
21 address one way or the other why those numbers --  
22 the legitimacy behind the numbers or not. I

1 think the X factor, and you mentioned is we call  
2 it a community attitude towards sexual violence.  
3 What are your panel members who are  
4 representative of your community, what is their  
5 attitude towards sexual violence and how they  
6 view facts, information, judging victims'  
7 statements and suspect statements. The thing  
8 that struck me about the one, the recent  
9 observation we did in San Diego was there was a  
10 Marine as a defendant in uniform at the defense  
11 table, and when they were choosing the panel, in  
12 marched 20 Marines in uniform. Now, in the  
13 civilian world if you had a police officer that  
14 was charged with a crime, we would not march in  
15 20 police officers as part of the panel.

16 And I realize that's the way the  
17 system is designed, but to me it just looked  
18 like, "Oh, wow. You have all these Marines in  
19 uniform with the same uniform this person has on  
20 right over here." I don't know; it's just a  
21 little sidebar thought in my head.

22 And so a couple things we did in



1 Maricopa County is we did community surveys  
2 because the prosecutor's office wanted to know  
3 who's going to be sitting on our panel, and what  
4 they think about if they were in a prior  
5 consensual sexual relation and this case involves  
6 interpersonal violence but now is a sexual  
7 assault, what do they think could somebody -- so  
8 questions like if the victim was involved in a  
9 consensual sexual relation with the person, could  
10 they be raped by that person.

11 And so they surveyed the community  
12 about what do you think, and then that's how they  
13 design, for prosecution of course, who do you  
14 want to sit on your panel. So the demographics  
15 of that person. And so I think -- I don't know  
16 if that's the X factor that we'll never be able  
17 to determine, but when the panel is making those  
18 decisions I find it rather odd when I'm watching  
19 a panel of uniformed Marines judge a Marine and  
20 they're sworn to follow evidence and the rules of  
21 law, of course, but no matter how you slice it  
22 there's always a bit of influence and bias in

1 everybody.

2 CHAIR BASHFORD: The victims are often  
3 in uniform too.

4 SGT. MARKEY: Well, yes.

5 CHAIR BASHFORD: There was one -- I  
6 can't find it right now -- but where it was a  
7 Servicemember victim, civilian victim, and wasn't  
8 the conviction rate slightly higher for the  
9 civilian victim?

10 MS. PETERS: In the past -- yes.  
11 Right. The data, I remember the JPP made that  
12 same observation and asked the DAC-IPAD to  
13 continue to look at that, so we do have that  
14 data.

15 CHAIR BASHFORD: Yes, that just seems  
16 somewhat anomalous.

17 I think that the -- again, it's  
18 upstream or a downstream problem when you have a  
19 top count trial conviction rate of only 20  
20 percent, something is wrong. I mean, I don't  
21 think we can sit here and say, "Well, so be it.  
22 That's what it is." Something's wrong.

1 MS. TOKASH: And you've asked us twice  
2 for a word to describe it now; I like use Judge  
3 Grimm's word, abysmal. I actually noted that Don  
4 Christensen co-opted in his cover letter to us,  
5 too. That really does describe it and I  
6 respectfully disagree with some of the Military  
7 Justice chiefs and trial counsel who think that  
8 it's not a sign of poor health of the military  
9 justice system. There's something really wrong  
10 here, and as far as being a member of the Case  
11 Review Working Group we've identified what  
12 potentially could be a major problem, and that is  
13 that there's a finding of no probable cause,  
14 those cases are sent forward anyway, maybe  
15 because the victim wanted to -- well, we don't  
16 know -- that's the X factor, we're not sure why  
17 the probable cause, the no PC determination was  
18 overcome -- and then the court-martial panel  
19 comes up with the same determination as the PHO,  
20 but just a higher standard, we are not finding  
21 that you proved beyond a reasonable doubt.

22 CHAIR BASHFORD: That doesn't account

1 for all of them. That's a small segment of them.

2 MS. TOKASH: You know, that is -- I  
3 think the probable cause thing is the most  
4 troubling part of this, but definitely conviction  
5 and acquittal rates are important in a justice  
6 focused field.

7 HON. GRIMM: If you're running for  
8 election as a DA and you've got a 20 percent  
9 conviction rate, you got a problem, then you'll  
10 have a lot of time to do jobs to reflect about  
11 that because you won't be the DA.

12 MS. TOKASH: Right.

13 CHAIR BASHFORD: And I know the  
14 defense to that as well, then people are just  
15 cherry-picking cases and only doing stranger  
16 cases with DNA, but that's just simply not true.

17 DR. MARKOWITZ: Well, it seems to be  
18 not only the question of the Article 32, but the  
19 33/34 process, that decision-making to me is  
20 where the lion's share of the problem is for that  
21 statistic. Because if it's a probable cause  
22 finding, that weeds out the really weak cases.

1 But if the finding after that should be the  
2 likelihood of success at trial and they're  
3 fudging on that one, that would account for that.

4 CHAIR BASHFORD: Going back to the  
5 data, again, we saw this morning, the Case Review  
6 Group thought that a conviction -- there's enough  
7 evidence to sustain a conviction in something  
8 like 40 to 50 percent, some place in there of  
9 cases that resulted in an acquittal. We thought  
10 there was enough evidence to sustain a  
11 conviction, almost 100 percent of the cases,  
12 99/100 percent of the cases where there was a  
13 conviction, so that was a great deal of  
14 concordance. But that 40 to 50 percent where we  
15 thought there was enough, but there was still an  
16 acquittal, there's something going on in there  
17 and I don't really know what it is. It could be  
18 -- and I don't know whether that was members,  
19 judge or both, it could be something going on at  
20 the trial level, but that was a bit of a  
21 disconnect. We should probably look at it more.

22 DR. MARKOWITZ: I know it's difficult

1 to do this, and maybe there's no way to do this,  
2 but it seems to me that if rates are getting  
3 worse and we're trying to sort of figure out what  
4 is happening here, it would be really helpful to  
5 hear from the one group we have not heard from,  
6 which is judges.

7 And I know it's hard to hear from  
8 judges and I know that judges don't typically  
9 want to talk to us, but maybe if there's a way to  
10 talk to judges who are retired judges or if  
11 there's a way to craft questions that are narrow  
12 enough so that we are not specifically asking  
13 about things like deliberative process and what  
14 have you, we can get a sense because at least  
15 when I think about Army judges, I mean there are  
16 some judges who have been or were on the bench  
17 for a long time and may have some perspective in  
18 terms of how things have changed. And it would  
19 be potentially helpful to have a conversation.

20 HON. GRIMM: To that end, why are we  
21 giving the judges a pass? I mean, they can't  
22 talk about a case pending before them. That

1 doesn't mean that they don't have ideas about it,  
2 and for them to say, "No, we don't talk about  
3 that. How's the weather out there?" That's  
4 ridiculous.

5 CHAIR BASHFORD: Our judges are very  
6 vocal when they think we brought a case that  
7 should not have been brought or where they  
8 thought the performance of a prosecutor was sub-  
9 par, they have no problem sharing that  
10 information.

11 DR. MARKOWITZ: Yes, I think it would  
12 be great to be able to talk to them, and I  
13 specifically don't know what the parameters are  
14 on talking to judges who are active on the bench.  
15 But if we have the ability to talk to judges, it  
16 seems to me that is the one group we have not  
17 talked to, we have not heard from, and have a  
18 very specific perspective, not just in terms of  
19 what's happening now. But again, I know what Mr.  
20 Christensen said today about how people are  
21 moving off the bench rapidly, but it seems to me  
22 we also have some judges who have been on the

1 bench a while and may have a different  
2 perspective in terms of how things have changed.  
3 And it would be great to talk to some of those  
4 judges about what they've seen in their career.

5 GEN. SCHWENK: Good point.

6 MS. CANNON: What about people who  
7 have been on jury's in sexual penetration cases?  
8 It sounds like that's where the acquittal is  
9 from. Right, isn't it jurors who acquit them?

10 MS. PETERS: Yes.

11 MS. HAM: There are some strict limits  
12 on getting opinions of jurors. They can  
13 generally give you their impressions of the  
14 advocacy, but they can never tell you their vote  
15 or consideration or anything like that.

16 MS. CANNON: It would be more  
17 generally the opinion, bottom line, why is it  
18 hard to get a conviction, what do you think of  
19 these cases, what kinds of issues come up.  
20 Because I can see them saying, "They were both  
21 drinking. It started out consensual." You know,  
22 I mean, I don't know, I can guess at some things,



1 but the question is could we get to them.

2 CHAIR BASHFORD: One would be very  
3 case specific, unless they sit on lots and lots  
4 of cases, you would have the perspective on just  
5 one --

6 MS. PETERS: One issue that has come  
7 up before is how training all of these potential  
8 members are given sexual assault training and  
9 what that does to influence them going into the  
10 courtroom and then how that comports with the law  
11 and the instructions they get from the Judge. At  
12 trial might be another way to explore their  
13 attitudes about the cases generally. And then,  
14 see what we can do about people with that  
15 experience.

16 CHAIR BASHFORD: SARC has become a  
17 verb, right? I'm going to SARC you, gets lots of  
18 training.

19 MG. ANDERSON; The convening authority,  
20 though, also still has some role in who's -- who  
21 -- the people who are put on the roster for new  
22 panel members.

1 MS. PETERS: Yes.

2 MG ANDERSON: Maybe that's a question  
3 to ask convening authorities. What  
4 considerations go through your mind in selecting  
5 perhaps what the advice of your senior enlisted  
6 advisor, people who are going to be on these  
7 panels?

8 MS. PETERS: Okay. And when people  
9 see, if they panel cases as you go out and  
10 observe courts martial and see the different  
11 composition relatively, like, that can be -- that  
12 can happen in the Army versus the Marine Corps  
13 versus the Navy.

14 So, maybe get see one example of the  
15 panel brought together and voir dired and then  
16 separately maybe talk to convening authorities  
17 about how they go through the UCMJ criteria and  
18 go about selecting them. We can do that.

19 CHAIR BASHFORD: I just think it has  
20 a huge ripple effect, too. I mean, if the  
21 convening authority is aware of the rates, so  
22 knowing every case I send out, only about 20

1 percent of these guys are going to get convicted  
2 of the top count. So, I'm sending out 80 percent  
3 that aren't.

4 If you're thinking of whether to  
5 report something, if I know that X number will  
6 never be preferred and the ones that are  
7 referred, here's the -- it just seems to me it's  
8 beyond just, you know, the individual complainant  
9 and the individual accused.

10 It has a much wider perception and it  
11 could affect the convening authority's decisions.  
12 Like, why should I send this forward if nothing's  
13 going to happen really?

14 MS. PETERS: We had, at least have the  
15 ability to ask the Special Victim Counsel program  
16 managers, what are your -- what do the folks in  
17 the field who are representing victims, what is  
18 their sense about the effect of a conviction of  
19 acquittal?

20 The information that brought back was  
21 that, although an acquittal may be devastating,  
22 in general, victims place greater value on how

1 they are treated to the process by investigators,  
2 the command, and prosecutors.

3 So, I just mention that to bring in  
4 that perspective as well.

5 BGEN SCHWENK: Those are not mutually  
6 exclusive, though. Those two points are not  
7 mutually exclusive, right? You know, they --  
8 that sentence reads as though you can have one or  
9 you can have the other.

10 But you can treat somebody well and  
11 have a conviction. And you can treat somebody  
12 well and have an acquittal and vice versa. So,  
13 I'm not sure what it really means.

14 HON. GRIMM: Yes, it could be -- it  
15 was, I was devastated by the result, but I  
16 thought I was treated with respect. And that's  
17 not exactly a four-star review.

18 MS. PETERS: And I think if you had  
19 about whether anyone is surveying victims in the  
20 system for retention -- of their rates of  
21 retention and that is not known and not tracked.

22 But some folks think that maybe go

1 back and look for it, but even if you only looked  
2 at population of represented victims, that would  
3 not be the universe of all sex assault victims  
4 whose case was handled in the military justice  
5 system.

6 So, that was just -- I wanted to bring  
7 out some of the information on the Special Victim  
8 Counsel view of the conviction and acquittal  
9 rate.

10 That is the bulk of the, I think, the  
11 highlights wanted to bring out for discussion.  
12 If we have missed anything or if there's anything  
13 else, I don't want to cut it short, but I don't  
14 have any particular questions what's been asked.  
15 But there was a lot discussed and a lot of  
16 questions we asked the Services about.

17 So, Chair Bashford, I leave it to you  
18 to survey folks. That's it from the staff.

19 CHAIR BASHFORD: Is there anything  
20 further for this other than that?

21 COL. WEIR; Just something for your  
22 all's consideration is that when we talked to the

1 Special Victim's Counsel, and in conjunction with  
2 the Case Review Working Group, we found that it,  
3 roughly 30 percent of the victims declined to  
4 participate in the process.

5 Something you all may want to  
6 investigate is why that happens. And none of the  
7 Special Victims programs track those reasons why.

8 You know, we've heard various -- it's  
9 attorney/client -- well, it's not attorney/client  
10 privilege. Establish a checklist, that's a  
11 anonymous that says, wanted to get on with my  
12 life. It took too long. I heard the acquittal  
13 rate and it's 20 percent, you know.

14 Those are questions that could help  
15 policymakers determine the course of action to  
16 take. If it takes too long and that's 75 percent  
17 of the reason victims decline, then that would  
18 inform the policymakers in the Department that  
19 maybe we need to put some time limits, like a  
20 ten-day. But that's something for you to  
21 consider as part of this ongoing review you're  
22 working on.

1                   SGT. MARKEY: I agree. And, in the  
2 case files, you would find a victim  
3 uncooperative, victim did not want to move  
4 forward. There was never --

5                   And I think there's a fear to ask, why  
6 don't you want to? You know, there -- that whole  
7 conversation which, you know, depending on how  
8 you ask it. But that goes back to them dropping  
9 out of the system back to that procedural justice  
10 heart of why we're here.

11                   Were they treated fairly? Was it --  
12 were the folks that prosecuted, investigated,  
13 seniors, were they professional? Were they  
14 qualified? Did they have experience, and  
15 knowledge, and skill? Did I feel like I got a  
16 fair shake?

17                   Because this system was the best it  
18 could be.

19                   COL. WEIR: And what we've heard from  
20 victims and Special Victims' Counsel is they  
21 develop, it is an attorney/client relationship,  
22 but they develop a close relationship based upon

1 the Services that are being rendered and helping  
2 that victim through this system.

3 And so, it doesn't seem to me to be  
4 beyond the realm of possibility to have that  
5 attorney, that Special Victims' Counsel ask his  
6 or her client or her client, okay, you decline.  
7 I need to know why so we can compile some  
8 information that may help down the road make the  
9 process better.

10 And if we knew that information, then  
11 it might help make some recommendations as to  
12 something to do.

13 CHAIR BASHFORD: And I think we did  
14 have some statistic, which is sort of surprising,  
15 that victim participation was slightly higher  
16 when they didn't have a VLC, not huge, but  
17 slightly higher. So, that was interesting, too.

18 And the other point I want to make,  
19 though, it's not just sexual assault cases. I  
20 mean, in the civilian world, you have a lot of  
21 victim declination and robberies and in  
22 burglaries. And, a lot of times, people just



1 don't want to be bothered after a while.

2 In domestic violence cases, that's  
3 much more complicated. But stranger robberies  
4 and stranger burglaries, I mean, there's a big  
5 drop off, you know, after the report and  
6 cooperation on those as well.

7 COL. WEIR: And just one more point on  
8 that. I think it's important, because what you  
9 hear, why all the victim -- why this percentage -  
10 - higher percentage of victims are dropping out,  
11 it's because the way they're treated by the  
12 command, it's the way they don't get a fair  
13 shake.

14 And so, this is an opportunity to  
15 actually put some data behind those reasons so  
16 we're not living on anecdotes of one or two folks  
17 who had a bad experience versus the 98 that had a  
18 good experience, but they didn't want to go  
19 forward for personal reasons that we can put down  
20 to say, okay, this makes sense.

21 CHAIR BASHFORD: So, we have two more  
22 reports, the site visit report and the court-

1 martial report, is that correct?

2 COL. WEIR: If you would like to,  
3 Chair, we can just drive on. It looks like  
4 people are taking breaks as they need and we can  
5 just start with the site visit.

6 CHAIR BASHFORD: I think that would be  
7 better than -- if we take a break, we'll be 20  
8 minutes getting back. So --

9 BGEN SCHWENK: Could you get all those  
10 issues put together by Monday and shoot me an  
11 email?

12 MR. HINES: Along with the questions  
13 that we want to ask them.

14 BGEN SCHWENK: That would be great.

15 CHAIR BASHFORD: Mr. Hines, you have  
16 the floor.

17 MR. HINES: All right, good afternoon,  
18 gentleman. I'm one of your attorney advisers,  
19 Glen Hines.

20 I'm sort of ponchoing, for lack of a  
21 better term, the site visit effort last fall.  
22 Well, I say last fall, the September -- Chair

1 Bashford approved the site visit plan.

2 I pushed out sort of a courtesy  
3 notification to the Service reps and indicated  
4 that this is what we were planning to do starting  
5 in April and going through next summer.

6 It's just a couple of slides up here  
7 and it's a short period of time for me. So, I  
8 don't plan on going off on any tangents, but I'm  
9 happy to ask -- answer any questions. Because I  
10 know the topic of site visits has come up  
11 throughout the day.

12 General Schwenk, I'm looking around,  
13 he may be the only person who was involved with  
14 site visits that we did with the Judicial  
15 Proceedings Panel three summers ago. So, I'll  
16 let him pipe in if he wants to add anything.

17 But, essentially --

18 BGEN SCHWENK: Don't believe a word he  
19 says. You're welcome.

20 MR. HINES: If I could just, on the  
21 front end, you know, what's the purpose of the  
22 site visits? And I'm not going to insult your

1 intelligence by, you know, reading everything on  
2 the slide.

3 But I think the value of the site  
4 visits are, and they were for the Judicial  
5 Proceedings Panel, as you get the opportunity to  
6 get out of the Beltway and go out to various  
7 installations on the ground, into the Fleet, as  
8 we say in the Navy and the Marine Corps, and talk  
9 to the various stakeholders who are the policy  
10 implementers on the ground, you're criminal  
11 investigators on the ground, your NCIS/CID agents  
12 at the various installations who are doing these  
13 investigations, your prosecutors, your trial  
14 counsel, senior trial counsel, Special Victims'  
15 prosecutors, your defense counsel, senior defense  
16 counsel, I believe we had a few regional defense  
17 counsel in the Marine Corps, which is an O-5 a  
18 couple of our site visits to North Carolina.

19 We had staff Judge Advocates come in  
20 on a couple of those visits. I can think of  
21 three or four battalion commanders that came in  
22 at Fort Bragg to give us their impressions on

1 some of these topics.

2 The Sexual Assault Prevention people,  
3 the SARCS, and essentially any group that's a  
4 stakeholder. And I know, you know, they're not  
5 on some of my slides -- you can go ahead and go  
6 to the next one.

7 Judges has come up, you know, and we  
8 don't need to waste time on whether we can get  
9 Judges or not. But we were able to get, you  
10 know, three or four Air Force Judges, I think,  
11 from one of the site visits a few years ago.

12 Typically, the Circuit Military Judges  
13 do not like their sitting Judges to make policy  
14 comments. And, but that doesn't mean that we're  
15 -- we can't go out and request to have some of  
16 them who are still serving come in and give some  
17 of their impressions. And those might be limited  
18 impressions.

19 The Article 120 Subcommittee, for  
20 instance, for the JPP, we did have some retired  
21 Military Judges that came in and gave their sort  
22 of unbiased opinion on that version of Article

1 120 and how it might be improved.

2 So, that's how they're usually  
3 structured. The first day as a travel day out,  
4 the middle days are there at the installation.  
5 And the day essentially looks like, you know,  
6 you'll get an agenda and it's stacked by what  
7 General Schwenk called panels.

8 And so, they just -- they come in,  
9 prosecutors will come in for a panel. Defense  
10 counsel will come in for an individual panel.  
11 And so on and so forth.

12 And it's a very valuable tool to sort  
13 of get people's unvarnished -- I like the term  
14 unvarnished -- and honest opinions on what their  
15 lives are like as investigators or prosecutors,  
16 defense counsel, trying to work within our  
17 military justice system.

18 It's in a non-attributional format.  
19 So, unlike a public meeting where every presenter  
20 that have you have has a nameplate, we have a  
21 court reporter, you know, taking down everything  
22 anyone says. And that goes back into the public

1 record. That's not what happens on these site  
2 visits.

3 And the reason for that is, we want  
4 them to feel as comfortable as possible giving us  
5 their honest opinions.

6 And so, I believe when that  
7 information was reported back to the JPP, as  
8 General Schwenk said, as far as we would go in  
9 identifying a person was we would say a, you  
10 know, a Captain trial counsel in the Army. Or,  
11 you know, a Major who's a defense counsel in the  
12 Air Force said this.

13 And so, that's the goal is to get them  
14 to be able to feel free enough with you to answer  
15 your questions honestly instead of just sort of  
16 parrot back, to use my own words, what might be  
17 the party line.

18 So, if we can -- well, go back please.  
19 So, yes, I just -- we have this slide up, and  
20 it's in your materials. These are the topics.  
21 These are just examples of some of the topic  
22 areas. And we've been hitting them all day,

1 Article 32, 33, 34, the conviction rates, the  
2 victims' decisions to decline to participate.

3 And then, training is one that I think  
4 arises from the Case Review Working Group. And a  
5 lot of questions asked to, you know, how are  
6 people being trained? What does the training  
7 consist of with respect to sexual assault? What  
8 is their concept of what a sexual assault or a  
9 rape is?

10 And, again, that's training that DoD  
11 works on annually, as time goes by, and it's  
12 continuously being tweaked. And so, the idea, I  
13 think, is, well, maybe we bring in some Soldiers  
14 and some Marines, and even trainees this time  
15 maybe at the training installations to find out,  
16 were you trained in sexual assault? If so, what  
17 was it? What's your take-away from that?

18 And just to find out what is an  
19 individual Service member at, you know, the rank  
20 of E-3 as opposed to E-7 or an officer understand  
21 sexual assault to be?

22 It could be valuable in telling you or



1 explaining some of the things that might come up  
2 in some of these investigations that we've looked  
3 at.

4 And one of the things I can think of  
5 is, going back to, you know, one of the issues  
6 covered this morning is, when you read through  
7 it, especially in a situation where there might  
8 be a third-party complaint, sometimes the  
9 question arises, does the victim even think they  
10 were sexually assaulted here?

11 You know, their statement is not  
12 making out probable cause. And so, if you can't  
13 even determine that as an attorney looking at the  
14 investigation, well, how are they able to  
15 determine, you know, was I sexually assaulted?  
16 Should I report this?

17 And so, that's one reason we think  
18 going to some of the training commands and  
19 exploring some of that might be of value to you.

20 And, again, I've already covered this.  
21 These are some of what I call the stakeholders  
22 that might make up some of the panels. You know,

1 Mr. Markey this morning brought up when he was  
2 talking about, for instance, I'll just give you a  
3 perfect example.

4 Formulating questions, what we did the  
5 JPP was, and it was a fluid process that evolved  
6 over time, but we started off with what we called  
7 a packet of questions that we prepared -- the  
8 staff prepared for each of the members, suggested  
9 questions, and we forwarded that out to the  
10 Committee Members and let them sort of vet it and  
11 look at it.

12 And so, when you get there, you're  
13 going to have what we would suggest, with your  
14 input, to be some of the question areas that you  
15 might want to go into.

16 And what we found was, after the first  
17 couple of visits, based on the feedback we got,  
18 we would alter some of those question packets.  
19 We would take some of the questions out. We  
20 would add other questions that might come up  
21 based on some of the answers that we were  
22 getting.

1                   And so, I just wanted to follow up on  
2                   that point.

3                   So, perfect example, Mr. Markey this  
4                   morning was talking about the first finding of  
5                   the Case Review Working Group, the notion of,  
6                   investigators may or may not be asking important  
7                   follow-up questions when they are taking the  
8                   victim's statement.

9                   And one of the, you know, that can  
10                  raise a number of questions. Are you not asking  
11                  these follow-up questions, for instance, because  
12                  you were told in your training on to ask that  
13                  question because it's too confrontational or it's  
14                  deemed to be, you know, victim blaming or  
15                  something?

16                  Or, is it just the discretionary  
17                  decision, you know, on the agent's part that,  
18                  well, I didn't ask that follow-up question or I  
19                  forgot to ask that follow-up question.

20                  These are questions that you can, when  
21                  we're bringing out a panel of say, NCIS agents,  
22                  you know, you can ask those types of questions.

1                   And so, that's what we see the process  
2 as. And we've already started to -- I've already  
3 started to prepare some of these question  
4 packets.

5                   And I know the question was raised  
6 earlier, can we ask them this? Can we ask them  
7 that? Certainly, you know, forward me, forward  
8 any of the staff any, at any time, you know,  
9 topics that I don't have listed in the paperwork  
10 or on the slides or lines of questioning that are  
11 generated by your work here. And we are going to  
12 weave that in as we go.

13                   It's not going to be a situation where  
14 you're just flying in and you walk into a room  
15 and you've got a stack of paper and you start and  
16 spend, you know, too much time trying to get up  
17 to speed. Our goal is, as soon as you go in  
18 there, you're ready and you're prepared. You  
19 know who you're going to speaking with during a  
20 certain period of time, how long they're going to  
21 be there, who that's going to be, and a list of  
22 the question areas that you want to cover with

1 that particular group.

2 And I just have this up, it's in your  
3 materials. I want to thank everyone. And I know  
4 Ms. Bashford has sent me occasional emails, you  
5 know, how are we doing on the site visits? Are  
6 people volunteering to go?

7 And the answer to that question is,  
8 yes. These are the trips as it stands right now  
9 and the Committee Members who've said they're  
10 available or want to go on those trips.

11 I know I've had a couple of Members  
12 come to me today. And I've noted, you know,  
13 Judge Brisbois did let me know which trips he was  
14 available to go to.

15 So, there's no staff on there because  
16 that could be a fluid process. But we have, you  
17 know, enough staff who put their hands in the  
18 air. And so, the word that I put out to everyone  
19 was that these were going to be worth the expense  
20 and the time, that we needed to have at least two  
21 Committee Members and at least two staff. And  
22 we've got more than enough Committee Members and

1 staff who are ready to go on each trip.

2 I would like to have one more Member  
3 on the Korea trip. We have three right now. So,  
4 if anyone wants to take the 16-hour flight over  
5 to Korea.

6 CHAIR BASHFORD: We're going to have  
7 a good time.

8 CSMAF MCKINLEY: Colonel, can I ask  
9 you a question? Colonel, can I ask you a  
10 question?

11 MR. HINES: Yes.

12 CSMAF MCKINLEY: Since the biggest  
13 proportion of our suspects and victims are E-2  
14 through E-5, and the biggest proportion of them  
15 live in the dormitories or barracks, would it be  
16 beneficial for our Members who are on these trips  
17 to make a quick trip to see where they live and  
18 the conditions they are in?

19 Because some of our Members have never  
20 been, you know. So, I think that would be a good  
21 thing to possibly see where they live and the  
22 surroundings they're in.

1                   MR. HINES: A great question, Chief.  
2                   And the answer is absolutely. We can try to do  
3                   that. I know, with the JPP and the RSP also did  
4                   site visits. I just wasn't part of the RSP. I  
5                   think Patty was, but I think that's called  
6                   colloquially a windshield tour, you know.

7                   And I know when at Norfolk, the staff  
8                   there built in time to -- the Navy people on the  
9                   ground built in time to show everyone, you know,  
10                  the carriers. And we chose not to go over there  
11                  because it was going to take too long.

12                  But the answer is, yes. And it  
13                  shouldn't be too difficult to setup something  
14                  like that.

15                  And so, how that would happen, it  
16                  would usually probably happen after the meetings  
17                  are done, you know, in the afternoon we can make  
18                  time to do that.

19                  CSMAF MCKINLEY: And, for me ,I've  
20                  seen tons, so it would be only if the other  
21                  Members would find it --

22                  CHAIR BASHFORD: He's looking at me.

1 CSMAF MCKINLEY: -- if they would find  
2 it beneficial, then I think it would be good.

3 MS. HAM: I think, Major, I recall  
4 with RSP, we'd seen Lackland and it was shortly  
5 after there was a big sexual assault issue there.  
6 And the Members did get a tour of the training  
7 area for the Airmen and Airmen lived and what  
8 changes had been made to that.

9 COL. WEIR: Chief, we're definitely  
10 going to do that. The Case Review Working Group  
11 probably, 75 percent of the incidents arose out  
12 of something that occurred in the common area of  
13 bridge, you know, where they're playing beer pong  
14 and then, who knows what happened.

15 We're also going to visit the smoke  
16 pit. That figures prominently into what goes on.  
17 And we're going to make sure we go to a smoke pit  
18 and check that out.

19 CSMAF MCKINLEY: I actually eliminated  
20 smoking in the dormitories in the Air Force when  
21 I was the Chief. And so, we moved them out to  
22 the smoke pits.



1 CHAIR BASHFORD: When we -- is there  
2 any limit on the number of Committee Members who  
3 can go on one trip? Do we want to file FACA at  
4 some point?

5 COL. WEIR: Yes, the limit is -- if we  
6 can have seven or less.

7 CHAIR BASHFORD: Okay.

8 COL. WEIR: Once we --

9 MR. HINES: If you have eight, you  
10 have a quorum and that signals a meeting.

11 COL. WEIR: And as this site survey or  
12 the site visits are fact gathering visits. So,  
13 you put together -- a report will be put  
14 together, you'll take notes. And then you come  
15 back with that information into the Committee and  
16 then deliberate and discuss what you found.

17 So, all that will be going on in a  
18 public meeting. But the purpose of the site  
19 visit is just to gather information, to formulate  
20 recommendations or findings and recommendations.

21 CHAIR BASHFORD: So, I would encourage  
22 the Committee Members, if you haven't yet signed

1 up for a visit, or if you have availability for  
2 more visits than you've signed up for, as long as  
3 we don't have, let's say it's seven or under,  
4 please let Glen or any of the other staff know  
5 your availability.

6 SGT. MARKEY: My agent will be in  
7 touch with you.

8 CHAIR BASHFORD: I'm a Delta gal.

9 SGT. MARKEY: In my understanding,  
10 when you discussed that we'd be meeting with  
11 panels, that we'll be meeting with a group of  
12 more than one person or we'll have individual  
13 sessions with, you know, SJAs, or defense  
14 counsel, or convening authorities?

15 MR. HINES: Right. So, panel is  
16 probably not a good term. So, when I say panel,  
17 it means, if it's trial counsel, those are the  
18 only people in the room. So --

19 SGT. MARKEY: But there will be a  
20 group of trial counsel.

21 MR. HINES: It will be a group. You  
22 know, at least three was sort of the guidance we

1 put out last time. Because when you get less  
2 than that, you're really not hearing from enough  
3 people.

4 I think on average, when the JPP did  
5 it, it was, you know, three to six. When we had  
6 the victim -- the VWAP people or the SARC people,  
7 you know, we got 8 to 10 to 12 that actually  
8 would come in on that. And, sometimes, that's  
9 too many.

10 But, no, that's the guidance that  
11 we'll put out. If, you know, we're going to  
12 bring in trial counsel for 90 minutes, we're  
13 going to want four to six from -- which is --

14 SGT. MARKEY: But beyond that to meet  
15 individually.

16 MS. HAM: You'll be surprised, sir,  
17 how --

18 SGT. MARKEY: I will be, yes, I will  
19 be.

20 MS. HAM: -- candid they are. It's  
21 not a --

22 SGT. MARKEY: We do the same process

1 with civilian law enforcement. Part of the  
2 strategy is, not just candid, but, you know,  
3 common knowledge skills and abilities. And if  
4 somebody starts BS then the other people will  
5 just, yes, that's BS.

6 And you can't really -- I don't want  
7 to saw QC, quality control, quality check the  
8 information you're getting at times, but  
9 individually, sometimes you get different  
10 information that you know triggers in your head  
11 that, okay, there's an issue with that or that's  
12 a concern or that's something that this person  
13 said this is happening and this person, this is  
14 happening.

15 And so, it's kind of a --

16 MR. HINES: I'm not saying --

17 SGT. MARKEY: For me, that's just my  
18 personal --

19 MR. HINES: There are no hard and fast  
20 rules one way or the other. I mean, this is just  
21 the way that we've done them to this point. And  
22 I think it's mostly just based on time

1 constraints.

2 And, sometimes, you're at one  
3 installation and you're starting at, say, 8:30  
4 and you're going to be done at 5:00. So, but we  
5 can certainly explore that.

6 CSMAF MCKINLEY: When we do  
7 operational readiness inspections in the Air  
8 Force, we have, you know, somewhere in there, we  
9 have like an open IG time where if someone wants  
10 to come in privately and speak to the IG, they  
11 can.

12 Are we going to have something like  
13 that for half an hour, 45 minutes that if someone  
14 wants to come in privately and speak to us, they  
15 could possibly do that?

16 MR. HINES: During the site visits?

17 CSMAF MCKINLEY: Yes.

18 MR. HINES: I'll throw that out to  
19 Colonel Weir. I haven't really thought about  
20 that.

21 COL. WEIR: That's something that we  
22 haven't contemplated, Chief. I don't know how

1 that, you know, it would almost have to be a  
2 base-wise announcement somehow that the DAC-IPAD  
3 is here. If you have something you want to talk  
4 to them about. I don't know if that would  
5 generate a 100 people coming in or --

6 CSMAF MCKINLEY: We might miss dinner.

7 COL. WEIR: -- you know to air their  
8 grievances against their chain of command or  
9 whatever. But that's not really the purpose of  
10 what we're doing.

11 SGT. MARKEY: I guess the question  
12 was, was there any issues with the previous? So,  
13 there's seven DAC-IPAD Members and two staff, so  
14 there's nine people sitting with these two trial  
15 counsels, whoever that might be.

16 I mean, just a visual of that would be  
17 intimidating, I think, to some degree.

18 MR. HINES: What we tried to do last  
19 time is, first of all, keep the staff members,  
20 you know, quiet unless we needed to -- and that  
21 wasn't a problem with, for instance, we had  
22 General Schwenk who is General Schwenk, you know,

1 and he can just kind of wind him up and he can  
2 go. You know? And run the whole thing himself.  
3 I mean, that in the kindest way, sir.

4 BGEN SCHWENK: Yes, thanks. I  
5 appreciate it, wind me up.

6 MR. HINES: But, you know, the staff  
7 wants to, you know, be quiet and sit in the  
8 background and take notes. So, how are we going  
9 to gather the information? Well, the staff  
10 should be gathering the information while you all  
11 are having the discussion and getting that.

12 But to get to your point, and someone  
13 mentioned this morning, what do we tell these  
14 people on the front end? As soon as -- and they  
15 were already told, you know, via email, but when  
16 they could come in the room, I or one of the  
17 other staff members or one of the Committee  
18 Members would say, okay, look, this is not for  
19 attribution. Have you been told that? Yes, sir  
20 or yes, ma'am, blah, blah, blah.

21 Which means, this is not being  
22 transcribed. This is not being tape recorded.

1 You know, we're just taking notes and you're not  
2 going to be named and they're not going to see  
3 your name in USA Today tomorrow.

4 So, trying to -- trying as much as you  
5 can to put them at ease, to relax, and to sit  
6 back and trust you to engage in a free flow of  
7 information.

8 I don't think anyone was intimidated.  
9 I don't know, I want to -- I don't think we had  
10 anymore than maybe four Committee Members at any  
11 of the site visits three years ago. So, it was  
12 typically three to four Committee Members and,  
13 you know, three or four staff in the back sort of  
14 taking notes and, you know, being a gofer if  
15 someone needed to go field a phone call or go out  
16 and grab the next panel and that sort of thing.

17 MS. HAM: And they do not permit their  
18 supervisor in the --

19 MR. HINES: Right, right. There was  
20 no situation where you had -- the concern came up  
21 earlier, there are three Army Captains in here  
22 and their boss who's a Lieutenant Colonel sitting



1 in the same room, for obvious reasons. You know,  
2 that's going to have a chilling effect, you would  
3 think, on the junior officer's ability to be  
4 completely honest about their life and what  
5 they're doing.

6 CHAIR BASHFORD: But they're military  
7 personnel, too, so presumably not intimidated by  
8 seeing somebody sitting in the room.

9 SGT. MARKEY: Well, I don't mean  
10 intimidation in the fact that, you know, I guess  
11 I mean it in the fact that, you know, I just know  
12 our -- the strategy that has worked for us is  
13 more of a one on one right now. And, of course,  
14 it's going to be nonconfrontational.

15 MS. TOKASH: I plan on cross examining  
16 all of them.

17 SGT. MARKEY: I know that, you'll  
18 probably cross examine me and I'll start -- I'll  
19 admit to something.

20 BGEN SCHWENK: There was a good --  
21 there's benefit to having one on ones. But  
22 there's a real benefit to have a group of them

1 because they interplay with one another. And you  
2 end up sitting back letting them disagree with  
3 each other, reinforce each other.

4           Somebody said something with -- who  
5 said, oh yes, this, dah, dah, dah. And that  
6 happened a lot that we would just sit there and  
7 I'd look at Glen and think, are we ever going to  
8 get to say anything? These guys -- they're on a  
9 roll.

10           And it was all interesting, you know,  
11 but so, I -- there's a real benefit to have a  
12 group of them in there.

13           MR. HINES: And they're going to know,  
14 they're going to know who you guys are. It's not  
15 like they're walking in like, is this the  
16 inquisition? Who are these people? You know,  
17 they're going to know that you're from the DAC  
18 IPAD and who you are and that you're not there to  
19 get anyone in trouble. You know, you're there to  
20 ask them questions and get their honest input on  
21 --

22           CHAIR BASHFORD: And, just to clarify,

1 day one on here is a travel day. Is the last day  
2 also a travel day?

3 MR. HINES: Yes, ma'am. So, if you  
4 notice, I mean, it doesn't marry up perfectly.  
5 And the Korea trip and the European trip, because  
6 of the long travel one way or the other probably  
7 has an extra day, maybe two built in there.  
8 Because, especially going to Korea, you'll lose  
9 an entire day going that way.

10 So, if you see something in boldface,  
11 that means there's going to be -- the plan is,  
12 there's going to be a day-long meeting at that  
13 installation.

14 And so, the other installations are on  
15 there because we're going to ask people from  
16 those installations to travel to the main  
17 installation.

18 So, if you look at, for instance, the  
19 Hawaii trip, that meeting would be at Pearl  
20 Harbor-Hickam, but we'd be inviting or asking  
21 people from the other, you know, Marine Corps  
22 Base Hawaii's up on the north side of the island.

1 We're asking them to travel down there for that.

2 MS. HAM: You'll hear themes develop.

3 I don't know if you -- it did for you, General  
4 Schwenk. I did all the site visits with Response  
5 Systems Panel. If you do more than a couple, you  
6 hear -- you'll hear the themes develop that give  
7 you information to develop recommendations and  
8 things and what you choose to do.

9 BGEN SCHWENK: I agree.

10 MR. HINES: And you'll find, you know,  
11 on these logistically, once we answer their  
12 questions and the Service reps are very good at  
13 speaking up when they're concerned about, you  
14 know, where you're going to be and who you want  
15 to meet with.

16 There'll be plenty of communication  
17 between all of us such that by the time we get  
18 there, it's a very fluid process. You know,  
19 getting on the installation, getting to where we  
20 need to go, having a room reserved, having the  
21 resources that we need.

22 Because, they want to assist as much

1 as they possibly can. And I know the RSP, all  
2 the installations did a great job at  
3 accommodating the RSP and they did it with JPP.  
4 And I have no reason to doubt that the Services  
5 will do the same thing for us this time around.

6 CHAIR BASHFORD: Okay, thank you.

7 We're going to be right on time, I  
8 think.

9 COL. WEIR: Yes, we just have Theresa  
10 to talk about the --

11 MS. GALLAGHER: Okay, wasting no time,  
12 I think you all are aware of the ongoing project  
13 that I'm going to talk about. It's the Court-  
14 martial Observation Project.

15 And essentially, what we're trying to  
16 do is to get all the DAC-IPAD Members to a court-  
17 martial by December of 2020. And this is, we  
18 want all Services to be observed. We don't want  
19 to focus too heavily on one or the other, we want  
20 everyone -- or each person to see a court-martial  
21 and we want to spread the wealth out through all  
22 Services.

1                   And the criteria using to select  
2 courts martial are a penetrative sexual assault  
3 case that has a not guilty plea in place and a  
4 panel for the forum.

5                   And the real purpose is to observe the  
6 court-martial. Many of you have not ever seen a  
7 court-martial. And those that have seen a court-  
8 martial, have not seen one recently.

9                   And even if you have seen one  
10 recently, you may not have seen all the Services.  
11 So, there may be a different Service you can go  
12 observe.

13                   The -- you'll have a chance to assess  
14 the current policies and practices in the  
15 courtroom. We have new rules being applied.  
16 Certainly, we noticed changes to the member  
17 selection.

18                   You also have the chance to observe  
19 the state of training and experience of all the  
20 participants in the trial. And that is, of  
21 course, going to help assess where we go with  
22 site visits, different questions will come up.

1           It'll affect how you are able to kind  
2 of view the context of all the issues that you're  
3 grappling with now. So, there's a lot of value  
4 to it.

5           The process being used is, first of  
6 all, we're trying to look at the e-dockets. All  
7 the Services have, in name anyway, electronic  
8 dockets. And the Army and the Air Force docket  
9 is very useful for our purposes.

10           They -- you're able to go onto their  
11 trial judiciary docket and see that it's an  
12 Article 120, a sexual assault case. You can see  
13 what the plea is. You can see the forum. You  
14 can see the dates the trial is scheduled for,  
15 whether it's three days, five days. And you can  
16 see the location.

17           So, I'm able to go on there and I'm  
18 able to say, okay, well, this member lives in  
19 this area and I can look and say, all right,  
20 here's a court that might be accessible to them  
21 knowing that you are all on very busy schedules  
22 and volunteering and we have you going all kinds

1 of places with site visits and these things.

2 We're trying to get it -- you to  
3 something as convenient to you as you can be.

4 And we understand that you may not be  
5 able to take an entire week and sit through a  
6 five-day trial or a three-day trial. But is  
7 exceptionally valuable, even to be able to attend  
8 one or two days of the court-martial. And so,  
9 we're not expecting you to sign up for the entire  
10 court. You take and attend whatever you can  
11 because that's going to be value.

12 So, the Navy and Marine Corps e-  
13 docket, electronic docket is a little different.  
14 Theirs is pushed out just a week, maybe two in  
15 advance. And they're not necessarily updated.

16 So, they have compensated by giving me  
17 point of contacts and I tell them kind of areas  
18 that I'm interesting in looking at courts martial  
19 and they're able to feed me information on what  
20 courts-martial that meet my criteria may be  
21 pending in those locations.

22 And so, once I get the information



1 where the courts are, I shoot them out in an  
2 email to you. And next week, you should get your  
3 next updated list of court-martials. I know I  
4 have two members currently projected to be at a  
5 court-martial. I can't even remember now whether  
6 it's December or early January. But that'll come  
7 out, a new selection of courts that are pending  
8 next week.

9           Once I get word back from you guys  
10 that, hey, this court-martial might fit into my  
11 schedule in the second week of February. I have  
12 some time open. Then, I take that court-martial,  
13 I reach out to my point of contact to the  
14 Services and say, hey, can you give me more  
15 information on this particular court-martial?

16           And at that point, they normally  
17 provide me more information and I'm able to  
18 assess, is this going to be one that is worth the  
19 time of -- does it meet our criteria?

20           Or, is it such a large, complex case  
21 that your one or two days that you're there,  
22 you're not going to be able to see all the

1 different pieces of the court-martial, so to  
2 speak.

3 So, we kind of screen it a little like  
4 that.

5 And then, it also alerts them to the  
6 fact that they may have visitors and so that they  
7 give me on the installation a point of contact.  
8 And that point of contact is exceptionally  
9 critical and valuable.

10 As we've seen now in two different  
11 cases, we'll have somebody locked into a case.  
12 They're ready to go, they've got the plane, the  
13 hotel, and the night before, there's a plea  
14 agreement or something happens in the trial,  
15 criteria disappear that we want to see.

16 And fortunately, the point of contacts  
17 have been so wonderful that we were able to stop  
18 Ms. Bashford from getting on a plane and she was  
19 able to keep working there and save her time for  
20 us for a different court-martial.

21 And so, and then, that happened again.  
22 And the fabulous Marine Corps JAGs reached out,

1       said, hey, there -- it's looking like this may go  
2       away. I'm able to then jump online and look for  
3       other possible forums and locations that maybe  
4       within that we can divert you to that might have  
5       a court-martial that meet the criteria going on  
6       at the same time.

7                   And we were just able to re-shift Mr.  
8       Markey and Dr. Spohn to a different Marine Corps  
9       case and they were able to view a court-martial.  
10      But neither of them had observed a court-martial  
11      before and it was a valuable experience.

12                   It was also very valuable, we send a  
13      staff member along for Colonel Weir who had not  
14      been in a court-martial under the new rules.

15                   And so, it's really a very valuable  
16      procedure.

17                   The other thing that we're doing is,  
18      of course, we're sending a checklist along with  
19      you. Because that's what we do. And you're able  
20      to, as the trial goes along, record your  
21      observations on the checklist. If you simply  
22      cannot do it because you just like to pay

1 attention, then, Colonel Weir or whatever staff  
2 member is there can certainly talk to you and get  
3 your reflections so that we have a record of  
4 them.

5 So, that when we are discussing  
6 different things, you can either refresh your  
7 memories or we can use that as a tool to say,  
8 hey, here's some things that are common that  
9 people are noticing that might need more  
10 attention.

11 It is a very fluid system for all  
12 people. That would be both the installations  
13 that may reach out and say, hey, you know, this  
14 trial may not happen as scheduled.

15 And I then immediately start reaching  
16 out to not just that Service, but maybe other  
17 Services as well and say, hey, can you kind of  
18 now immediately send me what kind of courts you  
19 have in this area that are going on to -- so I  
20 can try and redirect.

21 So, the Services have done a really  
22 great job working with us in those last minute

1 kind of requests to get the information.

2 And you all just have to stay  
3 flexible, knowing that it's trial work and it  
4 just may disappear at the last minute.

5 There's nothing saying that you cannot  
6 look at the list I sent you and say, hey, this  
7 fits into my schedule perhaps and this one and  
8 this one do. So, let me just project for all of  
9 them and maybe you get your first one, maybe it's  
10 the second one.

11 So, whatever works best with your  
12 schedule, we can accommodate.

13 And really, that's all I have. If  
14 there's no questions?

15 MS. TOKASH: I have a quick question.  
16 This is Meghan Tokash.

17 Do we get read ahead materials like  
18 the charge sheet, the 32 report?

19 MS. GALLAGHER: We have not been  
20 pushing. We do receive those kind of the same as  
21 we receive the documents or the investigative  
22 files. We receive them and we will provide you

1       some information from them. We don't want to  
2       release any information electronically to you  
3       unless you're here, you know, unless we're here.

4               But you will get the information that  
5       you need and certainly, you can have free  
6       discussion with the staff member that shows up  
7       for your trial.

8               COL. WEIR: At Miramar, they provide  
9       us the charge sheet. And when we were there, we  
10      asked for it so we could have better  
11      understanding.

12              MS. TOKASH: And could you ask some  
13      things like, I know the trial you watched ended  
14      in an acquittal, could you engage in discussion  
15      about --

16              COL. WEIR: No, we were gone by that  
17      time.

18              MS. GALLAGHER: Yes, I mean, given  
19      that we had one Member stay for two days, we had  
20      one Member stay for three days, you know, the  
21      court-martial, I think, you know, it took almost  
22      a full day to seat the jury.

1           Seeing the jury is very interesting  
2           for the people that have not observed a court-  
3           martial because it is kind of a little different  
4           selection of jury members. It's very detailed  
5           questioning of each member normally. And you  
6           also, throughout the trial, the members can ask  
7           questions via notes, of course, written ones that  
8           are submitted.

9           But no less, they are able to engage  
10          in that manner. So, it is a different process.  
11          And so, I would just encourage you, if you have  
12          not reached out yet to tell me, what is your best  
13          area to view a court-martial in. Please let me  
14          know.

15          If you are not limited and you just  
16          want to know where every court-marital is that  
17          I've -- that I'm sort of tracking, I will just  
18          include you on all of the emails out to whatever  
19          areas.

20                   CHAIR BASHFORD: The colder it gets,  
21                   the warmer we want.

22                   MS. GALLAGHER: And then you --

1 (Simultaneous speaking.)

2 MS. GALLAGHER: Well, there happens to  
3 be --

4 DR. MARKOWITZ: Minot is a delightful  
5 place in February.

6 MS. GALLAGHER: Yes, so, and I  
7 definitely want to give kudos to the Services  
8 that have just really been very cooperative and  
9 it is a -- it is going to be a long process to  
10 get everybody in and linked up with a court-  
11 martial, but the payoff is really huge.

12 COL. WEIR: Okay, thanks Theresa.

13 CHAIR BASHFORD: Well, thanks once  
14 again to our magnificent staff. Oh, one more  
15 thing.

16 COL. WEIR: Yes, just to wrap up --

17 CHAIR BASHFORD: Okay.

18 COL. WEIR: -- it's going to be short  
19 and sweet here.

20 Just wanted to kind of put out some  
21 information to the total Committee so you're  
22 aware of what's going on with the staff and some



1 of the other moving pieces.

2 So, on December 17th, 2019 the Chair  
3 will have a meeting with the Secretary of  
4 Defense. And we just thought that was going to  
5 be an office call. I believe the Secretary of  
6 Defense has opened that up to the Service  
7 Secretaries as kind of what we're getting. So,  
8 that'll be a good meeting for the Chair and the  
9 Secretary of Defense.

10 We've talked about the database issue  
11 before. So, the staff is working diligently to  
12 find an answer to the database issue. We have  
13 had meetings with the Defense Digital Service, a  
14 civilian vendor, a Marine Corps organization that  
15 uses a database, and last, this week, we met with  
16 a member of the OGC, DoD OGC staff, who's in  
17 charge of coming up with a database for the  
18 Departments for the General Counsel's Office.

19 That seems to be, right now, based  
20 upon what we know, the best solution. So, we're  
21 going to work closely with him and what he's  
22 doing. And he believes there'll be a proposal

1 out after the first of the year on the street for  
2 vendors to come back with some ideas so the  
3 Department can make a decision on who to go with.

4 It will be a cloud-based system. It  
5 would be a system that we could add to, and it  
6 would also be a system that would work for both  
7 the DAC IPAD and the Military Justice Review  
8 Panel. So, that's where we are with the  
9 database.

10 The next public meeting is scheduled  
11 for February 14th, 2020. I did not schedule it  
12 all so you guys can bring me flowers and candy.  
13 It just so happened that was the date that it  
14 fell on. So, that's the next public meeting,  
15 February 14th.

16 BGEN SCHWENK: And the 13th will be  
17 like normal?

18 COL. WEIR: Yes, the 13th --

19 BGEN SCHWENK: The working group  
20 meetings?

21 COL. WEIR: -- will be a working group  
22 preparatory session. And then, the 14th will be

1 the --

2 CHAIR BASHFORD: We're all going to  
3 have the tissue the boxes wrapped in crepe paper,  
4 the whole Valentine's.

5 COL. WEIR: However, we may need to  
6 schedule a telephonic public meeting like we've  
7 done in the past to discuss the annual report  
8 that is due March 30th. So, that may happen,  
9 we'll just have to see how it shapes out.

10 Save the date, and I'll send out  
11 another email, but May 15th, August 21st, and  
12 November 6th of 2020, those are the next  
13 scheduled public meetings after the 14th.

14 BGEN SCHWENK: May 15th and then what?

15 COL. WEIR: May 15th, August 21st, and  
16 November 6th.

17 COL. WEIR: And that's all I have.

18 CHAIR BASHFORD: So, I think this was  
19 a very productive meeting. Thanks again to the  
20 staff for all the work that they did.

21 Mr. Sullivan, you want to bring us to  
22 court?

1                   MR. SULLIVAN: I will, but before I  
2 close the meeting, I do want to note that this  
3 afternoon while we were meeting, the Supreme  
4 Court granted cert on a case involving three  
5 military rape convictions, United States v.  
6 Briggs and United States v. Collins which will be  
7 consolidated for oral argument.

8                   And with that, the meeting is closed.

9                   BGEN SCHWENK: Do you know the issue?

10                  CHAIR BASHFORD: What's the issue?

11                  MR. SULLIVAN: So, the issue -- it's  
12 a statute of limitations issue. The meeting is  
13 closed.

14                  (Whereupon, the above-entitled matter  
15 went off the record at 3:30 p.m.)

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## A

- a.m** 1:11 4:2 148:22  
**abilities** 17:12 284:3  
**ability** 14:15 15:9 59:11  
69:19 75:4,16 91:10  
115:19 163:19 164:13  
166:15 176:15 179:9  
180:5 225:2 255:15  
259:15 289:3  
**able** 5:19 22:13 35:13  
47:7 69:19 94:8 95:14  
95:15 101:13 142:4  
143:19 158:11 159:10  
207:9 214:17 244:11  
249:16 255:12 269:9  
271:14 273:14 295:1  
295:10,17,18 296:5,7  
296:19 297:17,22  
298:17,19 299:2,7,9  
299:19 303:9  
**above-entitled** 148:21  
308:14  
**absence** 243:1,5  
**absolute** 79:17 102:13  
**absolutely** 13:21 60:5  
73:10 98:16 174:16  
174:19 179:6,18  
279:2  
**absorbing** 178:20  
**absurd** 18:7  
**abuse** 31:12  
**abused** 203:14  
**abusing** 14:5  
**abysmal** 20:18 251:3  
**accept** 24:22 34:9 80:1  
187:13  
**access** 6:22 11:4 15:10  
24:16 25:2,5 26:7  
42:4 44:10 85:8 94:15  
**accessible** 295:20  
**accommodate** 301:12  
**accommodating** 293:3  
**accompany** 239:22  
**accorded** 115:14  
**account** 117:4 251:22  
253:3  
**accountable** 16:9  
**accounts** 174:21  
**accusation** 58:12  
**accused** 13:13 19:19  
25:1 38:22 58:22  
61:15 62:7 113:3  
122:12 156:5 206:14  
213:16 225:21 242:21  
259:9  
**acquit** 256:9  
**acquittal** 9:8 63:12  
73:15,16,18,19,20,22  
110:19 116:4,11  
119:15 120:15 133:5  
134:3 149:13 213:18  
231:22 232:10 240:6  
240:12 241:5,13,20  
241:22 242:13 244:19  
244:21 245:19 246:12  
246:19 247:11 252:5  
253:9,16 256:8  
259:19,21 260:12  
261:8 262:12 302:14  
**acquittals** 38:13 106:6  
117:10 241:15,17,19  
**Act** 25:5  
**acted** 138:14 139:4  
140:5  
**acting** 138:18 199:19  
**action** 38:9,12 39:2,3,5  
39:6 40:7 43:1,1  
57:21 58:8,8,10 59:4  
59:5 63:11,20 64:3,7  
65:13 90:11 101:20  
101:21 110:10 185:4  
204:18 262:15  
**actions** 37:4 58:1,3  
59:20 128:12  
**active** 210:15 255:14  
**active-duty** 141:19  
**actual** 22:22 61:21  
96:20 116:2 134:16  
178:19 179:22 194:7  
227:20  
**ADC** 20:3  
**add** 64:6 93:18 137:16  
160:8 164:16 169:9  
193:5 267:16 274:20  
306:5  
**adding** 164:8  
**addition** 153:10 156:10  
**additional** 10:5 44:4  
93:17 107:5 109:21  
131:16 151:17 154:21  
172:7 175:17 176:9  
188:19,20 238:14  
**Additionally** 38:10  
122:14  
**address** 197:11 203:19  
223:9 247:21  
**addressed** 8:6 153:16  
**addresses** 118:15  
168:7  
**adds** 168:5  
**adequate** 177:5  
**adequately** 25:17 51:19  
**adjourn** 148:16  
**adjudication** 3:6 7:3  
156:21 240:8 246:6  
**administrative** 39:6  
57:20,22 89:22  
**admiral** 229:7  
**admissible** 53:6 66:13  
71:9 72:18 103:21  
104:14 114:14 115:8  
161:15  
**admit** 289:19  
**adopted** 29:17  
**adopting** 13:4 15:1  
**adult** 37:1  
**advance** 53:17 296:15  
**advantage** 158:8  
**adversarial** 89:16 92:4  
156:6  
**adverse** 52:18 67:8  
**advice** 25:18 26:1 65:12  
74:5 78:4,14,15,21  
86:1 93:7 107:7  
108:18 111:3,6,10,16  
115:5 117:15 118:3  
122:10,19 123:2,12  
123:14 125:1,10,16  
149:12 159:20 174:20  
211:9 229:6,8 233:5  
235:11,19 237:5  
238:3,14,16 239:8,9  
239:10,12,17 240:2  
258:5  
**advices** 239:20  
**advise** 6:8 22:11 108:20  
210:4 211:8 230:4  
**advised** 8:17 109:3  
239:6  
**advisers** 266:18  
**advises** 197:1 209:8  
**advising** 85:22 117:12  
**advisor** 258:6  
**advisors** 113:10  
**advisory** 1:3 4:5,13  
46:21 69:5 113:8,13  
173:18  
**advocacy** 256:14  
**advocate** 20:22 21:14  
22:8 24:6 64:8 79:21  
80:3 99:17 105:3  
107:2,16 108:2,7  
109:3,11 139:3  
**advocates** 78:3,16 79:9  
92:13 103:6 115:2  
138:13 220:21 268:19  
**affect** 91:11 200:15  
230:6 259:11 295:1  
**affidavit** 176:4  
**afford** 115:12  
**afternoon** 106:15  
127:22 128:5 266:17  
279:17 308:3  
**afternoon's** 143:2  
149:4  
**age** 122:4  
**agenda** 10:15 143:2  
270:6  
**agent** 96:8 100:22,22  
101:4,15 104:1 194:6  
282:6  
**agent's** 275:17  
**agents** 268:11 275:21  
**aggressive** 221:8  
**ago** 22:1 34:3 68:1  
233:12 267:15 269:11  
288:11  
**agree** 84:7 87:14  
110:22 111:1,1  
160:20 165:2 167:2  
213:13 223:15 263:1  
292:9  
**agreed** 8:9 187:5  
189:11  
**agreement** 298:14  
**ahead** 36:9,13 111:12  
118:5 127:12 129:22  
130:2 131:6 151:19  
172:11 182:8 194:22  
200:18 208:13 209:14  
215:19 221:20 222:3  
269:5 301:17  
**air** 11:16 17:9,19 19:3  
19:21 21:4,9,22 23:9  
23:12,16 31:3 72:14  
76:6 107:18,19  
141:19 142:1 225:9  
234:5 269:10 271:12  
277:18 280:20 285:7  
286:7 295:8  
**airman** 209:11  
**Airmen** 30:2 280:7,7  
**airport** 217:2,5  
**alarm** 17:6  
**alcohol** 242:16,20  
243:10  
**alerts** 298:5  
**alike** 216:11  
**all's** 261:22  
**allegation** 49:11 53:9,9  
57:18  
**allegations** 6:10 9:11  
17:3 168:17  
**alleged** 16:20  
**alleges** 122:11  
**alleging** 160:11  
**alleviate** 52:17  
**allow** 166:11 218:4,8  
**allowed** 69:7 163:13  
181:19  
**allowing** 10:21 99:16  
231:9

**allows** 218:2  
**alter** 274:18  
**alternate** 194:17,21  
**alternative** 134:10  
 170:4 173:9  
**amalgam** 216:8  
**Amanda** 2:5  
**amazing** 18:14  
**ambitious** 10:15  
**amended** 6:7  
**amendment** 161:10  
**amendments** 141:6  
**American** 22:5 30:19  
**amorphous** 71:4  
**amount** 27:7 156:11  
 186:6 214:11  
**analog** 197:15 204:21  
**analogous** 60:5,17 80:6  
**analogy** 17:14 181:12  
**analyses** 38:7  
**analysis** 9:18 25:14  
 37:7 85:20 86:9  
 110:15 115:6 140:15  
 141:3,9,13 143:22  
 158:22 161:14 189:1  
 209:4 238:5  
**Analyst** 2:7  
**analytical** 87:12 207:2  
**analyze** 93:6  
**analyzed** 37:17 115:18  
 115:21  
**analyzing** 38:11 178:21  
**and/or** 79:3  
**Anderson** 1:14 4:19,20  
 222:15 223:2,6  
 257:19 258:2  
**anecdotally** 92:1  
**anecdote** 207:13  
**anecdotes** 265:16  
**announcement** 286:2  
**annual** 7:19 240:7  
 307:7  
**annually** 272:11  
**anomalous** 250:16  
**anomaly** 21:21  
**anonymity** 220:1  
**anonymized** 219:9  
**anonymous** 222:22  
 262:11  
**anonymously** 217:9  
**answer** 12:4 29:10  
 36:19 45:15 46:4 48:1  
 74:8 84:6,21 152:21  
 153:12 159:18 204:2  
 205:22 222:8 223:3  
 244:21 245:6 267:9  
 271:14 277:7 279:2  
 279:12 292:11 305:12

**answer's** 222:4  
**answered** 29:9 243:20  
**answers** 242:15,18  
 244:18 274:21  
**anybody** 29:22 31:2  
 41:18 46:19 70:17  
 202:21  
**anymore** 157:18 288:10  
**anyplace** 100:7  
**anytime** 102:7  
**anyway** 107:10 113:14  
 148:3 217:17 251:14  
 295:7  
**apart** 225:14  
**apologize** 106:17  
**apparent** 66:19 239:7  
**appeal** 18:15 23:19  
 91:17  
**Appeals** 23:6,10,12,16  
 24:12  
**appear** 92:15 228:9  
**appeared** 44:1 81:21  
 235:2  
**appears** 16:12 44:3  
 225:19  
**appellant** 18:12,13  
**appellate** 22:17,19,20  
 24:10  
**appendix** 34:6 160:9  
 168:3 212:6 227:16  
 227:19 228:2,3,13  
**appetite** 70:14  
**applicable** 163:17  
**application** 164:21  
**applied** 82:21 294:15  
**apply** 27:4 56:1 163:9  
**applying** 233:20  
**appointing** 198:17,19  
**appoints** 198:13  
**appreciate** 33:16 51:9  
 228:6 287:5  
**appreciative** 144:12,15  
**approach** 131:6 221:4  
 237:16,20  
**appropriate** 12:15  
 25:22 28:4 29:6,8  
 32:16 40:7 42:9,13  
 43:2 49:3 71:13,17  
 78:14 87:1 108:9  
 114:22 119:3 131:19  
 153:20 212:4 245:18  
 247:14  
**appropriately** 45:21  
 158:2  
**approval** 33:21 48:8  
 52:21 60:20 64:15  
 143:13  
**approve** 7:2 40:1,5

**approved** 143:7 267:1  
**approximately** 37:9  
 116:7  
**April** 267:5  
**apron** 18:6  
**arbitrated** 231:7  
**area** 25:12 280:7,12  
 295:19 300:19 303:13  
**areas** 40:9 59:17 60:3  
 91:5 202:16 203:18  
 271:22 274:14 276:22  
 296:17 303:19  
**arguably** 194:14,15  
 235:21  
**argued** 12:14 28:3  
**argument** 16:19 176:13  
 240:18 308:7  
**arguments** 234:8  
**arises** 272:4 273:9  
**Arlington** 1:11  
**armed** 1:4 4:7,15 6:11  
 23:6 24:12 222:9  
**Army** 1:11,14 11:11  
 35:17 75:1 100:11  
 136:18 137:12,16  
 138:4,17 139:10  
 140:17 141:1,5 194:3  
 235:7 254:15 258:12  
 271:10 288:21 295:8  
**arose** 280:11  
**arraigned** 196:14  
**arraignment** 196:13,14  
 196:22,22  
**arrest** 60:6,8 102:7  
**arrested** 58:19  
**arrived** 119:22  
**arrogance** 12:22  
**art** 90:19  
**articles** 7:22 151:2  
 209:19  
**articulate** 69:10,20  
 80:11 108:22  
**articulated** 66:2  
**ascribe** 246:1  
**aside** 149:16  
**asked** 46:12 53:10 62:4  
 84:1 144:3 213:1  
 225:1 240:15 242:11  
 242:15 250:12 251:1  
 261:14,16 272:5  
 302:10  
**asking** 35:8,19 48:8  
 52:21 53:14 56:17  
 57:5 64:14 126:16,21  
 131:18 165:11 195:7  
 202:3 206:17 219:18  
 225:17 226:15 241:11  
 254:12 275:6,10

291:20 292:1  
**aspects** 164:21  
**assault** 1:3 3:3,5 4:7,15  
 6:10,21 7:14 9:7,8,11  
 9:20 10:2 11:21 13:20  
 19:15,20 25:9 27:4  
 35:11,15 37:2 38:4,20  
 38:21 39:4 42:7 46:1  
 47:1 49:7,15,16 57:19  
 63:10 64:11 69:14,15  
 114:7 149:15 157:5  
 162:15 230:7 236:9  
 236:22 242:20 244:6  
 244:13 245:11 246:8  
 247:4 249:7 257:8  
 261:3 264:19 269:2  
 272:7,8,16,21 280:5  
 294:2 295:12  
**assault-trained** 47:2  
**assaulted** 50:20 51:1  
 97:2 273:10,15  
**asserts** 49:14  
**assess** 42:12 171:13  
 190:7 206:6 230:6,14  
 244:12 294:13,21  
 297:18  
**assessing** 49:2 123:1  
 240:7 241:4  
**assessment** 84:3  
 115:22 116:1 117:19  
 118:11,12 187:18  
 192:19 229:14,14  
**assessments** 38:18  
 240:9  
**assigned** 8:14 60:21  
**assignment** 18:15,18  
 23:15  
**assist** 35:8 220:15  
 292:22  
**assisting** 154:18  
**associated** 127:1  
**assume** 125:11 186:12  
**assounds** 146:10  
**attempt** 35:8 45:8,10,13  
 45:13  
**attend** 14:13 296:7,10  
**attendance** 4:12,18  
**attendant** 243:11  
**attention** 64:4 300:1,10  
**attitude** 113:14 234:4  
 248:2,5  
**attitudes** 208:1,2  
 222:17 234:1 257:13  
**attorney** 20:14 64:10  
 100:13 101:9 104:21  
 169:20 183:4 198:19  
 204:14,14 210:1,10  
 210:19 264:5 266:18

273:13  
**Attorney's** 79:15  
**Attorney-Advisor** 2:4,5  
 2:6,6,7,9,9  
**attorney/client** 262:9,9  
 263:21  
**attorneys** 68:10 109:16  
 117:22  
**Attorneys'** 115:14  
**attributes** 56:19  
**attribution** 217:17  
 287:19  
**audience** 10:7  
**August** 3:11 7:8 8:11  
 132:21 150:11 188:17  
 189:5 192:10 240:11  
 240:14 307:11,15  
**AUSA** 102:16  
**authorities** 65:8,14  
 70:8,10,12 71:8,17  
 83:14 86:1 100:4  
 114:16,19 115:10  
 117:12 122:8 123:3  
 138:14 159:3 221:2  
 235:10,17,20 236:5  
 239:5 258:3,16  
 282:14  
**authority** 42:21 44:10  
 72:9 74:10 78:17  
 79:22 81:18 91:15  
 100:1 108:2,8,21  
 109:1,4 111:11  
 112:14 122:20 123:11  
 123:20 135:22 136:1  
 136:4,8,11,17 138:20  
 140:5 160:1 163:11  
 167:1 169:20 174:3  
 177:5,20 179:14  
 182:7,9,20 184:12  
 186:10,12,13 187:5  
 191:3,22 192:7  
 198:15 211:10 219:1  
 219:2 228:9,10  
 229:21 232:15 236:8  
 236:14 237:15 238:8  
 257:19 258:21  
**authority's** 120:4  
 232:22 259:11  
**authorization** 176:6  
**authorize** 176:5  
**availability** 44:7 282:1,5  
**available** 32:4 37:16  
 45:3 73:11 95:12,13  
 124:7 155:8 158:5  
 166:10 177:13 235:15  
 235:16 277:10,14  
**average** 23:11 58:9  
 61:9 283:4

**avoid** 218:12  
**avoided** 59:20 90:14  
**awards** 58:3  
**aware** 42:6 53:9 77:6  
 118:2 189:2 191:9  
 233:10 258:21 293:12  
 304:22  
**AWOL** 69:16

---

**B**


---

**b** 1:19 49:9 114:18  
**baby** 31:13  
**back** 12:16 14:1 21:11  
 33:12 45:5,11 47:7  
 48:16 52:8 57:12 59:7  
 70:11 81:8 89:11  
 91:22 93:2,17 105:1  
 106:19 127:8 128:2  
 131:22 136:7 141:7  
 144:7,9,14 145:6  
 147:14,20 154:20  
 165:20 172:7,13  
 176:8,17 184:10  
 185:17 186:12,17  
 189:19 191:6 192:14  
 196:7 198:9,11  
 201:18 203:22 205:9  
 205:10,20 212:5  
 215:9 216:8 220:5  
 224:11 234:22 242:16  
 246:21 253:4 259:20  
 261:1 263:8,9 266:8  
 270:22 271:7,16,18  
 273:5 281:15 288:6  
 288:13 290:2 297:9  
 306:2  
**backed** 51:20  
**background** 30:3  
 130:20 136:3 287:8  
**backpack** 5:7 6:16  
**bad** 21:6 132:8 265:17  
**badly** 193:22  
**bag** 137:20 140:18  
**bail** 58:20  
**Baker** 23:5  
**balance** 57:1 204:9,18  
**ballpark** 184:10  
**bands** 33:10,10  
**bar** 25:5 79:17 102:13  
 162:1 208:7  
**bare-** 125:15  
**bare-bones** 123:18  
**barracks** 278:15  
**barrier** 199:21,21  
**base** 19:22 291:22  
**base-wise** 286:2  
**based** 38:16 39:11,14  
 39:19 49:22 50:16

77:18 79:18 82:13  
 86:9 88:22 90:7 92:5  
 96:10 101:6 108:22  
 114:4 115:21 118:4  
 138:21 144:20 187:19  
 189:18 206:22 207:1  
 207:11,12 216:17  
 226:21 227:11 237:5  
 263:22 274:17,21  
 284:22 305:19  
**basic** 61:19  
**basically** 34:4 90:20  
 92:11 105:3 202:22  
 242:17  
**basis** 56:12 91:20  
 175:19 181:17 223:21  
**battalion** 268:21  
**beans** 124:17  
**bear** 153:8 175:7  
 179:21  
**bears** 90:4 192:19  
**Beatles** 122:4  
**bed** 147:16,20  
**beer** 280:13  
**began** 110:6  
**beginning** 58:18 59:16  
 110:7 141:7  
**begs** 108:13  
**begin** 149:8  
**behalf** 143:10  
**behavior** 56:20 242:22  
 243:15  
**behavior/character**  
 53:5  
**believe** 12:18 17:21  
 21:6 31:1 32:19 33:2  
 46:15 76:22 82:5 96:7  
 102:2 118:8 122:12  
 160:15 180:7 194:3  
 209:8 267:18 268:16  
 271:6 305:5  
**believed** 79:8 245:8  
**believes** 305:22  
**bells** 17:6  
**bellwether** 164:20  
**belt** 20:12  
**Beltway** 268:6  
**bench** 18:3 24:7 254:16  
 255:14,21 256:1  
**beneficial** 278:16 280:2  
**benefit** 13:13 158:17  
 208:15 289:21,22  
 290:11  
**best** 18:12 42:3 66:14  
 95:12 100:14 218:4  
 218:12 220:7 263:17  
 301:11 303:12 305:20  
**better** 19:12,13 22:16

28:1 37:18 44:15  
 50:11 68:16 70:22  
 121:9 125:12 153:7,9  
 161:17 176:15 209:2  
 209:3 214:16,19  
 218:8 239:4 242:2,9  
 247:17,17 264:9  
 266:7,21 302:10  
**beyond** 75:22 97:18  
 98:14 118:9 120:12  
 163:2 190:2 244:1  
 251:21 259:8 264:4  
 283:14  
**BGEN** 5:18 36:12 41:4  
 44:19 46:20 48:11,17  
 52:7 57:7,14 63:16  
 64:12,17,22 65:3  
 66:16 70:16,21 73:14  
 73:20 77:21 78:6,9  
 81:7 83:19 85:11,14  
 97:5 99:3,8,11 106:13  
 106:18 112:6 114:1  
 119:14 121:21 122:2  
 122:6 126:13,17  
 127:8,22 128:5 129:4  
 129:7,14 130:3,12  
 132:10 145:9 147:3,9  
 159:12 162:20 170:9  
 171:3 180:13 184:6  
 184:19 185:16 186:1  
 187:15 193:16 196:10  
 215:10 260:5 266:9  
 266:14 267:18 287:4  
 289:20 292:9 306:16  
 306:19 307:14 308:9  
**bias** 82:21 249:22  
**big** 172:12 187:14  
 265:4 280:5  
**bigger** 108:16,17  
**biggest** 278:12,14  
**Bill** 216:13  
**billets** 146:15  
**binding** 71:12,16 89:19  
 91:10,15 99:14  
 114:19 160:3 164:1  
 173:4,22 174:18  
 175:8,17 176:11  
 177:12,21 178:9,11  
 179:4,6,10,19 180:17  
 180:22 181:2,13,21  
 182:3 198:9 201:2,3,5  
 201:7,11 202:1,2  
 204:2 231:13  
**bit** 81:2 85:6 136:3  
 137:11 140:17 189:12  
 226:13 238:22 249:22  
 253:20  
**bivariate** 38:6

**black** 111:3  
**blah** 287:20,20,20  
**blaming** 275:14  
**blank** 28:5  
**block** 140:20  
**blocks** 52:5  
**blue** 134:21  
**body** 12:19 34:4 51:11  
   51:13 212:7  
**boiled** 191:7  
**bold** 11:8 15:18  
**boldface** 291:10  
**bond** 196:16  
**bones** 125:16  
**bore** 192:2,3  
**borne** 50:3 54:14  
**boss** 222:4 288:22  
**bother** 97:9  
**bothered** 265:1  
**bottom** 134:19 256:17  
**Bowl** 17:20  
**Bowls** 17:18 18:8  
**box** 68:7 69:3 123:21  
   239:10,15  
**boxes** 87:7 239:14  
   307:3  
**boy** 74:4 76:19  
**boyfriends** 53:14  
**Brady** 17:15,17 18:7  
**Bragg** 268:22  
**branches** 235:3  
**brand** 177:17  
**brand-** 23:18  
**branding** 11:12  
**break** 7:20 266:7  
**breakdown** 111:16  
   137:9 139:16  
**breakfast** 33:7 147:7  
   148:13  
**breaks** 135:15 266:4  
**breath** 107:18  
**bridge** 234:14 280:13  
**brief** 39:13 41:1 101:1,4  
   128:10,11  
**briefed** 29:14 103:14  
   153:4  
**briefers** 65:1  
**briefing** 39:17 104:1  
   127:17 128:18 142:9  
**briefly** 42:6 128:10,11  
**Brig** 1:18  
**Briggs** 308:6  
**bring** 60:16 82:16 118:8  
   142:22 153:8,18  
   156:13 165:21 175:7  
   195:1 235:18 260:3  
   261:6,11 272:13  
   283:12 306:12 307:21

**bringing** 211:3 275:21  
**brings** 186:18 190:11  
**Brisbois** 1:15 4:21,22  
   36:3 91:21 181:12  
   182:22 183:3,16,19  
   184:21 185:11,15  
   200:19 203:22 206:8  
   206:11 213:4 215:10  
   277:13  
**broad** 51:17 152:11  
   155:4  
**broaden** 18:4  
**broke** 21:7  
**brought** 21:11 60:12  
   93:8 151:10 153:15  
   154:20 173:2 177:19  
   235:20 244:3 255:6,7  
   258:15 259:20 274:1  
**brush** 51:17  
**BS** 284:4,5  
**build** 246:16  
**building** 224:2,3  
**built** 279:8,9 291:7  
**bulk** 261:10  
**bullet** 176:20 177:3,11  
   180:4  
**bullets** 41:9  
**bunch** 216:5  
**burden** 77:1 92:6  
**burglaries** 264:22  
   265:4  
**burner** 196:7  
**busy** 146:7,9 295:21  
**Buzicky** 102:17

### C

**c** 49:12 115:2  
**cadre** 23:22  
**calculation** 190:13  
   230:11  
**calendar** 18:22  
**California** 58:16 167:5  
   168:20 196:11 201:12  
**call** 96:11 97:22 164:13  
   165:21 166:2,4  
   170:12 236:19 248:1  
   273:21 288:15 305:5  
**called** 18:20 87:11  
   168:15 270:7 274:6  
   279:5  
**calls** 245:15  
**Camp** 219:14  
**candid** 117:18 221:13  
   283:20 284:2  
**candy** 306:12  
**Cannon** 1:15 5:1,2 9:2  
   57:15,16 88:18,19  
   125:22 167:5 169:1,5

  170:10,21 171:6  
   175:21 183:13,18  
   195:6,20 196:12  
   197:5 199:8,15 200:6  
   200:9,14 212:22  
   213:7 217:12 256:6  
   256:16  
**canvassing** 53:3  
**capability** 32:6  
**capital** 18:14 19:2  
   128:7,8,8  
**captain** 218:18 219:13  
   221:14 271:10  
**Captains** 288:21  
**captured** 187:17  
**car** 217:13  
**cards** 154:10  
**care** 34:20 123:9  
   215:22  
**career** 17:12,16 18:5  
   21:17 22:14 24:1 61:7  
   61:10 62:12 68:9  
   215:2 256:4  
**careful** 47:16 87:12  
**carefully** 47:17 123:16  
**Carolina** 268:18  
**carried** 214:6  
**carriers** 279:10  
**carry** 62:14 90:16 215:3  
   215:4  
**Carson** 2:2  
**carving** 146:15  
**case's** 174:11  
**case-in-chief** 95:4  
**categories** 112:9  
**categorize** 175:3  
**categorized** 39:5  
**cell** 25:15  
**cert** 308:4  
**certain** 61:7 153:16  
   154:15 186:6,7  
   195:12 225:22 233:2  
   235:13 241:18 242:5  
   276:20  
**certainly** 61:3,11 70:13  
   71:17 72:13 75:13  
   77:6 80:19 85:5 87:17  
   109:17 112:15 153:7  
   163:17 165:19 208:1  
   209:3 217:18 218:3  
   219:21 225:6 227:5  
   276:7 285:5 294:16  
   300:2 302:5  
**certification** 186:2  
   210:21  
**CG** 191:3 195:2  
**chain** 286:8  
**challenge** 36:13 89:14

  181:17 183:9 239:12  
**challenged** 89:8 239:12  
**challenges** 183:13  
   237:14  
**chance** 71:1 118:20  
   182:5 215:1 225:19  
   226:14 294:13,18  
**chances** 61:6  
**change** 16:9 21:2 62:14  
   71:21 77:18 175:13  
   188:13 210:5,7  
**changed** 107:19 109:10  
   159:5 160:19 174:15  
   188:7 211:21 254:18  
   256:2  
**changes** 92:10,15  
   155:7,11 158:22  
   175:2,3,14 179:7  
   190:12 203:11 235:13  
   280:8 294:16  
**character** 243:2  
**characteristics** 37:20  
   37:21 38:12  
**charge** 35:9,12 37:13  
   93:16 104:2 164:4  
   169:4 196:20,21  
   204:15 301:18 302:9  
   305:17  
**charged** 104:13 133:11  
   133:19 134:10 169:8  
   213:15 248:14  
**charges** 38:8 39:6  
   60:11,17 63:13 65:9  
   86:2 93:19,19 102:21  
   112:19 122:9 135:22  
   136:2,9,14 161:20  
   162:9 164:5 168:16  
   169:6,8,9 196:15  
   209:14  
**Charlottesville** 224:2  
**charts** 34:1  
**chasm** 120:11  
**check** 52:5,6 56:4,4  
   68:7 69:3 204:8,17  
   227:17 232:22 236:18  
   239:10,14,15 280:18  
   284:7  
**check-the-box** 87:5  
   123:18 125:2,16  
**checked** 87:7 140:20  
**checking** 123:20  
**checklist** 53:22 55:14  
   56:1,3 74:6 83:11  
   100:8,9 103:17 105:4  
   262:10 299:18,21  
**checklist-driven** 53:2  
**checklists** 55:17,19,22  
   83:10



**cherry-picking** 252:15  
**chest** 154:11  
**chief** 2:3 5:15 23:5  
 101:11 279:1 280:9  
 280:21 285:22  
**chiefs** 149:22 150:1  
 154:5 173:21 177:2  
 178:18 179:20 251:7  
**child** 14:5 15:8 30:21  
 31:12  
**chilling** 289:2  
**choices** 98:4  
**choose** 63:1 292:8  
**choosing** 246:17  
 248:11  
**chose** 279:10  
**Christensen** 2:12 6:18  
 10:18,20 26:21 27:12  
 29:21 31:22 32:9  
 33:14,17 47:10 251:4  
 255:20  
**Christensen's** 7:1 43:7  
 121:12  
**Christmas** 19:1  
**Chuck** 2:6  
**chunk** 187:14  
**CID** 194:2  
**circle** 129:19,20  
**Circuit** 269:12  
**circuits** 21:5,6,7,10  
**circumstance** 94:10  
**circumstances** 201:14  
**citizen** 162:1  
**city** 1:11 204:14  
**civilian** 16:15 19:19  
 20:11 24:18,21 25:1  
 31:19 32:8 53:12  
 55:22 60:6,18 61:2  
 69:14 70:8,10,12,14  
 80:7 90:17 91:14 93:6  
 93:20 96:6 104:6,8  
 163:18 197:15,16  
 243:9,17,18 245:20  
 248:13 250:7,9  
 264:20 284:1 305:14  
**civilians** 68:5  
**clarification** 43:18  
 55:13 193:5  
**clarified** 55:16  
**clarify** 44:11 95:21  
 190:17 290:22  
**clarity** 42:18 80:20  
**clean** 193:20  
**cleans** 168:17  
**clear** 22:10,12 24:5  
 46:22 76:14 77:11  
 101:8 113:8 192:16  
 226:20 227:9 231:8

**clearances** 57:22  
**clearly** 40:9 87:19  
 124:3 144:12 195:4  
 219:18  
**client** 25:11,18 45:5,15  
 264:6,6  
**clients** 85:22  
**cloak** 82:19  
**clock** 197:2  
**close** 52:2 104:1 120:8  
 141:20 154:10 263:22  
 308:2  
**closed** 37:4 51:3 79:11  
 123:10 124:4 126:6  
 308:8,13  
**closely** 230:13 243:6  
 305:21  
**closer** 142:22  
**closure** 49:3  
**clothes** 32:22  
**cloud-based** 306:4  
**clue** 84:10  
**CMSAF** 1:17  
**CO's** 237:7  
**co-opted** 251:4  
**coach** 17:22  
**Code** 8:1 35:10  
**coding** 41:20  
**CODIS** 60:15  
**cognizance** 40:10  
**cognizant** 75:6  
**Col** 2:2 127:16,19  
 142:16,18,21 143:4  
 146:22 176:2 180:3  
 194:2 221:18 222:2  
 261:21 263:19 265:7  
 266:2 280:9 281:5,8  
 281:11 285:21 286:7  
 293:9 302:8,16  
 304:12,16,18 306:18  
 306:21 307:5,15,17  
**colder** 303:20  
**collateral** 3:13 9:20  
 142:18 143:6  
**collect** 216:7 242:9  
**collected** 39:14  
**Collins** 308:6  
**colloquially** 279:6  
**colonel** 10:10 21:22  
 47:10 278:8,9 285:19  
 288:22 299:13 300:1  
**colonels** 103:7  
**columns** 135:13  
**comb** 192:15  
**come** 10:21 17:22 18:1  
 28:9 29:7 47:22 56:13  
 58:15 63:4 67:22 75:9  
 85:4 96:19 99:17

101:1 145:19 171:4  
 176:8 179:8 181:16  
 183:7 184:4 190:5  
 192:22 201:18 205:9  
 205:10 215:16 216:6  
 216:8 220:21,22  
 224:11 256:19 257:6  
 267:10 268:19 269:7  
 269:16 270:8,9,10  
 273:1 274:20 277:12  
 281:14 283:8 285:10  
 285:14 287:16 294:22  
 297:6 306:2  
**comes** 21:1 24:15  
 43:13 55:15,20 57:1  
 79:4 103:22 110:17  
 126:1 159:20 164:3  
 175:18 176:4 197:14  
 199:1 251:19  
**comfortable** 23:8 271:4  
**coming** 10:19 33:15  
 36:18 61:2 86:6 104:7  
 104:9 205:20 223:21  
 286:5 305:17  
**command** 37:19 38:15  
 57:19 67:9 228:10  
 260:2 265:12 286:8  
**commander** 14:7 85:7  
 105:21 109:22 126:4  
 209:8,13 235:5  
**commanders** 37:17  
 65:7,13 78:21 114:16  
 268:21  
**commanders'** 178:1  
**commanding** 56:15  
 229:7  
**commands** 52:6 273:18  
**commands'** 83:7  
**commence** 178:6  
**commencement** 181:1  
**commencing** 103:18  
 104:20  
**comment** 3:18 10:4,6,8  
 40:17 56:7 102:4  
 104:18 189:20 191:19  
 215:12 240:20 241:8  
 245:18 247:15,17  
**comment/meeting**  
 148:20  
**commentary** 192:8  
**commented** 26:16  
 188:9 244:14  
**comments** 6:18 10:11  
 10:13 40:19 45:7  
 47:11 70:16 88:13,14  
 99:1 101:7 102:11  
 118:16 120:22 121:12  
 124:22 126:13 145:9

149:6 215:14 225:8  
 230:15 241:14 269:14  
**commit** 12:7 219:5  
**committed** 13:15 15:8  
 68:21 122:12 206:14  
 206:14 209:10,11  
**committee** 1:3,10 3:5  
 3:10 4:5,14 7:2,6,9,20  
 8:3,12,17 9:5 10:8,14  
 14:22 33:16 37:8  
 38:16 143:21,22  
 144:4,12 146:14  
 149:7,8,19,20 150:19  
 151:6,7 161:11 207:4  
 207:18 208:5 209:2  
 245:17,21 246:5  
 274:10 277:9,21,22  
 281:2,15,22 287:17  
 288:10,12 304:21  
**Committee's** 7:16 9:17  
 9:22 48:8 57:5 64:15  
**committees** 46:21  
 67:22 69:5  
**common** 53:16 280:12  
 284:3 300:8  
**communicated** 239:21  
**communication** 292:16  
**community** 69:14 71:22  
 93:20 197:17 226:4  
 226:10 248:2,4 249:1  
 249:11  
**comparable** 58:14  
 90:17 91:14  
**comparative** 31:18  
 76:12 79:12 100:11  
**compare** 134:20 197:15  
**compared** 233:21  
 244:13  
**comparison** 59:10  
 245:20  
**compel** 155:18 158:11  
 166:2 186:13  
**compelling** 171:12  
 186:19  
**compensated** 296:16  
**compile** 264:7  
**complainant** 245:5  
 259:8  
**complainant's** 71:15  
 80:10  
**complaining** 171:8  
**complaint** 49:1 58:17  
 102:8 104:3 196:18  
 273:8  
**complaints** 49:2,7,9  
 63:10 173:1 245:11  
**complete** 6:13 26:7  
 32:3 46:13 94:4 136:6

144:17 214:12 231:10  
**completed** 7:15 37:1  
 39:10  
**completely** 61:10  
 107:17 201:20 289:4  
**completes** 51:11  
**completion** 39:11  
**complex** 297:20  
**complicated** 265:3  
**complicating** 195:3  
**complications** 200:3  
**component** 103:16  
**comport** 178:19  
**comports** 257:10  
**composition** 258:11  
**comprehensive** 32:1,3  
 155:8 161:14 177:13  
**computer** 15:12 129:20  
 129:21  
**con** 240:15  
**concede** 127:8  
**conceded** 12:14  
**concept** 272:8  
**concern** 27:1,18,20  
 29:10,11 52:17 221:6  
 233:19 284:12 288:20  
**concerned** 59:5 61:15  
 70:3 117:18 292:13  
**concerning** 21:16  
 56:20 65:22 66:2  
 153:12  
**concerns** 27:8 170:14  
**concessions** 18:5  
**conclude** 49:18 117:11  
**concluded** 29:16  
**concludes** 142:8  
**conclusion** 85:4 99:17  
 115:7 125:4 133:16  
 207:11  
**conclusions** 85:20  
 122:21,22 123:5  
**concordance** 115:22  
 116:8 253:14  
**concrete** 216:4  
**condition** 225:2  
**conditions** 233:3  
 278:18  
**conduct** 7:11 103:20  
 131:11 226:4  
**conducted** 45:18  
**conducting** 46:5,8,16  
**conference** 223:8  
**conferences** 223:19  
**confidence** 214:5  
**confident** 75:4  
**confinement** 12:1,4,6  
 12:14,15 14:8,9,11  
 26:18 27:3,9,17

**confirms** 49:21  
**confrontational** 275:13  
**confused** 81:3  
**congratulations** 146:2  
**Congress** 7:17 9:13,19  
 13:8 21:16 22:4,10,11  
 24:4,8 28:20 245:6  
**Congress's** 155:6  
**conjunction** 262:1  
**connection** 63:9  
**consensual** 249:5,9  
 256:21  
**consent** 12:13  
**consequences** 14:18  
 14:21 28:13  
**consider** 40:20 83:5  
 86:20,21 87:1 105:5  
 113:18 121:2,6 151:7  
 173:3,8 175:12  
 213:19 225:5 228:14  
 228:15,20,20,22  
 229:1 238:2 262:21  
**consideration** 10:14  
 40:7 65:16,18 71:8  
 83:13 115:12 120:20  
 175:4 232:14 256:15  
 261:22  
**considerations** 65:22  
 66:2 67:6 157:19  
 224:19 227:21 238:1  
 240:3 258:4  
**considered** 72:7,8,10  
 79:13 81:19 123:16  
 156:6 213:14  
**considering** 73:5 74:2  
 74:12 83:10,16 235:3  
**considers** 86:19  
**consist** 272:7  
**consistency** 82:1  
 108:10 234:21  
**consistent** 108:13,14  
 138:18 139:8  
**consistently** 27:3  
 114:12 138:14 139:4  
 140:5  
**consists** 122:20  
**consolidated** 308:7  
**constitutes** 103:20  
**constitutional** 90:1,20  
 161:19 167:18  
**constitutionally** 213:15  
**constraints** 285:1  
**constructive** 215:11  
**consult** 101:10  
**consultation** 192:18  
**contact** 16:2 39:1 157:6  
 297:13 298:7,8  
**contacting** 56:8

**contacts** 296:17 298:16  
**contain** 176:4  
**contained** 7:5  
**containing** 41:9 85:18  
**contemplated** 285:22  
**CONTENTS** 3:1  
**contested** 115:17 244:7  
**context** 63:14 93:7,21  
 198:4 199:5 295:2  
**Continental** 11:10  
**continuance** 170:12  
 197:6  
**continue** 48:9 49:13  
 52:4,21 57:6 64:16  
 69:7 70:1 126:22  
 239:4 250:13  
**continued** 167:11 171:1  
 201:22 206:2  
**continues** 51:5  
**continuing** 40:2 43:11  
 52:4  
**continuously** 272:12  
**contradicted** 111:17  
**contrary** 233:2,5  
**contrast** 55:21  
**Contrasting** 123:17  
**contribute** 242:12,19  
 245:2  
**contributed** 242:12  
**contributes** 69:21  
**contributing** 46:3  
**control** 166:15 203:13  
 284:7  
**convened** 236:8  
**convenient** 296:3  
**convening** 65:7,13 71:8  
 72:9 74:10 79:22  
 85:22 100:1,4 108:2,8  
 108:20 109:1,4  
 111:11 112:13 114:16  
 114:19 115:10 117:12  
 120:4 122:8,20 123:3  
 123:10,20 135:22  
 136:1,4,8,11,17  
 138:14,20 140:5  
 159:2 163:11 167:1  
 169:20 174:2 177:5  
 177:20 179:13 182:6  
 182:9,19 184:12  
 187:4 191:3,21 192:6  
 198:14 211:10 219:2  
 221:1 228:9 229:21  
 232:14,22 235:10,17  
 235:20 236:5,7,14  
 237:15 238:8 239:5  
 257:19 258:3,16,21  
 259:11 282:14  
**conversation** 218:9

220:6 236:11 237:9  
 254:19 263:7  
**conversations** 217:19  
 217:22 218:7  
**convict** 247:3,4,9  
**convicted** 11:21 12:10  
 30:20 31:12 32:2,15  
 62:7 259:1  
**conviction** 9:7 15:19,21  
 16:1 20:19 27:3 71:10  
 72:5,18 74:3,13 75:5  
 75:17 76:2,18 103:22  
 104:15 109:5 111:22  
 114:9,14 115:4,9,13  
 115:18,20 116:6,17  
 116:21 119:2,8,11  
 120:21 133:6 134:3  
 149:13 161:15 162:7  
 163:19 164:19 166:9  
 166:22 170:2 179:10  
 184:17 185:3 225:19  
 226:14 229:15 240:6  
 240:12,21 241:12  
 242:13,19 243:7,18  
 243:21,22 244:8,12  
 244:13,16,19,21  
 245:3,9,14,19 246:8  
 250:8,19 252:4,9  
 253:6,7,11,13 256:18  
 259:18 260:11 261:8  
 272:1  
**convictions** 6:21 11:19  
 17:4 31:7 308:5  
**convince** 247:8  
**cook** 32:21 33:6 147:7  
 148:13,13  
**cool** 224:2  
**cooperate** 145:14  
**cooperating** 225:11  
**cooperation** 265:6  
**cooperative** 304:8  
**coordinating** 194:22  
**copies** 34:21 41:7  
 209:18  
**copy** 34:2 129:9 151:2  
**core** 204:8  
**corporate** 212:7  
**corps** 18:22 20:22  
 258:12 268:8,17  
 291:21 296:12 298:22  
 299:8 305:14  
**correct** 103:5 174:21  
 184:18 197:5 228:5  
 266:1  
**correctly** 117:12  
**correlation** 75:17  
**cough** 98:5  
**counsel** 8:5 11:6 18:12

19:19 20:11 21:8,8  
 25:1,3,17 26:4 45:2  
 47:13 60:21 85:21  
 91:5 92:2 98:9,15  
 124:15 139:2 143:17  
 150:1 156:3,7 157:20  
 158:2,7 167:21  
 179:21 184:12 188:18  
 190:1 191:2 194:16  
 194:16 206:20 208:18  
 211:13 218:10,20,21  
 219:11,14 220:3,20  
 220:20 221:7,10,12  
 251:7 259:15 261:8  
 262:1 263:20 264:5  
 268:14,14,15,16,17  
 270:10,16 271:10,11  
 282:14,17,20 283:12  
**Counsel's** 305:18  
**counsels** 222:6 286:15  
**count** 134:14 247:12  
 250:19 259:2  
**counterintuitive** 242:22  
 243:14  
**counters** 176:13  
**country** 13:2 23:20  
 205:1  
**county** 199:10 204:14  
 249:1  
**couple** 10:22 20:4 30:3  
 62:16 70:10 101:2  
 190:17 219:12 221:1  
 224:9 236:16 248:22  
 267:6 268:18,20  
 274:17 277:11 292:5  
**courage** 108:20  
**course** 74:8 186:2  
 249:13,21 262:15  
 289:13 294:21 299:18  
 303:7  
**court** 12:18 13:1 23:6,9  
 23:12,16,17,20 24:12  
 27:17,21 28:2,3,9  
 29:11 134:3 136:20  
 139:19 167:6 181:14  
 196:16 201:12 226:8  
 226:11 246:11 270:21  
 295:20 296:10 307:22  
 308:4  
**court-** 26:16 74:15  
 107:20 110:18 138:1  
 163:1 224:19 232:3  
 265:22 293:13,16  
 294:7 303:2 304:10  
**court-marital** 303:16  
**court-martial** 3:16 6:22  
 7:3 9:10 11:15 63:12  
 68:5 71:11 75:2 92:11

97:16 100:3 105:22  
 110:6 115:9 116:3  
 117:14 122:9 135:21  
 136:1,4,7,10,17 137:3  
 137:6,7,14 148:19  
 156:21 179:16 184:11  
 185:12 187:6 188:10  
 191:21 194:19 198:14  
 210:7,16 219:1,2  
 225:12,18 240:7  
 246:6 251:18 293:20  
 294:6,7 296:8 297:5  
 297:10,12,15 298:1  
 298:20 299:5,9,10,14  
 302:21 303:13  
**court-martialed** 14:4  
 38:22  
**court-martials** 187:11  
 245:4 297:3  
**courtesy** 236:19 267:2  
**courthouses** 199:9  
**courtroom** 18:10  
 257:10 294:15  
**courts** 10:2 32:13 114:7  
 115:17 258:10 294:2  
 296:18 297:1,7  
 300:18  
**courts-** 211:3  
**courts-martial** 210:6  
 296:20  
**cover** 229:9 251:4  
 276:22  
**covered** 99:6 273:6,20  
**covering** 7:4  
**craft** 254:11  
**crafted** 47:17  
**create** 81:22 83:10  
 195:14  
**created** 6:5 23:10 28:20  
 81:21 92:13  
**creates** 171:13 196:5  
**creating** 75:8 92:17  
 173:9  
**credibility** 81:22 82:16  
 88:5,8 117:4,7 171:13  
**credible** 225:10  
**crepe** 307:3  
**crime** 13:16 50:8 51:1  
 51:17 80:11 248:14  
**criminal** 23:10,12,16  
 42:8 95:1 101:10  
 102:8 104:2 164:21  
 206:19 268:10  
**criminologist** 37:7  
 38:10  
**criteria** 258:17 294:1  
 296:20 297:19 298:15  
 299:5

**critical** 12:6 90:18  
 211:12 212:1 223:9  
 298:9  
**critically** 25:16  
**criticism** 245:5  
**criticisms** 68:1  
**cross** 289:15,18  
**cross-examine** 167:19  
**cross-purposes** 95:19  
**CRWG** 37:22 39:12,17  
 40:2,5,10,15,16,16,20  
 44:19 47:17 57:6  
 67:16 89:1 125:20  
 126:19 187:16  
**CRWG's** 38:17 39:11  
**Crystal** 1:11  
**CSMAF** 5:16 61:14  
 213:20 246:10 278:8  
 278:12 279:19 280:1  
 280:19 285:6,17  
 286:6  
**cultural** 233:22  
**cumulative** 158:14  
**curious** 195:16 237:12  
**current** 21:14 24:17  
 31:6 55:5 74:13 92:21  
 160:8 169:12 174:7  
 203:18 206:3 235:12  
 294:14  
**currently** 81:20 122:7  
 182:15 214:4 297:4  
**cut** 261:13  
**cycle** 23:15 164:3

---

**D**


---

**d** 49:17  
**DA** 252:8,11  
**DAC** 290:17 306:7  
**DAC-IPAD** 1:4 3:10,12  
 4:16 6:5,14 7:3 8:6,9  
 8:16,21 9:15,21 10:3  
 10:9 38:1 39:8,18  
 40:1,4,18 41:14  
 131:22 133:8 143:10  
 143:12,14,20 150:10  
 205:8 229:19 242:14  
 250:12 286:2,13  
 293:16  
**DAC-IPAD's** 3:5 7:6,18  
 7:21 9:12 149:12  
**dad** 147:11  
**dah** 290:5,5,5  
**Dale** 2:3  
**damn** 33:7  
**darkness** 126:6  
**darn** 146:7  
**data** 7:4,7 16:17 17:2  
 33:21 34:11 37:6 38:3

39:10,14 41:20 58:5  
 63:9 90:4 99:20 112:3  
 115:16 128:15 129:6  
 130:17 132:15,16,18  
 134:15,16,18,19  
 141:10 142:3,13  
 149:13 151:14 154:15  
 161:1 162:12 178:1  
 187:2 188:3 199:18  
 207:21 216:7 242:9  
 242:14 246:6,8  
 250:11,14 253:5  
 265:15  
**database** 37:6 133:8  
 163:4 305:10,12,15  
 305:17 306:9  
**databases** 78:13  
**date** 128:12 149:7  
 195:5 306:13 307:10  
**dates** 295:14  
**daunted** 207:16  
**day** 12:2,20 14:11 61:21  
 62:1 70:13 90:16  
 146:8,19,20 165:20  
 179:22 180:1 186:4  
 191:14 226:11 267:11  
 270:3,3,5 271:22  
 291:1,1,1,2,7,9  
 302:22  
**day-long** 291:12  
**day-to-day** 102:18  
**days** 12:16 13:16 58:9  
 70:11 96:20,21 97:1  
 97:21 148:1 167:9  
 170:22 171:4 186:13  
 196:11,16,16 197:3  
 270:4 295:15,15  
 296:8 297:21 302:19  
 302:20  
**deal** 115:22 253:13  
**dealing** 205:5  
**deals** 77:9  
**dealt** 236:8  
**decades** 51:22  
**December** 293:17  
 297:6 305:2  
**decide** 93:12 121:7  
 138:11 165:16 205:11  
 206:17 214:17  
**decided** 107:7,21 133:7  
 147:18,19 186:10  
**decides** 60:7  
**deciding** 104:2 108:5  
**decision** 42:21 43:4  
 44:5,9,15 60:16 65:16  
 80:8,14 81:20 83:15  
 83:22 84:2 85:7 87:8  
 89:19 90:6 106:21,22

107:9 108:21 112:14  
 125:6 138:21 154:18  
 159:21 165:12 166:17  
 169:19 172:14,18  
 174:11 178:7 182:7  
 184:14 186:16 190:14  
 192:7 193:2 194:18  
 202:9 211:15 216:20  
 230:11 235:4,14  
 236:1 237:10 238:21  
 275:17 306:3  
**decision-making**  
 238:20 252:19  
**decisions** 37:3,19  
 38:15 78:20 82:2,4,8  
 82:13,18,20,21 84:17  
 85:2 86:2 107:12  
 108:15 149:14 177:6  
 178:1 207:22 231:9  
 232:8 234:18,19  
 237:15 239:6 249:18  
 259:11 272:2  
**decisive** 44:14  
**declination** 65:20 71:18  
 71:21 79:14 105:15  
 178:5 193:8 194:4  
 195:5 264:21  
**declinations** 73:7  
**decline** 100:17 101:17  
 101:19,21,21 149:14  
 262:17 264:6 272:2  
**declined** 102:3 262:3  
**declining** 79:3 100:19  
 103:18 104:20  
**dedication** 68:16  
**deem** 40:7  
**deemed** 275:14  
**deep** 50:3 58:21 88:20  
 205:3  
**deeper** 27:14 52:13  
**defend** 22:13 68:10  
**defendant** 32:2 118:22  
 167:17 182:9 204:11  
 242:7 248:10  
**defendant's** 178:12  
**defended** 30:2 31:11  
 160:17  
**defender** 27:14  
**Defenders** 2:12 6:19  
**Defenders'** 3:3  
**defending** 211:3  
**defense** 1:1,3,3 4:5,6  
 4:13,15 6:6,8,9 7:18  
 8:5 9:14,16 12:14  
 25:1,3,8 26:4 47:12  
 68:10 85:21 89:8  
 90:22 92:7 93:15 95:2  
 109:15 117:20,21

124:12,15 143:12  
 144:15 150:1 154:4  
 156:3,7,12,14 158:2,5  
 158:6,12,17,18 162:1  
 163:12 167:18 171:13  
 171:21 174:18 181:15  
 183:7 190:10 191:13  
 194:16,22 198:19  
 208:7 209:22 210:10  
 210:19 211:13 218:20  
 220:20 221:12 238:4  
 241:3 244:18 245:2,6  
 245:10,13 248:10  
 252:14 268:15,15,16  
 270:9,16 271:11  
 282:13 305:4,6,9,13  
**deference** 115:14  
**deficiencies** 165:7,8  
**definitely** 47:14 64:4  
 214:19 220:18 227:14  
 231:5 240:1 252:4  
 280:9 304:7  
**degree** 46:17 66:7  
 166:11 286:17  
**delay** 25:10  
**delayed** 50:5 242:22  
**delays** 170:12,19  
**deliberate** 9:5 39:9  
 75:11 281:16  
**deliberated** 7:7  
**deliberations** 3:5,8,10  
 7:11,16 9:12 148:17  
**deliberative** 254:13  
**delightful** 304:4  
**Delta** 282:8  
**demographics** 249:14  
**demonstrate** 241:17  
**denied** 24:17  
**department** 1:1 8:5  
 9:16 25:8 144:8,18  
 198:18 228:7 262:18  
 306:3  
**Department's** 9:19  
**departments** 45:20  
 305:18  
**depending** 96:17  
 155:14 196:15 263:7  
**deployed** 18:19  
**depository** 89:10  
**depth** 8:13  
**Deputy** 2:2  
**derail** 61:10  
**derailed** 58:19,20  
**describe** 83:15 154:12  
 251:2,5  
**described** 169:13  
**descriptive** 38:3  
**descriptor** 246:1

**design** 206:16 249:13  
**Designated** 2:3 4:4  
**designed** 149:5 203:4  
 206:5 212:18 248:17  
**desk** 229:9  
**despite** 30:11 111:12  
 137:7 138:2 141:18  
 185:9  
**detail** 42:9,11 186:21  
 189:19  
**detailed** 37:18 47:7  
 50:7 85:17 86:8 87:11  
 87:18 92:5 110:15  
 123:4,17 125:7  
 129:16 303:4  
**details** 30:10 86:12  
**detained** 206:6  
**determination** 80:7,12  
 89:3,7 96:2 99:15  
 101:12 105:14 112:10  
 112:17,19,20 114:20  
 117:5 123:2 138:3  
 166:6 173:12,14  
 174:2 175:16,20  
 176:16 177:12 179:3  
 179:5,8,18 180:16,21  
 180:22 182:11,12,13  
 183:10,21 184:5  
 201:10 208:20 209:8  
 212:12 251:17,19  
**determination's** 181:5  
 181:6  
**determinations** 38:15  
 60:1 79:10 103:12  
 112:15 113:12 138:16  
 138:22 139:9,20  
 140:6,16 144:19  
 151:8,15 160:2,3  
 177:22  
**determine** 35:13 42:22  
 65:8 100:16 101:6,13  
 164:14 214:15 249:17  
 262:15 273:13,15  
**determined** 139:21  
 160:22 169:6  
**determines** 169:3  
**determining** 89:16 91:7  
 160:10  
**detriment** 13:14  
**devastated** 260:15  
**devastating** 259:21  
**develop** 110:8 235:22  
 263:21,22 292:2,6,7  
**developed** 43:16,20  
 93:17 140:14  
**developing** 39:19 45:6  
 109:16  
**development** 68:17

209:20 223:8,16  
**Devin** 14:2 33:2,4  
**DFO** 2:4  
**dialogue** 239:5  
**dice** 94:6  
**Diego** 248:9  
**difference** 20:17 76:2  
 172:12 187:9 213:4  
**differences** 234:1  
**different** 45:10 66:4,7  
 99:17 104:7 110:9  
 118:6 134:11 152:2,7  
 152:12 158:7 165:3  
 172:20 173:17 184:1  
 184:4 190:17 195:9  
 198:11 213:7 216:5,6  
 234:21 235:2,3,3  
 240:1 256:1 258:10  
 284:9 294:11,22  
 296:13 298:1,10,20  
 299:8 300:6 303:3,10  
**differently** 233:21  
**difficult** 19:16 22:2 30:9  
 42:12,17 43:2 118:15  
 163:7 189:4,13  
 192:13 194:13 200:17  
 226:1 242:1 253:22  
 279:13  
**difficulty** 25:13  
**digital** 25:14 190:4  
 243:1 305:13  
**dilemma** 121:9  
**diligently** 305:11  
**dinner** 19:5 286:6  
**direct** 10:9 75:17 150:3  
**direction** 48:20 55:14  
 55:19 57:3 228:11  
**directions** 152:12  
**directive** 168:9  
**directives** 46:10 54:4  
**directly** 152:8  
**Director** 2:2,2 9:15  
 10:10  
**directs** 65:7  
**dired** 258:15  
**disagree** 84:8 87:14  
 179:15 183:21 202:6  
 251:6 290:2  
**disagreeing** 221:11  
**disagrees** 118:11  
 173:10  
**disappear** 298:15 301:4  
**disappointed** 118:10  
 146:4  
**disapproval** 143:13  
**discharge** 13:19 185:15  
**discipline** 65:10 66:3  
 66:15,19,20,22 67:13

69:11,18,22 107:13  
 122:17 174:5 177:7  
 205:16 214:1 215:6  
 225:21 226:6 241:16  
 241:21,22  
**disclosure** 91:12 238:4  
 238:6  
**disclosures** 56:11  
**disconnect** 110:21  
 113:12 253:21  
**discourse** 185:7  
**discovery** 11:5 24:16  
 24:18 25:7,9 91:12  
 94:21 167:20  
**discretion** 10:12 48:21  
 52:1 68:7 89:18  
 104:19 233:1  
**discretionary** 231:8  
 275:16  
**discuss** 128:14 131:5  
 281:16 307:7  
**discussed** 74:7,9  
 224:22 226:12 261:15  
 282:10  
**discusses** 139:14  
**discussing** 300:5  
**discussion** 78:22  
 105:13 126:4 149:18  
 150:7 151:20 153:3,6  
 176:2 179:13 190:19  
 190:20 200:20 238:9  
 239:2 240:19 242:10  
 261:11 287:11 302:6  
 302:14  
**discussions** 124:3  
 153:17 194:15  
**dishonorable** 13:18  
**disingenuous** 179:2  
**dismiss** 169:4,14 183:5  
 214:16  
**dismissal** 108:8 120:5  
 200:11 234:7  
**dismissed** 135:18,22  
 136:2,16,16,20 137:1  
 137:15 139:7,11,19  
 169:5 201:17  
**dismissing** 136:9  
**disobedience** 69:16  
**disparity** 13:10,12  
 28:21 29:18 234:18  
**dispersed** 21:9  
**disposition** 37:3 42:13  
 65:8,13,15 67:3,4  
 71:7,12 78:15,17,20  
 79:6 81:18,20 83:7,14  
 83:22 84:2,17 86:17  
 87:8 112:13,14  
 122:16 136:11 149:11

156:16 168:6 178:1  
 184:22 185:14 188:6  
 191:16 192:21 224:13  
 224:21 225:7 226:19  
 227:2,13,22 230:14  
 233:20 234:4  
**dispositions** 38:19 39:4  
 86:3 134:7 178:3  
**dispositive** 174:10  
**disrespect** 69:16  
 202:19  
**disrespected** 203:15  
**distance** 172:1  
**distill** 150:14  
**distinction** 75:20  
 169:11  
**distinguish** 59:18  
**distributed** 223:13  
**district** 118:18  
**dive** 27:14 50:3 88:20  
 205:3  
**diversion** 101:20  
**divert** 299:4  
**diving** 230:1  
**division** 18:13 40:8  
 149:22 154:4 173:21  
 177:2 178:18 179:20  
 244:4  
**DNA** 25:14 59:3 60:14  
 60:15,18 78:13 80:9  
 80:12,22 252:16  
**docket** 295:8,11 296:13  
 296:13  
**dockets** 295:8  
**doctor** 51:10,11 180:11  
**document** 41:8 83:8  
 150:9 231:6  
**documentation** 43:3  
 44:4 50:13 106:20  
**documented** 44:12  
 82:8 107:8,8 194:1  
 209:1 237:10,11  
**documents** 25:2 35:15  
 37:11 39:17 95:3  
 119:18 145:17 188:8  
 188:12 234:11 301:21  
**DoD** 143:16 272:10  
 305:16  
**doing** 20:11 23:8,8  
 27:14 28:8 47:2 51:22  
 55:10 68:21 72:20  
 91:22 92:16 94:18  
 98:13,17 108:11  
 124:19 157:22 158:9  
 164:10 179:22 199:13  
 199:15 205:20,21  
 216:19 222:21 236:21  
 245:4 252:15 268:12

277:5 286:10 289:5  
 299:17 305:22  
**dollars** 61:22  
**domestic** 265:2  
**Don** 2:12 6:18 251:3  
**door** 55:6  
**doors** 123:10 124:4  
 126:7  
**dormitories** 278:15  
 280:20  
**DoubleTree** 1:11  
**doubt** 76:1 87:4 97:18  
 118:10 120:12 163:2  
 244:1 251:21 293:4  
**doubts** 117:7  
**dovetails** 194:18  
**downhill** 65:1  
**downstream** 81:13  
 88:10 121:14 232:5  
 250:18  
**Dr** 1:17 5:13,14,19 9:2  
 34:15 37:7 48:13 51:8  
 72:21 73:8,13 106:9  
 106:12 217:18 224:6  
 252:17 253:22 255:11  
 299:8 304:4  
**dragging** 52:20  
**drill** 225:16  
**drinking** 256:21  
**drive** 1:11 266:3  
**driving** 217:2  
**drop** 215:9 265:5  
**dropped** 148:11 214:8  
 215:1  
**dropping** 263:8 265:10  
**drug** 31:9  
**drug-addicted** 119:7  
**druthers** 94:1  
**dual** 70:7  
**due** 58:15 68:11 90:1  
 91:12 126:10 145:1  
 160:1 178:12 213:2,8  
 240:3 245:4 307:8  
**dump** 224:4  
**duty** 61:21,21 210:15  
**Dwight** 2:3 4:4 146:4,21  
**dynamic** 95:10

---

**E**

---

**e-** 296:12  
**E-2** 278:13  
**E-3** 272:20  
**E-5** 278:14  
**E-7** 272:20  
**e-dockets** 295:6  
**earlier** 120:10 126:2  
 128:18 153:5 162:13  
 208:21 276:6 288:21

**early** 18:9,18,20 49:1  
 53:3 59:19 147:22  
 159:9 167:8 168:15  
 210:8 297:6  
**earnings** 59:12  
**ease** 288:5  
**easier** 146:1 208:13  
 220:11 229:21  
**easiest** 100:15  
**easily** 223:11  
**easy** 36:20 39:12 41:17  
 193:14  
**eat** 148:8  
**echelon** 232:18,21  
**education** 62:13  
**educational** 58:2  
**effect** 52:19 67:8 77:6  
 77:16 81:22 98:20  
 112:20 113:13 139:18  
 139:22 154:9 159:7  
 192:1 195:16 224:18  
 227:7 232:22 241:19  
 241:20,21 242:16  
 258:20 259:18 289:2  
**effective** 49:20 224:15  
 226:20 227:10 231:9  
**effectively** 167:21  
**effectiveness** 90:2  
 154:17 242:3  
**effects** 58:22  
**efficacy** 170:18  
**effort** 68:18 266:21  
**efforts** 228:7  
**eight** 27:17 55:3 137:18  
 281:9  
**eighty** 208:16  
**either** 26:19 91:3 93:18  
 101:15 133:5 136:9  
 140:20 173:3 198:11  
 208:12 300:6  
**elected** 131:9 197:21  
**election** 26:22 252:8  
**electronic** 295:7 296:13  
**electronically** 302:2  
**elects** 157:20  
**element** 51:1  
**elements** 49:15 85:19  
**elevated** 121:3  
**eligible** 157:7  
**eliminated** 92:11  
 280:19  
**email** 266:11 287:15  
 297:2 307:11  
**emails** 277:4 303:18  
**empirical** 29:18  
**empty** 89:21  
**Enclosure** 230:1,2  
**encompasses** 179:9

- encourage** 281:21  
 303:11  
**end-of-case** 177:16  
**ended** 121:4 302:13  
**endorse** 35:22  
**enforce** 94:21  
**enforcement** 190:2  
 245:12 284:1  
**engage** 288:6 302:14  
 303:9  
**enjoyed** 113:20  
**enlisted** 32:20 214:3  
 246:11,13 258:5  
**enormous** 214:11  
**ensure** 13:22 203:3,13  
 203:20  
**entail** 66:15  
**entire** 37:12 40:17  
 52:19 91:13 131:11  
 182:15 218:10 235:7  
 291:9 296:5,9  
**entirely** 18:11 183:5  
**envision** 71:19  
**Ephraim** 221:4  
**equal** 25:4 72:19  
**equally** 27:4  
**equivalent** 201:16  
**erode** 178:9,12  
**erodes** 180:4  
**eroding** 180:10  
**especially** 19:20 28:17  
 76:5 87:7 170:2  
 178:13 241:3 273:7  
 291:8  
**essential** 196:16  
**essentially** 208:8 233:3  
 267:17 269:3 270:5  
 293:15  
**establish** 79:17 83:4  
 102:12 262:10  
**established** 49:16 80:4  
**Europe** 12:9  
**European** 291:5  
**evaded** 98:3  
**evaluate** 161:11  
**evaluated** 84:9,9  
**evaluating** 240:22  
**evaluation** 114:13,15  
 115:3 184:17 185:2  
**everybody** 10:17 19:8  
 34:21 36:17,21 42:4,6  
 81:2 82:18 129:17  
 162:12 182:16 216:9  
 234:22 250:1 304:10  
**everybody's** 85:8  
**everything's** 214:8  
**evidence** 24:19 26:1  
 43:13 53:6 65:19  
 66:13 71:9,14 72:4,18  
 73:10 75:11 76:18,22  
 77:10 89:2,6,15 91:2  
 91:16 92:6 93:17 96:1  
 96:4,11 97:8,22 98:2  
 98:6 103:12,21  
 104:14 105:13 109:5  
 109:17,21 114:8,14  
 115:4,8,13 116:1,5,10  
 116:19 117:19 118:5  
 118:9 119:1,11  
 121:16 125:8,18  
 131:16 155:9,18  
 156:11,12,15 158:5  
 158:11 161:14 162:6  
 164:14 166:15 171:11  
 171:16 172:7 174:10  
 176:8,12,14 177:14  
 177:17,18,19 182:1  
 183:15,17 186:14  
 190:12 198:10 243:1  
 243:2,3 245:8 249:20  
 253:7,10  
**evident** 88:6  
**evidentiary** 50:15 54:3  
 93:11 211:17  
**evolved** 125:2 274:5  
**ex-** 53:13 192:5  
**ex-girlfriends** 53:13  
 56:8  
**ex-wives** 53:13 56:8  
**exact** 11:13 13:16  
 243:16  
**exactly** 47:8 67:10  
 83:12 97:7 165:13,15  
 231:1 260:17  
**examination** 51:11  
**examinations** 190:5  
**examine** 8:13,18  
 289:18  
**examining** 289:15  
**example** 38:20 118:17  
 136:13 154:2 258:14  
 274:3 275:3  
**examples** 271:21  
**exams** 25:14  
**exceedingly** 233:9  
**excel** 71:1  
**excellent** 108:12  
**exception** 29:20 136:18  
 138:17 140:13  
**exceptionally** 145:11  
 296:7 298:8  
**Excess** 210:17  
**excessive** 204:18  
**exchange** 238:17  
**exclusive** 260:6,7  
**excuse** 48:21 135:13  
**existed** 211:1  
**existence** 201:22  
**existential** 70:2  
**existentially** 201:21  
**existing** 8:16  
**exists** 122:14 162:5  
**expect** 22:1 141:12  
 144:6  
**expectation** 22:4,5 75:8  
 109:7  
**expected** 221:13  
**expecting** 296:9  
**expense** 277:19  
**experience** 18:4 19:7,9  
 19:11,14,18 20:16,20  
 22:3,22 23:21,22 29:4  
 46:6,17 47:9,11 57:2  
 70:22 76:12 82:11  
 92:20 93:7 100:11  
 120:17 153:8 164:11  
 165:19 186:7 207:13  
 257:15 263:14 265:17  
 265:18 294:19 299:11  
**experienced** 19:10  
 45:18 50:4 54:8 107:2  
 120:18,19  
**expertise** 38:16  
**experts** 82:12  
**explain** 12:17 40:16  
 125:14,17 130:5  
 246:22  
**explaining** 143:18  
 145:15 164:12 169:21  
 273:1  
**explanation** 85:6 87:12  
 99:18 109:1 122:21  
 123:4 125:6,6 229:12  
 229:15 243:21  
**explanations** 125:10,11  
 125:13 245:14  
**explore** 40:2 64:16  
 126:22 127:3 227:10  
 257:12 285:5  
**exploring** 273:19  
**expose** 244:22  
**express** 41:16 192:21  
**expressed** 206:20  
**extensively** 130:22  
**extent** 232:16  
**extra** 291:7  
**extraordinary** 68:18  
**extremely** 207:17  
**eyes** 213:12
- 
- F**
- 
- fabulous** 298:22  
**FACA** 281:3  
**facilitate** 238:8  
**facility** 50:10  
**facing** 12:13  
**fact** 30:12 61:7 63:9  
 75:7 82:3 84:20  
 119:16 141:18 164:3  
 178:15 201:16 228:12  
 281:12 289:10,11  
 298:6  
**factor** 71:14 140:4  
 163:16 195:3 225:4  
 228:16 242:20 248:1  
 249:16 251:16  
**factoring** 77:15  
**factors** 27:10 38:7  
 65:17,22 72:6,8 77:19  
 78:15 81:19 83:16  
 86:19 121:2 123:1  
 139:1 149:11 151:18  
 225:6 228:14,15,17  
 228:19 229:13 234:4  
 234:11 242:11,12,18  
 243:4,5,8 245:2  
**facts** 48:22 49:8 56:2  
 85:18 101:5 242:18  
 248:6  
**factual** 140:14 141:3  
**failing** 16:22 17:7  
**failure** 16:7,12 27:2  
 69:17 75:8 79:16  
 102:12  
**fair** 28:9 241:18 263:16  
 265:12  
**fairly** 106:1 180:12  
 247:1 263:11  
**fairness** 91:12 126:10  
**faith** 214:3  
**fall** 141:11,12 266:21,22  
**falls** 116:20 138:4  
**false** 183:17  
**familiar** 14:3 112:3  
 231:4  
**fan** 17:14  
**far** 15:19 22:20 46:11  
 52:11 70:2 94:4  
 126:19 128:22 151:19  
 215:5 219:19 225:14  
 234:14 251:10 271:8  
**farther** 79:5 81:13,14  
**fast** 284:19  
**father** 148:2  
**favor** 173:21 226:6  
**favorable** 58:1  
**favored** 174:18 238:19  
 238:19  
**FBI** 60:15 100:22  
**fear** 263:5  
**fears** 245:4  
**February** 297:11 304:5

306:11,15  
**fed** 242:14  
**federal** 2:3 4:4 13:3  
 15:1,6 28:20 29:2  
 31:19 32:8,10 78:13  
 93:9 94:20,22 96:7  
 100:12 103:20 104:8  
 104:16 119:5 163:18  
 181:14 201:8,12,16  
 204:22  
**feed** 296:19  
**feedback** 153:19  
 244:10 274:17  
**feel** 117:3 156:4,7,8  
 187:12 209:2,3  
 229:22 231:7,8,12  
 245:17 263:15 271:4  
 271:14  
**feeling** 87:6 208:20  
 245:7  
**feelings** 222:18  
**fell** 40:9 140:3 306:14  
**fellow** 53:4  
**felt** 47:18 75:4 174:8  
**ferret** 159:10  
**fewer** 17:2,3 220:11,11  
**field** 47:5 98:21 159:1  
 205:4 207:21 208:19  
 215:13 216:17 218:1  
 230:19 252:6 259:17  
 288:15  
**fields** 82:12  
**fifth** 4:13  
**fight** 18:19  
**figure** 35:20 118:19  
 124:15,19 159:22  
 194:8 254:3  
**figures** 156:20 280:16  
**figuring** 52:16  
**file** 37:12 42:21 43:20  
 50:6 83:21 85:4,9  
 94:16 105:12 115:21  
 165:5,18 177:16  
 187:19 281:3  
**filed** 58:12  
**files** 7:14 37:2 39:16  
 41:19 42:3 49:18  
 55:18 65:11 76:9  
 78:18 89:1 105:11  
 115:16 116:7 119:17  
 138:19 152:4,5  
 178:19 180:2 193:11  
 194:4 237:6 263:2  
 301:22  
**filing** 196:18  
**fill** 223:14  
**filtered** 217:7 218:6  
**final** 3:5 143:10

**finally** 9:21 24:15 38:14  
 49:17 115:11 160:12  
 178:8  
**find** 23:19 42:20 102:14  
 130:13 133:21 134:2  
 147:4 151:17 170:7  
 178:17 179:1 184:16  
 193:10 200:22 214:20  
 216:22 236:14 237:12  
 249:18 250:6 263:2  
 272:15,18 279:21  
 280:1 292:10 305:12  
**finding** 40:14 41:1 42:5  
 42:17 44:18 47:19  
 48:1,10,17,19 49:5,21  
 50:2,18 51:15,18 57:6  
 57:15,15,17 58:6 90:5  
 90:12 106:5 109:21  
 117:5 137:8 147:1  
 162:14 187:13 200:11  
 206:13 251:13,20  
 252:22 253:1 275:4  
**findings** 7:12 39:10,19  
 39:22 40:1,3,9 41:10  
 42:15 44:17 47:16,16  
 80:18 81:15 92:5  
 125:10 128:20 149:17  
 242:6 281:20  
**finds** 133:2 138:9  
**fine** 16:12 209:18 246:3  
**fingerprints** 59:2 60:14  
 60:15 78:5,13 80:9,13  
 80:22 163:3  
**fingertips** 246:20  
**first** 17:20 28:11 41:15  
 61:21 130:7,19  
 160:20 210:16 221:22  
 230:20 231:2 270:3  
 274:16 275:4 286:19  
 295:5 301:9 306:1  
**fiscal** 3:6 6:7 7:4,15  
 17:5 34:11 35:3 99:21  
 99:21,22 100:4 103:1  
 105:19 133:9 134:18  
 134:19 139:7 178:13  
**fit** 297:10  
**fits** 159:19 301:7  
**five** 14:9,10 20:1 22:1  
 24:10 129:7 142:21  
 295:15  
**five-day** 296:6  
**five-ten** 68:1  
**fixed** 125:21  
**flag** 206:2  
**flagging** 59:2 63:8  
**flags** 214:22  
**Fleet** 268:7  
**flexibility** 177:6

**flexible** 301:3  
**flight** 278:4  
**flip** 136:22  
**float** 232:5  
**floating** 80:16  
**flogging** 11:11  
**floor** 266:16  
**flow** 222:11 288:6  
**flowers** 306:12  
**fluid** 274:5 277:16  
 292:18 300:11  
**flying** 276:14  
**focus** 175:13 242:4  
 293:19  
**focused** 165:9 252:6  
**focusing** 51:12  
**FOIA** 25:6  
**folded** 19:5  
**folders** 150:4  
**folks** 56:11,16 126:14  
 192:10 218:1,15  
 220:11 223:9 240:15  
 259:16 260:22 261:18  
 263:12 265:16  
**follow** 47:4 107:7 134:4  
 145:1 170:3 217:10  
 249:20 275:1  
**follow-up** 42:9,11,19  
 43:11 44:2 275:7,11  
 275:18,19  
**followed** 133:15,22  
 134:6 161:4 175:19  
**following** 7:1 9:4 38:2  
 57:18 65:17 105:4  
 131:11 161:7 191:12  
**follows** 39:5 102:17  
**food** 32:21  
**foot** 147:17  
**force** 11:16 12:12 17:9  
 17:19 19:3,21 21:4,9  
 21:22 23:9,12,16 31:3  
 72:14 76:6 107:20  
 141:19 142:1 225:9  
 234:5 269:10 271:12  
 280:20 285:8 295:8  
**forced** 52:3  
**Forces** 1:4 4:7,15 6:11  
 23:6 24:12  
**forecasting** 95:17  
**forensic** 25:13 190:5  
**foreseeable** 198:1  
**forever** 170:15 184:9  
**forgot** 275:19  
**form** 57:20 84:1 96:3  
 101:20 112:18 125:2  
 140:19,19,20 193:16  
 194:2,4,7 196:20  
 206:3 230:21

**formal** 58:17 127:4  
**formally** 99:7  
**format** 174:8 270:18  
**formation** 131:1 148:4  
**formed** 208:3  
**former** 75:1 100:11  
**forms** 176:14 193:9  
**formulate** 110:11  
 200:21 281:19  
**Formulating** 274:4  
**Fort** 268:22  
**forth** 62:3 270:11  
**fortunately** 298:16  
**forum** 158:4 199:1  
 294:4 295:13  
**forums** 299:3  
**forward** 25:19 35:22  
 43:5 44:6 56:14 71:19  
 72:15 74:18 76:16,21  
 77:14 79:22 80:8 90:6  
 91:8 95:18 100:3,5  
 103:2 107:10 110:12  
 117:13 118:8,13  
 121:15,17 136:10  
 155:2 175:18 179:16  
 181:10 182:21 184:3  
 185:10 195:2,8  
 205:13 211:21 212:14  
 212:21 227:4 238:10  
 240:5 246:1 251:14  
 259:12 263:4 265:19  
 276:7,7  
**forwarded** 143:20  
 238:2 274:9  
**forwarding** 40:5  
**found** 11:22 43:1 57:18  
 63:6 64:8 65:14 79:8  
 84:17,19 85:2 88:21  
 90:10 102:1 115:19  
 116:5 120:8 133:13  
 133:20 134:12 135:3  
 135:8,17 136:15  
 137:18,18,20 142:2  
 158:13 176:19 178:5  
 179:19 198:10 206:18  
 242:8 262:2 274:16  
 281:16  
**foundation** 107:14  
**foundational** 201:21  
**four** 20:1 49:4 69:4  
 114:10 160:9 184:1  
 233:14 246:7 268:21  
 269:10 283:13 288:10  
 288:12,13  
**four-star** 260:17  
**four-year** 17:1  
**fourth** 180:4  
**frame** 170:10,19

**frank** 238:8  
**frankly** 202:19  
**free** 222:11 271:14  
     288:6 302:5  
**freely** 218:2  
**freezing** 59:1  
**frequent** 134:9  
**frequently** 49:7  
**fresh** 107:18  
**FRIDAY** 1:8  
**friends** 147:13  
**front** 28:3 55:6 75:14  
     102:7 129:9,18 130:1  
     130:18 138:19 187:20  
     205:6 209:4 217:20  
     219:5 227:15 267:21  
     287:14  
**fruit** 192:19  
**fruition** 75:9  
**fruitless** 52:4  
**fudging** 253:3  
**full** 34:5 51:11 110:19  
     211:17 228:6 302:22  
**full-time** 146:16  
**func-** 205:14  
**function** 160:21,22  
     161:11,13,13 162:6  
     204:1,20 211:6,7,20  
**fundamental** 67:21  
     70:3 159:15 163:6  
**funny** 147:19  
**further** 46:15 101:15  
     109:17 125:13 127:3  
     151:10 152:18 225:17  
     232:6 261:20  
**future** 39:10 40:21 47:6  
     52:8 128:13 145:20  
     214:18  
**FY14** 155:11  
**FY17** 37:5 128:16  
     137:22  
**FY18** 128:16 157:3,6,10

---

**G**


---

**gained** 62:1  
**gaining** 157:22  
**gal** 282:8  
**Gallagher** 2:4 41:2,5  
     77:3 293:11 301:19  
     302:18 303:22 304:2  
     304:6  
**game** 17:22 98:10  
**games** 203:1,7  
**gamut** 141:4  
**gaps** 237:14  
**Garvin** 5:3 9:2  
**gather** 131:16 149:5,18  
     175:10 176:7 281:19

    287:9  
**gathering** 131:21  
     281:12 287:10  
**GCMCA** 135:20 233:13  
**gelling** 234:3  
**gels** 182:14  
**Gen** 1:18 219:10 220:19  
     221:21 222:13,16  
     223:5,18 224:4,8  
     227:18 228:1 231:1  
     231:17,20 234:14  
     236:4 237:19 239:7  
     256:5  
**general** 4:19 5:17 8:5  
     9:1 21:14 32:20 33:6  
     41:13 48:7 57:4,13  
     71:22 81:10 83:1  
     110:18 122:9 130:2  
     135:21 136:10 143:16  
     147:7,11 161:16  
     165:14 177:4 187:6  
     216:10 219:2 221:19  
     223:3 229:7 259:22  
     267:12 270:7 271:8  
     286:22,22 292:3  
     305:18  
**generally** 155:6 192:5  
     238:13 244:15 256:13  
     256:17 257:13  
**Generals** 22:8 24:6  
**generate** 286:5  
**generated** 151:13  
     276:11  
**gentleman** 266:18  
**George** 11:10  
**getting** 17:19 25:13  
     35:6 195:4 207:4,16  
     212:7 222:9 237:5  
     254:2 256:12 266:8  
     274:22 284:8 287:11  
     292:19,19 298:18  
     305:7  
**giant** 206:1  
**give** 25:17,22 68:5,8,9  
     71:12 84:15 86:22  
     94:7 98:11 111:16  
     112:16 113:11 114:3  
     118:17 143:4 145:2  
     152:18 170:6 173:6  
     185:1 191:20 197:9  
     203:8 211:9 221:9  
     228:16,20 240:15  
     256:13 268:22 269:16  
     274:2 292:6 297:14  
     298:7 304:7  
**given** 38:9 39:9 46:11  
     72:19 73:12 74:14  
     94:1 98:8 111:11

    117:10,14 151:9  
     154:5 164:2 173:22  
     174:7 179:19 184:16  
     189:9 193:22 225:3,4  
     226:12,16 228:17  
     233:2 257:8 302:18  
**gives** 90:20 112:8  
**giving** 28:6 89:17 154:9  
     219:8 254:21 271:4  
     296:16  
**glean** 152:13 154:21  
**Glen** 2:6 266:19 282:4  
     290:7  
**goal** 131:15 219:22  
     271:13 276:17  
**God** 162:7 180:13  
**gofer** 288:14  
**goodwill** 21:14 22:7  
**gotten** 11:11,12 128:22  
     134:3  
**government** 18:13  
     25:20,21 26:9 92:6  
     94:22 98:4 101:9  
     104:21 181:22 190:6  
     191:8,13 195:2 204:6  
     237:17  
**grab** 288:16  
**grade** 186:7  
**grand** 93:14,18 96:8  
     104:3 171:20 172:5,6  
     172:9 181:14,20  
     183:5 201:11,13,16  
     204:4,10  
**grant** 170:19  
**granted** 242:7 308:4  
**grappling** 295:3  
**gratitude** 41:16  
**greater** 27:20 29:4,11  
     170:6 235:10 259:22  
**green** 135:1 209:13  
**grew** 221:14  
**grievances** 286:8  
**Grimm** 1:16 5:6 6:15  
     9:2 26:14,15,22 29:13  
     48:12 53:19 54:7,13  
     54:18 55:1 57:8 67:19  
     67:20 75:20 92:2 93:5  
     96:5 97:17 147:6  
     160:7 163:5 165:13  
     168:20 169:2,11  
     174:13,19 183:8  
     196:20 197:13 199:13  
     199:17 200:8,13,18  
     206:15 209:17 217:16  
     218:13 224:3 252:7  
     254:20 260:14  
**Grimm's** 251:3  
**ground** 268:7,10,11

    279:9  
**grounds** 103:17 104:19  
**group** 3:7,9 7:7,10,12  
     8:10,16,19,22 10:22  
     36:11,14,22 40:6,13  
     40:20 41:17,22 48:9  
     64:16 66:11 67:17  
     74:19 77:5,14 87:2  
     92:14,22 93:1 106:3  
     109:9 113:17,21  
     116:13 117:9 119:22  
     121:5,18 123:16  
     124:5 126:15,18,22  
     127:21 128:9,12  
     129:10,18 130:9  
     131:1,4,9,15 153:1,4  
     155:1 160:15 165:6  
     177:3 186:20 205:7,8  
     215:16 217:1 218:3  
     229:18 251:11 253:6  
     254:5 255:16 262:2  
     269:3 272:4 275:5  
     277:1 280:10 282:11  
     282:20,21 289:22  
     290:12 306:19,21  
**Group's** 8:20 9:4 42:14  
     142:13 152:3  
**groups** 147:4 220:4  
**guess** 11:16 52:11 67:1  
     97:6 106:19 175:1  
     235:19 256:22 286:11  
     289:10  
**guests** 148:6,8  
**guidance** 29:5,8 71:12  
     77:5,9,19 100:15,16  
     102:17 224:13,14,18  
     224:21 226:19 227:2  
     227:13,20 230:10,14  
     230:21 231:8,19  
     233:21 282:22 283:10  
**guide** 140:22 150:3  
**guidelines** 13:10 29:17  
**guides** 105:10  
**guilt** 118:9  
**guilty** 11:22 137:18,19  
     137:20 139:14,14  
     244:7,8 294:3  
**gun** 14:6  
**gunnery** 147:18

---

**H**

---

**hackles** 161:22  
**Hagy** 2:5  
**half** 50:6,9,14 69:1  
     116:9 141:11,11  
     285:13  
**Ham** 2:5 140:10 256:11  
     280:3 283:16,20



288:17 292:2  
**handcuffs** 104:11  
**handle** 186:19 237:8  
**handled** 22:2 145:10  
 237:3 261:4  
**handling** 68:2  
**handout** 176:20 240:4  
**hands** 117:20 178:20  
 277:17  
**happen** 24:21 63:13  
 109:18 158:15,15  
 168:11,12,13,19  
 187:20 200:16 258:12  
 259:13 279:15,16  
 300:14 307:8  
**happened** 109:18  
 110:21 111:10 120:15  
 194:9 203:11 210:22  
 233:11 280:14 290:6  
 298:21 306:13  
**happening** 30:5 46:1  
 97:2 104:11 116:9  
 117:16 124:4 145:4  
 243:15 254:4 255:19  
 284:13,14  
**happens** 59:3,13 60:9  
 109:20 169:2 193:20  
 199:5 262:6 271:1  
 298:14 304:2  
**happy** 26:10 130:13  
 267:9  
**Harbor-Hickam** 291:20  
**hard** 28:15 36:19 45:12  
 72:7 79:1 117:14  
 119:4,9 126:17 130:4  
 144:13,16 163:9  
 185:8 197:6 207:15  
 207:17 223:22 234:12  
 254:7 256:18 284:19  
**harmful** 76:13  
**harming** 109:6  
**hate** 125:15  
**Hawaii** 291:19  
**Hawaii's** 291:22  
**head** 14:6 18:13 51:10  
 51:14 248:21 284:10  
**headed** 11:10  
**headquarters** 52:2  
**heads** 16:8 20:22  
**health** 240:22 241:8  
 251:8  
**hear** 39:21 98:21  
 106:14 152:19 179:14  
 207:8 220:5 240:14  
 254:5,7 265:9 292:2,6  
 292:6  
**heard** 10:11 19:15  
 51:21 61:12 72:13

73:2 76:11 96:13  
 102:16 109:15 150:19  
 151:15,19 152:1  
 155:5,12,16 166:4,16  
 167:8 172:19 173:20  
 178:10 194:20 205:18  
 206:18 216:21 222:14  
 224:11 225:3 226:17  
 227:12 232:13 237:7  
 254:5 255:17 262:8  
 262:12 263:19  
**hearing** 34:19 37:14  
 79:19 85:17,20 86:7  
 86:13,16,18 89:4,5,7  
 89:10,12,18 90:4,13  
 90:15,18 91:1,11,17  
 93:11 94:2 95:22  
 96:22 98:8 99:16  
 100:2,5 111:2,21  
 112:9 113:20 114:11  
 133:2,12,12,20  
 134:12 135:3,7,16  
 136:5,15 137:7 138:2  
 138:9,16 139:1,9,17  
 139:21 141:8 149:10  
 151:8 155:13,16,17  
 155:18 157:1,8  
 159:14 167:6,7  
 168:21 173:6 174:8  
 178:9,11 179:3 184:7  
 189:16 190:21 191:4  
 195:9,22 197:3,16  
 201:15 204:7,13  
 211:16 218:21 220:2  
 234:17 283:2  
**hearings** 88:21 92:4  
 93:21 106:15 128:17  
 138:15 155:7,10  
 204:4  
**hears** 197:17  
**hearsay** 96:9 171:7  
**heart** 263:10  
**heavily** 31:20 72:12  
 293:19  
**heels** 96:20  
**heft** 89:12  
**height** 17:16  
**held** 16:8 134:22 136:6  
 157:9 232:16  
**help** 18:5 26:15 35:18  
 39:18 52:17 91:6  
 92:16 152:15 190:7  
 204:5 207:22 235:13  
 235:22 237:18 241:15  
 262:14 264:8,11  
 294:21  
**helped** 105:9  
**helpful** 82:22 85:9

87:20 107:10 114:15  
 115:10 123:3,14  
 159:2 163:20 166:7  
 166:13,19 208:1,3  
 217:19 218:19 230:8  
 235:12,17 238:13,15  
 254:4,19  
**helping** 123:19 264:1  
**helps** 124:1 170:13  
**hens'** 193:9  
**hesitation** 25:20  
**hey** 117:22 297:10,14  
 299:1 300:8,13,17  
 301:6  
**hi** 236:20  
**high** 73:18,18,20,22  
 106:1 138:11,12  
 162:18,21 168:19  
 226:1 231:22 241:5  
 244:6 246:2 247:16  
**higher** 220:10 232:18  
 232:21 244:1,16  
 247:11 250:8 251:20  
 264:15,17 265:10  
**highlight** 189:22  
**highlighted** 151:6  
 173:17  
**highlighting** 172:21  
**highlights** 150:14 155:4  
 261:11  
**highly** 151:20  
**Hilton** 1:11  
**hinder** 241:15  
**Hines** 2:6 110:1 266:12  
 266:15,17,19 267:20  
 278:11 279:1 281:9  
 282:15,21 284:16,19  
 285:16,18 286:18  
 287:6 288:19 290:13  
 291:3 292:10  
**hire** 19:19  
**historical** 209:19  
**hit** 222:10  
**hitting** 271:22  
**hold** 59:8 61:8 70:17  
 129:1 177:16 207:14  
 223:8  
**holding** 14:5 89:11  
 154:10  
**holds** 57:22  
**hole** 111:3  
**home** 147:10,12  
**Homeland** 100:22  
**Hon** 1:15,16,19 4:22 6:2  
 26:15,22 29:13,14  
 36:3 45:17 48:12  
 53:19 54:7,13,18 55:1  
 57:8 64:18 67:20

75:20 91:21 93:5 96:5  
 147:6 160:7 163:5  
 165:13 168:20 169:2  
 169:11 174:13,19  
 175:16 176:1 181:12  
 182:22 183:3,16,19  
 184:21 185:11,15  
 196:20 197:13 199:13  
 199:17 200:8,13,18  
 200:19 203:22 206:4  
 206:8,10,11,15  
 209:17 213:4 217:16  
 218:13 224:3 252:7  
 254:20 260:14  
**hone** 189:6  
**honest** 29:22 270:14  
 271:5 289:4 290:20  
**honestly** 247:20 271:15  
**Honing-in** 137:11  
**honor** 63:18 114:2  
**honoring** 226:10  
**hope** 17:14 29:9 86:22  
 116:20 152:13 154:21  
 161:16 162:7  
**hopefully** 22:11 82:4  
 86:18,21 101:12  
**hopes** 39:17  
**horrific** 71:19  
**hotel** 298:13  
**hour** 285:13  
**hours** 50:14 85:3  
 146:20 196:14  
**house** 55:2,6,7  
**How's** 255:3  
**how-does-it-serve-a...**  
 205:14  
**huge** 202:11 243:10  
 258:20 264:16 304:11  
**hundreds** 33:10 61:22  
 207:9  
**hurdle** 176:10  
**hurts** 51:10,14

---

**I**

**idea** 25:4 60:11 98:9,13  
 109:16 167:7,13  
 170:22 216:9 220:13  
 240:5 272:12  
**ideal** 15:20  
**ideas** 60:2 145:20 255:1  
 306:2  
**identifiable** 223:12  
**identification** 43:12  
**identified** 92:15 145:16  
 158:21 251:11  
**identify** 42:2 81:18  
 152:14 170:8 203:18  
 217:9 220:12

- identifying** 56:12 161:8  
271:9
- identity** 219:8
- idiots** 124:15
- IG** 285:9,10
- ignorance** 12:22
- ignore** 172:9
- ignored** 203:14
- illegally** 14:16
- illness** 197:21
- imagining** 98:14 199:4
- imbued** 174:3
- immediately** 57:18  
61:12 147:12 300:15  
300:18
- impact** 58:4 61:15  
62:11 81:22
- impacted** 59:9,13
- impeach** 92:8
- impeachment** 243:2
- implementation** 227:3  
230:5
- implementers** 268:10
- implementing** 175:15
- important** 19:3 23:21  
25:16 33:1,11 44:5,14  
63:3 69:9 74:2 111:20  
126:12 178:5 196:8  
201:4 225:6 228:2  
231:11 237:1 247:20  
252:5 265:8 275:6
- importantly** 150:8
- impose** 27:2
- imposed** 26:18 27:5  
60:1
- imposes** 57:20
- imposing** 165:2
- impressed** 20:15
- impression** 54:17 84:16  
110:8 112:2,16  
113:11 154:6 162:11
- impressions** 39:14,15  
86:6 149:6,19 256:13  
268:22 269:17,18
- improper** 244:22
- improve** 202:16 203:19
- improved** 96:14 270:1
- improving** 219:20
- in-courtroom** 22:22
- incentive** 95:11
- incident** 56:2 96:20
- incidents** 280:11
- include** 96:3 114:12  
125:17 131:17 242:20  
303:18
- included** 37:11 50:6  
123:4
- includes** 10:4
- including** 32:1,2 57:21  
78:15 90:21 99:21  
102:16 115:6
- inclusion** 131:22
- inconsistencies** 145:16
- increase** 59:11 96:17
- increased** 211:22
- independence** 228:8
- independent** 173:11,14  
174:1
- independently** 119:22
- indexing** 64:9
- indicated** 91:3 267:3
- indicates** 178:1
- indication** 65:15
- indicative** 241:6 246:2
- indict** 94:2
- indicted** 95:5 118:19
- indictment** 93:10,22  
96:10 104:10,13  
171:20 181:17 183:9
- individual** 14:4 41:6  
54:8 136:5 163:9  
235:5 259:8,9 270:10  
272:19 282:12
- individually** 221:2  
235:6 283:15 284:9
- individuals** 45:22
- inertia** 208:13
- inexperienced** 103:11
- infected** 212:8
- influence** 249:22 257:9
- influencing** 192:7
- info** 187:16 246:11
- inform** 262:18
- informally** 224:18
- information** 3:11 7:5  
35:2,6 42:1 43:3,13  
43:16,19 44:12 45:6  
47:8 56:14 90:7,8  
95:12,15 107:6 129:6  
131:21 149:3,6,9  
150:10 152:2,8  
166:10 169:10 175:6  
175:10,18 176:5,9,21  
188:4,22 189:15,20  
190:6 191:1,11 192:3  
192:6 195:7 203:8,9  
207:14,17 208:3  
216:16 217:7 218:5,8  
218:16 219:6,7  
220:16 226:21 227:5  
231:5 233:15 235:11  
235:19,22 237:5  
238:7,14,17 239:1  
248:6 255:10 259:20  
261:7 264:8,10 271:7  
281:15,19 284:8,10
- 287:9,10 288:7 292:7  
296:19,22 297:15,17  
301:1 302:1,2,4  
304:21
- informed** 207:14 208:2
- informs** 232:8
- initial** 37:3 39:4,13  
43:21 58:12 78:16,20  
79:5 81:17 83:22 84:2  
84:17 170:18 190:2
- initially** 226:18
- initiate** 100:17 101:14
- initiated** 102:21 153:3
- initiating** 79:3 100:18
- initiation** 79:13 105:14
- innocent** 63:6
- input** 37:15 127:5  
274:14 290:20
- inputted** 37:5
- inquiry** 164:15
- inquisition** 290:16
- inside** 180:2
- insight** 188:20
- inspections** 285:7
- installation** 3:14 10:1  
131:18 148:18 153:11  
270:4 285:3 291:13  
291:17 292:19 298:7
- installations** 127:6  
268:7,12 272:15  
291:14,16 293:2  
300:12
- instance** 233:10 269:20  
274:2 275:11 286:21  
291:18
- instances** 42:19 134:8
- instructed** 28:5
- instructions** 28:7  
257:11
- insufficiency** 239:13
- insufficient** 114:8  
120:20 125:8
- insult** 267:22
- intelligence** 268:1
- intelligent** 93:9 124:18
- intent** 124:17
- interaction** 220:16
- intercourse** 12:12
- interest** 8:14 65:9 66:1  
66:3,14,20,21 104:16  
122:17 225:20 226:5
- interested** 157:16
- interesting** 81:15 93:5  
104:22 106:12 109:12  
142:2 176:19 187:2  
187:16 190:15 208:18  
221:17 264:17 290:10  
296:18 303:1
- interestingly** 158:3
- interests** 174:5
- interfaced** 75:3
- Interim** 128:7,8
- interject** 77:3
- internally** 244:11  
245:21
- internet** 15:10
- interpersonal** 249:6
- interplay** 290:1
- interrupting** 106:17
- interview** 32:2 43:21  
44:13 45:1,3 46:12  
190:3 197:7
- interviewed** 45:9
- interviews** 44:8 45:17  
46:6,9,16 47:5 188:19  
190:1
- intimate** 243:14
- intimidated** 288:8 289:7
- intimidating** 286:17
- intimidation** 289:10
- introduced** 95:4
- Introduction** 3:2
- inure** 13:12
- investigate** 262:6
- investigated** 38:22 60:9  
60:10,11 160:18  
245:12 263:12
- investigating** 57:6  
60:19 97:22 98:1,5
- investigation** 1:3 4:6,14  
6:9 43:8,10,14,17  
47:3 48:22 49:2,6,10  
49:10 51:3,5,7 53:18  
58:16 79:11 89:11  
94:18 101:16 104:4  
110:7 116:2 128:15  
149:15 164:4 165:8  
195:19 196:17 211:9  
273:14
- investigations** 7:15  
38:5 43:8 45:19 49:12  
49:19 51:16 52:5  
53:16 61:6 268:13  
273:2
- investigative** 7:13 37:2  
37:12 39:16 41:18  
43:11,22 49:18 50:6  
65:11 83:21 85:4  
88:22 121:10 152:4  
165:4 187:19 301:21
- investigator** 42:10 47:2  
54:9 94:14 110:22  
171:7 184:11
- investigator's** 193:13
- investigators** 42:8 46:7  
46:11 47:13 48:20

50:1,12 51:21 52:9,18  
 53:22 54:17 55:22  
 57:3 68:6 69:2 78:3  
 120:18 164:7 212:1  
 260:1 268:11 270:15  
 275:6  
**invite** 192:8  
**inviting** 291:20  
**involve** 244:7  
**involved** 90:21 97:4  
 144:16 171:21 211:2  
 211:12,22 212:20  
 249:8 267:13  
**involves** 31:20 249:5  
**involving** 6:11 308:4  
**IPAD** 290:18 306:7  
**iron** 32:21  
**irrespective** 49:13 51:5  
 51:6 77:8  
**island** 291:22  
**issuance** 102:6  
**issue** 10:8 29:15 32:18  
 33:8 40:16 47:8 56:2  
 64:16 67:21 93:5  
 96:18 110:2 131:7  
 153:15 158:10,20  
 170:17 186:18 190:15  
 195:10 198:13 199:1  
 200:10 202:17 215:11  
 223:10 226:4 229:1  
 230:13,16 238:9,10  
 241:10 257:6 280:5  
 284:11 305:10,12  
 308:9,10,11,12  
**issues** 7:22 8:2,10,13  
 8:15,18 10:22 47:21  
 67:18 86:15 88:5,9  
 126:18,22 129:21  
 131:20 144:2,3  
 145:16 153:9 159:13  
 190:11 197:13 227:1  
 227:12 242:9 256:19  
 266:10 273:5 286:12  
 295:2  
**It'd** 232:15  
**it'll** 246:21 295:1  
**item** 126:2  
**items** 191:7

---

**J**


---

**J** 1:17  
**jacket** 101:17  
**JAG** 17:19 18:21,21,22  
 223:20  
**JAGs** 298:22  
**jail** 12:20 13:18 14:10  
 30:4,8,8,11,13,17,19  
 30:22

**James** 1:16,18  
**January** 77:7 141:8  
 224:15 297:6  
**Jenifer** 1:17  
**Jim** 1:16  
**job** 18:19 19:12 32:21  
 42:1 68:21 88:9  
 146:19 231:10 293:2  
 300:22  
**jobs** 24:9 112:9 146:9  
 252:10  
**jog** 150:18  
**join** 5:20  
**joined** 6:15  
**joining** 5:4,5  
**Joint** 143:21 144:3  
 146:13  
**joke** 22:12 174:20  
**joking** 100:8  
**JPP** 32:19 124:8 219:9  
 230:16 233:11 237:22  
 238:10,10 240:5  
 250:11 269:20 271:7  
 274:5 279:3 283:4  
 293:3  
**JPP's** 230:4  
**JSC** 146:8,19  
**judge** 4:21 5:6 6:1,15  
 9:2 15:3,9 20:22  
 21:14 22:8,16,17,18  
 22:20 23:2,4,5,8,11  
 23:17,17 24:5,9 26:4  
 26:14,20 27:10,18  
 28:4,15,15,22 29:5  
 48:3 64:8 67:19 69:1  
 78:3,16 79:8,21 80:3  
 92:1,13 97:17 99:16  
 103:6 105:3 107:15  
 108:1 109:3 115:2  
 138:13 139:3 183:8,8  
 199:20 215:10 221:3  
 246:18 247:2,3  
 249:19 251:2 253:19  
 257:11 268:19 277:13  
**judge's** 172:8  
**judge-alone** 13:7 15:2  
 27:21  
**judgement** 228:8  
**judges** 19:10 22:18,19  
 23:19 24:2,3,4,6 27:5  
 29:2 32:5 121:13  
 199:9,13,15,18 221:3  
 254:6,8,8,10,10,15,16  
 254:21 255:5,14,15  
 255:22 256:4 269:7,9  
 269:10,12,13,21  
**judging** 248:6  
**judgment** 54:8 101:8

119:19 164:11 165:17  
 166:1 174:4  
**judicial** 8:4 37:19 60:20  
 151:5 168:21 169:3  
 175:8 197:1,17,19  
 198:2 267:14 268:4  
**judiciary** 295:11  
**Julie** 2:2  
**jump** 299:2  
**jumps** 137:16 139:11  
**junction** 50:8  
**June** 8:5 11:17  
**junior** 289:3  
**juries** 96:8 201:13  
 204:4  
**jurisdiction** 68:4 70:7  
 86:3 96:9 101:18  
 104:17 112:18 113:3  
 122:13 171:19 172:4  
 197:20  
**jurisdictions** 16:15  
 65:21  
**jurors** 256:9,12  
**jury** 93:14,18 104:3  
 118:11,21 171:20  
 172:5,6,10 181:15,20  
 183:5 201:11,16  
 204:10 302:22 303:1  
 303:4  
**jury's** 256:7  
**justice** 8:2 9:9 11:2  
 13:19 17:11,13 35:10  
 65:9 66:1,14,17,18,20  
 66:21 67:5,12,13  
 69:12,22 75:5 100:14  
 101:8,22 102:5,11  
 104:18 118:14,22  
 122:17 123:8 143:21  
 144:2 146:12 149:22  
 154:4 162:2 164:6,22  
 173:20 174:6 177:2  
 178:18 179:20 180:1  
 198:18 201:19 203:16  
 204:21 206:19 209:22  
 240:9 244:4 251:7,9  
 252:5 261:4 263:9  
 270:17 306:7  
**justification** 69:12  
 169:22  
**justify** 173:11,13 196:3

---

**K**


---

**Kate** 2:9 102:17  
**Kathleen** 1:15  
**keep** 111:21 170:5  
 203:17 205:20 286:19  
 298:19  
**keeping** 146:9 219:22

222:22  
**Kelley** 14:2 33:4  
**Kelleys** 33:2  
**key** 223:1  
**killing** 146:17  
**kindest** 287:3  
**kinds** 59:12,19 195:7  
 207:20 220:7 256:19  
 295:22  
**knew** 84:13 92:13  
 119:10 222:19 231:17  
 264:10  
**knock** 143:1  
**knowing** 87:6 209:3  
 258:22 295:21 301:3  
**knowledge** 57:2 95:2  
 164:12 263:15 284:3  
**knowledgeable** 107:2  
**known** 219:3 260:21  
**knows** 15:21 280:14  
**Korea** 278:3,5 291:5,8  
**Kramer** 5:9 9:3  
**kudos** 304:7

---

**L**


---

**lack** 42:9,10,18,18  
 80:19 99:14 117:15  
 154:8 169:6 208:2  
 266:20  
**Lackland** 280:4  
**lands** 229:9  
**landscape** 222:20  
**language** 113:10  
**large** 84:18 101:11  
 117:10 152:5 199:10  
 223:22 229:19 234:17  
 297:20  
**largely** 192:4 226:12  
**larger** 205:8  
**largest** 210:6  
**lastly** 151:1 153:22  
**latch** 216:3  
**late** 92:3 144:9 159:8  
**latest** 168:2  
**Laughter** 5:8 36:16  
 54:20 55:8 65:2,4  
 71:2 88:3 99:10  
 121:20 122:5 126:20  
 127:11 130:6,11  
 147:2,8 148:14 156:1  
 158:19 180:14 237:21  
**law** 190:2 209:18 210:3  
 210:14,17 245:12  
 249:21 257:10 284:1  
**lawyer** 101:12 178:15  
 180:11,21 209:7  
 210:2,5,11,12,13,18  
 210:20 211:8,13,14

211:14  
**lawyers** 164:7 211:12  
 211:22 212:19  
**laying** 104:4  
**lead** 53:6 231:12  
**leadership** 14:20  
**leading** 164:4  
**leads** 49:18 116:8  
**lean** 225:11  
**learn** 96:9  
**leave** 20:22 59:13 202:9  
 202:13,14 210:17  
 261:17  
**leery** 222:5  
**left** 16:21 84:11 101:9  
 104:20 105:10 135:14  
 137:4 171:10  
**legal** 45:2 67:6 82:5,13  
 106:20 107:14 134:11  
 134:13,14 164:11  
**legally** 183:14  
**legislation** 20:21 21:13  
 21:15,17,19 27:22  
**legitimacy** 247:22  
**Lejeune** 219:14  
**lends** 82:2  
**length** 121:13  
**lengthy** 30:14  
**lenses** 162:3  
**Leo** 1:15  
**lesser** 185:4  
**let's** 15:8 59:3 68:3,5,7  
 68:9,10,11,13 94:15  
 148:15 152:16 202:4  
 241:11 244:18 282:3  
**letter** 8:6 9:17 74:5,6  
 111:4,6 123:12,14  
 125:16 143:17 144:11  
 146:5 229:6 239:9,11  
 239:13,17 251:4  
**letters** 239:8  
**letting** 196:6 290:2  
**level** 19:22 20:14 22:17  
 24:9,11 46:22 49:10  
 121:3 135:19 136:18  
 186:7 204:22 233:13  
 253:20  
**levels** 55:15  
**leverage** 153:10  
**lieu** 185:12  
**lieutenant** 103:7 147:10  
 147:12 221:14 288:22  
**life** 12:13 58:18 59:8,8  
 164:3 262:12 289:4  
**lift** 41:17  
**light** 108:7 161:1 175:4  
 177:17 190:12,12  
 209:13

**lightly** 202:11  
**likelihood** 74:3,13  
 86:15 116:17 119:20  
 120:6,7,9,20 184:17  
 185:3 189:10 229:15  
 243:6 253:2  
**liken** 51:8  
**likewise** 174:17  
**limit** 195:13 281:2,5  
**limitations** 308:12  
**limited** 23:21 28:11  
 35:10 56:12 57:21  
 89:20 113:8 160:10  
 201:14 269:17 303:15  
**limits** 156:11 195:10,19  
 256:11 262:19  
**line** 256:17 271:17  
**lines** 154:22 227:1  
 276:10  
**linked** 304:10  
**lion's** 252:20  
**list** 35:12 67:17 113:9  
 228:21 229:20 276:21  
 297:3 301:6  
**listed** 49:22 108:3  
 276:9  
**listening** 178:21  
**litigated** 20:2,4,9  
**litigating** 183:10  
**litigation** 17:11 18:18  
 19:2 21:18 25:7  
**litigator** 17:16 18:14  
**litigators** 24:1  
**little** 36:9 44:1 50:15  
 81:2 85:6 98:11  
 129:19 136:3 137:11  
 140:17 157:18 189:12  
 226:13 227:8 238:22  
 248:21 296:13 298:3  
 303:3  
**live** 89:13 278:15,17,21  
**lived** 280:7  
**lives** 196:9 270:15  
 295:18  
**living** 50:10 265:16  
**loaded** 14:6  
**local** 47:3 236:18  
**location** 18:19 295:16  
**locations** 223:10  
 296:21 299:3  
**locked** 181:10 182:20  
 298:11  
**logistically** 292:11  
**long** 5:10 9:3 29:10  
 30:4 52:20 113:9,22  
 196:3,7 213:18  
 254:17 262:12,16  
 276:20 279:11 282:2

291:6 304:9  
**longer** 11:17 27:15 49:7  
 59:9,11 61:10 90:11  
 108:6 155:8 167:12  
 194:10 219:15,17  
**look** 8:10 13:6 14:22  
 17:1,1 19:18 23:9,11  
 23:13,15 24:8 27:13  
 27:15 30:1,6,15 31:2  
 31:6,7,7 32:17 46:14  
 47:14,15,21 48:4,5  
 52:13 58:5 59:17,21  
 60:3 63:14 67:18  
 68:16,19,22 69:2  
 73:10 77:14 87:2 91:2  
 91:10,19 99:20  
 100:16 110:9 112:8  
 120:13 121:17 133:7  
 138:10 139:16 159:13  
 161:3 166:21 170:17  
 177:1 185:11 186:21  
 194:6 202:15 203:17  
 215:19 228:5,13,19  
 229:19 230:16 234:20  
 246:18 250:13 253:21  
 261:1 274:11 287:18  
 290:7 291:18 295:6  
 295:19 299:2 301:6  
**looked** 11:15 29:15  
 46:21 63:8 72:2 96:15  
 97:5 98:18 106:2  
 120:7 133:8,18  
 136:22 137:1 140:9  
 140:10 186:15 199:18  
 230:5 233:11 248:17  
 261:1 273:2  
**looking** 11:19 13:3 16:9  
 16:16 27:10,11 31:4  
 32:15 33:20 35:20  
 48:6,9 73:15 74:4  
 83:20,22 85:3 86:5  
 103:11 112:7 118:4  
 119:15,17 129:2  
 130:16 131:10 132:20  
 134:5,16 137:2,22  
 138:19 139:5 140:7  
 164:17 165:4 176:19  
 178:21 186:9 202:7  
 207:5,18 221:8  
 223:19 237:13 239:8  
 267:12 273:13 279:22  
 296:18 299:1  
**looks** 195:18 266:3  
 270:5  
**loosely** 150:17  
**lose** 59:14 291:8  
**loser** 110:17 116:22  
**lost** 76:3 214:9,9

**lot** 22:22 46:13 56:9  
 58:13 60:10 61:12  
 71:20 79:4 83:9 87:19  
 96:13 99:12 110:9  
 141:16 152:6,12  
 167:22 168:1 187:17  
 187:22 191:10 195:8  
 208:21 211:1 212:17  
 213:22 214:2,3,5  
 220:15 221:13,15  
 226:2 227:4 232:12  
 235:14 238:16 239:2  
 244:10 252:10 261:15  
 261:15 264:20,22  
 272:5 290:6 295:3  
**lots** 16:15 33:9 221:5  
 257:3,3,17  
**love** 118:21  
**low** 73:15,16 91:4  
 111:21 116:15 162:18  
 170:2 180:12 185:3  
 189:10 225:19 226:14  
 246:2 247:16  
**lower** 75:22  
**luck** 88:1 91:5  
**lucky** 236:13  
**lumped** 72:6  
**lunch** 7:20 127:17  
 143:1 151:15 155:22  
**lying** 183:19

---

**M**


---

**M** 1:14  
**ma'am** 33:18 36:8  
 142:12 233:8 287:20  
 291:3  
**Madam** 142:16  
**magistrate** 102:8 176:5  
 176:9  
**magnificent** 304:14  
**Mahal** 224:1  
**main** 291:16  
**maintain** 17:11 177:7  
 179:9 228:8  
**maintaining** 69:18  
**maintenance** 241:16  
**major** 251:12 271:11  
 280:3  
**majority** 55:18 82:9  
 136:13 140:3  
**majors** 103:7  
**makeup** 23:15  
**making** 27:21 33:11  
 44:5 80:17 86:1  
 103:12 104:13 108:15  
 112:16 113:12 117:4  
 122:4 173:4,21  
 174:18 249:17 273:12

**man** 12:10,19  
**manage** 200:4  
**managers** 259:16  
**mandate** 6:8  
**manner** 303:10  
**manpower** 32:6  
**manual** 79:16 100:14  
 101:8,22 102:5,11  
 104:18 115:15 118:14  
 119:1 210:5,7 227:16  
**mapping** 207:5  
**march** 7:18 9:13 49:21  
 144:5,9 248:14 307:8  
**marched** 248:12  
**Marcia** 1:14  
**Marguerite** 2:7  
**Maricopa** 249:1  
**Marine** 209:11 248:10  
 249:19 258:12 268:8  
 268:17 291:21 296:12  
 298:22 299:8 305:14  
**Marines** 248:12,18  
 249:19 272:14  
**Markey** 1:16 5:11,12  
 34:14 36:2 41:1,11,12  
 46:4 56:6 57:9 81:9  
 81:10 85:15 103:4,10  
 106:2,11,16,19  
 108:10 129:11 202:5  
 216:10 219:15 230:18  
 231:4,19 234:16  
 237:4 247:19 250:4  
 263:1 274:1 275:3  
 282:6,9,19 283:14,18  
 283:22 284:17 286:11  
 289:9,17 299:8  
**Markowitz** 1:17 5:13,14  
 9:3 34:15 48:13 51:9  
 72:21 73:8,13 106:9  
 106:12 217:18 224:6  
 252:17 253:22 255:11  
 304:4  
**marry** 291:4  
**Martha** 1:12,14  
**martial** 10:2 26:17  
 74:16 107:21 110:19  
 114:8 115:17 138:2  
 163:2 211:4 224:20  
 232:4 258:10 266:1  
 293:14,17 294:2,8  
 296:18 303:3 304:11  
**Mason** 2:6 33:18 34:20  
 36:7  
**mass** 223:9  
**matching** 132:3  
**material** 130:16 165:3  
**materials** 6:22 11:5  
 77:11 78:19 191:15

271:20 277:3 301:17  
**matter** 54:2 148:21  
 152:7 181:10 249:21  
 308:14  
**matters** 235:16  
**MCIOs** 46:5,15,22 47:6  
 55:16  
**McKinley** 1:17 5:15,16  
 61:14 213:20 246:10  
 278:8,12 279:19  
 280:1,19 285:6,17  
 286:6  
**McKinney** 2:7  
**MCM** 191:13  
**mealy-mouth** 221:15  
**mean** 21:20,20 31:2  
 32:12 45:20 63:12  
 66:11,12,13 67:6  
 73:15 76:6 87:12,13  
 92:21 104:9 105:3  
 112:22 116:18 126:8  
 148:1 161:18 162:22  
 170:4 172:11,16  
 174:16 193:8 199:19  
 200:19 204:9 218:11  
 218:16 223:18 224:16  
 236:19 239:21 250:20  
 254:15,21 255:1  
 256:22 258:20 264:20  
 265:4 269:14 284:20  
 286:16 287:3 289:9  
 289:11 291:4 302:18  
**meaning** 55:10  
**meaningful** 203:15  
**means** 66:20 67:11,15  
 81:3 135:21 260:13  
 282:17 287:21 291:11  
**meant** 145:18  
**measure** 242:1  
**measures** 242:3  
**mechanism** 49:1  
 196:19  
**media** 241:4 245:6  
**meet** 76:22 91:4 201:18  
 283:14 292:15 296:20  
 297:19 299:5  
**meeting** 1:6 3:12,18 4:7  
 4:13 6:12,17 7:8 8:9  
 8:11 10:3,6,6,11  
 33:22 55:17 132:21  
 143:8 145:7 149:21  
 150:11,15 151:13  
 153:14 154:2 158:3  
 188:17 190:18 194:12  
 232:18 239:3 240:21  
 270:19 281:10,18  
 282:10,11 291:12,19  
 305:3,8 306:10,14

307:6,19 308:2,3,8,12  
**meetings** 62:5 279:16  
 305:13 306:20 307:13  
**meets** 167:18  
**Megan** 162:22  
**Meghan** 1:18 2:7 74:21  
 128:1,16 140:10  
 176:18 180:15 208:8  
 246:10 301:16  
**member** 10:1,7 15:5  
 28:17 40:16 62:18,20  
 117:10 246:5 247:2,7  
 251:10 272:19 278:2  
 294:16 295:18 299:13  
 300:2 302:6,19,20  
 303:5 305:16  
**members** 4:12 6:4,11  
 8:12,18,19,21 12:16  
 12:18 13:1 27:6,17,21  
 28:2,3,9 29:7,12  
 36:20 37:8 40:17 41:3  
 44:20 59:14 61:17  
 79:7 84:16 111:13  
 115:19 116:5,13  
 132:22 144:1 146:1  
 151:12 154:7 209:2  
 214:2 219:12 246:12  
 246:13,18 247:12  
 248:3 253:18 257:8  
 257:22 274:8,10  
 277:9,11,21,22  
 278:16,19 279:21  
 280:6 281:2,22  
 286:13,19 287:17,18  
 288:10,12 293:16  
 297:4 303:4,6  
**members'** 38:16 39:15  
 149:19  
**memo** 105:6,6 125:10  
 189:1,2 193:17 238:5  
**memorandum** 8:17  
**memories** 242:17 300:7  
**memory** 150:18 243:11  
**mention** 226:9 239:20  
 260:3  
**mentioned** 140:1  
 232:13 239:19 248:1  
 287:13  
**mentions** 180:4  
**menu** 72:6  
**merit** 190:8  
**meritless** 245:1  
**meritoriousness** 190:7  
**merits** 86:16 182:5  
 189:1 238:5  
**message** 74:22  
**met** 1:10 51:2 79:1  
 131:4 221:1 305:15

**method** 45:6 127:4  
**methodology** 132:21  
**MG** 1:14 4:20 222:15  
 223:2,6 257:19 258:2  
**middle** 121:21 270:4  
**military** 3:3,14 6:20 8:1  
 9:6,9,22 11:2 13:4,12  
 14:20 15:5,16 16:6,13  
 17:3,11,13,13,15 18:1  
 18:10 20:14 24:18,19  
 25:3 26:19,20 27:5  
 29:5,7 32:5,7 33:9  
 35:10 42:8 50:1 51:2  
 56:16 58:21 61:17,18  
 62:13,18,21 66:17  
 67:13 68:2,4,14 69:7  
 69:12 70:1,8 83:1  
 104:6 123:8 143:21  
 144:2 146:12 148:18  
 149:22 153:11 154:3  
 162:2 164:6 173:20  
 177:2 178:18 179:20  
 180:1 193:8 199:5,18  
 199:20 200:4 201:19  
 203:16 209:21 213:7  
 214:1,2 215:2 219:16  
 226:3 240:9 244:4  
 246:9 251:6,8 261:4  
 269:12,21 270:17  
 289:6 306:7 308:5  
**military's** 245:18  
**milquetoast** 231:14  
**mimic** 32:7  
**mind** 75:14 197:14  
 220:1 221:16 238:1  
 258:4  
**mindful** 86:4 96:15 97:3  
 124:13 218:7  
**minds** 216:11  
**mine** 135:10  
**minimum** 26:6 116:15  
**Minnesota** 201:13  
**minor** 52:11  
**Minot** 304:4  
**minute** 62:12 111:5  
 130:18 300:22 301:4  
**minutes** 26:13 127:9,20  
 142:22 266:8 283:12  
 285:13  
**Miramar** 302:8  
**misconduct** 3:13 6:11  
 9:20 142:19 143:10  
**mislead** 145:18  
**misrepresent** 145:18  
**missed** 261:12  
**missing** 61:5,6  
**mission** 128:12 186:11  
 214:12

**misused** 203:14  
**mitigation** 156:15  
**mixed** 137:20 140:18  
**model** 13:3,3  
**modified** 35:5  
**modify** 35:7  
**moment** 184:9,10  
 186:22 246:21  
**Monday** 266:10  
**money** 33:9 214:11  
**monitor** 14:15  
**month** 27:16  
**months** 11:15 14:9,10  
 31:14 61:9 69:2 97:2  
 97:3,3 167:11  
**Monument** 1:10  
**moral** 108:19  
**morale** 214:9  
**morning** 4:3,11 33:19  
 35:1 36:17,21 128:6  
 130:22 147:14,21  
 148:5 152:1,1 253:5  
 273:6 274:1 275:4  
 287:13  
**mother** 148:2  
**motion** 34:9,13,14,16  
**motions** 181:16 242:5  
**move** 43:5 44:6 48:12  
 85:15 99:4 118:12  
 148:18 155:2 170:13  
 183:11 263:3  
**moved** 36:2 57:8 64:18  
 85:16 107:9 148:10  
 280:21  
**movements** 14:15  
**moves** 58:2  
**moving** 85:14 122:2  
 131:3 245:22 255:21  
 305:1  
**multiple** 14:6 65:19  
 80:15 133:19  
**multivariate** 38:7  
**murder** 33:5  
**muster** 167:19  
**mutually** 260:5,7

---

**N**


---

**N** 128:8  
**nachos** 18:6  
**name** 194:3 218:17  
 288:3 295:7  
**named** 288:2  
**nameplate** 270:20  
**napkins** 19:4  
**narrow** 98:19 254:11  
**narrower** 97:6  
**nature** 173:18 175:9  
 179:7 183:20 238:20

**Navy** 1:11 141:20 142:1  
 235:7 258:13 268:8  
 279:8 296:12  
**NCIS** 50:6 275:21  
**NCIS/CID** 268:11  
**NDAA** 6:7 155:11  
**NDAA's** 105:4  
**near** 207:2  
**necessarily** 12:4 58:20  
 77:18 149:17 165:10  
 220:3 241:8 245:19  
 246:15 296:15  
**necessary** 32:14 92:18  
 95:14 125:14 167:17  
 238:16  
**necessitate** 49:8  
**need** 18:4,5 19:17  
 22:10,11,13 24:13  
 26:6 34:8 48:20 68:15  
 76:1,7 82:16 93:4  
 121:5 159:13 185:19  
 192:1 195:7 196:4  
 205:10,11 209:5  
 211:16,19 212:19  
 215:7,8 217:8 229:11  
 229:12 237:2 262:19  
 264:7 266:4 269:8  
 292:20,21 300:9  
 302:5 307:5  
**needed** 119:10 150:22  
 277:20 286:20 288:15  
**needs** 18:4 22:10 25:15  
 49:1 51:7 96:15 121:5  
 125:20 162:3 168:14  
 177:5  
**negative** 58:3 180:17  
 181:4  
**negatively** 59:9 181:13  
**negotiate** 195:1  
**neither** 299:10  
**never** 24:22 45:10 53:5  
 53:12 67:7,9 72:10  
 107:3,8 109:8 176:11  
 212:2 232:2 236:8  
 239:16 249:16 256:14  
 259:6 263:4 278:19  
**new** 11:18 21:1,10  
 23:19 50:9 91:16  
 92:17 96:21 141:12  
 147:15 175:19 177:17  
 177:19 182:11 191:12  
 191:20 198:22 224:3  
 230:10 236:7 257:21  
 294:15 297:7 299:14  
**Newport** 224:5  
**news** 128:19  
**Ney** 143:17,20 144:3,7  
**Ney's** 144:11

**nice** 56:18 193:20 224:6  
 232:15  
**night** 146:18 148:6  
 298:13  
**nine** 17:18 18:7 39:22  
 40:3,5,10 55:3 286:14  
**no-action** 178:3  
**no-PC** 187:13  
**no-probable** 198:8  
**no-probable-cause**  
 151:14  
**no-true-bills** 172:6  
**non-** 71:11 210:12  
 244:13  
**non-adversarial** 93:16  
**non-attributional**  
 270:18  
**non-binding** 77:4,8,19  
 86:19 121:2 149:11  
 202:1 204:3 230:21  
**non-consensual** 11:21  
**non-criminal** 101:20  
**non-hearsay** 96:10  
 172:5  
**non-lawyers** 211:2  
**non-meritorious**  
 204:16  
**non-military** 164:20  
**non-sex** 244:15 247:5,6  
 247:9  
**nonconfrontational**  
 289:14  
**Norfolk** 279:7  
**normal** 306:17  
**normally** 297:16 303:5  
**north** 268:18 291:22  
**not-a-true-bill** 181:22  
**note** 133:17 141:6  
 224:15 244:5 245:10  
 308:2  
**noted** 43:6 44:22 45:7  
 89:1 146:6 161:17  
 165:7 188:3,8,12  
 227:13 251:3 277:12  
**notes** 193:13 216:11  
 219:13 281:14 287:8  
 288:1,14 303:7  
**nothing's** 259:12  
**notice** 291:4  
**noticed** 294:16  
**noticing** 300:9  
**notification** 267:3  
**notify** 8:13  
**noting** 195:4  
**notion** 68:22 275:5  
**November** 1:8 8:14  
 143:14,19 307:12,16  
**nowadays** 97:20

**number** 17:8 59:6 70:6  
 84:18 106:1,4 117:10  
 132:13 134:21 135:1  
 135:15 157:14 197:6  
 228:1 243:10 259:5  
 275:10 281:2  
**numbers** 27:13,16  
 63:18,19 105:18  
 106:3 135:11 136:12  
 138:10 139:6,14  
 167:3 223:22 246:15  
 246:16 247:19,21,22  
**numerically** 157:14

---

**O**


---

**O-3s** 140:2  
**O-4** 140:3  
**O-4s** 139:22  
**O-5** 140:3 268:17  
**O-5s** 139:22  
**O-6s** 140:2  
**objective** 37:21  
**objectives** 38:17  
**obligations** 94:22  
**observation** 40:14  
 47:18 70:17,19,21  
 71:5 74:18 77:7,13  
 78:1,2,9 81:8,17  
 82:15 83:18 85:15,16  
 86:10 87:16 88:18,21  
 92:18 95:21 96:3 97:6  
 98:18 99:1,4,7,11,13  
 114:6 117:9 119:15  
 121:7 122:3,7 123:13  
 123:15 124:21 140:8  
 141:15 154:14,15  
 245:22 248:9 250:12  
 293:14  
**observations** 3:16 7:12  
 10:2 39:20,22 40:3,5  
 40:11 41:9 42:15  
 44:17 65:6 70:18  
 81:14 88:12 114:3  
 116:12 127:1 128:20  
 138:7 148:19 151:18  
 152:3 154:1,22  
 224:14 226:18,22  
 299:21  
**observe** 258:10 294:5  
 294:12,18  
**observed** 70:6 242:14  
 293:18 299:10 303:2  
**observing** 77:20  
**obtain** 71:10 72:4 75:16  
 103:22 104:15 109:5  
 115:8,13,20 116:6  
 119:1,11 161:15  
 162:6 163:19 166:8

179:9 225:2  
**obtained** 90:9  
**obtaining** 164:18  
**obvious** 19:8 61:12  
 289:1  
**obviously** 17:17 46:14  
 73:17 74:1 86:9  
 112:13 151:22 166:1  
 221:13 244:8 246:20  
**occasion** 236:7  
**occasional** 277:4  
**occasionally** 44:22  
**occasions** 14:6  
**occupants** 55:5  
**occur** 83:2 133:1  
 203:11  
**occurred** 137:10  
 280:12  
**occurring** 43:21 82:22  
**occurs** 13:11 58:13  
 94:10  
**October** 8:8 131:5  
 143:16  
**odd** 249:18  
**off-the-cuff** 215:13  
**offender** 11:22 14:13  
 30:13  
**offenders** 12:8 13:20  
 13:21 33:12 56:10,10  
**offense** 15:8 32:14 39:1  
 45:19 68:4 103:20  
 113:4 122:11,12,14  
 133:3,10,11 134:10  
 135:4,9 160:11  
 162:16 206:13 209:9  
 209:12 247:5,7,8,9  
**offenses** 12:7 16:1,2  
 27:4 29:19 30:21,22  
 31:9,10 32:15,16  
 69:13 133:4,14,15,19  
 134:1,4,6 137:6,19  
 157:3,6 244:14,15  
 246:8  
**offensive** 161:19  
**office** 31:21 32:7 47:4  
 249:2 305:5,18  
**officer** 4:5 61:20 86:8  
 86:16,18 89:5,18  
 90:13 91:2 95:15,22  
 97:22 98:1,5,8 99:16  
 100:2,5 111:2 112:9  
 133:2,13,20 134:12  
 135:3,8,16 136:15  
 137:8 138:9,16 139:1  
 139:10,21 141:9  
 151:8 155:18 160:10  
 165:21 168:22 169:3  
 169:14 170:6 173:6

176:7 184:7 189:17  
 190:22 191:5 197:1  
 197:17,19 198:2,10  
 198:12,13,22 214:2  
 218:22 248:13 272:20  
**officer's** 85:20 138:3  
 179:3 289:3  
**officers** 32:20 33:6  
 56:16 79:20 90:4  
 91:11 103:6 114:11  
 117:3 139:17 210:3  
 248:15  
**offices** 221:2 244:4  
**Official** 2:3  
**oftentimes** 171:15  
**OGC** 305:16,16  
**old** 50:9 87:5 96:20  
 97:21 141:11 148:1  
 186:13  
**old-fashioned** 196:13  
**once** 35:11 45:8 62:6  
 93:16 96:16 136:6  
 145:6 146:9,14  
 160:22 180:20 183:11  
 192:13 222:2 281:8  
 292:11 296:22 297:9  
 304:13  
**one-half** 116:7  
**one-page** 140:19  
**one-pager** 239:14  
**one-stop** 229:22  
**one-time** 43:22  
**ones** 70:9 72:9 87:7  
 134:1 169:14 187:22  
 237:2 259:6 289:21  
 303:7  
**ongoing** 144:22 262:21  
 293:12  
**online** 186:5 299:2  
**open** 4:8 179:12 285:9  
 297:12  
**opened** 305:6  
**opening** 101:17  
**operated** 210:9  
**operates** 203:6 212:11  
**operational** 285:7  
**opinion** 105:16 256:17  
 269:22  
**opinions** 206:21,22  
 222:17 256:12 270:14  
 271:5  
**opportunities** 58:2 61:5  
**opportunity** 17:10 33:5  
 39:9 40:18 43:18  
 52:12 92:7 94:8,12  
 127:3 156:14 166:4  
 223:7,12 265:14  
 268:5

**opposed** 48:14 57:10  
 64:20 69:22 73:11  
 89:22 164:17 222:18  
 231:14 272:20  
**opposite** 136:19 240:18  
**opposition** 36:4 238:18  
**option** 113:15 136:8  
 184:7 185:1  
**optional** 217:12  
**options** 83:5 215:17  
 216:5,7  
**oral** 238:17 308:7  
**orally** 125:12,14 239:9  
**order** 37:18 45:21 66:18  
 66:21 69:11,16,21  
 98:12 107:13 113:5  
 167:20 172:6 174:5  
 177:7,7 195:14 200:1  
 205:15 210:10 214:1  
 215:5 225:20 226:6  
 241:16,21,22  
**orders** 136:5  
**Organiza-** 154:4  
**organization** 150:1  
 305:14  
**organization's** 6:20  
**organized** 150:17  
**origin** 209:20  
**originally** 43:15  
**ought** 74:18 97:8 113:5  
 121:3 170:17  
**outcome** 163:15  
**outcomes** 106:10 167:1  
**outlived** 212:18  
**outright** 247:10  
**outs** 160:1  
**outside** 55:7  
**outstanding** 42:1  
**overall** 136:14 157:14  
 235:18 241:8  
**overcome** 251:18  
**overlap** 114:6 151:22  
 152:7  
**overlaps** 194:18  
**overly** 162:17  
**overreach** 204:9  
**overridden** 105:21  
**overriding** 90:7 232:1  
**oversight** 196:6 203:13  
 213:15  
**overt** 76:6  
**overturn** 187:14 232:9  
**overturned** 107:3,5,9  
**overview** 9:5 150:9  
 176:21 196:5  
**overwhelmingly** 84:19  
 85:1 115:19

**P**

**P-R-O-C-E-E-D-I-N-G-S**  
 4:1  
**p.m** 149:1 308:15  
**package** 229:8  
**packet** 50:7,7 274:7  
**packets** 274:18 276:4  
**page** 130:20 131:3,14  
 132:6 150:13 239:15  
 240:4  
**pages** 34:6 132:2  
 173:18  
**paid** 161:6  
**panel** 8:4 26:20 51:21  
 75:10 109:15 111:13  
 151:5 179:16 220:21  
 220:22 222:9 246:17  
 248:3,11,15 249:3,14  
 249:17,19 251:18  
 257:22 258:9,15  
 267:15 268:5 270:9  
 270:10 275:21 282:15  
 282:16 288:16 292:5  
 294:4 306:8  
**panel's** 52:21  
**panels** 29:15 47:6  
 52:10 74:9 202:18  
 216:21 219:10 220:20  
 232:13 247:7 258:7  
 270:7 273:22 282:11  
**paper** 89:10 94:16  
 165:18 276:15 307:3  
**papers** 129:3 165:12  
**paperwork** 88:6 276:9  
**par** 255:9  
**Paralegal** 2:5,8,8  
**parameters** 255:13  
**parents** 147:16  
**parrot** 271:16  
**parse** 189:13 190:16  
 192:14  
**part** 20:17 51:12 82:10  
 83:17 101:11 124:20  
 182:4 191:8 199:3  
 202:11,17 203:12,15  
 212:6 248:15 252:4  
 262:21 275:17 279:4  
 284:1  
**part-time** 146:13  
**parte** 192:6  
**PARTICIPANT** 5:7  
 176:17  
**participants** 206:19,20  
 294:20  
**participate** 107:22  
 108:6 180:5 188:10  
 193:19 194:19 217:11  
 262:4 272:2

- participates** 194:10  
**participation** 9:9  
 149:14 264:15  
**particular** 51:7,17  
 54:10 56:2 67:2  
 118:22 134:4 199:10  
 209:10 230:7 261:14  
 277:1 297:15  
**particularity** 166:12  
**particularly** 69:9 164:2  
 164:19 193:7  
**parties** 32:4 131:19  
**partner** 243:14  
**party** 18:21,21 19:1  
 271:17  
**pass** 72:5 254:21  
**passed** 21:16  
**Patricia** 2:5  
**Patriots** 17:17  
**Patty** 140:9 279:5  
**Paul** 1:16 143:17  
**pay** 299:22  
**payoff** 304:11  
**PC** 79:4 80:11,14,21,22  
 88:4 105:20 109:20  
 117:4 123:22 172:12  
 180:16,18,18,18  
 181:3,5,6 182:19  
 187:3 232:1,9 251:17  
**Pearl** 291:19  
**peers** 59:10  
**pejorative** 172:16  
**pending** 206:6 254:22  
 296:21 297:7  
**penetrable** 162:15  
**penetration** 256:7  
**penetrative** 7:14 16:1  
 37:1 38:4,20,21 39:3  
 64:11 133:11,14,19  
 134:22 135:4 157:6  
 247:3,8 294:2  
**people** 13:15,15 14:17  
 16:8 17:6 18:10 19:17  
 20:16 22:3,5,13,21  
 28:16 30:1,2,8,11,13  
 30:17,18,20,22 31:11  
 33:5 34:17 47:5 53:8  
 56:21 62:22 64:2 66:4  
 68:12,20 70:22 98:21  
 103:11 117:17 121:8  
 123:6,8 124:18,22  
 127:5 146:13 164:10  
 186:3 195:9 197:7  
 198:5 199:6,11,11  
 205:4 207:18 208:15  
 210:4 215:12 217:9  
 217:10,20 218:2  
 219:8,12 221:15  
 222:3 223:14,20,21  
 226:15 246:17 252:14  
 255:20 256:6 257:14  
 257:21 258:6,8  
 264:22 266:4 269:2  
 272:6 277:6 279:8  
 282:18 283:3,6,6  
 284:4 286:5,14  
 287:14 290:16 291:15  
 291:21 300:9,12  
 303:2  
**people's** 196:8 270:13  
**perceived** 208:15  
**percept** 16:2,3,7,12,17  
 22:12 35:18 63:20,22  
 64:1 105:20,22 135:7  
 135:9 139:11,12  
 157:8,9,10,20 162:14  
 162:20 174:21 187:4  
 187:7,14 208:9,16  
 243:12,17 247:13  
 250:20 252:8 253:8  
 253:11,12,14 259:1,2  
 262:3,13,16 280:11  
**percentage** 58:7 138:8  
 156:18 180:11 244:6  
 265:9,10  
**perception** 47:18 232:2  
 232:16 259:10  
**perfect** 204:6 274:3  
 275:3  
**perfectly** 291:4  
**performance** 255:8  
**period** 10:4 15:14 27:15  
 30:7 61:8 196:21  
 198:1 267:7 276:20  
**periodically** 150:6  
**periods** 30:14  
**permanent** 61:5 62:14  
**permission** 34:19 36:5  
 57:5 172:8  
**permit** 288:17  
**perplexing** 67:1  
**person** 28:14 53:12,15  
 56:17,18,18 60:19  
 62:1,2 98:2 122:13  
 136:8 158:13 172:13  
 185:18,19 198:21  
 218:20 238:17 248:19  
 249:9,10,15 267:13  
 271:9 282:12 284:12  
 284:13 293:20  
**person's** 58:18 62:12  
 158:14  
**personal** 58:3 235:5  
 265:19 284:18  
**personally** 213:20  
 237:4  
**personnel** 58:1 214:10  
 289:7  
**persons** 32:20  
**perspective** 3:3 6:20  
 23:4 31:19 39:2 50:21  
 73:14 79:12 83:20  
 86:14 97:14 98:19  
 218:19 234:3 236:17  
 245:2 254:17 255:18  
 256:2 257:4 260:4  
**perspectives** 220:8  
 241:2  
**Peters** 2:7 142:12 149:4  
 156:2,20 157:2,5  
 158:1,20 162:11  
 172:19 174:17 175:1  
 188:2 194:11 206:12  
 219:21 224:9 227:19  
 230:4 231:2 232:17  
 233:8,18 234:13,15  
 235:9 236:3 237:22  
 239:18 243:19 246:14  
 247:5,14 250:10  
 256:10 257:6 258:1,8  
 259:14 260:18  
**phase** 105:15  
**phases** 211:13 212:1  
**PHO** 88:7 97:11 105:20  
 113:8 158:11,13  
 170:19 172:12 173:9  
 177:11,22 179:14  
 182:18 184:15 185:22  
 186:1,3 187:3,20  
 189:8 190:3 191:19  
 230:2 232:1 251:19  
**phone** 288:15  
**phones** 25:15  
**PHOs** 87:22  
**photo** 50:7,7  
**pick** 24:2 199:22 200:14  
**picked** 87:9  
**picture** 108:16,18  
**pictures** 50:13 54:21  
 55:6  
**piece** 141:17 192:15,16  
**pieces** 298:1 305:1  
**pile** 98:11  
**pipe** 267:16  
**pit** 280:16,17  
**pits** 280:22  
**pivot** 224:10  
**place** 28:18 30:16 31:9  
 31:15 33:4 48:4 59:1  
 100:9 160:5 183:22  
 220:9 224:7 228:4  
 236:14 253:8 259:22  
 294:3 304:5  
**placed** 64:2 104:10  
**places** 184:2 215:18  
 296:1  
**plan** 128:13 267:1,8  
 289:15 291:11  
**plane** 298:12,18  
**planning** 18:21 267:4  
**plans** 10:1  
**platoon** 56:16  
**play** 139:1 157:20 203:7  
**playing** 17:21 98:9  
 203:1 280:13  
**plea** 197:2 294:3 295:13  
 298:13  
**plead** 183:4  
**pleas** 244:8,8  
**please** 10:9 33:21 34:8  
 35:1 41:11 78:10  
 151:19 271:18 282:4  
 303:13  
**plenty** 292:16  
**plus** 187:17 246:7  
**point** 11:14 28:19 29:1  
 34:1 75:21 83:6 93:12  
 108:1 128:21 144:6  
 158:9 160:7 161:18  
 163:5,6 176:20  
 177:11 178:8 190:16  
 211:7 220:1 221:18  
 221:19 227:8 256:5  
 264:18 265:7 275:2  
 281:4 284:21 287:12  
 296:17 297:13,16  
 298:7,8,16  
**pointed** 165:20  
**points** 260:6  
**police** 45:20 248:13,15  
**policies** 46:22 294:14  
**policy** 3:9 8:16,19,22  
 9:4 21:2 40:6,13,20  
 66:10 67:17 74:19  
 77:14 87:2 92:22  
 113:17 121:5,18  
 123:16 124:5 126:18  
 126:21 127:21 128:9  
 128:11 129:9,18  
 142:13 144:19 153:1  
 155:1 186:20 205:8  
 215:16 229:18 268:9  
 269:13  
**policymakers** 262:15  
 262:18  
**political** 118:18 204:11  
**politicians** 182:8  
**ponchoing** 266:20  
**pong** 280:13  
**poor** 251:8  
**popular** 118:18  
**population** 141:18,19



261:2  
**pornography** 15:9,11  
**portion** 102:5 104:18  
**portions** 56:1  
**pose** 45:4  
**posed** 159:4  
**position** 24:17 114:4  
 207:13 225:22 240:16  
**positions** 23:2  
**positive** 180:18  
**positively** 181:13  
**possession** 15:11  
**possibility** 264:4  
**possible** 47:22 97:14  
 115:20 218:3,5 271:4  
 299:3  
**possibly** 278:21 285:15  
 293:1  
**post** 58:19  
**post-32** 192:4 193:21  
**post-hearing** 190:20  
**posted** 6:14 34:10  
**potential** 44:7 172:20  
 173:1 175:7 226:2  
 257:7  
**potentially** 15:1 56:13  
 173:5 190:13 240:8  
 251:12 254:19  
**Powell** 2:8  
**power** 89:18 90:21 91:1  
 170:6 173:7 174:4  
**PowerPoint** 150:5  
**practice** 49:19 58:16  
 77:17,20 102:18  
 118:8 125:12 234:17  
**practiced** 17:9  
**practices** 240:1 294:14  
**practicing** 103:15  
 226:16  
**practitioner** 80:2  
**practitioners** 81:3  
 180:1 230:9,19  
**pre-** 233:2  
**pre-preferred** 80:8  
**preceded** 159:19  
**predecessor** 8:3  
**predictive** 38:8  
**prefer** 209:14  
**preference** 49:14 51:6  
 65:20 71:6,16 72:12  
 76:8 77:10 107:19  
 109:11 188:16 192:5  
 192:21 193:7,10  
 225:7 226:11 229:16  
 239:17  
**preferential** 114:4  
**preference** 131:12 182:11  
 244:2,22

**preferals** 141:22  
**preferred** 35:9 37:13  
 38:8 39:6 63:13 110:5  
 161:20 162:8 164:5  
 241:7 259:6  
**prefers** 204:14  
**prejudice** 91:16  
**preliminary** 37:14  
 79:19 85:17,19 86:7  
 86:13,16,18 89:4  
 90:13,14,18 91:1,10  
 93:11,21 94:2 95:22  
 96:22 98:7 99:15  
 100:2,5 106:14 111:2  
 112:8 114:11 128:17  
 133:2,12,20 134:12  
 135:3,7,16 136:14  
 137:7 138:2,9,16,22  
 139:9,17 141:8  
 149:10 151:8 155:10  
 155:13,17 159:14  
 167:6 168:21 174:8  
 179:3 184:7 197:3,16  
 201:15 204:4,13  
 211:16 216:14 218:21  
**premise** 56:9  
**preparation** 94:4 95:14  
**preparatory** 306:22  
**prepare** 39:18 87:20  
 94:8,9 216:3 276:3  
**prepared** 94:13 132:17  
 145:17 160:17 218:14  
 219:4 274:7,8 276:18  
**presence** 232:21 243:1  
 243:4  
**present** 1:13 2:11,22  
 4:20 5:7,12,14 6:4  
 156:14 158:5 171:16  
 172:7 243:10  
**presentation** 3:7,9 7:10  
 7:21 93:12 142:14  
**presented** 7:6 9:12  
 33:22 89:3,5 90:8  
 96:1 109:22 134:17  
 162:13 171:11 188:4  
**presentencing** 32:3  
**presenter** 150:17  
 270:19  
**presided** 164:14  
**President** 2:12 6:18  
**presiding** 1:12  
**press** 129:22  
**pressed** 16:14  
**pressure** 195:15  
**presumably** 141:22  
 160:14 289:7  
**presume** 107:1  
**presumption** 82:10,11

**pretrial** 14:9 101:19  
 115:5 122:19 123:2  
 131:12 181:16  
**pretty** 66:19 84:6  
 130:22 134:9 223:22  
 239:7  
**prevail** 76:20  
**prevails** 245:8  
**prevalent** 212:20 243:9  
**Prevention** 269:2  
**previous** 46:20 49:21  
 52:9 55:17 56:15,16  
 97:7 120:22 128:18  
 203:10 286:12  
**previously** 56:21  
 122:18 150:19  
**price** 161:6  
**primarily** 65:16  
**principle** 56:7,9  
**principles** 82:6,14  
**printed** 34:2,4  
**printout** 150:5  
**prior** 92:20 108:5,21  
 135:18 149:12 182:11  
 193:1 242:20 243:12  
 243:13 249:4  
**priority** 32:18 33:8  
**prison** 12:13  
**Privacy** 25:5  
**private** 74:9  
**privately** 285:10,14  
**privilege** 262:10  
**privy** 107:6 109:19,19  
 189:16 190:21,22  
**pro** 240:15  
**probably** 50:14 61:21  
 141:10 150:8 175:21  
 188:22 218:12,14  
 247:6 253:21 279:16  
 280:11 282:16 289:18  
 291:6  
**probation** 31:21 32:7  
**problem** 27:6 46:3  
 47:11 52:15 84:21  
 91:6 119:16 121:14  
 121:17,19 125:20  
 155:20 156:3 178:16  
 199:3 234:1 246:2  
 250:18 251:12 252:9  
 252:20 255:9 286:21  
**problematic** 76:9 80:1  
 109:8 247:16  
**problems** 13:9 58:11  
 92:14,17 108:3,4  
 125:8 173:1,1 236:4  
**procedural** 154:17  
 156:4 175:14 242:5,6  
 242:8 263:9

**procedure** 95:1 191:11  
 299:16  
**procedures** 173:6  
**proceed** 40:22 123:21  
**proceedings** 8:4 90:19  
 98:3 151:5 200:12  
 267:15 268:5  
**process** 9:9,10 11:9  
 12:22 13:1,2 14:19,21  
 27:1 28:12,21 29:3  
 33:3 44:15 46:12  
 52:19 58:14,15,18  
 59:15 61:18 67:22  
 68:11 76:4 82:3 83:2  
 89:15,16,21,22 90:1  
 91:13,13 92:16,17  
 93:10 121:10 126:10  
 131:8,12,17 141:7  
 156:6 163:11 164:9  
 170:13 172:3 178:12  
 193:19 199:4 202:12  
 202:16,20,22 203:3,3  
 203:16,20,21 206:5,9  
 206:10 210:21 211:2  
 212:11,20 213:2,8  
 219:20 220:17 222:21  
 231:10 234:19 235:4  
 238:21 241:18 242:4  
 252:19 254:13 260:1  
 262:4 264:9 274:5  
 276:1 277:16 283:22  
 292:18 295:5 303:10  
 304:9  
**produces** 170:1  
**product** 124:11  
**production** 158:12,14  
**productive** 307:19  
**professional** 58:4  
 62:13 223:7,16  
 263:13  
**professionalism**  
 211:22  
**program** 186:6 210:18  
 259:15  
**programs** 262:7  
**progressed** 211:11  
**progression** 81:13  
**prohibiting** 58:1  
**prohibits** 122:8  
**project** 7:17 39:12  
 188:3 293:12,14  
 301:8  
**projected** 297:4  
**prominently** 280:16  
**promotable** 59:10  
**promotion** 61:5  
**promotions** 58:2  
**prompted** 99:4

**proof** 29:18 116:16  
243:22  
**proper** 91:11 112:18  
160:21,22 161:9,11  
161:13,13 162:5  
**properly** 25:17 42:12  
**proportion** 278:13,14  
**proposal** 35:22 305:22  
**propose** 52:16  
**proposed** 27:22 42:5  
48:19 49:5 50:2 57:14  
57:15,17 153:20  
194:21  
**proposing** 60:2  
**pros** 105:6  
**prosecute** 19:17 21:22  
22:13 25:22 65:21  
69:8  
**prosecuted** 12:10 30:1  
31:11 104:17 119:5  
160:17 263:12  
**prosecutes** 69:13,15  
**prosecuting** 68:9 211:3  
**prosecution** 1:3 3:3 4:6  
4:14 6:9 15:19 20:18  
69:20 79:3,18 91:7  
93:15 100:17,19  
101:14,17,18,19  
102:13 103:18 104:8  
104:20 105:5 149:15  
152:5 163:12 167:15  
178:6,7 179:15 181:1  
185:9 189:1 192:18  
192:22 213:16 238:5  
249:13  
**prosecution/convicti...**  
11:4  
**prosecutions** 26:17  
**prosecutor** 12:9 19:22  
20:5 26:4 69:1 75:1,3  
94:1,11 100:12,13  
105:9 111:1 118:19  
169:9 171:11,15  
190:10 198:18 210:1  
210:12,13 211:14  
255:8  
**prosecutor's** 50:20  
118:1 249:2  
**prosecutorial** 204:9,18  
**prosecutors** 19:10  
47:12 68:8 70:14 95:5  
117:20 120:19 121:13  
158:16 163:17 174:14  
245:13 260:2 268:13  
268:15 270:9,15  
**prosecutors/trial** 92:2  
**prostitutes** 119:7,8  
**protect** 2:12 3:3 6:19

59:15 219:7  
**protected** 238:3,6  
**protection** 213:16  
**protections** 68:11  
**protector** 27:13  
**protects** 15:16  
**prove** 118:9  
**proved** 251:21  
**provide** 9:16,22 37:22  
38:1,3,6,14 54:3  
68:12 95:14 114:19  
115:3 122:15 125:3,5  
125:13 141:9 143:12  
167:18 175:18 191:14  
205:15 206:5 297:17  
301:22 302:8  
**provided** 37:12 78:3,16  
125:12 143:19 144:17  
191:4 235:11  
**provides** 100:14 122:10  
158:4  
**providing** 9:17 154:17  
191:2  
**province** 40:13  
**proving** 167:3  
**proximity** 104:1  
**public** 1:6 3:12,18 4:13  
7:8 8:8,11 10:3,4,8,10  
10:13 34:12 63:17  
83:1 143:7 145:7  
148:20 270:19,22  
281:18 306:10,14  
307:6,13  
**publish** 34:9  
**published** 34:10,21  
**publishing** 34:18  
**pull** 20:6  
**pulled** 74:15  
**pulling** 193:9  
**punchline** 174:20  
**punishment** 12:7 14:21  
28:4  
**punishments** 11:13  
**purchased** 14:16  
**purpose** 66:17 67:12  
86:14 92:12 94:17  
128:9 156:9 159:14  
159:17,18 160:6  
161:9 203:5 204:1,5  
204:10 212:16,19  
235:21 267:21 281:18  
286:9 294:5  
**purposes** 38:17 71:22  
160:16 169:10 200:20  
220:13 295:9  
**push** 88:7  
**pushed** 121:15 267:2  
296:14

**pushing** 25:19 301:20  
**put** 11:16 15:3 18:6  
23:4 51:19 59:8 67:17  
68:18 93:2 94:16 99:6  
105:17 126:7 128:16  
138:6 147:16 148:3  
163:3 165:22 171:22  
188:22 189:14 195:14  
214:14 215:7 217:14  
217:15 219:13 238:10  
240:5 257:21 262:19  
265:15,19 266:10  
277:17,18 281:13,13  
283:1,11 288:5  
304:20  
**putting** 11:17 92:7  
105:7 144:13 146:16  
156:9 196:3  
**PWG** 170:17

---

**Q**


---

**QC** 284:7  
**qualifications** 198:20  
200:1  
**qualified** 171:7 263:14  
**quality** 20:13,15 22:16  
65:1 203:13 284:7,7  
**quarters** 147:15  
**quasi-judicial** 175:9  
**question** 12:15,21 29:9  
31:17 45:22 53:19  
70:3 84:1 86:11 91:9  
108:14 111:9,15  
124:4 132:22 155:19  
158:1 159:4,15,18  
162:17 167:3 171:14  
175:1,22 176:1  
185:18 195:9 201:2  
201:21 202:13 204:2  
206:1 213:2 222:17  
223:2 229:3 230:19  
231:3 242:15 252:18  
257:1 258:2 273:9  
274:14,18 275:13,18  
275:19 276:3,5,22  
277:7 278:9,10 279:1  
286:11 301:15  
**questioning** 42:10,11  
43:12 44:1 82:3 83:2  
83:17 276:10 303:5  
**questionnaire** 216:15  
**questions** 26:11,13  
36:19,20 39:19 40:19  
44:9,11 45:4,16 46:14  
47:20 52:14 81:5  
98:20 110:11 131:19  
142:3,7 145:8 151:12  
151:17 152:14,20

153:12,20 173:2  
202:3 205:18 206:1  
206:16 213:1 221:20  
222:3,8,10,19 227:3  
249:8 254:11 261:14  
261:16 262:14 266:12  
267:9 271:15 272:5  
274:4,7,9,19,20 275:7  
275:10,11,20,22  
290:20 292:12 294:22  
301:14 303:7  
**quick** 143:5 145:2  
278:17 301:15  
**quickly** 18:11 33:20  
**quiet** 286:20 287:7  
**quite** 112:4 201:4  
202:19 224:20  
**quorum** 6:4 281:10

---

**R**


---

**R** 1:18  
**raise** 40:19 161:22  
275:10  
**raised** 74:6 213:3  
215:10 276:5  
**raises** 86:11 111:15  
113:15 190:10 206:1  
**raising** 205:19  
**ramifications** 42:16  
173:4 175:7 226:3  
**ran** 141:4 180:7  
**range** 15:3 63:19 140:3  
196:1  
**rank** 139:17 140:4  
220:10 272:19  
**ranks** 30:15,16  
**rape** 12:10,17 272:9  
308:5  
**raped** 249:10  
**rapidly** 255:21  
**rare** 183:15 233:10  
**rarely** 45:8 67:6,7 107:4  
107:8 115:2 155:12  
**rate** 15:21 16:1,7,12  
20:19 35:17 73:16,17  
73:21,22 111:22  
119:16 149:13 230:14  
234:7 240:12 241:13  
241:20 242:19 243:18  
243:21 244:9,12,13  
244:16 245:3,14  
246:8,19 247:11  
250:8,19 252:9 261:9  
262:13  
**rater** 217:21  
**rates** 9:8 11:4 15:20  
166:22 170:2 231:22  
232:10 240:6,21

- 241:5 242:13 244:19  
244:21 245:9,19  
246:12 247:1 252:5  
254:2 258:21 260:20  
272:1  
**rationale** 65:15 82:17  
106:20,21 107:4  
169:22  
**RCM-405** 156:10  
**re-** 183:9  
**re-imagine** 198:7  
**re-shift** 299:7  
**reach** 297:13 300:13  
**reached** 298:22 303:12  
**reaching** 300:15  
**reaction** 123:19 245:16  
**read** 42:6 120:14  
165:11 195:5 226:17  
273:6 301:17  
**readily** 244:12  
**readiness** 285:7  
**reading** 39:15 41:20  
146:5 178:20 268:1  
**reads** 260:8  
**ready** 10:18 17:19  
94:12 196:2 276:18  
278:1 298:12  
**real** 14:18,21 25:12  
40:15 89:10 164:15  
196:18,19 289:22  
290:11 294:5  
**reality** 217:4 237:13  
**realize** 41:20 248:16  
**realized** 81:12  
**realm** 264:4  
**reason** 16:11 20:18  
21:12 28:19 48:5  
53:20 112:17 188:1  
195:5 243:20 246:14  
262:17 271:3 273:17  
293:4  
**reasonable** 76:1 84:2  
84:13,20 85:3 97:18  
118:10 120:5,6,12  
163:2 178:2,6,7 197:9  
244:1 251:21  
**reasoning** 87:13 246:11  
**reasons** 29:16 67:4  
74:1,1 110:11 112:1  
146:7 173:22 174:6  
179:1 184:3 189:14  
204:12,13,16 225:17  
226:12 262:7 265:15  
265:19 289:1  
**rebuffed** 45:14  
**recall** 144:21 280:3  
**receive** 7:9,21 35:11  
49:9 71:7 75:10  
301:20,21,22  
**received** 10:5 34:2  
78:21 149:7,20  
150:10,20 152:8  
176:21 207:15 231:6  
233:16  
**receives** 176:14  
**receiving** 149:9  
**recognize** 12:5 14:20  
121:8  
**recommend** 40:1,4  
47:19 64:13 69:5  
101:16,19 146:14  
205:12  
**recommendations** 184:19  
**recommendation** 70:18  
73:3 86:17 93:2  
107:16 112:11,12,21  
113:2 122:15 124:8  
147:1 156:16 160:13  
160:18 161:7 163:21  
164:2 166:7 168:6,9  
169:17,21 170:1,3  
182:4 184:22 185:3,4  
189:11 191:16 238:2  
**recommendations** 9:18  
39:11 48:1 80:18 83:3  
83:7 92:5 93:9 113:7  
125:11 128:21 143:14  
144:4,19 149:18  
160:2,4 161:4 185:2  
186:16 264:11 281:20  
281:20 292:7  
**recommended** 8:2  
189:9  
**recommending** 79:21  
**reconsider** 84:8  
**record** 99:7 148:22  
166:18 271:1 299:20  
300:3 308:15  
**recorded** 26:8 44:13  
287:22  
**recordings** 44:8,10  
**records** 37:18  
**recruit** 61:17 62:19  
**recruiting** 61:18  
**recurring** 205:22  
**red** 206:2  
**redirect** 300:20  
**reduced** 124:6,9  
**reduces** 99:18  
**reduction** 13:17  
**reexamination** 212:2  
**refer** 66:9 101:18 150:6  
187:5 189:8 225:18  
226:13 232:19 233:2  
233:4  
**reference** 8:21 151:3  
193:12 227:14  
**referral** 9:10 103:3  
108:21 116:13 120:5  
123:1 131:7,12,13,17  
135:18 149:12 154:18  
159:21 178:14 187:18  
188:6,12 189:9  
190:14 191:3 193:1,4  
220:17 230:6,11,14  
235:13,22 239:22  
244:3 245:1  
**referred** 59:2 75:2  
107:20 109:2 110:18  
114:7 120:13 125:5  
128:17 133:4 136:20  
137:3,5,6,13,15 138:1  
139:19 177:18 241:6  
259:7  
**referring** 114:21,22  
122:8 150:21 187:10  
225:11  
**reflect** 235:7 252:10  
**reflected** 167:22 168:1  
168:2  
**reflecting** 238:20  
**reflection** 87:22  
**reflections** 300:3  
**reflective** 169:8  
**reform** 11:3,7 28:20  
152:17 173:5 202:12  
203:10  
**reforms** 172:21 240:9  
**refrain** 122:3  
**refresh** 300:6  
**regard** 27:2 57:17 230:8  
**regarding** 3:10 6:19  
7:11,22 9:18 58:6  
148:17 151:14 176:22  
177:6 179:2 181:1  
244:19  
**regardless** 163:22  
175:17 178:14  
**regards** 77:4 192:4  
**Reggie** 1:19  
**regional** 268:16  
**register** 30:12  
**regular** 223:21  
**regulation** 195:12  
**reinforce** 290:3  
**reinforced** 90:12  
**related** 7:22 35:15  
39:16 119:18 230:13  
242:6 243:6  
**relating** 6:22  
**relation** 38:19 44:18  
249:5,9  
**relationship** 53:15  
145:22 242:21 243:12  
243:13 263:21,22  
**relative** 246:16  
**relatively** 154:11 167:8  
244:6 258:11  
**relax** 288:5  
**release** 15:4 145:6  
302:2  
**released** 14:1 33:12  
34:12 124:11  
**relevant** 41:8 56:5 58:5  
99:20 123:1 151:20  
156:15 158:13 191:17  
229:11,13  
**relied** 234:11  
**reluctance** 218:17  
**rely** 21:13 22:7  
**remainder** 127:9  
**remaining** 37:11  
**remains** 159:1 175:9  
**remark** 154:3  
**remarkable** 244:16  
**remarks** 7:1 10:19  
11:14  
**remember** 148:7  
236:12 250:11 297:5  
**remind** 156:17  
**reminder** 151:4  
**reminds** 212:22  
**remove** 68:3 93:19  
**removed** 201:20  
**rendered** 68:1 264:1  
**rendering** 86:1  
**repair** 69:17  
**repeating** 225:8  
**replicate** 142:5  
**report** 3:6,13 7:4,5,19  
9:13,19 17:4 32:3  
33:21 34:5,5,9 35:16  
37:14,22 38:21 44:12  
47:7 50:5 84:5 87:5  
110:14 117:7 123:18  
132:1 136:6 142:19  
143:6,11,11,20  
144:14,17 156:21  
159:6 187:20 191:20  
220:14 230:2 239:19  
246:7 259:5 265:5,22  
266:1 273:16 281:13  
301:18 307:7  
**reported** 7:17 38:18  
271:7  
**reporter** 270:21  
**reporting** 131:22  
242:22  
**reports** 41:21 65:12  
67:3 84:6 85:18 86:13  
87:18 89:1 114:12  
140:9,11,14 141:2,13

159:1 240:8 265:22  
**represent** 24:16 25:11  
**representative** 248:4  
**representatives** 189:21  
**represented** 261:2  
**representing** 259:17  
**reps** 267:3 292:12  
**republic** 162:1  
**request** 3:10 10:9 35:2  
 35:12 143:11 197:10  
 269:15  
**requested** 8:11 143:18  
**requests** 10:5 149:3  
 301:1  
**require** 158:22 195:13  
**required** 54:9 81:21  
 101:22 102:6 115:5  
 141:9 149:12 244:2  
**requirement** 79:4,15  
 100:20 144:22 159:6  
 161:10 164:12  
**requirements** 86:6  
**requires** 43:17 114:18  
 197:11 206:12  
**requiring** 24:9 52:6  
 79:14  
**research** 152:14 154:19  
**research-based** 216:12  
**reserved** 292:20  
**residents** 50:9  
**resolution** 49:6 194:17  
**resolutions** 194:21  
**resources** 19:6 49:20  
 51:18 292:21  
**respect** 203:2,21  
 260:16 272:7  
**respected** 202:21  
**respectfully** 251:6  
**respects** 203:6 220:14  
**respond** 43:19 77:17  
**responded** 143:17  
**response** 9:17 16:13  
 35:17 45:11 48:15  
 57:11 64:21 68:14  
 70:20 73:2 81:6 85:13  
 88:16 99:2 143:13,18  
 144:8 145:6 151:12  
 172:22 213:2 292:4  
**responses** 3:10 9:6  
 149:2,20 150:12,16  
 151:11 173:17 177:1  
 216:17 225:1,12  
**responsibility** 32:11  
 164:6  
**responsive** 35:14  
**rest** 52:19 98:12 130:5  
 194:6 213:8  
**restriction** 12:17 13:17

30:5  
**restrictions** 14:12,14  
 15:3 63:8  
**result** 37:14 38:12  
 47:21 58:7 63:20  
 111:8,14 116:2 133:5  
 155:6 203:10 211:5  
 242:4 245:5 260:15  
**resulted** 27:16 63:11  
 106:6 115:17,18  
 116:4 154:8 253:9  
**resulting** 37:2,6 52:18  
**results** 9:11 11:15,20  
 25:13 26:16 30:6 31:4  
 108:16 120:14 161:5  
 166:21 170:1 190:4  
 197:8  
**resumed** 148:22  
**Ret** 1:14,16,17,18  
**retainability** 61:16 62:8  
 62:17,22 63:5  
**retention** 260:20,21  
**retire** 197:20 199:11  
**retired** 22:1 254:10  
 269:20  
**retirement** 59:12  
**retrospect** 207:7  
**return** 176:11  
**revealed** 111:19  
**reveals** 110:2,2  
**review** 3:7 7:10,16 8:3  
 36:11,14,22 37:1  
 41:17,19,19,22 42:14  
 48:9 49:17 50:16 51:4  
 64:15 65:11 72:22  
 77:5,12 78:18 79:18  
 82:10 92:14,22  
 105:11 106:14 109:9  
 109:13 130:8 131:11  
 142:13 144:1,18  
 152:3,4 155:8 165:6  
 177:3,13 207:3,3  
 208:5 209:19 224:13  
 226:22 232:18,21  
 237:6 251:11 253:5  
 260:17 262:2,21  
 272:4 275:5 280:10  
 306:7  
**reviewed** 7:13 37:9,10  
 37:11 39:2 50:5,19  
 76:10 78:19 102:15  
 107:17 177:8,10,15  
 187:22 207:10 233:3  
**reviewer** 75:14 111:18  
**reviewer's** 187:17  
**reviewing** 75:15 79:13  
 105:1 189:5  
**reviews** 88:22 110:3

**revisit** 200:11  
**RFI** 3:11 35:6 36:1,6  
 148:17 149:20 150:11  
 150:15 151:11 173:2  
 173:17 177:1 225:12  
 226:12  
**RFI's** 224:12,22 225:3  
 239:1 240:10  
**RFIs** 77:17 153:15  
 159:5 173:8 176:22  
 191:7 192:3 225:16  
 238:11  
**rid** 11:11,12 170:7  
 202:4  
**ridiculous** 26:2 255:4  
**righteous** 179:15 185:9  
**rights** 90:22 178:12  
 197:1 242:5,6  
**rigorous** 29:3  
**ring** 84:14  
**ripple** 258:20  
**road** 52:4 79:5 264:8  
**robberies** 264:21 265:3  
**robust** 158:22 159:6  
**Rodney** 1:17  
**role** 92:12 113:9 257:20  
**roles** 219:16  
**roll** 16:8 94:5 128:2  
 290:9  
**room** 1:11 19:9 147:15  
 219:11 276:14 282:18  
 287:16 289:1,8  
 292:20  
**roster** 257:21  
**rotate** 23:1  
**rotated** 198:6  
**rotating** 24:4  
**roughly** 157:12 262:3  
**roundtable** 153:17  
**routine** 26:7  
**routinely** 57:20  
**row** 134:21 135:1  
**rows** 134:18  
**Rozell** 2:8  
**RSP** 279:3,4 280:4  
 293:1,3  
**rule** 175:15  
**rules** 92:10 95:1 155:17  
 224:19 249:20 284:20  
 294:15 299:14  
**run** 146:12 148:4  
 158:10 172:16 287:2  
**running** 252:7  
**runs** 18:22

---

**S**

---

**S** 1:14  
**safeguard** 154:17 156:4

**safety** 71:21 226:9  
**sailor** 209:11  
**sake** 215:4  
**San** 248:9  
**sanctity** 12:19  
**SANE** 25:14  
**SAPR** 17:4  
**SARC** 257:16,17 283:6  
**SARCS** 269:3  
**sat** 148:8 219:11  
**Saunders** 2:9 129:5,8  
 129:13,17 130:7,15  
 132:4,7,12  
**save** 298:19 307:10  
**saw** 33:22 53:1 55:4  
 56:15 60:13 65:18  
 67:2,7 70:6,9 71:15  
 72:11,22 73:6 80:19  
 80:21 87:5,18 90:3  
 105:11 107:4,16  
 111:18 112:4 117:2  
 139:6 179:22 239:16  
 253:5 284:7  
**saying** 12:3 15:20  
 20:13 21:17 50:22  
 54:4 72:17,22 73:1  
 79:20 80:3 94:22  
 98:10 111:17 121:4  
 164:16 165:14 166:18  
 180:16 181:8 182:18  
 185:1 187:12 200:6  
 208:8,8 256:20  
 284:16 301:5  
**says** 60:22 62:11 85:17  
 86:20 97:7,12 99:9  
 102:5 103:19 119:1  
 150:9 161:10 166:3  
 172:12 173:9 181:15  
 181:20 182:18 189:7  
 228:13 233:1 241:14  
 262:11 267:19 270:22  
**scenarios** 186:4  
**scene** 50:8  
**schedule** 36:10,13,15  
 297:11 301:7,12  
 306:11 307:6  
**scheduled** 10:16  
 127:13,19 295:14  
 300:14 306:10 307:13  
**schedules** 198:6  
 295:21  
**school** 210:14,17  
**schools** 61:7 223:20  
**scope** 52:15  
**screen** 298:3  
**sealed** 101:3  
**search** 15:13 101:3,3  
 102:9 176:3,6

- seat** 302:22  
**second** 28:13 34:15,22  
 36:3 48:13 57:9 64:19  
 71:5 103:16 177:11  
 210:17 297:11 301:10  
**seconded** 34:17  
**secrecy** 93:14  
**secret** 171:21  
**Secretaries** 305:7  
**secretary** 6:6,8 7:18  
 9:13 143:12 144:14  
 144:18 232:19 233:6  
 233:15 305:3,5,9  
**section** 102:4 118:16  
 227:22  
**security** 57:22 100:22  
**seeing** 28:17,22 36:5  
 54:14 79:19 102:20  
 105:1 108:18 135:11  
 245:9,10 289:8 303:1  
**seek** 75:5  
**seen** 21:4 51:4 80:9  
 109:9 155:17 159:1  
 203:11 230:21 256:4  
 279:20 280:4 294:6,7  
 294:8,9,10 298:10  
**segment** 252:1  
**select** 294:1  
**selected** 22:19 215:18  
**selecting** 258:4,18  
**selection** 294:17 297:7  
 303:4  
**sell** 18:6  
**send** 35:2 36:1 45:4,5  
 105:22 111:12 126:18  
 130:13 215:17 232:5  
 232:9 238:11 258:22  
 259:12 299:12 300:18  
 307:10  
**sending** 109:7 130:9  
 136:9 221:19 222:5  
 232:3 259:2 299:18  
**sends** 74:22  
**senior** 2:5,8,8 21:8 22:2  
 164:10 258:5 268:14  
 268:15  
**seniority** 225:22  
**seniors** 263:13  
**sense** 17:14 24:11 54:2  
 74:16 131:20 145:3  
 154:3 187:18 204:6  
 212:10,17 233:18  
 235:10 254:14 259:18  
 265:20  
**sent** 60:14 100:1,4  
 103:2 178:14 179:16  
 222:2 240:10 245:3  
 251:14 277:4 301:6  
**sentence** 15:6 26:18  
 27:9 28:10,16 123:7  
 124:20 260:8  
**sentenced** 14:7 30:17  
**sentences** 27:5 28:17  
 28:18 29:6,8 31:7,8  
 31:13  
**sentencing** 3:4 6:21  
 11:3,7,9 13:7,9,11  
 14:19 15:2 26:19  
 27:11,22 28:6,12,14  
 28:22 29:16 31:20  
**sentiments** 178:17  
**separate** 206:8,10  
 220:4  
**separately** 191:10  
 258:16  
**September** 9:19 119:6  
 143:7,9 266:22  
**sergeant** 147:19  
**serial** 56:10  
**serious** 59:18,19,21  
 61:4 88:5,8 117:7  
 133:10 167:10  
**seriously** 213:19  
**served** 14:8 27:8 148:9  
 219:16  
**serves** 15:5  
**service** 24:13 38:4  
 59:14 62:9 63:4 75:18  
 144:1 146:13 155:15  
 189:21 232:19 233:14  
 233:22 234:3 243:5,7  
 243:20 267:3 272:19  
 292:12 294:11 300:16  
 305:6,13  
**Service's** 150:11  
 172:20  
**Servicemember** 250:7  
**Serviceperson** 59:7  
**Services** 35:8,16 37:13  
 62:5 73:1,4,4 77:16  
 140:12 143:21 144:4  
 145:14,22 150:20  
 152:9 159:5 173:15  
 189:19 192:9 194:7  
 220:7 223:15 224:16  
 225:14 233:19,20  
 234:6,21 238:12  
 241:12 242:2,10  
 244:11,14 261:16  
 264:1 293:4,18,22  
 294:10 295:7 297:14  
 300:17,21 304:7  
**Services'** 3:10 9:6  
**serving** 8:22 204:20  
 269:16  
**session** 149:4 150:3  
 152:1 306:22  
**sessions** 282:13  
**set** 3:11 18:8 19:4 46:7  
 83:4 121:15 147:15  
 148:17 149:16 152:5  
 167:15 196:1 213:12  
 218:1  
**sets** 19:1 22:16 57:3  
 195:12  
**setting** 17:6 75:7 109:6  
 195:21 218:3  
**settings** 217:5  
**setup** 279:13  
**seven** 8:21 23:18 26:12  
 50:14 55:3 137:13,14  
 180:9 281:6 282:3  
 286:13  
**sex** 11:21 12:7 13:20  
 25:9 30:13,21 32:16  
 33:12 45:18 47:1,1  
 49:7,15,15 119:6  
 149:15 244:6,12,14  
 261:3  
**sexual** 1:3 3:3,5 4:6,15  
 6:10,10,20 7:14 9:7,8  
 9:10,20 10:2 12:12  
 19:15,20 27:4 35:11  
 35:15 37:1 38:4,20,21  
 39:1,4 42:7 46:1  
 57:19 63:10 64:11  
 68:3 69:15 114:7  
 133:3 157:4,5 162:15  
 230:7 236:9,22  
 242:19 245:11 246:8  
 248:2,5 249:5,6,9  
 256:7 257:8 264:19  
 269:2 272:7,8,16,21  
 280:5 294:2 295:12  
**sexually** 50:20,22  
 273:10,15  
**Sgt** 1:16 5:12 34:14  
 36:2 41:12 46:4 56:6  
 57:9 81:10 103:4,10  
 106:2,11,16,19  
 108:10 129:11 202:5  
 216:10 219:15 230:18  
 231:4,19 234:16  
 237:4 247:19 250:4  
 263:1 282:6,9,19  
 283:14,18,22 284:17  
 286:11 289:9,17  
**shake** 263:16 265:13  
**shaken** 31:12  
**shape** 179:7  
**shapes** 307:9  
**share** 24:20 252:20  
**sharing** 33:15 238:7  
 255:9  
**She'll** 5:4  
**sheet** 35:12 37:14  
 147:17 229:9 301:18  
 302:9  
**sheets** 63:19  
**shift** 240:4  
**shit** 222:12  
**shoot** 222:13,15 266:10  
 297:1  
**shopping** 199:1 229:22  
**short** 261:13 267:7  
 304:18  
**short-sheeting** 147:20  
**shortly** 380:4  
**show** 114:3 177:9 222:4  
 222:7 223:20 236:6,7  
 279:9  
**showed** 162:13  
**showing** 122:4  
**shown** 22:9 25:20  
 196:3  
**shows** 134:20 135:12  
 302:6  
**shrinking** 157:15  
**side** 43:6 67:5 136:22  
 141:15 148:11 240:18  
 291:22  
**sidebar** 248:21  
**sides** 154:9 196:9 203:1  
 234:8  
**sign** 241:9 251:8 296:9  
**signals** 281:10  
**signed** 102:9 194:5  
 281:22 282:2  
**significant** 58:7 59:6  
 81:19 106:4 164:18  
**significantly** 141:21,22  
**similar** 38:11 176:3  
 224:17,18 238:1  
 247:2,12  
**similarly-** 13:14  
**simplicistic** 162:18  
**simply** 15:16 45:12  
 60:5 80:10 95:16  
 164:16 166:18 252:16  
 299:21  
**Simultaneous** 213:6  
 304:1  
**sincerity** 68:19  
**single** 12:2,20 106:7  
**sinking** 87:6  
**sir** 168:8 283:16 287:3  
 287:19  
**sit** 80:2 97:12,13 249:14  
 250:21 257:3 287:7  
 288:5 290:6 296:5  
**site** 3:14 10:1 39:18  
 127:3 131:18 148:18

- 153:11,17,21 200:22  
205:3 220:8,17 227:6  
230:9 239:3 265:22  
266:5,21 267:1,10,14  
267:22 268:3,18  
269:11 271:1 277:5  
279:4 281:11,12,18  
285:16 288:11 292:4  
294:22 296:1  
**sits** 182:15  
**sitting** 83:20 100:10  
102:16 162:9 218:10  
249:3 269:13 286:14  
288:22 289:8 290:2  
**situated** 13:15  
**situation** 64:3 169:18  
273:7 276:13 288:20  
**six** 11:15 17:18 31:14  
61:9 96:21 97:1 283:5  
283:13  
**six-month** 30:7  
**sixth** 27:16  
**sizes** 141:19  
**SJA** 90:6 105:21 107:3  
108:7,11,18 109:11  
109:16 111:16 117:18  
122:9,14 125:3,5  
164:7 173:10,10,22  
176:14 179:13 181:7  
182:19 185:7 187:4  
189:2,7,10,15 190:21  
191:8,22 192:6 193:1  
211:13 218:9 220:3  
220:15 222:12 235:6  
239:20 240:2  
**SJA's** 115:7 122:19  
123:4 192:17 220:10  
220:16 221:1 222:7  
229:14 233:5 236:18  
**SJAs** 85:22 114:17,18  
117:11 282:13  
**skill** 18:8 19:3 20:13  
46:7,21 57:2 263:15  
**skilled** 107:2  
**skills** 45:21 46:17 284:3  
**skyrocketed** 246:12  
**slam-dunk** 116:18  
**slaughtered** 14:17  
**slice** 249:21  
**slide** 78:7 130:19  
131:14 132:11,12,13  
134:17 135:10,12  
136:21,22 138:6  
139:5,13 140:7  
189:14 268:2 271:19  
**slides** 41:7 129:9,18,22  
130:18 132:5,18  
150:5 267:6 269:5  
276:10  
**slightly** 250:8 264:15  
264:17  
**small** 63:21 252:1  
**smart** 19:6 22:21  
**smoke** 280:15,17,22  
**smoking** 280:20  
**smooth** 145:19  
**social** 18:22  
**society** 12:5 14:1 15:16  
30:19  
**soldier** 209:10  
**soldiers** 53:4 272:13  
**sole** 32:21  
**solely** 66:17  
**solution** 25:6 28:1  
121:8 305:20  
**solutions** 11:8 15:18  
52:14  
**solving** 121:19  
**somebody** 11:20 17:16  
18:2 21:1 28:2 43:2  
60:7,10,22 67:7 87:10  
120:10 152:19 161:20  
162:9 165:11 168:15  
172:10,17 184:2  
186:22 198:17 199:12  
221:21 249:7 260:10  
260:11 284:4 289:8  
290:4 298:11  
**somebody's** 60:9 217:1  
222:3  
**someone's** 32:14  
**something's** 16:3  
250:22  
**somewhat** 89:20  
250:16  
**soon** 142:4 276:17  
287:14  
**sorry** 41:5,11 73:21  
78:8,11 130:2 132:4,7  
195:20  
**sort** 35:5 46:11 52:7  
53:3 72:6 105:18  
114:5 116:22 119:14  
119:18 150:14 154:11  
164:20 172:15 175:2  
175:2 182:14 189:4  
193:3 195:1 216:4  
225:15 230:15 242:8  
254:3 264:14 266:20  
267:2 269:21 270:12  
271:15 274:10 282:22  
288:13,16 303:17  
**sorts** 32:7  
**sound** 43:4 82:5,13  
106:20 162:17  
**sounded** 66:7  
**sounds** 67:13 256:8  
**source** 152:2,8 165:3  
**SPCMCA** 135:20  
**speak** 32:10 110:3  
163:14 218:2 221:16  
285:10,14 298:2  
**speakers** 97:7  
**speaking** 154:11 155:6  
213:6 276:19 292:13  
304:1  
**special** 19:21 20:5 21:7  
25:16 45:21 68:18  
75:1 100:12 136:1,4,7  
136:17 149:22 184:11  
185:18 191:21 198:14  
210:15 219:1 225:22  
259:15 261:7 262:1,7  
263:20 264:5 268:14  
**specially** 212:2  
**specific** 48:22 52:14  
67:9 152:14,20,22  
225:9 226:15 237:2  
241:5,10 255:18  
257:3  
**specifically** 11:3 24:20  
232:12 254:12 255:13  
**specification** 122:10  
**specify** 102:1  
**spectrum** 140:18 141:1  
**speed** 276:17  
**spend** 71:20 276:16  
**spending** 12:19  
**spends** 33:9  
**spent** 61:22 68:8 85:3  
207:19  
**spilling** 124:17  
**spinning** 129:19  
**Spohn** 5:19 299:8  
**spoke** 123:9 225:15  
**sponsors** 21:19  
**sports** 17:14  
**spread** 293:21  
**spreadsheet** 129:11,15  
129:16  
**stack** 276:15  
**stacked** 270:6  
**Stacy** 2:8  
**staff** 2:1,2,2,3 7:22 8:13  
9:15,21 10:9 36:18  
37:8,10,17 41:16  
44:20 79:21 84:17  
99:16 103:14 107:15  
108:1 109:3 115:2  
128:15 130:3 138:13  
139:3 145:10 151:13  
153:19 154:19 155:1  
155:19 158:21 188:3  
192:14 193:15 207:16  
261:18 268:19 274:8  
276:8 277:15,17,21  
278:1 279:7 282:4  
286:13,19 287:6,9,17  
288:13 299:13 300:1  
302:6 304:14,22  
305:11,16 307:20  
**stage** 90:18 94:4  
100:21  
**stages** 53:3 183:12  
**stagnant** 43:9  
**stakeholder** 269:4  
**stakeholders** 268:9  
273:21  
**stand** 32:6 118:20  
**standalone** 7:3 37:22  
50:17  
**standard** 66:6,8 67:14  
67:15 73:5 83:4 97:17  
102:6 114:20,22  
116:14,15 120:1  
122:16 163:7,8,8  
165:3 168:18 225:9  
234:22 243:20,22  
244:2 251:20  
**standards** 76:3 80:16  
**standpoint** 97:6 161:19  
177:3  
**stands** 16:19 124:20  
277:8  
**stapled** 150:9  
**star** 233:14  
**stares** 28:6  
**start** 4:17 31:3 41:2  
101:16 104:4 110:7  
110:10,20 120:1  
121:1 128:4 155:3  
160:5 182:2 230:1  
236:10 266:5 276:15  
289:18 300:15  
**started** 73:15 120:16  
170:11 256:21 274:6  
276:2,3  
**starting** 65:6 267:4  
285:3  
**starts** 197:2 284:4  
**state** 58:15,16 96:21  
167:6 196:2 201:8,12  
204:22 294:19  
**stated** 169:7  
**statement** 16:5 42:20  
43:7,9,15 80:10  
232:20 273:11 275:8  
**statements** 14:2 25:6  
42:7,12,19 248:7,7  
**states** 1:1 25:8 26:9  
31:20 100:13 102:11  
213:8,9 308:5,6

**station** 62:15  
**statistic** 252:21 264:14  
**statistical** 105:18  
**statistically** 157:13  
**statistics** 241:20  
 247:18  
**stats** 180:7  
**Status** 3:13 142:19  
**statute** 167:9 233:1  
 308:12  
**statutory** 195:11  
**stay** 197:12 301:2  
 302:19,20  
**Stayce** 2:8  
**stayed** 188:14  
**steadily** 157:15  
**step** 103:19  
**steps** 12:6 182:1  
**Steven** 2:2 10:10  
**steward** 147:18  
**stick** 199:9 212:14  
**stop** 105:7,7 149:16  
 298:17  
**story** 91:18 147:9  
**stranger** 252:15 265:3  
 265:4  
**strategically** 157:22  
**strategy** 284:2 289:12  
**strawmen** 215:17  
**stream** 121:22  
**street** 306:1  
**strength** 215:7  
**strengthen** 214:21  
**strengthened** 213:21  
**strengthening** 213:19  
**strengths** 188:21  
**stress** 85:1  
**strict** 256:11  
**strikes** 91:21 162:19  
**stroke** 51:18  
**strongly** 47:19  
**struck** 112:7 141:17  
 193:7 248:8  
**structure** 218:7  
**structured** 270:3  
**stuck** 98:8  
**study** 9:1  
**stuff** 98:11,13 124:16  
 186:8 221:5 229:11  
**sub-** 255:8  
**subcategories** 49:4  
 114:10  
**subcommittee** 79:8  
 269:19  
**subject** 15:13 37:20  
 45:22 58:4 89:8 91:15  
 91:17 152:7 212:7  
**subject's** 57:19

**subjective** 38:15,18  
 66:5 117:1  
**submission** 78:4,12  
 191:18 192:17  
**submissions** 190:20  
**submit** 98:20  
**submitted** 10:13 59:3  
 143:9 303:8  
**subordinate** 114:16  
**subsequent** 37:3  
**subsequently** 90:10  
**substance** 93:2 236:21  
**substantially** 247:11  
**substantive** 125:7  
 150:2,16 153:12  
 192:5 205:14  
**success** 74:3 86:15  
 119:20 120:6,7,9  
 160:12 182:5 189:10  
 253:2  
**suddenly** 21:5  
**sufficiency** 65:19 71:13  
 77:9 90:5 115:3,12  
 118:5 125:17 174:11  
 183:14  
**sufficient** 42:9 66:13  
 71:10 76:18 86:14  
 89:2,6,17 90:15 96:1  
 97:8 103:21 104:14  
 114:13 115:8 116:6  
 116:10 118:9 121:16  
 174:9  
**sufficiently** 164:10  
**suggest** 14:22 24:8  
 152:17 219:19 274:13  
**suggested** 59:17 161:2  
 242:2 274:8  
**suggesting** 76:15  
**suggestion** 68:3  
**suggests** 161:6  
**Sullivan** 2:3 4:3,4,10  
 307:21 308:1,11  
**summaries** 140:15  
 141:4  
**summary** 85:18 132:18  
 154:12  
**summer** 23:14 98:22  
 149:21 159:9 267:5  
**summers** 267:15  
**Super** 17:18,20 18:8  
**supersede** 93:18  
**supervised** 15:4,14  
**supervision** 33:13 47:3  
 219:17  
**supervisor** 101:10  
 288:18  
**supplants** 54:7  
**supplemented** 53:21

**support** 35:1 41:9 89:6  
 96:2 114:9,14 115:4  
 207:10  
**supporting** 85:19  
**suppose** 184:15  
**supposed** 18:16 28:8  
 59:7 86:8 93:8 94:18  
 129:2 191:19 220:14  
**Supreme** 308:3  
**surprise** 174:14,16  
**surprised** 111:13  
 283:16  
**surprising** 244:17  
 264:14  
**surroundings** 278:22  
**survey** 216:12,15 217:7  
 222:18 223:13 261:18  
 281:11  
**surveyed** 249:11  
**surveying** 260:19  
**surveys** 249:1  
**suspect** 45:9 46:2 58:9  
 58:10 59:20 62:10  
 207:1,12 214:19  
 248:7  
**suspect's** 53:5  
**suspects** 62:17 63:6  
 64:2 278:13  
**suspension** 57:21  
**sustain** 71:10 72:4,18  
 75:17 76:18 103:22  
 104:15 109:5 114:9  
 115:9,13,20 116:6  
 119:2,11 161:15  
 162:7 163:19 166:8  
 253:7,10  
**sustained** 19:7 160:12  
**sustaining** 164:18  
**SVC** 24:19 171:4  
**SVC/VLC** 193:14  
**SVCs** 85:21  
**swayed** 27:7  
**swaying** 228:10  
**sweet** 304:19  
**sworn** 249:20  
**symptom** 241:9  
**system** 11:2 15:1,7  
 31:19 32:8,10 54:1  
 63:2 68:5,18 69:12  
 74:13 79:2 93:10  
 94:20 108:14 112:22  
 119:5 141:11 146:12  
 162:2 163:18,18  
 164:16,22 169:12  
 170:20 200:3,4 201:8  
 201:9,12,17,19  
 203:16,21 209:22  
 211:11,21 212:3

214:4 240:10 241:1,9  
 242:3 248:17 251:9  
 260:20 261:5 263:9  
 263:17 264:2 270:17  
 300:11 306:4,5,6  
**systems** 68:17 92:20  
 92:21 104:6 201:11  
 204:22 292:5

---

**T**


---

**T** 128:8  
**tab** 41:3,5,6 129:4,5,16  
 130:16 132:16,20  
 150:4,4 151:1  
**table** 148:11 248:11  
**tables** 34:1  
**Tagert** 2:9 55:13 64:6  
 99:5  
**tailing** 88:19  
**tailor** 48:21  
**tailored** 49:11 51:16  
**Taj** 224:1  
**take-away** 272:17  
**take-aways** 240:20  
**taken** 17:17 18:8,17,20  
 34:20 38:9 39:3,7  
 42:8 43:15 58:8,8,10  
 59:4,5 60:14 63:11  
 90:12 119:10 123:9  
 212:8 213:17  
**takes** 45:21 170:15  
 262:16  
**talk** 10:21 14:2 47:12,17  
 48:3 93:22 130:19  
 220:6 221:1,3 236:7  
 236:15 254:9,10,22  
 255:2,12,15 256:3  
 258:16 268:8 286:3  
 293:10,13 300:2  
**talked** 21:18 33:3 47:13  
 83:9 122:18 138:7  
 169:18 209:19 214:22  
 216:5 221:4,5 225:20  
 239:16 240:11 255:17  
 261:22 305:10  
**talking** 40:11 63:21  
 64:1 74:15 89:9  
 110:14 151:21 162:4  
 163:1 177:4 178:22  
 180:10,17 185:21  
 192:12 196:13 198:4  
 201:8 217:20 220:12  
 236:10,12 255:14  
 274:2 275:4  
**tangents** 267:8  
**tangible** 95:2  
**tape** 287:22  
**target** 104:8

- targeted** 175:14  
**task** 101:15 230:17  
**tasks** 131:1 152:22  
 230:4 240:13  
**team** 82:10 192:18  
 193:1  
**tedious** 41:21  
**teeth** 193:9 213:22  
 214:7,14  
**teleconference** 2:22  
 131:5  
**telephone** 5:4  
**telephonic** 143:7 307:6  
**telephonically** 194:5  
**tell** 28:2,12 159:9  
 215:20 218:15,22  
 219:5 234:2 256:14  
 287:13 296:17 303:12  
**telling** 121:18 217:1,3  
 228:15 272:22  
**tells** 12:2  
**ten** 11:22 30:7 167:9  
 170:22 171:4 196:11  
 196:15,16 197:3  
**ten-day** 262:20  
**tended** 244:20  
**tendency** 53:7 235:8  
**tendinitis** 51:12  
**term** 90:19 154:12  
 266:21 270:13 282:16  
**terms** 8:21 26:17 27:11  
 111:5 164:8 166:22  
 166:22 199:4 200:3  
 204:21 207:4 212:11  
 254:18 255:18 256:2  
**Terri** 2:9 128:16  
**terribly** 55:4  
**terrific** 145:21  
**test** 164:20 197:8  
 201:18 211:17  
**tested** 167:14  
**testified** 68:20 156:8  
 180:9  
**testifies** 96:8  
**testify** 76:11 96:16 97:1  
 155:12 180:5 216:21  
**testifying** 155:15 171:8  
**testimony** 3:11 9:7  
 15:22 50:1 53:21  
 54:12 61:13 72:14  
 73:2 89:13,13 92:9,19  
 94:6 96:13 102:15  
 149:21 150:14 151:11  
 154:5,9,12 156:2  
 158:3,7 173:3,16  
 175:5 179:19 188:17  
 189:4,12,18 191:6  
 192:2,10,15 194:11  
 202:18 204:7 205:18  
 224:12,22 225:13,13  
 230:8 232:17 233:9  
 234:17 235:2,14,18  
 237:7 240:11 245:16  
**tests** 25:14,14  
**thank** 4:9 10:17,19,20  
 29:13 33:15,17,18  
 36:8 41:12,12 57:16  
 73:13,21 81:10 130:8  
 130:9 180:13 224:8  
 277:3 293:6  
**thanks** 287:4 304:12,13  
 307:19  
**theft** 69:14  
**Theirs** 296:14  
**themes** 292:2,6  
**theoretically** 241:13  
**theories** 134:11  
**theory** 45:14 134:13,14  
 238:15  
**therapy** 68:12  
**Theresa** 2:4 293:9  
 304:12  
**things** 16:10 17:8 29:1  
 30:5 44:21 48:3 52:11  
 52:20 53:12 54:1 56:5  
 59:12 60:4 61:14  
 62:11,15 64:22 69:5  
 69:13,17 87:21 91:19  
 92:1 95:3 104:11  
 105:4,7,8 109:15  
 112:6 113:4 121:6  
 126:1,5 127:2 146:17  
 159:7 160:9,14  
 167:20 179:8 189:6  
 189:22 190:18 192:13  
 192:16 193:3 195:15  
 196:6 202:7 207:4,20  
 215:3 216:9,21 225:4  
 229:20,22 234:20  
 235:4 240:14 243:11  
 248:22 254:13,18  
 256:2,22 273:1,4  
 292:8 296:1 300:6,8  
 302:13  
**thinks** 118:19  
**third** 28:14 177:21  
**third-party** 273:8  
**thorough** 144:17 165:9  
 238:9 240:2,19  
**thoroughly** 186:15  
 245:11  
**thought** 40:9 54:17  
 66:5 67:15 72:3 74:2  
 74:17 116:10 118:3  
 123:15 145:11,21  
 158:17 219:22 222:21  
 223:17 238:12 242:12  
 244:15 248:21 253:6  
 253:9,15 255:8  
 260:16 285:19 305:4  
**thoughtful** 87:19  
**thoughts** 33:16 48:2  
 149:5 153:7 215:15  
 230:3  
**thousands** 61:22 193:8  
**threatening** 14:7  
**three** 13:18 23:7 39:21  
 39:22 40:3,8 46:9,10  
 50:8 69:4 95:7 111:7  
 114:2 137:14 140:8  
 147:22 148:2 184:1  
 192:16 193:3 202:7  
 216:6 233:14 267:15  
 268:21 269:10 278:3  
 282:22 283:5 288:11  
 288:12,13,21 295:15  
 302:20 308:4  
**three-** 17:1  
**three-day** 186:2 296:6  
**threshold** 50:21 75:22  
 91:4 201:2  
**threw** 119:12 189:13  
**throw** 101:2 203:17  
 285:18  
**tie-ins** 220:15  
**tighten** 95:6  
**time-consuming** 41:21  
 53:17  
**timely** 195:15  
**times** 60:10 120:8,16  
 264:22 284:8  
**timetable** 196:1  
**timing** 94:7  
**tinkering** 113:16 205:10  
**tinkers** 211:20  
**tion** 154:5 184:20  
 205:15  
**tip** 117:19  
**tissue** 307:3  
**title** 185:12  
**TJAG** 19:1 21:10  
**TJAG's** 19:5  
**today** 4:12 6:4 23:11  
 39:13 48:2 128:9  
 154:20,22 189:20  
 255:20 277:12 288:3  
**today's** 6:12,17 10:6  
 150:3  
**Tokash** 1:18 5:21,22  
 31:17,18 32:1 48:18  
 48:19 52:8 53:20 54:6  
 54:11,15 55:12 64:19  
 74:20,21 76:5 77:2,22  
 78:2,8,11 81:5 99:9  
 99:12 103:4,9,13  
 107:15 108:17 118:7  
 118:14 161:12 168:12  
 169:18 176:18,19  
 180:20 181:8 185:6  
 185:13,21 208:11,17  
 251:1 252:2,12  
 289:15 301:15,16  
 302:12  
**Tokash's** 163:5 180:3  
**told** 24:20 52:9,9 105:6  
 147:3 190:4 275:12  
 287:15,19  
**Tom** 17:15,17 18:1,7  
**tomorrow** 288:3  
**tons** 279:20  
**tool** 171:18,19 205:15  
 216:12,15 217:8  
 223:13 270:12 300:7  
**tools** 15:3  
**top** 55:15 102:22  
 134:18 229:8 247:12  
 250:19 259:2  
**top-down** 54:4  
**topic** 150:17 173:18  
 176:20 240:4 267:10  
 271:21  
**topics** 149:9 150:2,16  
 151:4,21 152:11  
 153:13 155:5 189:14  
 224:10 269:1 271:20  
 276:9  
**total** 37:9 134:21 135:1  
 137:5 304:21  
**totally** 174:21  
**touch** 282:7  
**tough** 16:14,15 76:20  
 182:6  
**tour** 279:6 280:6  
**track** 62:16,22 63:4  
 110:22 128:22 194:13  
 262:7  
**tracked** 260:21  
**tracking** 303:17  
**tracks** 21:18 62:9  
**trafficking** 119:6  
**trail** 268:13  
**train** 62:19  
**trained** 45:18 68:21  
 212:2 272:6,16  
**trainees** 272:14  
**training** 46:7 47:8 57:2  
 61:19,20 62:2 164:11  
 185:19 223:16 231:5  
 236:12 257:7,8,18  
 272:3,6,10,15 273:18  
 275:12 280:6 294:19  
**tranche** 69:8



**transcribed** 6:12  
 287:22  
**transcript** 6:13 189:5  
 200:12  
**transferred** 199:6  
**transparency** 82:1,17  
 85:5,10 107:11  
 117:15 126:3,11  
 238:19  
**transparent** 107:17  
**trauma** 96:17 97:4  
**travel** 270:3 291:1,2,6  
 291:16 292:1  
**treat** 40:15 75:18  
 260:10,11  
**treated** 63:2 260:1,16  
 263:11 265:11  
**treatment** 13:22 14:14  
 15:15 68:12 114:4  
**treats** 17:13  
**trends** 246:17,19  
**trends/patterns** 42:2  
**Trexler** 2:3  
**trial** 16:15,16,18 21:8  
 22:17,18,18 23:2 24:9  
 37:15 62:7 71:11 72:1  
 74:3 94:5,9 95:8 98:9  
 98:15 106:5 109:2  
 114:21 115:1,9  
 116:16 119:2,9,10,13  
 119:21 120:14 124:12  
 133:5 137:17 139:2  
 154:4 161:5 167:15  
 177:18 179:21 184:12  
 188:18 190:1 204:11  
 204:16 206:7,20  
 208:18 218:10,20  
 219:11,13 220:3,20  
 221:7,10 222:6  
 243:18 250:19 251:7  
 253:2,20 257:12  
 268:14 271:10 282:17  
 282:20 283:12 286:14  
 294:20 295:11,14  
 296:6,6 298:14  
 299:20 300:14 301:3  
 302:7,13 303:6  
**trials** 20:1,3,8,8 244:7  
**tricky** 94:19  
**tried** 24:5 145:19  
 189:22 210:15 221:3  
 225:16 234:20 240:18  
 286:18  
**trigger** 196:10,12,18  
**triggering** 196:19  
**triggers** 196:21 284:10  
**trip** 278:1,3,17 281:3  
 291:5,5,19

**trips** 277:8,10,13  
 278:16  
**trouble** 221:11 232:3,4  
 290:19  
**troublesome** 51:13  
**troubling** 102:14,19  
 105:15 232:11 252:4  
**true** 87:3 89:12,14  
 199:8 213:10 238:20  
 252:16  
**truly** 58:21  
**trust** 154:8 225:22  
 288:6  
**truthfulness** 243:2  
**try** 28:9 36:14 44:14  
 45:11 93:8 121:7  
 146:12 147:5 150:13  
 193:10 202:15 207:20  
 212:10 228:9 279:2  
 300:20  
**trying** 25:9,11 35:16,20  
 42:2,22 71:21 94:21  
 147:6 159:22 171:3  
 189:5 194:8 200:20  
 206:16 254:3 270:16  
 276:16 288:4,4  
 293:15 295:6 296:2  
**turnover** 236:5  
**turned** 227:11 272:12  
**twice** 21:16 142:1 251:1  
**two** 18:15 20:1,6 23:2  
 23:13 24:7 25:8 27:18  
 30:2,21 34:2 42:15  
 46:5,6,9 76:3 95:7  
 98:4 112:9 132:5  
 134:18,19 135:13,14  
 137:18 140:11 145:9  
 154:8 187:3 191:14  
 202:5 214:6 220:4,10  
 223:11 233:12 236:16  
 242:2 244:14 260:6  
 265:16,21 277:20,21  
 286:13,14 291:7  
 296:8,14 297:4,21  
 298:10 302:19  
**two-page** 140:20  
**two-thirds** 37:5  
**type** 29:19 41:19 102:9  
 156:12 193:17 216:22  
**types** 175:3 275:22  
**typical** 19:21  
**typically** 163:8 254:8  
 269:12 288:12

---

**U**


---

**U.S** 1:14 32:6 79:15  
 115:14 183:3

**UCMJ** 65:7 146:11  
 151:2 235:1 258:17  
**uh-hum** 77:2,2 142:15  
**ultimate** 131:15 134:7  
 169:19  
**ultimately** 75:11 80:13  
 137:17 192:10 205:9  
**unacceptable** 16:7  
**unanimous** 125:19  
**unanimously** 8:9  
**unanswered** 46:13  
**unaware** 53:8  
**unbiased** 269:22  
**unchanged** 11:9  
**uncharged** 60:19  
**unclear** 78:14,19  
**uncooperative** 263:3  
**underlying** 170:14  
 211:19 231:22 232:7  
 232:11  
**undermining** 94:17  
**understand** 26:3,5  
 28:13 37:19 56:7 79:2  
 84:7 94:11 105:10  
 124:1 152:16 155:2  
 272:20 296:4  
**understandable** 218:17  
**understanding** 52:15  
 61:4 103:5,9,13  
 107:11 153:2 154:16  
 157:17 218:5 282:9  
 302:11  
**understatement** 85:2  
**understood** 30:20  
 66:16 87:15  
**undertake** 153:1  
**undertaking** 9:1 131:2  
**undertook** 154:19  
**unexplained** 122:22  
**uniform** 8:1 35:10  
 248:10,12,19,19  
 250:3  
**uniformed** 249:19  
**uniforms** 32:22  
**unique** 17:10 69:17  
**unit** 214:9,10,13 226:3  
**United** 1:1 25:8 26:9  
 31:20 100:13 213:8,9  
 308:5,6  
**universe** 261:3  
**unnecessary** 177:22  
**unrealistic** 109:7  
**unreasonable** 84:14,18  
**unsealed** 104:10  
**unsure** 82:19 83:14  
**untailored** 49:19  
**unvarnished** 270:13,14  
**update** 3:13,14,16 9:16

131:3 142:13,19  
 143:5 145:2 148:19  
 148:20  
**updated** 34:3 296:15  
 297:3  
**updates** 9:22 129:10  
**upstream** 121:17  
 250:18  
**upstream/downstream**  
 121:12  
**urged** 151:7  
**USA** 2:2 288:3  
**USAF** 1:17  
**use** 19:6 49:20 50:11  
 56:1 66:8 121:9  
 145:20 154:11 194:7  
 201:13 219:6 234:19  
 242:16 251:2 271:16  
 300:7  
**useful** 85:21 122:22  
 125:2 154:16 164:2,9  
 240:22 241:4,14  
 295:9  
**usefulness** 99:19  
 213:13  
**useless** 174:22 208:7  
**users** 203:20 216:19  
 222:21 230:20  
**uses** 305:15  
**USMC** 1:18  
**usually** 22:21 45:9  
 103:7 167:10 192:22  
 220:9 270:2 279:16  
**utility** 157:18 202:7  
 206:2

---

**V**


---

**v** 308:5,6  
**vacation** 199:12  
**vague** 66:6  
**Valentine's** 307:4  
**validate** 216:16  
**valuable** 59:14 62:20  
 62:20 168:3 236:17  
 237:1 240:8,17  
 270:12 272:22 296:7  
 298:9 299:11,12,15  
**value** 19:11 20:20 50:15  
 54:3 55:4 56:12 76:3  
 163:10 164:15 240:12  
 241:12 259:22 268:3  
 273:19 295:3 296:11  
**variety** 127:5,6  
**various** 82:12 198:6  
 210:4 262:8 268:6,9  
 268:12  
**vast** 140:2  
**vendor** 305:14

**vendors** 306:2  
**verb** 257:17  
**verdict** 125:19  
**verdicts** 139:15  
**verification** 194:14  
**versa** 260:12  
**version** 34:3 45:10  
 160:8 269:22  
**versus** 12:22 139:14  
 246:18 258:12,13  
 265:17  
**vet** 171:16 274:10  
**vetoing** 172:18  
**vettoed** 245:12  
**vetting** 89:15 172:2  
 174:9  
**viable** 90:11  
**vice** 260:12  
**victim** 6:21 9:8,20  
 12:17 24:16 25:5,15  
 26:6 37:15,20 43:18  
 43:22 45:2,3 49:14  
 50:19,22 61:16 62:6,6  
 62:8 65:20 68:13  
 72:11,15 75:1 76:8  
 96:16 97:1 100:12  
 107:21 108:5 109:10  
 125:8 166:2,3 180:5,9  
 191:2,14 192:4 193:7  
 194:9,20,22 195:4  
 214:17,17 220:21  
 225:11 242:7,21  
 249:8 250:7,7,9  
 251:15 259:15 261:7  
 263:2,3 264:2,15,21  
 265:9 273:9 275:14  
 283:6  
**victim's** 49:13 51:6 53:4  
 71:6 77:10 107:19  
 178:9 188:5,16  
 192:20 193:10 194:16  
 225:7 226:10 229:16  
 239:16 262:1 275:8  
**victims** 11:5 19:21 20:5  
 24:17 42:7 56:13 63:5  
 65:20 74:22 75:3,7,18  
 76:10 89:14 109:6  
 119:7 150:1 155:12  
 186:18 245:7 250:2  
 259:17,22 260:19  
 261:2,3 262:3,7,17  
 263:20 265:10 278:13  
**victims'** 21:8 25:16  
 68:18 149:13 242:17  
 248:6 263:20 264:5  
 268:14 272:2  
**view** 1:10 75:21 188:5  
 221:10 222:20 238:6

248:6 261:8 295:2  
 299:9 303:13  
**viewed** 162:3 164:19  
**views** 66:4  
**violations** 242:8  
**violence** 248:2,5 249:6  
 265:2  
**violent** 12:8 13:21  
 14:13 32:15 33:12  
**Virginia** 1:11  
**virtually** 11:9 239:9  
**visibility** 226:2  
**visible** 82:18  
**visit** 3:14 10:1 148:19  
 199:11 220:8 265:22  
 266:5,21 267:1  
 280:15 281:19 282:1  
**visitors** 298:6  
**visits** 39:18 127:3  
 131:18 153:11,17,21  
 200:22 205:3 207:21  
 220:17 227:6 230:9  
 239:4 267:10,14,22  
 268:4,18,20 269:11  
 271:2 274:17 277:5  
 279:4 281:12,12  
 282:2 285:16 288:11  
 292:4 294:22 296:1

**visual** 286:16  
**VLC** 264:16  
**VLCs** 85:21  
**vocal** 255:6  
**voice** 77:22  
**voir** 258:15  
**volunteered** 8:18  
**volunteering** 277:6  
 295:22  
**vote** 3:5 7:2 75:12  
 256:14  
**VWAP** 283:6

## W

**W** 1:16  
**wait** 128:1  
**waiting** 59:22 197:7  
**waive** 157:21 208:14  
**waived** 155:10 156:19  
 157:11,19 208:9  
**walk** 98:15 276:14  
**walked** 12:1 14:11  
**walking** 290:15  
**Walton** 1:19 6:1,2 29:14  
 45:17 48:3 64:18  
 175:16 176:1 183:8  
 206:4,10  
**wanted** 72:15 98:2  
 108:6 143:4 145:2  
 146:3 149:16 158:12

190:16 192:14 193:5  
 199:19 244:5 249:2  
 251:15 261:6,11  
 262:11 275:1 304:20  
**wanting** 71:22  
**wants** 39:13 91:7  
 112:22 171:15 267:16  
 278:4 285:9,14 287:7  
**warmed** 77:22  
**warmer** 303:21  
**warming** 17:20  
**warped** 97:14  
**warrant** 102:7,9 176:3  
**warrants** 101:3,3  
**warts** 185:10  
**wash** 32:22  
**Washington** 11:10  
**wasn't** 45:12 74:17 90:8  
 126:3 210:18 225:14  
 239:15,21 244:16,17  
 250:7 279:4 286:21  
**waste** 182:15 215:22  
 269:8  
**wasted** 214:10  
**wasting** 293:11  
**watched** 28:5 302:13  
**watching** 249:18  
**way** 13:21 15:12 17:12  
 54:18 63:4 68:2 76:15  
 91:22 92:10 94:7,9  
 117:1 124:17 128:10  
 130:14 131:6 134:17  
 145:10,13,14 147:4  
 151:17 166:12 171:20  
 172:17,19 174:15  
 182:14 194:9 195:15  
 203:4 206:13 207:5  
 212:3,14 213:17  
 218:2 220:7 228:10  
 232:10 239:4 244:22  
 247:17,21 248:16  
 254:1,9,11 257:12  
 265:11,12 284:20,21  
 287:3 291:6,9  
**ways** 46:5 165:1 182:2  
 182:3 202:5 227:10  
 230:12  
**wayside** 215:6  
**weak** 16:20 110:9,15  
 117:13 168:8,14,14  
 245:3 252:22  
**weakness** 11:2  
**weaknesses** 117:21  
 188:21  
**wealth** 293:21  
**weapon** 14:16 62:14  
**weather** 255:3  
**weave** 276:12

**website** 6:14 31:3  
**weeded** 16:19  
**weeds** 252:22  
**week** 34:4 80:12 94:5  
 95:7 296:5,14 297:2,8  
 297:11 305:15  
**weekends** 146:18  
**weeks** 34:3 95:7,7  
**weigh** 226:6  
**weighed** 173:15  
**weighed-in** 139:2,3  
**weighing** 73:11  
**weighing-in** 64:10  
**weight** 71:7,13 72:19  
 73:12 74:14 87:1  
 89:13 90:16,20 151:9  
 193:22 225:2 228:16  
 228:21  
**weighted** 72:12  
**weighting** 72:10  
**Weir** 2:2 10:10 127:16  
 127:19 142:16,18,21  
 143:4 146:22 176:2  
 180:3 194:2 221:18  
 222:2 261:21 263:19  
 265:7 266:2 280:9  
 281:5,8,11 285:19,21  
 286:7 293:9 299:13  
 300:1 302:8,16  
 304:12,16,18 306:18  
 306:21 307:5,15,17  
**welcome** 3:2 4:11  
 130:12 146:21 147:19  
 267:19  
**well-** 140:13  
**well-behaved** 56:18  
**well-developed** 45:20  
 141:3,13  
**well-positioned** 174:1  
**well-serving** 160:16  
**Wells** 37:7 216:13  
**went** 30:8 62:3 67:5  
 72:16 87:10 106:5  
 110:5,12 130:21  
 137:17 144:14 147:12  
 147:14,16 148:9,22  
 154:19 188:13,14  
 191:6 198:9 233:13  
 308:15  
**weren't** 109:19 126:5  
**whatnot** 108:20 195:5  
**whatsoever** 140:22  
**when/if** 125:14  
**who've** 226:15 277:9  
**wide** 13:10 15:2 28:21  
**wider** 259:10  
**wife** 14:5  
**willing** 217:10 221:16

236:15  
**willingness** 188:9,10  
**win** 76:16 226:7  
**wind** 287:1,5  
**windshield** 279:6  
**winner** 116:22 119:19  
**wire** 101:2  
**wish** 84:13 107:22  
 219:3 231:12,13,17  
**wished** 8:12  
**witness** 94:13 158:12  
 167:19 171:8,9  
**witnesses** 43:12 94:6  
 96:11 117:8 155:15  
 164:14 165:21 166:5  
 186:19 190:11  
**witnesses'** 242:17  
**woke** 147:22 148:3  
**won** 17:18 18:7  
**wonder** 187:8 212:15  
**wonderful** 86:10 87:13  
 143:3 298:17  
**wondering** 73:16 121:1  
**word** 184:18 251:2,3  
 267:18 277:18 297:9  
**words** 271:16  
**work** 32:20 52:22 62:1  
 81:16 93:3 124:10  
 130:4,9 131:10  
 144:13,16 193:4  
 207:15,17 208:4  
 214:10 215:9 216:22  
 219:19,21 220:18  
 270:16 276:11 301:3  
 305:21 306:6 307:20  
**worked** 56:17 143:6  
 145:13 219:18 289:12  
**working** 3:7,9 7:7,10,12  
 8:10,16,19,20,22 9:4  
 18:14 36:11,14,22  
 40:6,13,20 41:17,22  
 42:14 48:9 64:15  
 66:11 67:17 74:19  
 77:5,14 81:13 82:4,4  
 87:2 92:14,22,22 93:4  
 95:18 96:13 106:3  
 109:9 113:17,21  
 116:13 117:9 119:21  
 121:5,18 123:16  
 124:5 126:15,18,22  
 127:21 128:9,12  
 129:10,18 130:8  
 131:1,4,9,15 146:17  
 152:3 153:1,4 155:1  
 165:6 177:3 186:20  
 205:8 215:16 229:18  
 251:11 262:2,22  
 272:4 275:5 280:10

298:19 300:22 305:11  
 306:19,21  
**works** 181:14 182:2  
 199:4 272:11 301:11  
**world** 33:10 53:13 60:6  
 60:18 61:3 80:7 85:16  
 90:17 91:14 96:7  
 124:5 167:5 200:16  
 236:22 243:9,17,18  
 245:20 248:13 264:20  
**worried** 168:18  
**worry** 63:22 209:16  
**worse** 254:3  
**worth** 12:19 48:6 67:16  
 113:16 223:18 236:19  
 277:19 297:18  
**worthy** 175:4  
**wouldn't** 18:7 33:4 55:5  
 169:17 176:11 222:16  
 223:22  
**wow** 248:18  
**wrap** 52:2 191:20  
 304:16  
**wrap-up** 3:18 148:20  
**wrapped** 51:3 307:3  
**wrestling** 11:1  
**write** 105:5 216:13  
 221:21 239:13  
**writing** 102:1 105:7,8  
 108:2 109:12 124:6,9  
 125:13 126:7 150:20  
 173:12,13 192:22  
 193:21 217:15 235:15  
 235:16 240:20  
**written** 6:13 9:6 10:12  
 11:14 14:1 16:5 43:7  
 45:4 47:11 67:9 74:10  
 79:9 108:18,22 118:2  
 122:10,15 125:3  
 143:13 149:2,19  
 150:11,15 151:3,11  
 176:22 191:11,15,18  
 192:17 216:11 239:1  
 303:7  
**wrong** 12:3 16:3 103:5  
 217:6 250:20,22  
 251:9  
**wrongfully** 213:17  
**wrote** 67:3,8 145:12  
 146:5

---

**X**

---

**X** 197:6 248:1 249:16  
 251:16 259:5

---

**Y**

---

**year** 6:7 7:15 11:18  
 14:8 17:5 18:16 19:12

23:17,18 24:7 31:5  
 32:13 34:11 35:3 69:1  
 77:7 99:21,22,22  
 100:4 103:1 105:19  
 131:18 134:18,19  
 141:8 142:6 178:13  
 210:17 227:8,8 306:1  
**years** 3:6 7:4 13:8,18  
 17:9 18:16 20:6,12  
 22:1 23:2,7,13 24:7  
 24:10,11 25:8 30:3,9  
 31:14 50:9 55:1,3  
 56:21 62:16 68:1  
 133:9 140:11 146:11  
 187:3 214:6 233:12  
 246:7 269:11 288:11  
**yesterday** 50:4 106:3  
 147:4  
**York** 96:21  
**young** 221:7

---

**Z**

---

**zero** 162:21 233:6

---

**0**

---

**1**

---

**10** 13:16 20:3,9 24:11  
 27:16 30:11 139:5  
 185:12 283:7  
**100** 22:12 34:6 174:21  
 253:11 286:5  
**108** 17:5  
**11** 3:3,11 137:17 139:13  
 148:17 177:1  
**11:20** 127:14  
**11:42** 148:22  
**11:45** 127:13  
**12** 6:3 69:1 140:7 283:7  
**12:45** 148:16  
**12:47** 149:1  
**120** 12:11 269:19 270:1  
 295:12  
**128** 3:9  
**132** 3:10  
**13th** 144:5 306:16,18  
**14** 16:3  
**142** 3:13  
**14th** 306:11,15,22  
 307:13  
**15** 1:8 127:20  
**15-year** 24:13  
**15th** 307:11,14,15  
**16** 28:1 135:6 138:5  
 143:9 162:13  
**16-hour** 278:4  
**17** 105:19  
**17th** 305:2

**18** 105:19 137:5,16  
 139:7  
**180** 58:9 109:12  
**180-** 66:6  
**19** 8:8 35:3  
**1969** 23:10 210:5  
**1st** 143:14,19

---

**2**

---

**2** 48:17,19 70:21 130:20  
 160:9 168:3 173:18  
 176:20 230:2  
**2,000** 7:13 32:13 37:10  
**2.1** 227:16,19 228:2  
**20** 20:8,11 99:22 100:1  
 103:2 157:20 162:13  
 162:20 178:13 208:9  
 243:17 247:13 248:12  
 248:15 250:19 252:8  
 258:22 262:13 266:7  
**2002** 17:21  
**2003** 17:20  
**2006** 21:6  
**2015** 3:6 6:7 7:4 17:2  
 28:1  
**2016** 6:6 23:14 157:13  
**2017** 7:15 38:5 86:5  
 99:22 100:4 103:1  
 133:10 134:19 135:9  
 135:15 139:12 157:13  
**2018** 3:6 7:5 8:8 17:5  
 34:11 99:21,22 103:2  
 133:10 134:18 135:6  
 135:14 136:13 137:4  
 178:13  
**2019** 1:8 3:11 7:8 8:6,11  
 8:14 9:19 11:8 49:21  
 80:19 83:3 141:10  
 142:5 143:9,15,16,20  
 156:11 158:22 159:9  
 191:12 224:15 226:16  
 227:5 305:2  
**2020** 3:14 7:18 9:5,13  
 9:22 38:1 39:18 144:5  
 145:1 153:11 159:10  
 293:17 306:11 307:12  
**2021** 132:1  
**21** 157:9  
**21st** 307:11,15  
**22** 135:9 157:10  
**23** 3:11 17:9 19:12  
**23rd** 7:8 8:11 150:11  
**25** 20:8 127:9  
**255** 17:3  
**26** 14:17 33:5  
**266** 3:14  
**27.220** 103:17  
**28** 31:14

**293** 3:16  
**2nd** 143:16

---

**3**

---

**3** 57:15,15,17 78:1,2,9  
 131:3 189:14  
**3:00** 147:14  
**3:30** 10:16 308:15  
**30** 12:16 16:2 20:12  
 30:9 65:6 262:3  
**300** 1:11 32:19  
**304** 3:18  
**30th** 307:8  
**314** 180:8  
**32's** 162:14  
**321** 37:9  
**32s** 92:3 134:22 156:18  
 157:14 177:12 180:8  
 188:3 199:19 208:7  
**33** 3:5 8:1,15 11:20  
 40:12 71:11 77:4,15  
 77:19 149:10 151:2  
 224:12,21 227:14  
 233:20 272:1  
**33's** 230:5  
**33/34** 252:19  
**34** 8:1 40:12 65:12 74:5  
 111:3,6 114:18 115:5  
 122:7,19 123:2,11,14  
 123:19 125:1,9,16  
 139:7 149:11 151:2  
 159:20 182:13 229:6  
 229:7 238:3 239:8,9  
 239:10,11,12,15,17  
 272:1  
**34-related** 8:15  
**36** 3:7

---

**4**

---

**4** 3:2 41:3,6,6 81:8,17  
 131:14 189:15  
**40** 20:12 105:19,22  
 187:7,9,14 210:15  
 253:8,14  
**45** 285:13  
**45-** 197:9  
**48** 196:14

---

**5**

---

**5** 63:21 85:15,17 129:5  
 129:16 130:16 132:16  
 132:20  
**5:00** 148:4 285:4  
**50** 253:8,14  
**500** 20:12  
**52** 137:5 139:7  
**570-E** 194:2

---

**6**

---

**6** 88:18,21 99:1,5  
 134:17 150:4,4 151:1  
**60** 35:18 64:1 146:11  
 187:4,9  
**60-day** 197:9  
**60s** 63:19  
**6th** 307:12,16

---

**7**

---

**7** 99:4,5,7,11,13 113:19  
 135:10,12 240:4,4  
**70** 63:20 64:1 139:11  
 157:8  
**70s** 210:8  
**72** 196:15  
**75** 262:16 280:11

---

**8**

---

**8** 136:21 283:7  
**8:30** 285:3  
**80** 16:6,11 138:1 243:12  
 259:2  
**80s** 13:5 92:1,3  
**82** 139:11  
**832** 169:7

---

**9**

---

**9** 70:19 122:3,4,7 127:1  
 138:6  
**9-27.200** 100:18  
**9-27.220** 118:16  
**9:00** 1:11  
**9:04** 4:2  
**90** 243:12 283:12  
**95** 16:17  
**98** 265:17  
**99/100** 253:12

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In the matter of: Public Meeting

Before: DAC IPAD

Date: 11-15-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

*Neal R Gross*

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Court Reporter

**NEAL R. GROSS**

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