

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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WEDNESDAY
FEBRUARY 22, 2023

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The Advisory Committee met in Salon 4
in the Renaissance Arlington Capital View, 2800
South Potomac Avenue, Arlington, Virginia, at
8:55 a.m. EST, Hon. Karla N. Smith, Chair,
presiding.

PRESENT

Hon. Karla N. Smith, Chair
MG(R) Marcia Anderson
Ms. Martha Bashford
Mr. William E. Cassara
Ms. Meg Garvin
Hon. Suzanne Goldberg
Hon. Paul Grimm*
Ms. Jennifer Gentile Long*
Ms. Jenifer Markowitz
Hon. Jennifer O'Connor*
BGen(R) James Schwenk
Ms. Meghan Tokash

*Participating virtually

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Officer

DAC-IPAD STAFF

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

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Kate Tagert, Staff Attorney

Ms. Eleanor Magers Vuono, Staff Attorney

Ms. Theresa Gallagher, Staff Attorney

Ms. Meghan Peters, Staff Attorney

Ms. Terri Saunders, Staff Attorney

CONTENTS

Welcome and Overview of the Day. 4

Military Sentencing Update 5

Former Military Judges39

Policy SC Update and Annual Report Input 144

Case Review SC Update and Annual
Report Input 164

5th Annual Report Deliberations. 185

Meeting Wrap-Up/Preview of Next Meeting. . . . 194

Public Meeting Adjourned

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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P-R-O-C-E-E-D-I-N-G-S

8:56 a.m.

MR. SULLIVAN: Good morning and welcome to day two of the meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, ever known as the DAC-IPAD.

I am Dwight Sullivan. I'm the DAC-IPAD Designated Federal Officer.

Judge Smith, you have the floor.

CHAIR SMITH: Good morning, everyone. Good morning.

Colonel Bovarnick?

COL BOVARNICK: Yes, we're going to just jump right into it and hand it off to Ms. Kate Tagert, who will introduce our first speaker today.

MS. TAGERT: Good morning, Chair Smith and Committee Members.

I have the pleasure of introducing Colonel Tyesha Smith, currently serving as the Chief Trial Judge of the United States Army.

1 Chief Judge Smith has spent the majority of her
2 career in military law and is an expert in
3 military law.

4 She also serves as the Chair of the
5 Military Sentencing Parameters and Criteria
6 Board, which is a congressionally-mandated board
7 that is currently looking at sentencing criteria
8 and parameters for the United States military.

9 Colonel Smith's biography can be found
10 in tab 6 in your public meeting read-ahead. So,
11 all the information is there.

12 Judge Smith will provide you an update
13 of the current state of military sentencing and
14 answer any questions that you may have.

15 And, Colonel Smith, at this time, we
16 would turn it over to you.

17 COL SMITH: Thank you, Kate.

18 Good morning, Members. It's so good
19 to be here with you all today.

20 The Military Sentencing Parameters and
21 Criteria Board -- that's a mouthful. We need to
22 come up with a good acronym, don't we?

1 But before I talk about the Board and
2 our mission, and what we've been doing to
3 accomplish that mission, I thought that I would
4 first talk about sentencing reform, where it used
5 to be, where we are now, and where we're headed.

6 So, of course, we all know that the
7 Military Justice Act of 2016 created sweeping
8 changes to military justice, and sentencing was
9 also impacted. So, prior to the Military Justice
10 Act of 2016, the accused had really very limited
11 options. If the accused was tried by members,
12 then they also had to be sentenced by members.

13 So, many years ago -- and I won't tell
14 you the year -- I was a Captain Action Officer at
15 the Defense Appellate Division. And there was an
16 appellant who at trial was charged with larceny
17 as well as wrongful use of a controlled
18 substance, marijuana. The fact at trial, when
19 she learned that she was accused of stealing from
20 the PX, it stressed her out. So, she smoked
21 marijuana that evening. So, when she went to
22 trial, she actually pled guilty to wrongful use

1 of marijuana, but she contested the larceny
2 charge and she elected to be tried by members.

3 And at that time, because she elected
4 to be tried by members, then she also had to be
5 sentenced by members. And so, the story is that
6 she was found guilty of the larceny -- I'm sorry
7 -- she was acquitted of the larceny, but, of
8 course, she pled guilty to the wrongful use of
9 marijuana.

10 So, you can imagine the members'
11 surprise when they thought that they had
12 completed their service, when they learned that
13 they then had to sentence this accused for some
14 offense that they hadn't heard about all
15 throughout the trial. And so, that panel
16 sentenced that accused or that appellant --
17 because I was the Action Officer on appeal -- but
18 they sentenced that accused, who has 16 years in
19 the military, to a bad conduct discharge for one
20 specification, wrongful use of marijuana.

21 But, then, we had the Military Justice
22 Act of 2016, which gave the accused or gives the

1 accused options now.

2 And if I could have the next slide,
3 please?

4 So now, the accused has options. So,
5 if there are findings of guilt, then the accused
6 can actually elect to be sentenced by the members
7 or they could be sentenced by a military judge
8 alone. In the absence of a plea agreement, then
9 the members and a judge alone have great
10 discretion. Really, their punishment can range
11 from no punishment or the mandatory minimum
12 amount of punishment to the maximum amount of
13 available punishment.

14 And if the accused elects members,
15 then the members will impose a sentence for all
16 of the offenses which will run concurrently, but
17 it's a little bit different when it comes to
18 sentencing by a military judge alone, because
19 they, a military judge, uses segmented
20 sentencing. And so, the judge would impose a
21 segmented sentence that would impose a sentence
22 to confinement or fines for each offense the

1 accused was found guilty of.

2 And what that sounds like, I'll give
3 an example:

4 "Specialist John Smith, this court
5 martial sentences you to be reduced to the grade
6 of E-1, to forfeit all pay allowances, to be
7 confined as follows:

8 "For Specification One of the charge,
9 to be confined for six months.

10 "For Specification Two of the charge,
11 to be confined for 18 months.

12 "All sentences to confinement will be
13 served concurrently, and you also be discharged
14 from the service with a bad conduct discharge."

15 So, that just gives you an idea of
16 what a segmented sentence sounds like. And the
17 segmented sentencing applies to the confinement
18 or fines. And in my experience, fines are really
19 rarely imposed.

20 And how do we get to segmented
21 sentencing? Well, it really was a recommendation
22 by the Military Justice Review Group. And they

1 believed that segmented sentencing was necessary
2 for three reasons:

3 First, it would increase transparency
4 in military sentencing by allowing the public to
5 know the specific punishments for each offense.

6 Second, they thought that it would be
7 helpful for the victim to be able to identify the
8 sentence with their associated injury.

9 And lastly, the Military Justice
10 Review Group believed that segmented sentencing
11 would provide the practitioners, as well as
12 policymakers, with more accurate information
13 about punishments in courts martial, particularly
14 in the development and refinement of sentencing
15 parameters and criteria.

16 And that's where we step in. That
17 leads me to the future. The Fiscal Year 2022
18 National Defense Authorization Act provides for
19 sentencing by a military judge alone only. It
20 continues to require judges to improve segmented
21 sentences to confinement and fines for each
22 offense, but, for the first time in the history

1 of the Uniform Code of Military Justice, the Act
2 requires judges to impose confinement in
3 accordance with sentencing parameters and
4 criteria, or in the civilian sector, known as
5 Sentencing Guidelines.

6 The Board is composed of nine members.
7 We have five voting members and four non-voting
8 members. Of course, I am the Army's
9 representative. But all the Services are
10 represented.

11 So, I actually have a couple of
12 members here with me today. Captain Stephen
13 Reyes is the Vice Chair of the Sentencing
14 Parameters and Criteria Board. Colonel Chuck
15 Wiedie is the Air Force Chief Trial Judge.
16 Captain Tedd Fowles is the Coast Guard Chief
17 Trial Judge, and then, Colonel John Stephens is
18 the Marine Trial Judge.

19 And we have our four non-voting
20 members. We have Lieutenant Promotable Josh
21 Bearden, who represents the National Guard; Mr.
22 Dwight Sullivan from OGC, and Colonel Matt King

1 is our member from Joint Staff, and then, Mr.
2 Dave Anderson is our representative from the
3 Court of Appeals for the Armed Forces. So, we
4 have folks that are steeped in military justice.

5 The Sentencing Parameters and Criteria
6 Board -- but I think I'm just going to call it
7 "the Board" -- has been diligently working on
8 proposed sentencing guidelines in accordance with
9 the National Defense Authorization Act for 2022.

10 The Act requires the Board to
11 establish a sentencing range or parameters for
12 all of the offenses, except those offenses that
13 are unsuitable for characterization and have no
14 civilian criminal offense counterpart. Those are
15 our criteria offenses.

16 So, we have two offenses. We have
17 parameter offenses, and then, we have criteria
18 offenses. The parameter offenses are somewhat
19 similar to the civilian sector. The criteria
20 offenses are those really military-specific
21 offenses like wartime or battlefield crimes.

22 The Board found that the previous work

1 done by our predecessors -- there was a
2 Sentencing Interim Working Group, or the SIG;
3 they had a better acronym -- they did a lot of
4 work towards this project, but we found their
5 work to be helpful and we also found the
6 voluntary sentencing guidelines developed by the
7 District of Columbia, with its very simple
8 structure and broad ranges that allowed for
9 individualized consideration, to be very useful
10 in developing our framework. The Board also
11 considered the limited sentencing data collected
12 by the Defense Legal Services Agency.

13 And so, with much discussion and
14 consideration, the Board unanimously agreed upon
15 the categories for the confinement ranges. We,
16 then, went through each and every offense under
17 the Uniform Code of Military Justice and
18 delineated the offense as either a parameter
19 offense with a confinement category or a criteria
20 offense with specific factors for the military
21 judge to consider.

22 The Act requires the Board to consult

1 authorities on, and individual and institutional
2 representatives of, various aspects of the
3 military justice system. So, back in December,
4 the Board sent a draft of the proposed guidelines
5 to all of the military justice stakeholders. So,
6 that was all the Services' respective OSTCs,
7 Trial Defense Services, Special Victim Counsel,
8 Criminal Law Headquarters, our Court of Appeals,
9 our Courts of Criminal Appeal, and military
10 judges, as well as the Joint Service Committee,
11 for their review and comments.

12 Then, based on their feedback, we
13 again discussed all the offenses under the
14 Uniform Code of Military Justice and refined our
15 proposals based on their feedback.

16 Then, on January the 20th, we
17 submitted our proposed parameters and criteria
18 for presidential approval.

19 And with that, I'm happy to entertain
20 questions you may have.

21 MEMBER SCHWENK: We've heard that the
22 general practice today is that military judges do

1 not explain their sentences once they announce
2 the sentence. Is that going to change? Or, one,
3 is that true? And two, if it's true, will
4 military judges be like civilian judges and start
5 explaining why they gave what they gave? Or, is
6 it just going to continue like it has been?

7 COL SMITH: So, the Act allows the
8 military judge to depart from the parameters, but
9 only with a written explanation on the record.
10 So, to an extent, the judges, if they want to
11 depart, will have to provide an explanation on
12 the record.

13 There's an interesting Law Review
14 article written by my predecessor, the Chief
15 Trial Judge of the Army at the time, Colonel Tim
16 Hayes, who has an article exactly on that. And
17 there was some hesitation by judges just with the
18 parameters, what they could actually say.

19 But, as part of our work, the only
20 explanation regarding their sentence really
21 pertains to departures.

22 CHAIR SMITH: You may have said this,

1 but when does the judge alone sentencing begin,
2 and when do the parameters and criteria come into
3 effect?

4 COL SMITH: So, the Act provides that
5 it takes effect two years after the enactment of
6 the National Defense Authorization Act of 2022.
7 And so, that military judge sentencing alone will
8 be for all offenses after December 27th of 2023.
9 So, that's why we have been diligently working
10 for all offenses after December 27th.

11 CHAIR SMITH: And will the Board
12 continue to look at the effects of sentencing?
13 You know, if a particular parameter seems to be
14 too excessive or not excessive enough, will that
15 be considered or are there any plans to follow
16 it?

17 COL SMITH: Yes. And so, the Board is
18 a standing board. So, our work is not done. The
19 Act actually provides that the Board shall
20 regularly submit to the President, through the
21 Secretary of Defense, proposed amendments to the
22 sentencing parameters and sentencing criteria.

1 And so, the Board is a standing board that will
2 continue to meet even after our proposed
3 guidelines are approved.

4 MEMBER GARVIN: I have a followup
5 question on that.

6 COL SMITH: Sure.

7 MEMBER GARVIN: For that regular
8 meeting to look at it, are you modeling after the
9 Federal Sentencing Commission, because that takes
10 regular hearings, or how are you like thinking
11 about looking at continuing to monitor impact?

12 COL SMITH: And so, for the members of
13 the Board it's somewhat of a collateral duty.
14 And so, we have generally been meeting just about
15 every two weeks to discuss the parameters and
16 criteria, particularly given that their effective
17 date is after December 27th of 2023. And so, we
18 have certainly prioritized this endeavor. But
19 it's really left to the discretion of the Board
20 members. But we generally meet about every two
21 weeks or have been meeting about every two weeks.

22 MEMBER SCHWENK: What about engaging

1 the public in the review, in the continuing
2 review? As you know, the Joint Service Committee
3 for decades were opaque to the public and didn't
4 do anything, and they finally were browbeaten
5 into publishing in The Federal Register, having a
6 public hearing or meeting for the public to come
7 forward.

8 And are you all considering doing the
9 same thing, publishing a notice, you know, "We're
10 doing our review. If anybody has comments, send
11 them in here. And we'll have a meeting at the
12 Court of Appeals of the Armed Forces," which
13 seems to be the favorite spot to do them, you
14 know, "on such-and-such a date. Come forth and
15 let us know what you think."?

16 COL SMITH: And so, that is not
17 something that the Board has currently
18 considered. Perhaps it might be a point of
19 discussion for some of our future meetings. But
20 the Act does require us to specifically consult
21 with the military justice stakeholders, but it
22 doesn't necessarily require the public's access

1 at this point.

2 MEMBER SCHWENK: That's only because
3 Congress is myopic at times.

4 (Laughter.)

5 But, you know, I would suggest you
6 consider doing that.

7 COL SMITH: Yes.

8 MEMBER SCHWENK: I mean, the Joint
9 Service Committee learned their lesson, and prior
10 to Dwight being there, I might say.

11 But it seems to me that's something
12 worth considering.

13 MEMBER GARVIN: And I would echo that.
14 That's part of what was the impetus for my
15 question. The Federal Sentencing Commission
16 finally stood up advisory groups for their
17 ongoing work, which is part of what led to
18 identifying some of the disparate impact of
19 sentencing.

20 And so, encouraging, as you continue
21 the work after the date, right -- getting to the
22 date is critical, but after that, as you're

1 continuing to look at it, setting up
2 opportunities for input has helped. It hasn't
3 fixed, but it helped on some of the Federal
4 Sentencing Guidelines.

5 COL SMITH: Thank you.

6 CHAIR SMITH: I was going to ask
7 whether there was any plan to look at the
8 disparate, if there is any disparate impact with
9 respect to sentencing -- gender, race, et cetera
10 -- since you are a committee that's going to
11 continue functioning.

12 COL SMITH: Yes, and certainly, one of
13 the other things that we're working on is really
14 the collection of data and how we can collect any
15 disparities in race, ethnicity, or any other
16 disparities, based on demographic data. And that
17 is something that we are open to and we welcome.
18 Of course, all the members are aware of the GAO's
19 report regarding some of the disparities in the
20 prosecution of minorities. Currently, we are
21 unaware of any disparities in sentencing, but
22 that is something that we are definitely very

1 concerned about and will pay close attention to.

2 MEMBER CASSARA: Good morning, Colonel
3 Lowery.

4 COL SMITH: Hi. Good morning.

5 MEMBER CASSARA: We're both smiling
6 because we've known each other for more than a
7 year.

8 (Laughter.)

9 COL SMITH: Way back.

10 MEMBER CASSARA: In terms of the
11 effective date, will it be by date of offense or
12 by date of preferral? Do we know that yet?

13 COL SMITH: We do. It's the date of
14 the offense.

15 MEMBER CASSARA: Okay.

16 COL SMITH: So, it will probably take
17 some time before we actually see offenses, where
18 all the offenses occur after December 27th of
19 2023.

20 MEMBER CASSARA: So, it will be like
21 the old world where if half the offenses occurred
22 prior to and half after, it's the latter of those

1 offenses, correct?

2 COL SMITH: It would be all of the
3 offenses that would happen, yes.

4 MEMBER CASSARA: Oh, right, right.

5 And my second question is, as we're
6 looking at formulating parameters, guidelines,
7 whatever, for the military judge, I'm just kind
8 of curious how that works. I mean, you know, you
9 look at an offense and you say, well, robbery,
10 there's a direct correlative offense under state
11 code or under the federal rules. I mean, how do
12 we say, you know, the 10-year guideline, 15-year,
13 flip a coin, 20-year? You know, I really just
14 don't know. So, I'm curious as to how you all do
15 that -- without giving any of the predecisional
16 information that will cause Dwight to come over
17 and protest that we can't do that.

18 (Laughter.)

19 COL SMITH: Yes. And so, we were very
20 deliberate in our consideration of the parameters
21 and criteria. And so, to the greatest extent
22 that we could, we relied on the limited data that

1 we had available from the Defense Legal Services
2 Agency. And so, I don't know if you all have
3 the data that they've collected, but they broke
4 it out according to the Services. And they tried
5 to find the offenses and gave the median for that
6 particular offense. And to the greatest extent
7 possible, we used that to inform our decisions
8 concerning the parameters.

9 MEMBER TOKASH: Meghan Tokash, for the
10 record.

11 Will there be more lead time between
12 the sentencing phase and the guilt phase going
13 forward? Or will that be something that will
14 remain the same? Or is that something you're all
15 considering?

16 COL SMITH: Yes. And so, right now,
17 that is something that will remain the same. If
18 you're speaking about if there are findings of
19 guilt, do you go directly into sentencing, that
20 is right. And so, it will continue. That will
21 continue to be the process.

22 MEMBER TOKASH: My other question is

1 about the parameter sentencing versus criteria
2 sentencing. Can you say how you arrived at using
3 specific factors for the judge to consider for
4 only military-specific offenses? And you
5 probably can't say what those factors are at this
6 point, but if you can, that would be great. If
7 not, why are there no specific factors for the
8 judge to consider for parameter sentencing?

9 COL SMITH: Yes. And so, for the
10 criteria offenses, we relied heavily on Rules for
11 Courts Martial 1004(c) that discusses some of the
12 aggravating offenses for capital cases. But we
13 found that some of those same aggravators could
14 also be used for distinguishing -- or factors for
15 military judges to use in fashioning sentence for
16 the criteria offenses. So, we greatly considered
17 Rules for Courts Martial 1004.

18 MEMBER GARVIN: A question about --
19 and first, I want to go back. The first time I
20 spoke, I should have apologized to you for
21 stepping in late and missing your introduction.
22 So, I want to acknowledge that and I apologize.

1 And the question I have is, if a judge
2 decides to depart from the guidelines, that
3 discretionary departure, did you provide any
4 guidance on like what they should be considering
5 to depart? Are there factors that they're
6 supposed to be considering, any guidance around
7 when to exercise departure discretion? Did you
8 include that?

9 COL SMITH: There will be. That's
10 actually what we're working on now.

11 MEMBER GARVIN: Great.

12 COL SMITH: So, our 50-meter charge,
13 it was, you know, to get our proposed parameters
14 and criteria to the President for his approval.
15 And now, we're working on providing military
16 judges with guidance on upward and downward
17 departures.

18 MEMBER GARVIN: Thank you.

19 MEMBER SCHWENK: Recognizing that
20 legislative history is an art that has long since
21 dwindled, especially on NDAA -- so, therefore,
22 you may not know the answer -- but do you know

1 why Congress wanted parameters on non-military
2 offenses and criteria, rather than having
3 parameters on all offenses?

4 COL SMITH: Probably some speculation
5 on my part. But I believe that they were
6 considering, really, the civilian sector, and
7 really, to a certain extent, wanted us to be
8 modeled after the civilian sector. And so, of
9 course, the military is especially a unique
10 society with special offenses. And so, I think
11 that they just thought that that should be more
12 discretionary. Pure speculation on my part,
13 though.

14 CHAIR SMITH: So, my understanding is
15 that in the military you go straight from the
16 finding into sentencing. So, there's no
17 opportunity to prepare allocution on behalf of an
18 accused as to why he or she shouldn't receive a
19 particular sentence.

20 Is that something that your committee
21 is looking at or is that not something that's
22 being considered in terms of, you know, in more -

1 - well, really, for any offense -- but
2 particularly for the more serious offenses,
3 giving counsel an opportunity to prepare a
4 sentencing memorandum or, you know, whatever the
5 case may be, whatever they want to do to allocute
6 on behalf of their client? And the same thing
7 for the government.

8 COL SMITH: And so, I would say -- and
9 perhaps because we've been doing it this way for
10 so long -- that, generally, counsel and the
11 accused are prepared. I've had wonderful
12 experience in the JAG Corps. And so, I've been a
13 defense counsel, as well as a senior defense
14 counsel. And we just know, going into it, that
15 we need to prepare. You know, we are preparing
16 for the best possible outcome, but we know that
17 if there are findings of guilt, then we're going
18 to go right into a sentencing phase. And so, our
19 counsel know that they just have to prepare for
20 both. That is not something that we have
21 specifically discussed as a part of our task.

22 CHAIR SMITH: So, there's no

1 opportunity for -- we call it a presentence
2 investigation; I don't know what they call it
3 under the federal system. But, you know,
4 sometimes things can come to light that are
5 helpful. You're just expected to kind of have
6 all of that?

7 COL SMITH: Yes. And so, the military
8 is unique, but we don't have those same
9 resources. And so, it's my understanding that
10 there's generally a probation office that
11 prepares a presentence report. I believe that's
12 what it's called. But we don't have those
13 resources. And so, military judges, essentially,
14 have what the counsel and the accused bring to
15 our attention -- so, our resources.

16 MEMBER CASSARA: Ma'am, could you
17 please explain to me just a little bit more
18 clearly -- not that you didn't explain it clearly
19 (laughter); that I might understand it more
20 clearly -- on the criteria offenses, how that --
21 I'm having a little bit of a hard time
22 understanding. So, you know, we've all had

1 clients like yours who were acquitted of a rape
2 and convicted of a two-day AWOL.

3 COL SMITH: Yes.

4 MEMBER CASSARA: How does that
5 military, if that occurs after the enactment, how
6 does a military judge take into consideration how
7 to sentence somebody for a two-day AWOL, or
8 something along those lines?

9 COL SMITH: And to an extent, it's
10 somewhat similar to what military judges are
11 using now, except that they will have some
12 specific factors.

13 And so, what the Board has done, we've
14 identified a number of criteria offenses. I
15 don't want to, you know, state numbers. I don't
16 want to step outside of my lane. But we've
17 identified really just a handful of offenses
18 where we couldn't find a civilian counterpart.
19 And what we did, we listed that particular
20 article, and then, we gave a list of factors,
21 heavily relying on RCM 1004, and just factors for
22 the military judge to consider when imposing

1 appropriate sentence for that military-specific
2 offense.

3 MEMBER ANDERSON: Good morning.

4 COL SMITH: Good morning.

5 MEMBER ANDERSON: Thank you so much
6 for your presentation. And I also want to
7 apologize for being tardy.

8 I'm Marcia Anderson. And I just have
9 a quick question.

10 I used to work in the federal courts
11 before I retired. And I remember when the
12 Sentencing Guidelines were initially discussed,
13 proposed, and implemented, there was quite a bit
14 of, I'll just delicately call it, consternation
15 amongst the judges about someone telling them how
16 to impose sentences. And I think what we didn't
17 do was do enough training with the judges at that
18 time.

19 So, what is the process you're going
20 to employ to get your judges up-to-speed and
21 address anybody's concerns about, you know their
22 having -- and, in fact, and this is for those who

1 don't know, there were a number of judges who
2 deliberately departed from those guidelines in
3 protest, and then, wrote lengthy opinions
4 justifying their departures. It finally calmed
5 down after a while, but it was pretty ugly for a
6 little bit.

7 COL SMITH: Yes. And so, the Army's
8 responsible for training all of the military
9 judges. And so, we have a three-week course. And
10 so, the sentencing parameters and criteria, I
11 will do a -- and I'm there the entire three weeks
12 -- but I will do a block of instruction
13 concerning sentencing parameters and criteria for
14 the new judges. And so, that course will take
15 place May 22nd to the 9th of June.

16 I can speak to the Army -- well, I
17 should mention as well, so just about two weeks
18 ago, all the judges were together for, we call
19 it, JMJAT -- we've got a good acronym for that --
20 the Joint Military Judges Annual Training, where
21 all of the Service judges were together. And we
22 did, very briefly at that time, mention the

1 sentencing parameters and criteria.

2 But all the judges by that time were
3 really familiar because we consulted with them
4 and gathered their feedback, and then, further
5 refined our proposals based off their feedback.
6 And so, in between JMJAT, the military judges'
7 course, and in the Army, all the Army judges get
8 together for training again in September. And
9 so, it will certainly be more emphasis,
10 especially because the implementation date will
11 be shortly thereafter, there will be a great
12 emphasis on training. And I suspect that my
13 sister Services are doing the same.

14 MEMBER CASSARA: Does that training
15 include Reserve judges?

16 COL SMITH: It does.

17 MEMBER CASSARA: Good.

18 (Laughter.)

19 MEMBER BASHFORD: Oh, just following
20 up on Mr. Cassara's example, where the only
21 charge on which somebody is convicted is, say, a
22 two-day AWOL, is there any provision for

1 referring something like that back to the Command
2 for adjudication?

3 COL SMITH: Yes. And so, referral
4 decisions are really outside of our lane. That's
5 not something that's for our consideration. We
6 just take the cases as they come to us. We don't
7 worry about referral, unless defective referral
8 is raised to our attention.

9 MEMBER GOLDBERG: Thank you very much.

10 I have a question about the departures
11 that you may not be able to answer. But
12 wondering, I know you said it's to come, sort of
13 the guidelines for departures for exercising
14 discretion in conjunction --

15 COL SMITH: I should mention, if I
16 may, that the Act certainly gives the judge to
17 depart with a written departure, but it was not a
18 specified task for the Board to actually
19 delineate the departure. And that's why the
20 departures did not go up at the same time as our
21 proposed parameters and criteria, because it's,
22 technically, not required, but we thought, as a

1 Board, that would be helpful for the military
2 judges.

3 MEMBER GOLDBERG: Thank you for that.

4 And so, I'm going to ask a question I
5 think I know the answer to, and then, another.
6 But what's the reason for wanting to have space
7 for departures? And related to that, is there
8 any sense of like, roughly, what kind of
9 percentage of departures the Army is thinking
10 would be typical or to be expected?

11 COL SMITH: Yes. And so, the reason,
12 really, for our departures it because the Board
13 was tasked of coming up with parameters for the
14 typical offense. But all of us have been judges
15 long enough to see that there are cases that
16 deviate, right? We've got the aberrant case.
17 And so, the reason for departures was really to
18 address those cases that are not the typical
19 case. And so, that's the reason for the
20 departures.

21 And I'm sorry, I don't think I got the
22 second part of that.

1 MEMBER GOLDBERG: I mean, maybe this
2 is related to your answer to that question, but
3 is there a sense of sort of to what extent --
4 like what percentage of departures would be
5 typical? I'm not asking for a specific number,
6 but I think the question is more, you know, is
7 kind of looking at the number of departures going
8 to tell you anything about how the parameters are
9 working? And will the departures, then, be sort
10 of associated with the facts of a particular case
11 or the sense that maybe the parameters are too
12 high or too low?

13 COL SMITH: And so, I'm sorry, you
14 know, this is new to all of us.

15 MEMBER GOLDBERG: Uh-hum.

16 COL SMITH: And so, I don't have a
17 percentage that I could quote to you, but,
18 certainly, the Board will continue to look at the
19 sentences that are being imposed and will make
20 adjustment, as necessary, if we see that certain
21 offenses, generally, are skewing higher or lower
22 in our categories. And we'll make

1 recommendations to the President for those
2 adjustments.

3 MEMBER GOLDBERG: And I guess, to just
4 close out the point, I mean, it sounds like the
5 expectation is that the aim is that departures
6 will be infrequent. Is that fair to say or TBD?

7 COL SMITH: Well, we did our best --

8 MEMBER GOLDBERG: Yes, yes.

9 COL SMITH: -- to try to cover the
10 typical offense. And I will say -- and I didn't
11 mention this before -- but the Act requires,
12 well, a minimum of five categories, but no
13 greater than twelve. And so, we have proposed
14 broad ranges. And so, we believe that the
15 military judges will generally be able to impose
16 an appropriate sentence within the confines of
17 the parameters.

18 MEMBER GOLDBERG: Thank you.

19 COL SMITH: You're welcome.

20 MEMBER GARVIN: A follow up question
21 on the training question. I can't remember who
22 asked it; I apologize.

1 But will you all be involved in the
2 training that also happens for trial counsel,
3 defense counsel, SVC? These end up being -- I
4 remember. I'm actually having like modest, like
5 painful moments remembering being a clerk, a
6 federal clerk, and having to look at the Federal
7 Sentencing Guidelines and figure things out. And
8 I just remember wishing someone had really done a
9 training for me, as someone who was going to have
10 to advocate around it or talk around it.

11 And so, you are now the experts on it,
12 even though it hasn't happened yet. And now,
13 there's going to have to be training, not only of
14 the judges, but also of trial counsel, of defense
15 counsel, and victim counsel. And I'm just
16 curious, will they have to be learning that
17 themselves or will you, first, train the trainers
18 on that?

19 COL SMITH: Yes. And so, we're happy
20 to train them. So, the vision of at least the
21 Army trial judge is independent, but invested.
22 We believe in improving people and processes.

1 And so, all the time last week I was at the
2 Special Victim Counsel course for their training,
3 and next week I'll be in Charlottesville again.
4 And I'm sure it's the same for our sister
5 Services. But we are happy to come out and train
6 on the essence in parameters and criteria.

7 MEMBER GARVIN: Thank you.

8 CHAIR SMITH: Any other questions?

9 MEMBER TOKASH: This is Meghan again.

10 I have a question about mandatory
11 minimums. Are there any mandatory minimums that
12 the group or panel has decided, and can you talk
13 about that?

14 COL SMITH: And so, the mandatory
15 minimums will change. And so, that probably
16 addresses your question, but we have not proposed
17 any additional mandatory minimums besides, you
18 know, our offense categories.

19 CHAIR SMITH: Any other questions?

20 (No response.)

21 Thank you very much, Colonel.

22 COL SMITH: Thank you for having me.

1 CHAIR SMITH: So, we're 15 minutes
2 early. Do we want to take a 15-minute break, and
3 then, start with our next panel? Yes, we'll do
4 15 minutes, 9:45.

5 (Whereupon, at 9:31 a.m., the
6 foregoing matter went off the record and went
7 back on the record at 9:44 a.m.)

8 MS. VUONO: Well, today, we have
9 assembled a terrific panel of retired military
10 judges. Their impressive bios are included at
11 tab 7A in the read-ahead materials. So, I'm only
12 going to mention a brief introduction for each
13 one of them.

14 I also note that you have questions
15 available to you at tab 7B, but I'm sure no topic
16 is off-limits and they'll be free to give you
17 their opinions since they're all retired.

18 (Laughter.)

19 Lieutenant Colonel, Retired, Stefan
20 Wolfe was a military trial judge for the Army's
21 4th Judicial Circuit and served as a Senior Judge
22 on the Army Court of Criminal Appeals. He was a

1 member of the Military Justice Review Group that
2 culminated in the historic changes of the
3 Military Justice Act of 2016. He retired from
4 the Army in 2019 and currently works at the
5 Department of Justice.

6 Commander, Retired, Will Weiland had
7 extensive litigation experience in the Navy as a
8 military trial judge, as the lead prosecutor at
9 the world's largest fleet concentration area for
10 the Navy, and as Senior Defense Counsel
11 responsible for defense services at all Navy
12 installations west of the Mississippi. He
13 retired from the Navy in 2018 and is currently a
14 civil litigator with the Department of Justice.

15 Lieutenant Colonel, Retired, Michael
16 Libretto was a trial judge for the Marine Corps
17 at Camp Lejeune and the Recruit Depot, Parris
18 Island. He retired in 2020 and currently serves
19 as a litigation attorney advisor at the Marine
20 Corps Defense Services Organization, where he
21 trains, mentors, and assists uniformed defense
22 counsel representing Service members at courts

1 martial and adverse administrative proceedings.

2 Captain, Retired, Mark Fulton of the
3 Navy had tremendous experience on the bench, both
4 as a trial judge and on the Navy-Marine Corps
5 Court of Criminal Appeals. His final tour on
6 active duty was as the Director of the Navy-
7 Marine Corps Appellate Defense Division.

8 And Colonel, Retired, Shane Cohen is
9 here with us from Salt Lake City, where he flew
10 in. He may not be going back, given that storm
11 that's heading that way. Prior to his retirement
12 from the Air Force, he was the Chief Circuit
13 Military Judge for the Air Force Trial Judiciary
14 Eastern Circuit. He was also a military judge
15 presiding over the 9/11 Military Commission cases
16 at Guantanamo Bay, Cuba, and he currently works
17 as the supervisor for the Homicide Unit in the
18 Salt Lake County District Attorney's Office.

19 So, welcome, and over to you.

20 CHAIR SMITH: Thank you very much for
21 appearing this morning.

22 I guess we'll just jump right in. If

1 you can explain to us -- one of the things that
2 came up with our last panelist, Judge Smith,
3 related to judges not explaining their sentences.
4 What are your thoughts about that? A good
5 practice, not a good practice? Why is it the
6 practice?

7 Jump in.

8 LTC WOLFE: I'll jump in.

9 I was taught at the military judges
10 course not to talk about sentences. That was
11 just part of the instruction you got as you
12 became a new judge. I think it is based on a
13 misreading of Military Rule of Evidence 509,
14 which says that the deliberative process of panel
15 members and judges in courts-martial shall be the
16 same as in civilian courts, which, of course,
17 means the panel member to jury, judge to judge,
18 which would have a different effect.

19 When I was at the Army Court of
20 Criminal Appeals, I would say we were issued a
21 couple of opinions in which we said it is not
22 technically impermissible to comment on

1 sentences, but the message we were sending was
2 clearly you shouldn't.

3 That was probably all error. I think
4 one of the issues that I hear about is we
5 shouldn't talk about sentences because it creates
6 appellate issues. And a judge not explaining
7 their reasoning because they're afraid of
8 creating an appellate issue is a bad judge. I
9 think if you are making a bad decision, and you
10 are not willing to -- and you don't tell the
11 world why that is, right, you're not allowing
12 that to be corrected on appeal.

13 If we didn't explain a lot of things
14 as trial judges, there would be fewer appellate
15 issues. If we didn't explain our suppression
16 hearing rulings, they would not be reviewable.

17 So, preventing appellate issues is not
18 a good reason for not explaining why you're not
19 doing -- why you are not explaining your
20 sentences.

21 Based on the changes that are coming
22 that you just saw briefed, I think that will

1 probably change. You know, sentences are now
2 appealable to the CCAs, both up and down, if a
3 judge deviates from parameters. And the
4 standard, I believe, is plainly unreasonable to
5 appeal a -- for the government to appeal a
6 sentence, which I think mirrors the standard in
7 federal court.

8 Federal practice is a sentence is more
9 likely to be unreasonable if you don't explain
10 why you gave it. Right? So, I think over time
11 that culture, which I certainly saw as a trial
12 judge, of not explaining a sentence is going to
13 ebb with the new rules.

14 CHAIR SMITH: Anyone want to add to
15 that?

16 CDR WEILAND: Certainly, I'll take my
17 chance.

18 Good morning. Thank you for inviting
19 me here to speak to you about this and my
20 personal experiences.

21 I don't disagree with anything that
22 was said. I do think the nature of appellate

1 review in the military system is slightly
2 different than it is in the civilian system.
3 It's more encompassing. I think there's more
4 litigation about even just the appearance of bias
5 on the part of a military judge.

6 And at least in my observations, those
7 allegations are not rare. They sometimes become
8 packages or weaponized with ethics allegations.
9 And so, judges are, I think, reticent.

10 In my experience on the bench, I only
11 explained one sentence during my time there, and
12 it was because of the facts. The individual pled
13 to a far less serious offense than perhaps the
14 victim believed occurred. The victim's statement
15 was far more powerful, and I thought it was
16 important to explain both to that individual and
17 to the government that, as a judge, my
18 responsibility was to sentence the offense for
19 which the accused stood convicted and nothing
20 else; and that if there was something more to the
21 case, it probably should have gone to trial or
22 they should have forced the accused to take a

1 plea. And then, I imposed the sentence.

2 CHAIR SMITH: Can you move your
3 microphone a little closer to you?

4 CDR WEILAND: I am a low talker. I
5 apologize for that.

6 CHAIR SMITH: Oh, there we go. That's
7 much better. Thank you.

8 CDR WEILAND: And so, I agree that the
9 new changes, perhaps with the imposition of
10 parameters, I think you would have to explain,
11 obviously, any departure. I think there will be
12 probably a lot of discussion about how those
13 parameters have been calculated.

14 I had a brief opportunity to prosecute
15 violent crimes in the Eastern District of
16 Pennsylvania. And so, I have a passing
17 familiarity with the Federal Sentencing
18 Guidelines. I think there is a value in the
19 probation office, which doesn't exist in the
20 military system, an impartial body that
21 calculates a baseline, and then, the litigators
22 appear before the judge and discuss whether or

1 not they think that's correctly calculated.

2 I enjoyed that deliberative,
3 thoughtful process to sentencing, and I think it
4 will be of value to the military as well.

5 LTCOL LIBRETTO: When I first took the
6 bench in 2014, the Chief Trial Judge of the Navy-
7 Marine Corps Trial Judiciary at the time gave me
8 sage advice. And that was, never miss a good
9 opportunity to say nothing at all. And I took
10 that to heart and never said anything that I
11 regretted, which served me well.

12 Although I do agree with Mr. Weiland
13 that I think a large fear within the trial
14 judiciary, particularly in light of how we bounce
15 around from billet to billet -- and one day you
16 could be a judge; the next day you could be a
17 prosecutor or defense counsel, and vice versa --
18 I think that builds in inherent reluctance to
19 explain sentences. But I also agree that, with
20 the criteria and parameters coming our way, I
21 think it gives the judges an opportunity -- and,
22 in fact, perhaps even an obligation -- to explain

1 them in the context of those parameters and
2 criteria.

3 I submit to you that it would be wise,
4 I think, to have that requirement built in, not
5 only for departures from the sentencing
6 parameters and criteria, but, just generally, an
7 explanation as to why the judge arrived at the
8 sentence that they did.

9 CHAIR SMITH: So, you said something
10 interesting, that this -- what is it? -- yes, the
11 reluctance that you had, knowing that you're
12 going to move from being a judge one day to a
13 defense attorney and back to a prosecutor. One,
14 I'm curious as to why there was this reluctance.
15 If you could just kind of expand on that? And
16 then, two, does that mean that it might be a good
17 idea to have sitting judges, as opposed to this
18 method of, you know, going from being a judge
19 back to being an attorney, back to being a judge,
20 et cetera?

21 LTCOL LIBRETTO: I'll answer the
22 second question first, if that's okay. I'm a

1 huge proponent of sitting judges, appointed
2 judges for a duration, certainly more than three
3 years. But, as an initial matter, we have to get
4 those selections right, which, in my observations
5 over the last couple of years, perhaps we don't
6 across the board.

7 But I do believe that that is a way of
8 the future and necessary to maintain the
9 integrity and independence, and even the
10 perception of fairness within the military
11 justice system.

12 With respect to your first question,
13 the reluctance I think stems from the idea that
14 there's always a question of where you just came
15 from and where you're going to go next. And if
16 you are to share why you arrived at a certain
17 sentence, or any decision, for that matter, other
18 than those that are required in terms of creating
19 findings of fact and conclusions of law, and
20 things of that nature, I think there's a
21 perception amongst the judges in the judiciary
22 that that may be used against you, either in that

1 case on appeal perhaps, or more importantly, I
2 think, in future cases where you're presiding
3 over a similar case with similar fact patterns.
4 And things that you might say might give rise, at
5 least for the litigation, to challenges for cause
6 for the military judge.

7 CHAIR SMITH: As a judge, I think
8 that's cheating, not being required to say why
9 you're saying it, and then, having to deal with
10 it later on and be thinking every second, "Okay,
11 this is what I just said and I need to make sure
12 I don't say this." But, I mean, I guess it's a
13 good way to go about it, if you can do it.

14 COL COHEN: Yes, one of the things I
15 was noticing is, for example, we set up the
16 Office of the Special Prosecutor in this most
17 recent enactment, but, yet, we didn't put that
18 individual no longer under the TJAG, but under
19 the Secretary of the Air Force, for example, or
20 the Secretary of the Army, et cetera, but we did
21 not create an independent judiciary. So, that
22 judiciary still responds to the Judge Advocate

1 General of the various Services.

2 And if you really want to create an
3 appearance where the judiciary is independent,
4 and that they can say what they need to say, then
5 -- because I was always happy to say exactly what
6 I thought and rule exactly the way I wanted to
7 rule.

8 But appearances matter. And as I say
9 in cases every day now, what the public is seeing
10 about the process matters, because of inherent
11 universal trust in the system itself.

12 And so, it was very interesting that
13 you would set up a judiciary or let a judiciary
14 remain that was not, apparently, independent and
15 was still relying on the decisions of an
16 individual with respect to assignments; how long
17 you would stay on the bench, all those kinds of
18 things.

19 And so, I'm with Lieutenant Colonel
20 Libretto; I do believe that having a judiciary
21 that has a vetting process, that has actually
22 been appointed to be on the bench, and even with

1 respect to the potentials for the appellate court
2 judges having actually a requirement to be trial
3 judges prior to being on the appellate bench,
4 will give them some additional perspective, et
5 cetera. And so, I fully support that.

6 MEMBER SCHWENK: If military judges
7 didn't report to the Judge Advocate General, then
8 who would they report to? Or would they report
9 to no one?

10 COL COHEN: No. For example, the
11 special prosecutor reports directly to the
12 Secretary of the Air Force. And so, you could
13 set up something very similar to that in the same
14 way. And then, it just no longer matters about
15 an assignment action or anything like that.

16 In fact, the thing that we noticed is
17 just -- for example, I was a judge two different
18 times. The first time was three years, and then,
19 I went off to do additional assignments, which
20 was wonderful for my career and I had a wonderful
21 time doing it. But the reality is that, after
22 three years as a judge, I was really starting to

1 get good at being judge, and then, I was sent off
2 to do something else.

3 If you're really looking to have a
4 judiciary that has significant experience and is
5 very familiar with the processes and procedures,
6 and those kinds of things, then you want to have
7 judges that are there for a longer period of time
8 than two to three years, based on an assignment
9 cycle.

10 Or, you guys, at the end of the day,
11 it seems to me that the needs of the military
12 would also be having an independent judiciary
13 with skilled judges.

14 MEMBER TOKASH: Meghan Tokash, for the
15 record.

16 Do you think that the military justice
17 system could benefit from a more robust
18 magistrate program? For example, if while you
19 were on the bench during your time in the
20 military you had, say, for example, reports and
21 recommendations, like the federal system, from a
22 magistrate on pretrial motions, where you then,

1 as the trial judge, could issue a decision and
2 order, either in concurrence or non-concurrence,
3 where magistrates could decide the issue of
4 detention of release, things of that nature. Can
5 you comment on that and help us understand if you
6 think the military could benefit from a similar
7 type of a system?

8 CDR WEILAND: Will Weiland.

9 I'm not certain that the workload
10 exists in the military justice system to have
11 that sort of demand. I do think the magistrate
12 system would be valuable, and I think it's being
13 employed with regards to Article 32 preliminary
14 hearings and things of that matter. But I don't
15 know that there are just enough cases to merit
16 having a magistrate do all the work for a
17 suppression hearing, and then, have that be
18 litigated against in front of a military judge.

19 It may be that my experience is
20 different than the others on the panel, but I
21 just don't see that.

22 CAPT FULTON: I think there's

1 efficiencies in -- I mean, as a judge, I learn
2 something about a case from dealing with
3 confinement issues. I learn something else from
4 a suppression issue and it will save me time on
5 the case on the merits. I think that's probably,
6 ultimately, a more efficient way to address a
7 case longitudinally.

8 LTC WOLFE: I would agree that at
9 least -- you know, I've been out of the picture
10 now for four years. But there's not the volume
11 to support a magistrate program. I believe the
12 statutory and regulatory structure already exists
13 for it to be created, should a Service want to do
14 it. So, I don't believe that there's a rule
15 change that's required.

16 The primary benefit I would see to it
17 is it is a way to train the next echelon of
18 military judges and give them a trial run, and
19 see if you can do a suppression motion in a
20 complicated case or can't. You know, that's
21 important to know.

22 But I think it's part of the same

1 problem I think that is, in my view, one of the
2 biggest problems in the military justice, which
3 is the lack of experience of the participants,
4 right?

5 So, to some extent, if we don't change
6 -- if we change military judges relatively
7 frequently, and they're not overworked as it is,
8 giving work to magistrates is depriving those
9 judges of the experience that they need to become
10 more experienced and handle the bigger cases.

11 So, under the current system, probably
12 I would not recommend it. But under a system
13 that had a higher volume, it would certainly --
14 it could be beneficial for multiple reasons.

15 So, that having a higher volume is not
16 a point in a criminal justice system.

17 (Laughter.)

18 MEMBER TOKASH: Well, no, that's
19 interesting to hear your perspectives, and I'm
20 interested in hearing from the Marine Corps and
21 the Air Force. Because what we've heard, at
22 least anecdotally, is that the magistrates don't

1 want to be pressed into service because they
2 think they're going to be overwhelmed and this is
3 going to be very burdensome for them.

4 So, again, I think just it's
5 interesting to hear from all perspectives. So,
6 thank you.

7 LTCOL LIBRETTO: So, from my
8 perspective, having served at Camp Lejeune and
9 the Marine Corps Recruit Depot, Parris Island --
10 and I'll give you my experience at Marine Corps
11 Recruit Depot, Parris Island first.

12 I was volunteering my services
13 throughout the country, trying to get on cases,
14 so I can get my reps in to stay current and sure.
15 So, in that regard, I don't believe that the
16 military magistrate program is necessary, because
17 I think it would deprive, by and large, the
18 sitting military judges from the opportunity to
19 get into the case, identify the issues, research
20 the issues, and get better.

21 However, I do believe that there's a
22 place for the military magistrate program in

1 prereferral issues that have now broadened in
2 scope. So, pretrial confinement issues, to
3 include initial confinement decisions.

4 Right now, we have a line officer or
5 a logistician or a motor transport officer
6 determining whether or not an accused stays in
7 confinement. I do not believe that that's
8 appropriate, and I think the military magistrate
9 program could serve a good purpose there, as well
10 as in the Article 32 proceedings. Although we
11 have come now to the point where we're having
12 judge advocates preside over the Article 32
13 hearing, I believe that somebody that is detailed
14 and assigned for that purpose -- and we have
15 enough to do that -- I think that that would
16 serve the Services and the military justice
17 system well also. So, a limited scope of a
18 military magistrate program, not akin to what
19 they have in the federal jurisdiction.

20 COL COHEN: I agree with that. I
21 think that I have the comparison now between my
22 civilian practice now versus my military

1 practice. And I can tell you that the amount of
2 warrants that I even just review, as the
3 supervisor of the Homicide Unit, is probably 20-
4 fold compared to the number of warrants I
5 reviewed during my entire time in the military,
6 just because of the volume of cases.

7 You know, we're talking about a couple
8 of thousand cases in the military a year, and
9 we're talking about tens of thousands of cases,
10 you know, even just in Salt Lake County, Utah.

11 So, for that perspective, I wouldn't
12 say that I would necessarily have them reviewing
13 all those things, but with respect to unique
14 decisions that require some specialized legal
15 training, or at least should require some
16 specialized legal training, then I believe the
17 magistrate program would definitely be
18 appropriate, and actually, should be utilized
19 more effectively than it is currently.

20 The idea that you have -- well, I love
21 the Air Force and I love commanders, and I worked
22 for some phenomenal commanders. The reality is,

1 why are you going to have a JAG Corps with
2 specialized legal training if we're not going to
3 allow them to actually make some of those legal
4 decisions that are out there?

5 And so, I really would look at
6 situations like pretrial confinement, things like
7 that, and then, consider having a magistrate
8 review those, as opposed to the line officer.

9 MEMBER SCHWENK: So, what do you all
10 think about military -- since we don't have
11 robust magistrate programs -- military judges as
12 preliminary hearing officers?

13 You know, back in the day when I was
14 in, and it was an investigation, if we had a real
15 sensitive or complex case, we might stop by to
16 see the Chief Judge and see if we could free up
17 one of his people to do it for us. But it was
18 also common to have the logistician, or whoever,
19 as the preliminary hearing officer.

20 And now, we've gone past that and
21 there's a focus on military judges being the
22 right people to be preliminary hearing officers.

1 What are your thoughts on that?

2 COL COHEN: In my current practice in
3 the 3rd District of Utah, which is Salt Lake
4 County proper, the judges, the District Court
5 Judge is the ones that do the probable cause
6 hearings. And essentially, in many cases, that's
7 exactly what we're talking about. I mean, you
8 make the conversion, you know, Article 32 to just
9 a probable cause hearing. And we find it to be
10 very effective.

11 And, in fact, in many cases, it's the
12 same judge who sat over the preliminary -- the
13 probable cause hearing who then sits over the
14 trial. And so, you're able to reference back to
15 issues that occurred previously in the trial, et
16 cetera.

17 I think there is efficiency in having
18 the judges do similar things in the military
19 practice, because, as was referenced earlier, you
20 learn things throughout the process of the case,
21 and you may have to go back and address things
22 previously. And so, being able to set up a

1 similar system in the military I think also could
2 be beneficial.

3 CAPT FULTON: If I might, I think what
4 you describe is pretty close to ideal. I think
5 there are cases, say, the whole loss of a ship,
6 where you want to have a military judge with some
7 credibility making an informed projection about
8 what might happen in the case. But, in your
9 general meat-and-potatoes kind of case, I think
10 any judge advocate with some litigation
11 experience is going to do, should be able to do a
12 sufficient job as a preliminary hearing officer.

13 But I think there's value. I can
14 remember serving as an IO back then in cases
15 where I think that I was probably value-added. I
16 think sometimes it's useful.

17 LTCOL LIBRETTO: I think part of that
18 is also going to depend on, from what my
19 understanding is, some changes coming down the
20 road with the Article 32 and the requirements,
21 and perhaps some of the evidentiary issues that
22 currently now the prosecutors don't face in,

1 basically, what we've dubbed the paper Article 32
2 preliminary hearing.

3 I think if we go beyond that and
4 actually require a robust hearing, I think the
5 military magistrate program would be ideal for
6 that, because I don't believe that the military
7 judges that are sitting as permanent judges or
8 full-time judges will have the bandwidth to
9 undertake that responsibility.

10 LTC WOLFE: I'll jump on that and say
11 it all depends what the purpose of the Article 32
12 hearing is, right? If you go back to 1950 when
13 the UCMJ was created, which really predated the
14 Defense Department's various criminal
15 investigative agencies in their current robust
16 form, the purpose of the Article 32 was
17 investigatory. It was an investigation to gather
18 evidence and assemble to the convening authority
19 to make the referral decision.

20 Over time I think that, mainly through
21 I think appellate decisions, the accused was
22 given more and more rights to the 32 and it

1 transformed into what is essentially a defense
2 tool to prepare for trial.

3 Then there was a counter-revolution to
4 that and some of the -- a lot of those tools of
5 the defense counsel had to prepare for trial were
6 then removed. And so then the real question is
7 what is the current purpose of the 32? It's not
8 investigation. Is it a probable cause hearing?
9 If it is a probable cause hearing, and that's
10 really what it is, you could just have a probable
11 cause hearing as a part of trial, right, where
12 defense could make a motion saying that there was
13 not probable cause to support one or more charges
14 and the judge could rule based on whatever
15 evidence was available. If it's to inform the
16 convening authority however, structure it that
17 way.

18 So I would say in terms of how you
19 view the -- what you propose doing with the
20 Article 32, you first have to determine what the
21 purpose of it is. And I don't think it has a
22 clear purpose right now. I think people have

1 been rejecting what it used to be about, and some
2 of those rejections are very valid in terms of
3 what has happened historically, but it's kind of
4 lost its purpose within the code as to what it
5 does.

6 MEMBER SCHWENK: I think you've talked
7 to a number of the people out in the field,
8 because when we do it's generally the trial
9 counsel and defense counsel that say Article 32 -
10 - it has no purpose. It just takes up some of my
11 time, which is troubling because it's still there
12 and we need to fix it.

13 Do you all -- anybody else have
14 thoughts on what to do with the Article 32? I
15 mean turn it into a judge probable cause hearing
16 to start the trial and if there's not probable
17 cause, the Government can try again later, but
18 it's out of the box at the moment? Whether to do
19 some kind of a preliminary hearing with a judge,
20 do something else with the 32? Any thoughts?

21 CDR WEILAND: Well, I do tend to think
22 there is some value in an Article 32 hearing

1 officer's report to a convening authority about
2 whether or not there is probable cause on a case.
3 I do think that remains an important advisory
4 aspect that the rules should continue to provide.
5 It may have been in the last several years -- and
6 I retired in 2018, so I haven't been a part of
7 these for some time -- but it may have lost a lot
8 of that function. But I do think there is value
9 in having that done.

10 I don't think you put that on the
11 military judge. I think that's a perfect
12 magistrate task. And I think the volume could be
13 there because then there's -- the convening
14 authority is seeing more of these cases and
15 making informed decisions as opposed to referring
16 a case to trial and then having the judge
17 determine that there's no probable cause. That
18 seems like a waste of time.

19 COL COHEN: I agree with the comments
20 and will add to it as follows: The 32 has a
21 unique perspective within the military because
22 there are more options than just prosecution.

1 There are administrative actions. And so things
2 along that can come as a result of this to
3 address misconduct or behavior, the lack of
4 witness cooperation, all those other kinds of
5 things.

6 But we're in a very binary system in
7 the civilian world because if I -- if a witness
8 doesn't show up, I can't prosecute the case;
9 therefore no further action can be taken by the
10 state with respect to that particular issue. The
11 military is unique in the fact that there are
12 other tools available to address misconduct such
13 as sexual assault, sexual harassment, et cetera
14 within the military. Therefore that Article 32
15 has a great purpose because it gives you an idea
16 of well, perhaps there's not going to be a
17 reasonable likelihood of success beyond a
18 reasonable doubt at trial. Nevertheless, there's
19 clearly probable cause here to believe that
20 something inappropriate happened, so perhaps you
21 need to address this in a different way.

22 And so I believe to the extent that an

1 Article 32 allows a convening authority or a
2 commander or whomever has responsibility for
3 addressing that misconduct, or alleged misconduct
4 rather, having those types of reports and
5 allowing them to consider the full range of
6 options is critical and something that is
7 uniquely military in the fact that you can
8 address all those different types of misconduct
9 and behavior.

10 I wish we had similar things like
11 that. It's unfortunate sometimes when we have
12 some egregious sexual misconduct in the civilian
13 world and if you have a reluctant witness, which
14 is completely understandable, unfortunately we
15 can't go forward and address anything until, at
16 least in the military, there's that opportunity.
17 And so I believe that there are those unique
18 circumstances that the rules need to allow for
19 and we shouldn't do away with.

20 MEMBER GOLDBERG: Thank you very much.
21 I'm going to shift gears slightly, but go back to
22 something that you said earlier, Colonel Cohen,

1 which is the connection between appearances and
2 trust in the system.

3 Something that we've talked about a
4 lot in the DAC-IPAD, at least since I've been
5 here, and I'm a relatively new member, is how you
6 -- what is it in the institutional design that is
7 either supporting or working against trust in the
8 system? And two issues that have come up are
9 composition of -- two intersecting or related
10 issues that have come up is -- concern the
11 composition of the panel, one in terms of the
12 race of panel members, which as we have heard is
13 frequently all White. And the questions have
14 been raised about the challenges that pose when a
15 -- when the accused is Black or Latino in
16 particular, a person of color more generally.

17 And the second is when a -- in a
18 sexual assault context; not always, but
19 frequently enough, the victim is a woman. And
20 there are frequently few or no women on panels
21 and women seem disproportionately excused from
22 participating on panels either because they are

1 more likely to have experienced sexual assault or
2 served in a role of supporter.

3 So the question for you is if you
4 agree that panel composition along these lines is
5 a concern -- not necessarily for the excellence
6 of the thought process, but -- that panel members
7 bring, but for the appearance and the connection
8 of that to trust in the system. If you agree
9 that that's a concern, what thoughts do you have
10 on what this committee might be able to recommend
11 related to changes?

12 We've talked some about randomization.
13 We've talked some about the Article 25 criteria.
14 We've talked about a number of different things
15 and heard a number of views. So would very much
16 appreciate your thoughts. And I am sure I and
17 others will have follow-up questions, but I
18 thought I'd at least lay out all of the issues in
19 that domain to get that part of the conversation
20 started.

21 CAPT FULTON: I think that -- let's suppose
22 that we started with just pure randomization and

1 you're pulling officers, it's an officers' panel,
2 and it's -- there's no discretion given to a
3 convening authority at all. It's going to happen
4 with some frequency that you're going to draw a
5 homogeneous panel just through random selection.

6 And that's going to create moments,
7 even when there's no discretion given to a
8 convening authority, that look pretty awkward
9 with the demographic of whoever is sitting at the
10 table or is sitting as a complaining witness.

11 And you're either going to have to decide that
12 you're okay with that happening sometimes and
13 that we're going to live with those appearances
14 and we're going to live with those results, or
15 you're going to have to do something fairly
16 dramatic the other way. And I suppose you could
17 select people by race or gender. I think that
18 would be a pretty big step.

19 MEMBER GOLDBERG: So if I could just
20 expand from what you said. I mean certainly,
21 right, there's complete randomization, there's
22 the current practice. We've heard about a lot of

1 gradations and options in between in terms of
2 including the way that the roster, the alpha
3 roster gets selected, gets put together and the
4 discretion that goes into that. So I don't think
5 that the -- it would be helpful to hear more than
6 just selection. If you have thoughts that -- in
7 addition to selection by race versus
8 randomization versus status quo.

9 CAPT FULTON: You could add it as a
10 criterion or -- sex/gender as criteria to Article
11 25 I suppose. That too would be --

12 CDR WEILAND: So there's a lot to
13 unpack here.

14 MEMBER GOLDBERG: Yes.

15 CDR WEILAND: In my experience a
16 military justice system cannot lose focus on the
17 military's mission, right? You still have to
18 create a system where particularly the
19 operational forces keep the main thing the main
20 thing. And so you are all -- in a strictly
21 random system -- I'm a believer or I believe that
22 a computerized aid to a commander's selection of

1 a venire is valuable, but you have to craft that
2 system very carefully.

3 In my experience commands who nominate
4 members tend to send who they can spare. Has
5 nothing to do with the Article 25 criteria.
6 Those are great criteria. I think they're how
7 you would want to assess anyone's fitness to sit
8 on a venire.

9 But when I was the Staff Judge
10 Advocate to the Admiral commanding all submarines
11 operating from the International Dateline to the
12 Suez Canal our sailors were out there working
13 hard in some of the most politically and
14 militarily-sensitive areas of the world every day
15 and there was no way we were sending our
16 operations officer, or mission planners, our
17 watch officers. They were vital to keeping that
18 mission going, a national security mission.

19 So the two people on staff who were
20 perhaps -- the admiral wouldn't mind not seeing
21 so much of were myself; but nobody wanted to hear
22 from me because I had been the senior prosecutor

1 in the region, and the supply officer.

2 MEMBER GOLDBERG: And the what
3 officer?

4 CDR WEILAND: Supply officer.
5 Unfortunately for him that's who we sent every
6 time. He was a fine officer. He never got
7 selected for a panel, much to the chief of
8 staff's pleasure, because he got his worker bee
9 back.

10 But you have to have a system that
11 accounts for operational necessity. You can't
12 have a system -- when I was in Norfolk you can't
13 have a system that pulls the CO of a DDG that's
14 about to deploy in a month, that you would have
15 to allow for a reclama from the operating forces.
16 And as soon as you allow for a reclama you're
17 going to end up very much with the same system
18 you have today, which is commands nominating
19 those people they believe they can spare,
20 especially when the op tempo is high.

21 But I think part of the problem for
22 the convening authority, the regional convening

1 authority is he didn't know what his entire
2 population to pull from was. They probably won't
3 like to hear me say it here, but there were fine
4 officers throughout this country going to get
5 their graduate degrees.

6 I went to law school for three years
7 as a part of the Law Education Program. I was
8 available to serve on a jury. But for a couple
9 weeks for examinations I could have been pulled.
10 The only reason I wasn't I wasn't on anyone's
11 radar. And then it cost money, but TAD dollars
12 are budget dust. And if you had a well-thought-
13 out pool that you can pull from randomly and you
14 pick your criteria for selecting that venire of
15 nominees that goes to a convening authority, I
16 think you'll find you will have a far more
17 representative panel.

18 My experience was the panels were
19 largely representative of the fleet at large. I
20 didn't see a lot of disparity there, but I
21 recognize I have a limited view, which is only my
22 own experience. That's all I can relate it to.

1 CAPT FULTON: And the officer panel
2 doesn't look like the whole military either.

3 MEMBER GOLDBERG: Understood.

4 LTC WOLFE: So I'm going to -- at
5 least based on my experience; I don't have data
6 on this, I'm going to challenge an assumption in
7 the question.

8 It's fair to say women are subjected
9 to sexual assault, at least in the military, on a
10 higher rate than men, but the voir dire questions
11 I had were to husbands who had daughters and
12 wives and -- who had experienced sexual assault.
13 And the problems they -- I faced on voir dire was
14 just as real with them as whether they could sit
15 as to it is with a woman.

16 And so I'm not sure, though I -- I
17 would look at the data before assuming that women
18 are excused at higher rates. It may be true. If
19 there is a logical sense to it in my experience
20 that was not true.

21 I would say if anything convening
22 authorities pick panel members that are more

1 diverse than the panel they're -- than the pool
2 they're selecting from. If a two-star in an
3 infantry division who's picking some 06s and 05s
4 to sit on the panel is not starting with a
5 diverse pool, right, the staff to looked to find
6 five retired military judges who can sit before
7 you came up with the panel they did --

8 (Laughter.)

9 LTC WOLFE: -- right, because the
10 pool, retired military judges in the D.C. area is
11 what it is. And I think convening authorities,
12 at least -- I never have sat in a room with them
13 -- but they went out of their way to try to make
14 diverse panels. And there's a chance if you went
15 randomization; just give me five colonels in my
16 infantry division to sit on the panel, you would
17 end up with a more homogeneous panel, if you
18 didn't weight the randomization with a criteria.

19 There are two other logistical
20 problems I would raise that have to be solved.
21 They're not insolvable, but they're there. At
22 least speaking of the Army I don't think --

1 because there's always tenant units that fall
2 under a GCMCA there is not a list of people on my
3 base on any given day that I can send to a court-
4 martial. It has to be assembled ad hoc.

5 And the second problem is you pick
6 these people and then the trial happens weeks to
7 months, probably many months later, and someone
8 who is a commander is going to have to decide
9 whether that person is available for a trial even
10 though they were selected randomly. They're
11 going to the field. They're being deployed.
12 They're going to school. They have scheduled
13 leave. A commander is going to have to make that
14 decision about whether that panel member is
15 excused, because I think it would be the worst
16 possible thing for a military judge to decide
17 what is the best military mission, right? That
18 is not our job. It is to make -- decide whether
19 a panel member is -- should go on a deployment or
20 should come to the court-martial.

21 So a commander is going to make that
22 decision anyway. And the longer that tail gets

1 between when you select and you end up at trial
2 you may end up in a system that is not too
3 different than this current one because the
4 commander is deciding well, that person's
5 unavailable, that person's unavailable, and they
6 end up with a system that is not random. And if
7 you put -- if a statute requires randomness,
8 there may be now a challenge because of the
9 convening authority.

10 It has logistical issues that are not
11 non-solvable. They're doable. We've changed
12 lots of things in the military judges and going
13 through a churn while we adjusted to them, but it
14 is -- I do see having some churn that will be
15 required to make that adjustment.

16 LTCOL LIBRETTO: I had the opportunity
17 to sit on a number of both Marine Corps and Navy
18 panels and I agree with Commander Weiland's
19 observation that the Navy panels were much more
20 diverse than the Marine panels. I don't know if
21 that's a product of simply the population that
22 the convening authorities had to choose from, but

1 by and large we have panels that are mostly White
2 males. In fact over the last six to nine months
3 I would say we've had three panels with minority
4 accused with all-male White panels. And that is
5 a -- obviously a concern from their perspective
6 that needs to be addressed.

7 The logistical and administrative
8 problems associated with what the other comments
9 were, I wholeheartedly agree with and I think
10 really it comes down to making a decision as to
11 whether or not the military justice process and
12 panel selection is going to be the prerogative of
13 the judiciary or a court administrator or the
14 convening authorities.

15 If it's the court administrator, then
16 we're going to have to accept that there are
17 going to be impacts to mission. Leave that has
18 been scheduled for periods of time -- I was
19 speaking with the AUSA last week about this in
20 fact and from my understanding and her comments
21 to me were that federal district court judges
22 don't take kindly to excuses like I've got a

1 family vacation planned.

2 So, so long as we as an institution
3 are willing to go there, I think that's the means
4 by which we get to a diverse panel with a pool of
5 people for the convening authority or the court
6 administrator to select from, wherever that
7 decision point resides. Where there's a pool of
8 individuals throughout the entire base that can
9 be randomly selected and perhaps based on --
10 there are criteria associated with who gets put
11 into that pool.

12 But one of the things that -- another
13 comment was about the lead time between selection
14 and the actual court-martial going. I mean we
15 don't get panels right now until two to three
16 days in advance of the panel -- of the trial. So
17 I don't necessarily think from the Marine Corps's
18 perspective that that's necessarily a concern
19 because the panels get put together at the last
20 minute.

21 So, so long as that population is
22 available to serve and we are willing to accept

1 some deviations from current practice, which
2 basically rests the availability decision wholly
3 within the convening authority, I think the
4 mechanism by which to do that is a larger
5 population, basically the -- whatever base or
6 installation is at issue or where the case is
7 being tried. And then a court administrator
8 randomly selecting from the population that's
9 available.

10 CDR WEILAND: I agree wholeheartedly
11 with all that. I just want to say I think you
12 could also cast a wider net. I think there are
13 creative ways to solve this. You have people who
14 are in leave in transit between duty stations
15 that are not in any particular job you would have
16 to manage. And you could identify those people
17 as being part of the pool for a month and just
18 make it clear to them, like now you have --
19 instead of 45 days leave in transit, you have 90,
20 but you're going to be spending some of that time
21 going to sit in potentially a panel.

22 You have to manage the daisy chain

1 because most -- particularly when you're talking
2 about senior officers or folks with critical
3 skill sets, they've got to go relieve someone
4 who's got to go relieve someone who's got to go
5 to the vital job at the front. But I do think
6 identifying folks that are available are the --
7 there are opportunities for that.

8 MEMBER GOLDBERG: And I absolutely
9 want to hear from Colonel Cohen. I'd just put a
10 pin in that and ask -- it would be helpful to
11 hear the panel -- and I know other colleagues
12 will have questions on this, but talk about sort
13 of if you have thoughts for us on what
14 specifically might be useful for casting the
15 wider net. And you've just identified some of
16 them, but really I think that's a lot of the
17 question that has come up, which is that the net
18 tends to be the people who are known to the
19 convening authority and --

20 MEMBER SCHWENK: Let me jump in and
21 say that the defense -- the chiefs of the defense
22 services suggested that one possibility might be

1 for enlisted accused who have the option of
2 asking for enlisted members -- raising the
3 percentage from one-third to some higher number
4 like 50 percent or something might help with the
5 diversity issue because there are so many more
6 apparently Black, Hispanic, minority enlisted
7 compared to officers. And so they threw that --
8 so that's something I'll just add.

9 COL COHEN: So that was actually -- my
10 comment was if the paradigm as it currently
11 exists using the Article 25 criteria -- and I've
12 advised many convening authorities in the past
13 when I was a staff judge advocate with respect to
14 the utilization of this -- tends to -- if you
15 gravitate towards applying all of those factors,
16 you gravitate towards more rank. The higher the
17 rank you go, you could look at the demographics
18 within the military, you're less likely to have
19 minorities, you're less likely to have females,
20 et cetera.

21 So the real question then becomes is
22 it a necessity that a panel actually consist of

1 jurors who are senior in rank to the actual
2 defendant or accused in the military or is it
3 just that they actually meet certain criteria?
4 The reality is is I would think that an E-6
5 technical sergeant in the Air Force would care
6 just as much about the prosecution of a
7 lieutenant colonel and whether that lieutenant
8 colonel has violated the law or not as a
9 lieutenant colonel who happens to be one more day
10 senior in rank than that lieutenant colonel,
11 which is what would be currently required.

12 So it's kind of a paradigm shift, but
13 if you enlarge and allow the composition of the
14 panels to change and it's not so focused on rank
15 but just doing their duty, their military duty,
16 then you naturally increase the size, the
17 demographic from which you can pull and would
18 have a much more diverse, potentially, jury pool
19 than you would -- or member pool than you would
20 otherwise.

21 CAPT FULTON: I think that's -- I'll
22 agree that that would happen. The rationale for

1 a court-martial and for a panel of members though
2 has traditionally been -- I mean not just
3 traditionally -- legally been the court-martials
4 functioning as some -- it's exercising some
5 aspect of command. I mean it really is -- it's
6 not a jury. It wasn't intended to be a jury.
7 Article 25 tells us that it's not supposed to be
8 function like a jury. It's an extension in some
9 sense of the commander, which is why it's senior
10 and it's why it's selected.

11 When I was an SJA I did apply Article
12 25 when I was helping my commander come up with a
13 panel. And I looked at age, experience, length
14 of service, judicial temperament, education, and
15 training, the factors I'm supposed to look at to
16 put together a panel.

17 And yes, obviously there's operational
18 considerations that keep people off of panels. I
19 guess the extent to -- how far you want to go
20 down any of these roads might depend on why you
21 think we have courts-martial and why you think we
22 have members panels, what their role is.

1 MEMBER GOLDBERG: I have plenty more
2 questions, but I'm sure my colleagues have
3 others, so I'll cede.

4 MEMBER CASSARA: For those of you that
5 were here yesterday, you will have heard part of
6 this. I think I know pretty much all of you or
7 have appeared in court before many of you.

8 I have been practicing military law
9 for 30 years. Twenty-five years were spent as a
10 trial attorney. I told everybody yesterday my
11 very first trial as a prosecutor I prosecuted a
12 young E-4 African American. We walked into the
13 courtroom. And I was as green as green could be.
14 We walked into the courtroom and I even I was
15 shocked that everybody on the panel was a White
16 male, E-9, E-8, O-5, O-6. I was upset. I can't
17 even imagine what the accused thought when he
18 walked into that courtroom.

19 The very last trial that I tried was
20 an African American male, E-5, I think. Walked
21 into the courtroom. There were eight or nine
22 panel members, all White except for one African

1 American who was immediately struck.

2 The only time that I have walked into
3 a courtroom and seen a -- with -- and gotten a
4 convening order of predominantly African
5 Americans is when a panel was selected the night
6 before the trial of a White officer accused of an
7 offense against an African American enlisted.
8 And when we got the convening order there were 70
9 percent African American.

10 I'm sorry, but -- and I'm not casting
11 an aspersion on to any of you all because I know
12 you weren't involved in any of these processes,
13 but my point is that that wasn't an accident. We
14 went judge alone. He was acquitted. Life worked
15 out. Nobody had to raise the issues on appeal.

16 I refuse to believe that those three
17 instances and numerous ones in between were
18 accidents. And look, I'm a defense hack. I've
19 been a defense hack for 30 years. I'm not -- I'm
20 completely unapologetic about that. But for that
21 -- for an African American junior enlisted to
22 walk into a courtroom and see nothing but senior

1 White non-commissioned officers and officer
2 members -- I don't know what the solution is,
3 gentlemen, but I know that it's not to continue
4 the system the way it is, in my opinion.

5 CAPT FULTON: Well, right now I think
6 just from having talked in the recent past to
7 people who help put together panels -- I think
8 racial diversity and gender diversity kind of
9 lives a little bit with operational availability
10 is kind of an unspoken sub-Article 25
11 consideration. I mean and I -- the question is
12 do you want to take it out of the shadows? You
13 want to put it in Article 25 or should we not be
14 considering these sort of extra legal
15 considerations at all? And you're going to --

16 MEMBER CASSARA: In my pontification
17 I'm not proposing an answer. I'm expressing my
18 concern.

19 (Laughter.)

20 CAPT FULTON: You're going to come up
21 to a fork in the road here pretty quick though.
22 So what you -- if you don't want to ever have a

1 moment like that, like the ones you described --
2 I mean, just as a matter of random chance they're
3 going to occur unless you take pretty interesting
4 steps to make sure that never happens.

5 MEMBER CASSARA: But I would believe
6 that if the accused knew that it was simply a
7 random choice as opposed to a deliberate decision
8 by the person who has referred charges against
9 them, that that might create a very different
10 perception.

11 CAPT FULTON: Yes, that's true too.

12 CDR WEILAND: A random system would
13 certainly eliminate the panel packing concern
14 that I think you're articulating. It would go a
15 long way to that.

16 CHAIR SMITH: Well and I think -- not
17 to say that anybody has bad intentions, but
18 history has shown us repeatedly that people have
19 biases, prejudices, et cetera. And so for the
20 Black person or Hispanic person walking into that
21 scenario knowing that one person at the end of
22 the day has selected the people who are going to

1 stand in judgment of them, and being asked --
2 knowing what it is like to be a Black person,
3 Hispanic person, other minority in this country
4 you're asking them to trust a process that
5 repeatedly -- not just in the military, but just
6 generally has not been equal or fair.

7 So there's perception and there's
8 reality and presumably there's a combination --
9 not to say any of you would be guilty of that,
10 but there's a combination of those things that
11 occur. There's just no way that they don't. And
12 I hear everything that you're saying about we can
13 consider it, the convening authorities do a good
14 job of considering it, but what about the ones
15 who don't?

16 And again, leaving it to one person as
17 opposed to having a process where, I don't know,
18 a -- what did I say, algorithm or whatever the
19 case may be -- I mean we use algorithms in every
20 other walk of life. It seems that all these
21 smart people, smarter than myself; I'm not good
22 at that stuff, could come up with ways to ensure

1 that it's not just perception, but it is reality
2 that people's individual biases, as much as
3 possible, are removed from the equation.

4 LTCOL LIBRETTO: Going back to a
5 comment that was made earlier, I think when you
6 expand the pool of eligible people, eligible by -
7 - I mean in the local area or what have you, I
8 think diversity is going to come along with that
9 as well as the perception of -- that comes -- a
10 perception of fairness and impartiality that
11 comes along with the randomized selection.

12 We vest judges -- going back to a
13 comment that was made earlier, we vest judges
14 with a lot of discretion in determining whether
15 to grant a continuance in light of the
16 unavailability of a witness or of whatever
17 operational tempo things are going on at the
18 time. If we reside that process within the
19 judiciary or a court administrator construct, I
20 think -- and take it away from the CA's ability
21 to say yes, no, yes, no, you're serving, you're
22 not, I think it goes -- it will go a long way to

1 the perception of fairness. And by casting a
2 larger net of people on the installation
3 diversity will also follow.

4 So I think in terms of a measure to
5 take I think residing that process within an
6 entity within the judiciary and allowing the
7 judges to make the determination as to whether or
8 not somebody is available or not as opposed to
9 the convening authority will go a long way to
10 that end.

11 MEMBER MARKOWITZ: So I have a
12 question to follow up on something that Colonel
13 Wolfe said. As an expert sitting in courts for
14 more than 15 years now I've listened to a lot of
15 voir dire and I've watched a lot of women, and
16 yes, a lot of parents of -- and spouses -- the
17 challenge for cause and end up leaving panels
18 because of challenges for cause, either for
19 actual or perceived bias related to experiences
20 with sexual violence.

21 So I guess my question is related to
22 the issue of perceived bias and the

1 disproportionate number of folks who end up being
2 kicked from a panel for perceived bias, which
3 doesn't seem to happen in -- with the same rates
4 in the civilian sector, right? We don't see
5 people being kicked off juries for perceived bias
6 because of a relationship to an experience of
7 sexual violence, or even the actual experience of
8 sexual violence.

9 So I guess my question is is this --
10 and I'm sorry that you're watching the sausage
11 actually be made as it's happening.

12 (Laughter.)

13 MEMBER MARKOWITZ: Is this an issue
14 that you feel -- is it appropriate that we are --
15 that it is given this much weight? Do you think
16 that the perception of bias is as significant as
17 it really is to a military panel? Do you feel
18 like this is being overblown in any way? I just
19 watch as particularly women are truly being
20 removed from panels at an extraordinary rate.

21 And yes, Colonel Wolfe, also parents
22 and spouses as well, but certainly this is where

1 we do truly seem to lose women from a lot of
2 these panels.

3 So I'm curious about your thoughts
4 related to perception of bias as it relates to
5 the experience of sexual violence.

6 LTCOL LIBRETTO: One of the -- coming
7 up as a military judge I've learned -- I learned
8 two areas of my practice that were subject and
9 most vulnerable to appellate issues. Number one,
10 instructions; number two, jury problems, members
11 sitting on a panel that shouldn't be sitting.

12 So I believe that military judges,
13 myself included, were very sensitive to that
14 issue and combined with what we know as the
15 liberal grant mandate, tended to not necessarily
16 per se disqualify those with those types of
17 experiences or work as a victim advocate for
18 example, but it certainly made our hair stand up.

19 So one of the benefits of
20 randomization, right -- I mean the body of law
21 surrounding the liberal grant mandate doesn't
22 really have a place anymore because the liberal

1 grant mandate was to counteract the idea that a
2 convening authority is selecting a panel and
3 therefore the accused ought to be given an
4 opportunity to liberally challenge for cause. If
5 that randomization process comes to fruition,
6 then the body of law associated with that
7 principle probably largely goes away. But I
8 believe that that -- the liberal grant mandate as
9 well as the vulnerabilities associated with that
10 have caused military judges to be overly
11 sensitive to that.

12 Now having said that, I do believe
13 that a large majority of those individuals, for
14 reasons beyond just that experience but the way
15 in which that experience might have affected them
16 or the reasons why they undertook a certain role
17 as a victim advocate or something like that,
18 oftentimes lent themselves to an appropriate
19 challenge for cause.

20 So I think there's a dynamic there
21 between just the perception issues and the
22 vulnerabilities associated with member selection

1 as well as the idea that they ought not to be
2 sitting on a panel when they're so closely
3 related to an experience that they've had.

4 CAPT FULTON: Implicit in your
5 question is the notion that a defense counsel
6 necessarily wants to kick women off the panel. I
7 don't think that's necessarily the case. And I
8 can tell you that as a defense counsel myself I
9 was frequently keen to keep women on the panel.

10 I don't want to put Mr. Cassara on the
11 spot here, but if you're looking to -- if you
12 want to invite the panel to scrutinize the
13 actions of a female victim, you want women on the
14 panel, not men. Men get really squirrely about
15 evaluating women's conduct leading up into a
16 certain --

17 MEMBER MARKOWITZ: And please let me
18 clarify. I actually agree that there are times
19 when folks do want -- but I do see that at any
20 point when there is a mention of having either
21 experienced any type of either sexual or intimate
22 partner violence or having somebody close to you

1 that that automatically then is -- sends up the
2 flag and --

3 CAPT FULTON: I agree with Mr.
4 Libretto then. As a judge if you're going to get
5 -- my big one reversal as a trial judge is
6 leaving a member on a panel I should have taken
7 off. And that's what we're squirrely about is
8 members issues and instructions.

9 LTC WOLFE: And for those who don't
10 know -- I mean I'm just going to explain the
11 liberal grant mandate. If you don't find actual
12 bias and you don't find implied bias, so
13 therefore you're finding there's nothing wrong
14 with this panel member but you determine it's a
15 close call, dig up, right? So it's a
16 requirement, it's a judge-made law from the Court
17 of Appeals for the Armed Forces that -- and one
18 could argue whether that should happen with an
19 Article 1 court, but it's a judge-made law that
20 kicks people in close calls even though the judge
21 does not find that the panel member is a problem.

22 And these are closely reviewed by the

1 CCAs. There's an interesting question as to
2 whether they're reviewing its reversible error,
3 that you violated the liberal grant mandate or
4 whether the CCA actually has to find that there
5 was implied or actual bias. But I grew up
6 thinking you could be reversed just for violating
7 the liberal grant mandate, which means the CCA
8 could reverse you even though they didn't find
9 actual bias in the panel members.

10 And it's all based on a transcript
11 where you're there, you're looking at this person
12 and the CCA is not. And I've definitely had the
13 case; and this was an easy case, where a panel
14 member is giving all the right answers on paper
15 and I do not trust them, right? And they're
16 gone, right? Their credibility is -- the way
17 they're answering the questions tells me they are
18 giving me the answer they think I want to hear so
19 they can stay.

20 But also I've had panel members where
21 the answer that they're saying is going to look
22 problematic on paper when it's reviewed by my

1 superior court, but in person I trust them. They
2 are credible. The way they're answering the
3 questions, the way that -- and I'm not a terribly
4 big believer of a human's ability to judge lying
5 or not, but sometimes you believe people or you
6 don't. And that's a job you have to do as a
7 judge.

8 And the setup we have right now, I
9 understand why it exists. It exists because of
10 how we select panel members. It's a remedial
11 measure. This is one of the ways we are
12 fundamentally different than civilian trial
13 systems. And so it's in place because of how we
14 select members.

15 And I'm not going to -- once you start
16 pulling strings on this you're probably going to
17 end up at a system that is very much like federal
18 district courts and how they select juries
19 because it's all built up where all these
20 counteracting forces are trying to achieve
21 balance.

22 And so the convening authority picks

1 panel members. You don't give either side a lot
2 of peremptories like the civilians. We have a
3 liberal grant mandate and we reverse a lot of
4 cases on appeal for voir dire errors. And the
5 judges know that so then they grant more
6 excusals.

7 You could change all of that. It's
8 very hard to change a piece of it because it is
9 all interconnected to try to create a balanced
10 system. You can shift the balance a little bit,
11 right? And then that's fine, but these things
12 were all created on purpose because of how the
13 system is done.

14 MEMBER BASHFORD: I just want to say
15 one thing about perception versus reality. We've
16 been talking -- when we talk about perception,
17 usually what would the defendant think walking
18 into a court-martial and seeing a certain panel
19 composition or a judge composition? And one of
20 our subcommittees is looking at that to actually
21 get the data.

22 But back in line of the sexual assault

1 victim or father of a sexual assault victim, I
2 can't imagine that if a challenge for cause is
3 denied because the person says they can be fair
4 and you don't have the robust number of
5 peremptories -- if I were the defendant, I'd --
6 like wait a minute, the sexual assault victim
7 says she can be fair but she's on my panel? To
8 me that would be a bigger perception of
9 unfairness. So I think when we're talking about
10 perceptions we have to -- like whose perceptions
11 are we talking about?

12 MEMBER SCHWENK: What are your
13 thoughts on peremptory challenges since it's been
14 brought up now twice in a row? One is the
15 loneliest number or --

16 LTC WOLFE: It is what it is. It
17 creates logistical problems the more peremptories
18 you have, right? I mean it is hard to seat cases
19 and it is not uncommon to bust the panel. And
20 now you're recessing for a month and -- or you're
21 recessing to your next hole in your trial docket,
22 which might be four months or five months.

1 So you can do that. If you
2 increase the number of peremptories, understand
3 that's the number of more -- that many more
4 people are showing up to sit on the panel, right?
5 And that's going to have a logistical tail. At
6 any time you make a system more logistically
7 difficult to do, you are changing the incentives
8 for the people who administrate it about what
9 cases they refer. So that's just the balance you
10 have to ask yourself. More peremptories and a
11 greater number of strikes is probably fair in the
12 abstract.

13 COL COHEN: So I think it depends on
14 the paradigm through which you're looking at all
15 of these issues. Like I said, if we're looking
16 at redoing Article 25 -- I'm not advocating. I'm
17 just saying if that's what you're considering
18 doing, then I agree you have to look at it
19 wholesale and say okay, how does -- what would we
20 envision with Article 25 with respect to the
21 selection process?

22 I think peremptory challenges are an

1 important part of that. I think that the size of
2 the initial venire that's selected -- for
3 example, in a homicide case it's not unusual for
4 me to have 100 people who were initially
5 selected. That's not going to happen on a
6 military base, not necessarily.

7 But I also know that there are many
8 cases where you're so interested in minimizing
9 the amount of people who actually have to report
10 for jury duty that you start with a panel of 13.
11 Well yes, you're going to bust four of them
12 pretty quick once you apply a few challenges for
13 cause and implied bias challenges as well. So
14 the reality is though -- but if you're looking at
15 a broader group of people who come initially,
16 then you could increase the number of
17 peremptories.

18 The other thing that I think we're
19 having now done in the civilian sector is we
20 alternate. Prosecution uses a peremptory.
21 Defense uses a peremptory after we've done all of
22 our challenges for cause. I find that to be much

1 more effective. And it also makes it a less
2 likely that we're going to bust this panel.

3 And we also don't stop -- we stop the
4 venire once we actually get to the point where we
5 know we have enough people, that if everyone
6 exercised all their peremptory challenges we'd
7 still have enough panel members on there.
8 Because that's efficient, right? You don't start
9 with a less number thinking well, I don't know
10 how many are going to come here. You start with
11 a larger number.

12 Now are there military impacts
13 associated with that? Absolutely there will be.
14 But I also know that a garrison or on an
15 installation if you've increased the size of
16 those, there's usually a couple thousand people
17 on that installation who are potentially
18 available for jury duty on any given day. And so
19 the reality is is when the convening authority
20 only considers a pool of potentially 25 to pick
21 12, you are picking such a small percentage of
22 the actual base population who could be made

1 available for jury duty irrespective of
2 operational needs because the operational needs
3 are already known. And if you want to add an
4 operational necessity, I concur with that. If
5 you want operational necessities in Article 25
6 criteria, that would be something that's
7 appropriate too.

8 But I think the issue here is is that
9 -- I love the JAG Corps. I advocate for the JAG
10 Corps, but I've also now spent time in the
11 trenches in a different system and I'm realizing
12 that there are merits to the other system and
13 tradition alone doesn't necessarily necessitate
14 the most effective and efficient means of
15 military justice.

16 LTC WOLFE: I'm going to offer a
17 counterview. And I don't disagree with what he
18 said, but the -- one thing we need to -- any
19 person who's recommending changes to our system
20 that would -- I would keep in the back of your
21 mind is that this system and the change that you
22 are considering has to work in war with a draft

1 army, right? Ultimately this about -- that's not
2 been our experience for the last -- well, hell,
3 my entire career as a JAG -- a judge advocate.
4 That was not what we were doing. But the system
5 has to work in a conscript army deployed. You
6 cannot have a mass mobilization, go to war, and
7 then create a new military justice system for the
8 army you now have. And so somewhere in the back
9 there has to be -- this needs to work in war.

10 We didn't do that for the most part
11 when we were in Iraq and Afghanistan. We had
12 some court-martials, but not a lot. My
13 understanding is the Navy generally doesn't do a
14 lot of court-martials on ships. But the system
15 needs to be able to do that when it has to.

16 And so when I'm talking about the
17 logistical tail of the court-martial system; I
18 didn't say this earlier, that's what I'm thinking
19 about. It may be we've gone too far. The system
20 has already been too civilian-ized that it's
21 never going to work in a conscript army and
22 therefore we should just go with the full way.

1 And that might be the right decision.

2 That is one concern I have with
3 increasing logistical tails of court-martials is
4 you need to have a commander in the field, be
5 able to do a court-martial when people don't want
6 to fight.

7 MEMBER CASSARA: I'm going to -- if we
8 look at our numbering system here of what we've
9 talked about, this is sort of an offshoot of
10 that. When we talk about voir dire I'm just
11 curious as to what you gentlemen's experience was
12 on the bench. I mean I've had military judges
13 who have said I do all the voir dire. You don't
14 -- here's no individual -- there's no voir dire
15 by defense counsel. I've had judges who have
16 allowed me to pontificate for -- ask minutia
17 questions. And I'm just not -- I'm just curious
18 as to what you all's policies were in the
19 courtroom and what you found --

20 (Simultaneous speaking.)

21 CAPT FULTON: I never would have let
22 Bill Cassara do voir dire.

1 MEMBER CASSARA: That I understood,
2 Judge, completely.

3 (Laughter.)

4 CDR WEILAND: My practice was a bit of
5 a hybrid. Counsel would submit their proposed
6 voir dire questions ahead of time and I would vet
7 those. There were certain questions that were my
8 province to begin with. Talking about victims in
9 particular there were two questions that I asked.
10 Are you willing to discuss it today and do you
11 think you can be a fair juror? And if they said
12 no to either one of those, the inquiry was done.
13 The courtroom is not a therapeutic environment
14 and I wasn't going to drag someone who is
15 uncomfortable talking about their experience, to
16 have to relate those details.

17 Also I think these members regardless
18 of where they come from take their oath
19 seriously. I enter with a belief that they are
20 people of honor and integrity and the best our
21 society has to put forward. And so if they told
22 me they were willing to answer questions about it

1 and they thought they could be fair, I would
2 allow some voir dire by the counsel on that.

3 I paid hyper close attention to ensure
4 that that questioning was respectful and
5 relevant. I think when I was defending cases if
6 a military judge gave me an opportunity to ask
7 any question I wanted to and I wasn't really
8 certain why I didn't feel comfortable with a
9 particular member, I would ask as many questions
10 as I could in a fishing expedition to try and
11 remove that person because I just needed to get
12 to perception of bias. And I was aware of that
13 as a military judge and so there were no fishing
14 expeditions that were going to be allowed in voir
15 dire, but I never prohibited counsel from
16 exploring those areas that were pertinent to the
17 facts to the case that I was presiding over.

18 LTCOL LIBRETTO: My experience has
19 been it's very dependent on the military judge.
20 I did something much similar to Commander
21 Weiland. I permitted very little, in fact zero
22 general voir dire of the en banc panel by

1 counsel, but I gave them a lot of latitude during
2 individual voir dire, mostly out of concern that
3 I didn't want -- if they tainted one member I
4 didn't want them tainting the entire panel.

5 One of the problems that I think we
6 have in the military justice system is because
7 we've gone so far in limiting and restricting
8 counsels' ability to conduct voir dire is we've
9 gotten very bad at it. Counsel generally have I
10 think more comprehensive voir dire. How do you
11 implement that I don't know because I mean the
12 case law is very clear that military judges
13 maintain wide latitude and discretion into how
14 they control or expand voir dire. Whether or not
15 there's any mechanism by which to ensure that
16 counsel are provided the opportunity to do voir
17 dire I don't know.

18 I think it's important for it to be
19 done and I think it's important for the counsel
20 to become better at it, particularly as we get
21 more involved with these complex cases and issues
22 that perhaps were overlooked or not necessarily

1 addressed to the degree that they are now with
2 the types of cases that we're trying.

3 So my experience has been it's very
4 limited. Judges are reluctant to allow it
5 probably as a byproduct of their own inexperience
6 and perhaps lack of knowledge of the importance
7 of it.

8 MEMBER CASSARA: Would you prefer a
9 more uniform system amongst judges?

10 LTCOL LIBRETTO: One hundred percent.

11 MEMBER CASSARA: Okay.

12 LTCOL LIBRETTO: Absolutely. And I
13 think that will go a long way into setting
14 expectations of counsel, right, because they'll
15 go into one courtroom one week, not be allowed to
16 ask a single question during general or
17 individual voir dire, and then the next judge the
18 following week will come in and say okay,
19 counsel, have at it. So having some expectation
20 as counsel going in what the left and right
21 lateral limits are going to be I think will
22 improve the process greatly.

1 COL COHEN: One other comment on that.
2 I know questionnaires are allowed, member
3 questionnaires are allowed per the current rules
4 if you chose to use them. Most judges don't. I
5 never did. Having used those now I find there is
6 a lot of utility actually in those. And so it
7 might be something to consider as --

8 MEMBER CASSARA: I'm sorry, Judge.
9 Did you say futility or utility?

10 COL COHEN: Utility.

11 (Laughter.)

12 MEMBER CASSARA: Big difference.

13 Okay. Thank you.

14 COL COHEN: Yes, big difference. No,
15 actually I found them very helpful. It answers a
16 lot of the questions. It helps me narrow down if
17 I do have any specific questions. We do allow
18 for some individual voir dire in the third
19 district there, in Salt Lake County as well.
20 Primarily though the judge conducts the voir
21 dire.

22 I did a hybrid, similar to my

1 colleagues here, when I was on the bench. But I
2 do find that -- we provide some general basic
3 background about the members, but the reality is
4 is that a lot of the questions in the voir dire
5 process could be taken care of in a much more
6 efficient way by just having some general
7 questionnaires.

8 LTC WOLFE: I think judges control
9 voir dire because of the standards of review we
10 talked about earlier, right? So this is the
11 cause and effect of you have very scrutinous
12 appellate courts looking at how judges conduct
13 voir dire. Judges control it -- put their hands
14 on it and control it because of that. If you
15 gave judges broad discretion to conduct voir
16 dire, I think they would allow broad voir dire.

17 MEMBER ANDERSON: This is Marcia
18 Anderson. Thank you for coming today. This has
19 been a really fascinating discussion.

20 I want to circle back for a minute to
21 the qualifications in Article 25. We discussed
22 briefly -- well at some point yesterday with

1 defense trial counsel about the -- when they are
2 -- when people are -- when a convening authority
3 is being advised by an SJA about qualifications
4 for jurors. The others make perfect sense to me:
5 age, education, experience. How much weight you
6 give those is up for debate, but the one that I
7 still don't understand, what seems very squishy
8 to me, is judicial temperament.

9 So when you were advising a convening
10 authority about considering that as a factor,
11 what kind of advice did you give them?

12 LTC WOLFE: So as judges we didn't
13 advise convening authorities.

14 CDR WEILAND: So when we -- when I did
15 that it was whether or not the commander trusted
16 them to make an important decision where
17 someone's -- I would explain -- I didn't have to
18 repeat it; the admiral understood, but I would
19 explain the process. I mean we were bit
20 resource-limited as far as officers, but whether
21 or not the commander thought this person could be
22 entrusted with making a weighty decision that

1 affects someone's life on both sides of the
2 scale, whether or not they will approach it from
3 an appropriate sense of professionalism and
4 impartiality. But it is a very amorphous concept
5 to explain.

6 COL COHEN: I would go to the Article
7 25 criteria specifically with them, made sure
8 that every single time it was in my written legal
9 review that would go up with them. And then I
10 also would advise them. I also told when they're
11 considering the members that they also should
12 consider the perception of the fairness of the
13 system. And that was important to me that they
14 considered that.

15 It was not an Article 25 criteria, but
16 it's a general justice and good order and
17 discipline criteria that your people have to have
18 faith in the system. And so I would ask them to
19 look at that. And so sometimes I might get --
20 I'd tell a commander to choose a brand new second
21 lieutenant on a case because they're like, you
22 know what, I trust him. They seem like a sharp

1 little -- a sharp butter bar there. I'm going to
2 put them on the panel. But it also gave the
3 appearance that hey, I'm not trying to stack this
4 with a bunch of 6s on this particular type of
5 case.

6 That was just something that I did,
7 but I think it goes to that issue. Appearance
8 has always been important. It was important to
9 me as a judge; it was important to me as counsel,
10 and it's still important to me today. And I
11 think the idea that we can't consider that means
12 that we're not willing to consider the public's
13 trust in our system.

14 LTC WOLFE: If it helps to answer the
15 question, I was going to say when they passed
16 Article 25 with the UCMJ there were no judges,
17 right? The court-martial was the panel members.
18 They were the court. So judges came along in the
19 late '60s. And Article 25 hasn't been amended,
20 but if you think back to its historical purpose,
21 the judges -- the panel members were the court-
22 martial.

1 CHAIR SMITH: Can we shift to victims'
2 statements and what your thoughts are on victim
3 impact statements? There's been a lot of
4 conversation by the DAC-IPAD about the process of
5 redlining victim impact statements and not
6 allowing victims to say certain things that are
7 objectionable, et cetera. And that's something
8 that we are looking at as a committee, so
9 thoughts on --

10 MEMBER SCHWENK: In judge-alone
11 sentencing, which is --

12 CHAIR SMITH: In judge-alone
13 sentencing.

14 MEMBER SCHWENK: -- the future for
15 sentencing.

16 COL COHEN: I think the judge-alone
17 sentencing will do away the need to do any of
18 that. The judges are relied upon routinely to
19 hear information. You may suppress for example
20 evidence and yet the case goes forward because
21 there's additional evidence and yet they could
22 even go in a judge-alone trial under those

1 circumstances.

2 I think that once you go to judge-
3 alone sentencing the victim should be allowed to
4 be heard. Those matters are presented and the
5 judge can give whatever weight is appropriate to
6 what is said. I think the concern that I always
7 had as a judge was if I didn't at least review
8 and see what was there, that something might come
9 before the jury that was completely inadmissible
10 and never should have been considered by the jury
11 in their determination of a sentence. But if the
12 jury's no longer making those decisions, then the
13 JAG is already aware of that. I was already
14 aware of it and I wouldn't have given it weight
15 if I wasn't supposed to under the law.

16 And so I think that's -- to me that
17 was always a concern. Going judge-alone
18 sentencing I think negates the need for that at
19 all. Sentencing in the current jurisdiction --
20 which is interesting because we have all these
21 rules for sentencing and yet in the other systems
22 it's basically like well, just give us everything

1 you got and we'll figure out what's the best
2 thing to do. That actually seems to work really
3 well most of the time.

4 I know there's a recommendation for a
5 possible presentence report or something along
6 those lines. I'm not sure how you would do that.
7 That's a lot of labor-intensive efforts to set up
8 a system like that. But those are actually very
9 helpful as well. I mean, so I think there's
10 things that you can do, but I think judge-alone
11 sentencing is a good solution to allowing people
12 to say what they want to say to the court and
13 then letting the judge do the right thing.

14 CDR WEILAND: I would agree with that.
15 I never edited any or put any limit on any victim
16 statement that was coming to me as a military
17 judge alone. I wouldn't. I would let them
18 allocute and say what they had to say.

19 The only time I commented is when that
20 statement went beyond what the accused stood
21 convicted of and I felt it important to explain
22 to both the victim's family, because it was a

1 father speaking, and the government.

2 I think if you -- I don't know why
3 there's a perception that, if there is one, that
4 perhaps a victim's statement is more impactful
5 than any other participant's statement.

6 I think the government's argument and
7 statements about what they think is an
8 appropriate sentence is taken into consideration,
9 so is the defense's. I don't see why a victim
10 can't say what they think is appropriate.

11 I do think it puts an onus on the
12 judge to articulate what they're considering in
13 case something does come up that's beyond, far
14 beyond the scope, but I had, even with my
15 reluctance to ever make a statement on the
16 record, I did on at least one occasion feel that
17 need. I was going to either way at that point.
18 Perhaps it was sort of a practical consideration
19 I thought was important.

20 LTCOL LIBRETTO: I agree with
21 Commander Weiland. I mean, my observation to
22 this day has been that judges are reluctant to

1 strike things from victim impact statements other
2 than things that the accused was found not guilty
3 of.

4 So, as long as the statements and, you
5 know, what they are permitted to say tracks along
6 with what is relevant to what the judge is
7 considering, I don't think that there should be
8 much limitation.

9 However, I think that is the one
10 limitation that needs to be imposed is that if an
11 accused is found not guilty of an offense even if
12 charged, then the victim should not be permitted,
13 in my opinion, to get up and talk about all of
14 those things that the accused is found not guilty
15 of.

16 And just like the accused has almost
17 unfettered opportunity to say his piece during
18 presentencing, there are limitations as well,
19 right? I mean, he can't impeach the verdict, for
20 instance.

21 So, I think there is a place for
22 limitations and I think that limitation is what

1 is relevant to the judge's decision on the
2 offenses that the accused has been found guilty
3 of.

4 LTC WOLFE: I would suggest looking at
5 it a little bit broader. All of our sentencing
6 rules are really designed for panel sentencing,
7 right?

8 The rules of evidence fully apply in
9 a military courts-martial sentencing procedure.
10 RCM 1001, which is the rule that governs how we
11 conduct sentencing, restricts it even further
12 about the rules of evidence.

13 And all of that was designed to make
14 sure we didn't put stuff that was overly
15 persuasive or prejudicial in front of a panel and
16 they would weigh it too heavily, usually against
17 the accused.

18 In December 2023, that kind of all
19 goes out the window with judge alone sentencing,
20 and so, you know, there's an opportunity to kind
21 of just re-look at the entire sentencing process
22 and ask why do we have military rules of evidence

1 in sentencing when federal district courts don't?
2 Why isn't just indicia of reliability is the
3 standard?

4 And if you get rid -- if you
5 reevaluate the entire RCM 1001 and question
6 whether military rules of evidence should apply
7 in sentencing, that will swallow the victim
8 problem and you won't have to consider making a
9 special rule for victims.

10 I think you could just open the
11 aperture for sentencing evidence of all types and
12 military judges can weigh it just like district
13 court judges do.

14 (Simultaneous speaking.)

15 CDR WEILAND: I'm sorry.

16 LTC WOLFE: I'm not concerned about a
17 victim testifying about an accused's offense he
18 was acquitted of. I'm the judge. I know that,
19 right? You know, so I ignore that. It's awkward
20 once it's there, but I don't think it matters.

21 CDR WEILAND: I would add that the
22 application of sentencing parameters would go a

1 long way to dampening any concerns about outside
2 impact of a statement.

3 I mean, if it was so powerful that a
4 judge felt a need to depart from the parameters,
5 then I think the judge would have to articulate
6 why and that would be reviewable, so I think
7 that's an important piece of the puzzle as well.

8 MEMBER BASHFORD: The DAC-IPAD has
9 been asked to consider whether there should be a
10 uniform policy that would give SVCs access to the
11 prerecorded statements the victim made to the
12 investigators, to their medical records in
13 possession of the government, and for the, any
14 forensic rape kits or forensic evidence on
15 property obtained from them. Do you have any
16 opinion as to whether that should happen?

17 LTCOL LIBRETTO: I believe that that
18 would be counterproductive to the end that it's
19 intended to serve. I believe that decision
20 should rest with the prosecutor.

21 And as we consider providing those
22 uniform policies to access to evidence of any

1 sort, I believe it takes the ability of the
2 prosecutor to really control the case from them,
3 which I think then blends the VLC, victim legal
4 counsel, or SVCs into a quasi-prosecutor making
5 the determination as to what's best for this
6 witness in terms of the presentation of the case,
7 and I think that that decision as to what any
8 witness, to include a complaining witness or a
9 victim, has access to should reside with the
10 prosecutor on a case by case basis.

11 CDR WEILAND: I don't necessarily
12 disagree with my colleague here. I think he's
13 incredibly articulate on that and I
14 wholeheartedly agree with him that the exercise
15 of prosecutorial discretion ought to remain with
16 the prosecutor.

17 I see your question as a little bit
18 more narrow about access to information,
19 evidence, medical records, at least based on the
20 questions that were presented ahead of time.

21 I think the matter is really a matter
22 of timing. I don't think there should be access

1 granted before the investigation is complete,
2 right? Then you always have the concern that
3 somehow the investigation is going to be
4 influenced.

5 But if the time arrives, for example,
6 that discovery is now due to be disclosed to an
7 accused, I don't quite understand why you
8 wouldn't also provide that same sort of
9 information to a victim.

10 I also don't understand why, and maybe
11 this is just my experience, a victim wouldn't
12 have access to his or her own medical records.
13 They are their own medical records.

14 I think sometimes you find the
15 objection perhaps from a prosecutor is like just
16 go to the front desk and ask for it. The SANE
17 kits, I do understand, would be a part of the
18 evidentiary package and whatnot.

19 I wouldn't provide them additional
20 statements out of an investigation, but if it
21 were something pertaining to evidence that's been
22 taken from them or information that they

1 themselves have provided, I don't quite
2 understand why they're not provided access.

3 LTC WOLFE: As an additional thought
4 as to why I think timing is critical is it is not
5 uncommon in an abusive spousal relationship for
6 the victim to be working with her spouse, right?

7 And I can easily see a circumstance
8 where if you gave them broad investigatory access
9 to evidence, she's requesting evidence because
10 the accused asked her to, and so that's -- the
11 timing is more important to me than if they get
12 it. Once a case is referred and the government
13 has decided there's enough evidence to go
14 forward, it seems to be less concerning.

15 MEMBER SCHWENK: I wonder about any
16 thoughts you might have on this. The statistics
17 that we got on court-martials shows that as a
18 percentage of contested cases, the number of
19 acquittals in sexual assault cases is a lot
20 higher than in non-sexual assault cases, and so
21 the question is, obviously, why is that so? And
22 are they more complex? What -- you know, any

1 thoughts you have on that having watched them?

2 CAPT FULTON: Timidity on the part of
3 commanders who don't want to decide to not refer
4 marginal cases.

5 MEMBER SCHWENK: This is -- I was
6 going to save this for the end as a tidbit, but
7 thank you for being here, but on that comment, so
8 one of the things we looked at were 2,000
9 penetrative sexual assault criminal
10 investigations that were closed in 2017.

11 And in the midst of all of this data,
12 we find about 80 cases where the preliminary
13 hearing officer said no probable cause, and the
14 SJA said probable cause, and the convening
15 authority said go to court on that penetrative
16 sexual offense.

17 And so, if it was 80, 77 were
18 acquittals, two of the convictions were reversed
19 on appeal for insufficient factual basis, and one
20 made it through. So, you know, you wonder why
21 that occurs, but anyway, I'm wondering about in
22 the courtroom.

1 CDR WEILAND: If I might, I mean, I
2 think we also need -- these are incredibly
3 difficult cases to prove, particularly when
4 you're talking about an alcohol-facilitated
5 sexual assault between people who have had a
6 prior relationship. That is very -- proving
7 something occurred beyond a reasonable doubt is
8 difficult.

9 I have seen cases where I have
10 recommended that it not go forward, go forward.
11 I have seen cases where I have recommended it not
12 go forward, not go forward. I have won difficult
13 cases. I have lost cases I thought I could win
14 as a sexual assault prosecutor.

15 And so, your question raises another
16 one that we were provided, which is whether or
17 not Article 34 should be changed, the standard
18 for referral, and I don't think it should. I
19 think there's a difference between a legal
20 standard and a practical one, a policy decision.

21 I think the standard ought to remain,
22 in any referral decision, probable cause to

1 believe that an offense has occurred, and then a
2 prosecutor exercising discretion who he trusts,
3 who is experienced has to make a tough decision
4 about whether or not that case should or should
5 not be prosecuted in consultation with a victim
6 and her counsel if need be.

7 But cases that go forward to trial can
8 sometimes be very difficult to prove and you're
9 going to see a lot of cases where the government
10 loses in these particular facts and appeals.

11 CAPT FULTON: If I can return to that
12 point, I remember when I was a brand-new trial
13 judge in Pearl Harbor and we had a members' panel
14 who tended to -- we got repeat members showing up
15 for courts-martial.

16 And I remember observing the changes
17 in some of my frequent flyers when more than one
18 weak sexual assault case appeared before them.
19 They were different people on their second or
20 third go around and I think --

21 MEMBER SCHWENK: By different, do you
22 mean skeptical?

1 CAPT FULTON: Yes, yes, they were much
2 harder to convince after the first one. That's
3 my -- you know, I don't know, right? I can't
4 talk to them. I don't -- but I watch.

5 MEMBER BASHFORD: I just want to have
6 you all just follow up on that for one second
7 because we don't have standing jury panels. They
8 sit on a case and maybe two, four, six years
9 later, they sit on another case.

10 And I am concerned about the impact of
11 somebody sitting on multiple cases just even
12 unconsciously weighing well, there was that much
13 proof in this one and less proof in this one, or
14 more proof in this one.

15 I mean, what do you think about -- I
16 don't want to dissuade you from the why are so
17 many cases resulting in acquittals in the sexual
18 assault forum, but the standing panel issue as
19 well.

20 LTCOL LIBRETTO: We don't have
21 standing panels in the Marine Corps. I've never
22 seen that as long as I've been practicing. It

1 is, as I said earlier, a compilation of people
2 put together two, three days before the trial is
3 set to begin, so that is -- I understand that
4 perhaps some of the other services go with that
5 model, but as a general proposition, the Marine
6 Corps doesn't.

7 LTC WOLFE: So, the Army has standing
8 panels and I would say I would agree there is
9 cynicism and it works both ways, right? If the
10 government presents three cases that results in
11 convictions and the panel is coming back for the
12 fourth time, that's not the same panel or the
13 panel members are cynical in a different way than
14 what Captain Fulton said.

15 It's probably similar most to a grand
16 jury. I mean, having worked with some U.S.
17 attorneys, you know, they don't give their most
18 difficult case to a brand-new grand jury. They
19 give them the simple ones first, get them used to
20 the process, and then they bring the more
21 difficult case where the evidence is a little
22 sketchy, because I think people over time become,

1 get to know the system and become more
2 comfortable with it, or become skeptical. You
3 can put it either way.

4 I would add one wrinkle to this, which
5 is -- this is not my military judge time. This
6 is from training prosecutors. Oftentimes, people
7 don't know what a good case or bad case is,
8 right? We have a system in which defense
9 counsel, I believe in the Army, have less than
10 one panel contest a year on average.

11 If you just look at the number of
12 panel contests and you look at the number of
13 defense counsel that we have, it's significantly
14 less than one. There's more prosecutors than
15 there are defense counsel, so the ratio is even
16 less for them.

17 And my common experience of going to
18 trial counsel around the country and asking to
19 talk about their cases is they often misjudge
20 their cases substantially in both directions.
21 They thought a bad case was a great case. They
22 thought a great case was a bad case.

1 On average, for prosecutors, I thought
2 they tended to be scared of the case and more
3 skeptical than was warranted, and I think that's
4 true of any new prosecutor. They saw monsters
5 lurking in every evidentiary shadow.

6 And they didn't think, well, okay,
7 that's what the defense counsel says. How is he
8 getting that into evidence? Oh, only through the
9 accused. If that happens, what else happens?
10 You get to cross examine the accused. Is that --

11 You know, and so they would think
12 about -- they wouldn't think about the case just
13 because of an experience, and there's no solution
14 to my problem because, again, repeat what I said
15 before. The purpose of a criminal justice system
16 is not to try more cases, but there's no
17 misdemeanor docket, right, in the military
18 justice system anymore.

19 It used to be we had several times as
20 many special courts-martial as we have general
21 courts-martial. That is gone. So, it is not
22 uncommon, when I was a trial judge, for people's

1 first case to be a contested sexual assault.

2 And so, the problem with imposing any
3 type of standard is you have to trust the
4 decision of the people who are making it, and in
5 my experience, what they thought at the referral
6 stage, which is relatively early before they had,
7 you know, talked to their witnesses and done all
8 of their questions, is not necessarily how they
9 felt about the case right before they made
10 opening statement. I don't have an answer for
11 that, but I think it's a consideration.

12 CDR WEILAND: If I might add, I think
13 the Office of the Special Trial Counsel is a
14 massive step towards a consistent and wise
15 exercise of prosecutorial discretion in these
16 cases.

17 I wouldn't -- to qualify my comment,
18 I don't believe the legal standard under Article
19 34 should be changed, but I don't disagree with
20 some practical standard that makes only cases
21 that have a substantial likelihood of success
22 perhaps being the ones that are going forward,

1 because it does sort of create a perception
2 within the community perhaps that when you are
3 charged and brought before a general court-
4 martial, there is some merit to it.

5 I mean, when I was, for the limited
6 time I was trying cases in federal court,
7 criminal court, when we made a federal case of
8 it, the defense bar was very aware that we had
9 serious evidence and were likely to succeed, and
10 we got cooperation. We received and were able to
11 build bigger cases.

12 If you are constantly going in and you
13 have created a perception perhaps within the
14 community that every case is a loser, you are not
15 fighting that as you try to convince them this
16 case isn't like that one.

17 And so, I think the Office of Special
18 Trial Counsel is an important first step in the
19 exercise of discretion. I wouldn't tie that
20 person's hands to some subjective standard like
21 substantial likelihood of success. I would leave
22 that discretion.

1 CAPT FULTON: And if you're trying
2 that many bad cases, you're probably also
3 convicting some number of people who ought not
4 have been convicted. I mean, that's just going
5 to be the natural probable result of that
6 practice.

7 CHAIR SMITH: So, we have time for one
8 more question, okay, well, two more questions.

9 (Laughter.)

10 MEMBER GARVIN: So, this might be
11 something that you want to submit after if it's
12 going to take too long, but I'm going to move
13 back to the SVC/VLC for just a moment, and I
14 apologize if I missed in any of your bios, but I
15 don't think any of you served in that role, and I
16 don't think judges so far -- I don't think an SVC
17 or VLC had moved into the role of judge yet in
18 the branches, but maybe I'm wrong on that.

19 So, I know it's new, right? That's my
20 point on that, and so I'm curious. It's new that
21 SVC/VLC exists. It's new that 6b rights exist.
22 It's new that there's an analysis of standing on

1 6b rights 412, 513, right? It's a really
2 emerging, evolving area of law, very much akin to
3 those of you who practice in the civilian, right?
4 The federal CVRA is still evolving.

5 And so, I'm curious how you've thought
6 about that as SVCs and VLCs appeared in front of
7 you in proceedings. What latitude did you give
8 them since the law, right, we don't have
9 direction from the appellate courts yet on what
10 their role is, and then what records you were
11 making with regard to rulings you made on their
12 participatory status on behalf of the victims
13 such that appellate courts could analyze now that
14 there's a writ opportunity?

15 COL COHEN: So, I would routinely --
16 I saw one of the questions, the prepared
17 questions was would you allow them in the 802
18 sessions, et cetera? And the answer was yes. I
19 didn't have a reason why they shouldn't be there.

20 I made it very clear you're not a
21 party in the sense that you're not the
22 prosecution or the defense, but I also found that

1 it was very helpful to have them there because
2 then they could go back and talk with the victim
3 in the case and further explain some of, you
4 know, the processes that were going on and those
5 kinds of things, and once again from an
6 appearance standpoint, you know, that was
7 important to me.

8 With respect to standing, I always
9 went back to the statute or the rules and I said
10 do you have standing to make this motion? And if
11 you do, I'll be more than happy to hear it. If
12 you don't -- and then I would get the input of
13 the parties.

14 And if we needed to have, you know,
15 written motions and argument on that with respect
16 to standing alone, then that's exactly what I
17 would do.

18 And I think that's consistent with
19 really kind of what's envisioned, you know, when
20 they create these rules, is there's going to be
21 certain things that -- someone's always going to
22 be trying to push the envelope. Someone's going

1 to try keeping someone back.

2 And really, that's the role of the
3 judge is to interpret the law and to apply it to
4 anyone that's there, and if they disagree, then
5 that's what those writs are for and they can take
6 those up, and then we get new guidance on that.

7 But I thought it was a benefit to the
8 system. To be honest with you, I think it
9 removed a burden to a large extent off of the
10 prosecution who had a tendency to be seen as
11 victim's counsel when a prosecutor is not
12 victim's counsel.

13 And I think that's important to have
14 that separation of roles and responsibilities,
15 but nevertheless, to work closely with the actual
16 victim's counsel to achieve the objectives of the
17 victim in a particular case.

18 LTCOL LIBRETTO: Although a new
19 construct, I've seen a great deal of progress in
20 the willingness of military judges, to include
21 myself.

22 When the programs first became

1 established, I was very hesitant, reluctant, and
2 aggravated at times when we had another, you
3 know, attorney wanting to say their piece. I
4 mean, attorneys like to talk, and having another
5 one made things longer.

6 But in any event, I think we've come
7 a long way and I think where we are now is
8 actually in a good space where they're being
9 heard and being permitted to be heard on many
10 things that even they don't necessarily by
11 statute or rule have the authority to be heard
12 on.

13 I think judges are becoming much more
14 willing to engage because I think it does foster
15 trust in the system, the perception of fairness,
16 and I think it just makes things go smoothly.

17 CHAIR SMITH: Ms. Goldberg?

18 MEMBER GOLDBERG: So, I think given
19 the hour, we are at the end, I think I'll just
20 note my question to you, and perhaps if you're
21 here for a moment after the panel formally
22 concludes, I'll be able to talk further.

1 I just wanted to go back to something
2 we were talking about earlier in terms of panel
3 selection and ways to think creatively about how
4 to address the range of issues that we discussed.

5 And I know some of you, you know,
6 we've talked about the convening authority making
7 the determination of availability, and obviously,
8 availability is a very significant issue. We
9 also talked about a judge or a court
10 administrator making that determination.

11 And I think we would all be interested
12 if there are others you would identify, if
13 there's some combination or process as between
14 the two that you would recommend, or if there is
15 some other approach that you think might be
16 useful for us to think about as we think about
17 the question of how to broaden, or whether and
18 how, if so, how to broaden or adjust, make
19 recommendations regarding adjustment of the panel
20 development process.

21 So, I don't think we need to talk
22 about it right now, but it would be helpful to

1 hear about that from you afterwards and also in
2 any written comments you might want to share with
3 us after today.

4 CHAIR SMITH: All right, so that
5 concludes this panel. Thank you very much. It
6 was very informative. Thank you. We're breaking
7 for lunch for an hour or until what time, 12:30?
8 Okay.

9 (Whereupon, the above-entitled matter
10 went off the record at 11:32 a.m. and resumed at
11 12:33 p.m.)

12 COL BOVARNICK: Okay, so we have our
13 members are up on Zoom as well, so we're going to
14 start off with the Policy Subcommittee update.

15 MEMBER SCHWENK: Okay, so this
16 afternoon, we have the pleasure of listening to
17 the two Terrys bring us up to date on what the
18 Policy Subcommittee has been doing, and I'm
19 looking forward to hearing what they've been
20 doing.

21 Oh, wait, and a head's up. At the end
22 of the presentation, I will be asking the DAC-

1 IPAD for authority, in coordination with the Case
2 Review Subcommittee that Martha chairs, to work
3 on jury selection and Article 25.

4 In coordinating with them and working
5 on this issue to see if it was worth asking for
6 this permission or authority, we found that there
7 can be a division of labor that, working
8 together, we can coordinate with the Policy
9 Subcommittee looking at the technical aspects of
10 Article 25 while the Case Review Subcommittee
11 continues to work on jury composition and the
12 data collection for that. So, that's a head's up
13 as you listen to this that I'll be asking at the
14 end. Thank you.

15 MS. SAUNDERS: Okay, good afternoon,
16 Madam Chair and Committee members. So, for the
17 next few minutes, we're going to talk to you
18 about the victim impact statement report and
19 close that out hopefully, and then give you an
20 update on alternative justice, and then move over
21 to, as General Schwenk just talked about, to the
22 Article 25 panel selection issue.

1 So, starting with victim impact
2 statements, about a couple of weeks ago, we sent
3 you a draft victim impact statement standalone
4 report, and the idea was that this report on
5 victim impact statements would be a standalone
6 report and would not be incorporated into the
7 annual report, although there would be a summary
8 in the annual report which you'll hear about here
9 shortly.

10 So, the victim impact statement, you
11 know, you all had a very robust conversation
12 about that at the last meeting in December, and
13 you, the Committee ultimately voted to approve
14 five of the six recommendations that were before
15 you.

16 So, what we've done in providing you
17 the report, the draft report, which is at Tab 8b
18 in your materials, is to, you know, include the
19 recommendations, provide the information that we
20 relied upon to come to those recommendations, and
21 also to answer the questions that were posed way
22 back in the fiscal year 2020 National Defense

1 Authorization Act joint explanatory statement by
2 Congress, which is, you know, are military judges
3 interpreting RCM 1001(c) too narrowly and also
4 whether they're permitting witnesses to testify
5 about the impact of the crime.

6 So, the final report, the draft report
7 that we sent you is actually missing three pieces
8 of information. One piece of that was following
9 the meeting in December, we sent out a couple of
10 supplemental questions to the victims' counsel
11 representatives that you had heard from in the
12 December meeting just following up on a couple of
13 things.

14 You know, we asked them, you know, do
15 you, in fact, advise your clients that some of
16 the, you know, if some of the information in
17 their victim impact statements may be outside the
18 scope of the rule or potentially could lead to an
19 objection by defense counsel?

20 And as you would expect, the defense,
21 or excuse me, the victims' counsel in their
22 responses, which you have at Tab A of your

1 materials, the victims' counsel said yes. I
2 mean, we do look at their statements. We do
3 advise them, you know, if we think that some of
4 the information may be, say, outside the scope of
5 the rule or, you know.

6 One of the prohibitions in the current
7 rule is the victims are not allowed to recommend
8 a specific sentence, so if we feel like they're
9 going astray in some of those areas, we do advise
10 them, although ultimately, it's, you know, the
11 victim's call whether she wants to include that
12 information. So, that's, you know, again
13 included in Tab A of your materials.

14 And then, of course, yesterday, you
15 heard from the defense counsel and they, you
16 know, you all asked them a question about victim
17 impact statements and heard their responses.

18 So, what I had provided you this
19 morning, there was a piece of paper which would
20 be information that we would include in the final
21 report, and it's just one paragraph in red that's
22 a summary of the responses that we got back from

1 the victims' counsel, and then the paragraph in
2 red at the bottom is a summary that we prepared
3 of what the defense counsel said yesterday
4 regarding victim impact statements. So, we would
5 propose to include that in the final draft of the
6 report.

7 The third piece of information which
8 I don't have for you is you heard from the
9 military judges here today. We do have a section
10 in the report that does talk about former
11 military judges.

12 You heard from them a couple of years
13 ago, so we did include that, but they did provide
14 some additional information here today, so my
15 proposal would be I will draft up a summary of
16 that and include that in the actual final report
17 that goes out.

18 So, going to the actual responses to
19 Congress in the victim impact statement report,
20 the first question again is are military judges
21 interpreting RCM 1001(c) too narrowly and
22 limiting what victims can say?

1 So, part of the report, the Policy
2 Subcommittee actually reviewed victim impact
3 statements for cases that were closed in fiscal
4 year 2021 and, you know, looked at, you know, how
5 many involved victim impact statements, you know,
6 how many instances did a military judge limit
7 those victim impact statements, and what were the
8 reasons?

9 So, what we found, and this is
10 included in the report, is in the vast majority
11 of cases, judges do not limit a victim impact
12 statement. They let them give the statement
13 without limitation. In those instances where the
14 military judge did limit a victim impact
15 statement, it was generally done in accordance
16 with the rules.

17 What several members noted and we
18 included is that sometimes the standard for what
19 is within the scope of victim impact may be
20 unclear and that different judges apply the
21 standard differently.

22 The ultimate conclusion that everyone

1 came to was that it may be, it's more likely that
2 the rule itself is simply too narrow, and that is
3 especially true in light of military judge alone
4 sentencing, which we know is coming at the end of
5 this year. So, that was the proposed response
6 which is on page 16 of the draft. It includes
7 that information.

8 The second question which is are
9 military judges permitting other witnesses to
10 testify about the impact of the crime, you know,
11 keeping in mind that it's been three years since
12 Congress made this request that the DAC-IPAD look
13 at this issue, a lot has happened in that three
14 years.

15 So, you heard at the last meeting
16 that, you know, you had a couple of members who
17 had testified, or the husband had testified in
18 the court-martial, had provided a victim impact
19 statement, but they would not allow his spouse.
20 They said one of you can provide a victim impact
21 statement, but you both cannot.

22 What we have heard and what we've seen

1 in looking at all of these victim impact
2 statements is that things seem to have loosened
3 up and that the appellate courts and judges have
4 taken a more expansive view.

5 So, even if someone is not necessarily
6 a named victim on a charge sheet, they will often
7 allow them to make a victim impact statement or,
8 you know, if it's a case of parents, they would
9 allow both parents, for example, to make a victim
10 impact statement. So, the sense of the
11 subcommittee was that that issue has really been
12 largely resolved.

13 So, before we get to alternative
14 justice, are there any questions about the
15 report, the recommendations, the response to
16 Congress from any of the members? Okay, Madam
17 Chair, at this point, would it be appropriate to
18 recommend a vote on this issue?

19 CHAIR SMITH: Sure. Well, I think the
20 easiest thing to do is anyone opposed to the
21 report?

22 MEMBER GARVIN: Sorry, Chair, can I

1 ask a clarifying question?

2 CHAIR SMITH: Sure.

3 MEMBER GARVIN: So, the document we
4 have today that has the color on it, that's to be
5 substituted in so it's robust based on all of the
6 information, but were you also saying that you
7 were going to try to weave in what the judges,
8 the former judges said today or are we sitting
9 with what's drafted as-is?

10 MS. SAUNDERS: No, good question. I
11 would actually like to supplement what we
12 currently have with just a short, you know, few
13 sentences about what we heard today, which I
14 think what we heard today is that with judge
15 alone sentencing on the way, that they have much
16 less concern about prejudice and, you know, that
17 perhaps that aperture for what a victim may be
18 able to say should be opened a little bit wider,
19 or quite a bit wider actually.

20 So, but I can include that and, you
21 know, make sure everyone is happy with that
22 language. So, if you all are comfortable voting

1 on that today, I can include that and make sure
2 everyone is happy with the language in that.

3 CHAIR SMITH: How will you provide us
4 with the additional language?

5 MS. SAUNDERS: I can email that to you
6 and, you know, if people are happy with it, then
7 we'll just go with that. The alternative is you
8 could delay the vote, but I don't think anything
9 that they said was terribly controversial or
10 terribly -- you know, I think we got the gist of
11 it.

12 MEMBER TOKASH: I was just saying one
13 option, this is Meghan Tokash, could be we're all
14 meeting again, virtually albeit, on the 13th, so
15 I don't know what everybody's comfort level is,
16 but just as a fallback --

17 MS. SAUNDERS: Sure.

18 MEMBER TOKASH: -- you know, if you
19 need to get something completed with the report
20 for everybody to see before we vote, I'm just
21 throwing that out there.

22 (Off-mic comment.)

1 CHAIR SMITH: So, why don't we wait
2 until we get the entire packet? Does that sound
3 okay to everyone? Is it March 13 or 14?

4 MS. SAUNDERS: I think it's March 14,
5 is it?

6 COL BOVARNICK: I'm sorry, 14th.

7 CHAIR SMITH: 14th.

8 MS. SAUNDERS: Okay.

9 CHAIR SMITH: Okay, okay, that was Ms.
10 Tokash's fault, all right.

11 (Laughter.)

12 MS. SAUNDERS: Okay, that sounds
13 perfect. We'll get that updated and provided it
14 to you and we'll delay the vote.

15 So, the next issue is alternative
16 justice, and back to our old friend, the FY 2020
17 National Defense Authorization Act joint
18 explanatory statement.

19 In addition to asking the DAC-IPAD to
20 look at victim impact statements, they also
21 requested that the DAC-IPAD review whether there
22 could be other justice programs such as

1 restorative justice or mediation that could be
2 used to help victims or offenders, particularly
3 in cases where the evidence, you know, has not
4 been determined to be sufficient to take to a
5 court-martial.

6 So, in the intervening time -- so
7 again, that was more than three years ago that
8 Congress made that request. A lot's happened in
9 the intervening three years.

10 For one, the DAC-IPAD, as you all are
11 very well aware, was suspended for a significant
12 period of time as part of the Secretary's zero
13 based review.

14 While that happened, the Secretary of
15 Defense established, at the President's request,
16 a 90-day commission, the Independent Review
17 Commission, of which both Meghan Tokash and
18 General Schwenk were members, to look at various
19 aspects of the military's response to sexual
20 assault.

21 So, as part of that study, the
22 Commission released a report, and one of the

1 recommendations in that report was this
2 recommendation that you see, 4.3(e), which is
3 actually that the DAC-IPAD study methods our
4 allies have used to make amends to survivors,
5 including restorative engagement.

6 And this was based on some programs
7 that they looked at from our allies. They looked
8 at programs from Israel, the United Kingdom,
9 Canada, Australia, and I think there's -- did I
10 say Canada?

11 So, they looked at some of the
12 programs our allies used, and in particular,
13 there were programs from Canada and Australia
14 that were similar in which it wasn't restorative
15 justice, which is what you typically think when
16 you have an offender and a victim together in a
17 room.

18 This was more of a restorative
19 engagement. It was, you know, they considered
20 this a healing process for victims where a victim
21 who chooses to can meet with a senior defense
22 leader in the Canadian or Australian armed forces

1 and talk about their experiences, you know, to
2 that person.

3 And so, the IRC saw a lot of promise
4 in those types of programs and they recommended
5 that the DAC-IPAD take a closer look at those
6 programs.

7 When the Secretary of Defense actually
8 approved that recommendation, he modified it to
9 some extent to say rather than having the DAC-
10 IPAD look at it, that the DoD should look at
11 this. So, the Secretary of Defense approved that
12 recommendation for the DoD to look at that
13 program.

14 So, what we can tell you now is that
15 the DoD is studying this program with an
16 estimated completion date of fiscal year 2027. I
17 can't provide you any more information on that
18 because it is all pre-decisional.

19 So, when the Policy Subcommittee met
20 on this yesterday, you know, the question was
21 where do we want to go with this? Do we want to
22 wait until 2027, keeping in mind that the DAC-

1 IPAD is currently scheduled to expire in 2026, or
2 do we want to actually, or does the Committee
3 want to actually engage on this?

4 And I think the Policy Subcommittee's
5 recommendation is that we take some of this
6 information that, you know, that the IRC looked
7 at from the programs of our allies, and actually
8 the staff has quite a lot of information on some
9 of those programs as well, and put those
10 together, and at a future meeting, at one of the
11 upcoming DAC-IPAD meetings, present that material
12 to you all and see if you want to make a
13 recommendation for the DoD on what they may want
14 to look at in some of those programs, so more to
15 come on that from the Policy Subcommittee.

16 Any questions on alternative justice?
17 Otherwise, I'm going to turn it over to Terry to
18 talk about Article 25.

19 MS. GALLAGHER: Yeah, so as General
20 Schwenk mentioned, at the end of this, he's going
21 to request that the Policy Subcommittee be
22 assigned to study Article 25. Is it on?

1 PARTICIPANT: It is supposed to be on.

2 MS. GALLAGHER: So, is that better?

3 All right, so what I'm going to do is just kind
4 of give you a very broad overview of the proposed
5 study. What we are interested in doing is kind
6 of -- I mean, you've heard a lot of reasons why
7 one would study Article 25 selection and their
8 processes.

9 One is you all have expressed a great
10 deal of interest and perhaps concern about the
11 current system, and public testimony and
12 testimony really from almost all of the speakers
13 have raised issues with the current validity of
14 the configuration and the process.

15 The other important aspect is that you
16 have a new statutory amendment to Article 25
17 requiring randomization to the maximum extent
18 possible. That is effective December 2024.

19 So, you will have the regulations and
20 the rules being revised between now and the
21 implementation in 2024, and you also have judge
22 alone sentencing that will change the landscape

1 effective December 2023.

2 And that's, you know, important in
3 that many of the justifications for the current
4 system are that you need a lot of seniority on
5 the panel in order to effectively determine a
6 sentence that's appropriate for good order,
7 discipline, and military justice.

8 And so, if you don't have panel
9 members doing sentencing, their roles and
10 responsibility changes and you should probably
11 assess the criteria in light of that.

12 And then you have the big factor, that
13 these criteria were put into place in 1950 in a
14 system that was pre-judge even, and there has
15 been little to no development in that since then,
16 so it is definitely ripe for a review.

17 The scope that we propose is to review
18 and assess the member selection criteria and the
19 processes, and a holistic review looking at it,
20 you know, how is this going to -- you know, what
21 are their qualifications?

22 What should they be in order to sit as

1 a panel member given military concerns, and what
2 processes best reflect the best practices for the
3 reform? How can we make a randomization work and
4 stuff? So, we propose to look at that as the
5 scope.

6 It will be a coordinated effort. The
7 Policy Subcommittee is going to focus more on the
8 modernization of the selection criteria and
9 processes, whereas the Case Review Subcommittee
10 will be focusing more on the demographics of the
11 current panels, identifying the age, the rank,
12 the gender, the race of those that are selected
13 through the revised convening orders and also
14 through the people that are actually empaneled
15 and are to hear the cases, and that, of course,
16 will inform the policy study as well.

17 With that overview, are there any
18 questions before turning it back to General
19 Schwenk?

20 CHAIR SMITH: Just one kind of side
21 issue, you talked about the demographics of the
22 current panels. I think a while back, we had

1 asked, the Committee had asked for the
2 demographics on military judges, trial counsel,
3 defense counsel, SVC, VLC, and we didn't ever get
4 those numbers and, you know, they may play a role
5 in something that we are looking at in terms of
6 recommendations or considerations, so I just want
7 to reiterate that that was something we were
8 looking for.

9 MEMBER BASHFORD: And in fact, Madam
10 Chair, when we were talking, one of the things I
11 want the DAC-IPAD to agree to is when we were
12 looking at panel composition, we were only tasked
13 with looking at the panel members, and the
14 accused, and the victim. We would like to expand
15 that to, on a case by case basis, who was the
16 judge, who are the trial counsel, and who are the
17 defense counsel, so you have a snapshot of that
18 courtroom for that court-martial.

19 MEMBER SCHWENK: So, the Policy
20 Subcommittee requests authority from the DAC-IPAD
21 to pursue the Article 25 study as indicated by
22 the briefing. Thank you.

1 CHAIR SMITH: All right, any member
2 opposed to this idea? No? Hearing no
3 opposition, approved.

4 MS. GALLAGHER: And that is it from
5 the Policy Subcommittee.

6 CHAIR SMITH: Thank you very much. Up
7 next, Case Review? Colonel Bovarnick, that's
8 correct. Do we have a time on the 14th, on March
9 14? We haven't set a time, okay. People are
10 asking. That's why I'm asking.

11 PARTICIPANT: We can set it right
12 after this session.

13 CHAIR SMITH: Okay, perfect.

14 MEMBER CASSARA: Inquiring minds want
15 to know.

16 CHAIR SMITH: Yes.

17 MS. TAGERT: Committee members, we're
18 going to get started on the Case Review
19 Subcommittee update. The last couple of times
20 we've presented, it's been about the appellate
21 project that was assigned by OGC, but today we're
22 talking about the way ahead.

1 And I'm going to start it off
2 discussing the study that we are going to be
3 conducting on panel composition, and then I'm
4 going to pass the microphone to Ms. Bashford, who
5 is going to give you some updates to our project.

6 But I also wanted to introduce Ms.
7 Eleanor Vuono, who you all know, but she's now
8 part of our Case Review Subcommittee team, as
9 well as Ms. Stacy Boggess, who, as you know, is
10 my right-hand woman when it comes to all of this
11 stuff, so I appreciate them both being up here
12 because we've all done a lot of work on this
13 project, so we're excited to share it with the
14 Committee.

15 So, we're going to be talking about
16 the study, and then as well as the appellate
17 review study, which you will then have to vote on
18 as a standalone, as well as the annual report
19 that was emailed to you last week.

20 So, just as a reminder, reviewing
21 cases is a statutory requirement of the DAC-IPAD,
22 and what we are proposing to do is to review

1 cases, and based on those reviews, look at the
2 composition of the convening orders as well as
3 who is eventually seated on contested court-
4 martials for sex assault.

5 And as far as we can tell through our
6 research and talking to DoD, there really hasn't
7 been a study that looks at what the demographics
8 are of panel members. That's not unique to DoD.
9 It's actually kind of hard to figure out what
10 juries look like in the civilian world as well.

11 So, this will definitely be a
12 groundbreaking study as far as military justice
13 is concerned, and the first step is we really
14 just want to obtain an understanding of what the
15 panels look like in sexual assault courts-
16 martial.

17 We also want to look at what the race
18 and gender is of victims and accused and then
19 cross check that against what the panel
20 demographics are.

21 We're also going to be looking at the
22 data that is relevant to understanding the panel

1 selection outcomes, as well as comparing this
2 data across services and potentially
3 installations if we're able to get the
4 demographic information of the installations.

5 So, those are the initial purposes.

6 As we have talked to Dr. Wells and we also met in
7 a subcommittee meeting at the end of January,
8 there are also additional questions that come up,
9 but at this point, we want to just focus on
10 trying to determine what the panels look like
11 before we potentially go into more nuanced
12 issues.

13 The methodology for this particular
14 study is going to concentrate on Article 120 for
15 obvious reasons. We're also going to be looking
16 at child cases, and we are going to be looking at
17 any court-martial where a panel was seated
18 regardless of the outcome.

19 Most of those will have a conviction
20 or an acquittal, but there are sometimes reasons
21 that a panel may be seated where there is no
22 disposition that is a conviction or an acquittal,

1 but we'll be looking at all of those cases.

2 We're going to be recording
3 information from source documents, meaning we
4 will not be relying on the services for this
5 information, and at that point, we will provide
6 certain information to the services' HRC or
7 personnel offices for them to provide us with the
8 demographic data of the convening, the people
9 that were on the panel, as well as the victim and
10 the accused.

11 After that, we're going to give the
12 information back to Dr. Wells, who will be able
13 to provide an analysis for us for you to review.
14 So, having said that, I'm going to pass it over
15 to Ms. Bashford.

16 MEMBER BASHFORD: The other data point
17 we are going to be accumulating is for each panel
18 member, were they on the original convening
19 order, and that's just going to be a yes/no,
20 because there are so many convening orders as
21 time goes on, so we want to do that.

22 As I indicated before, I also would

1 like the subcommittee to have the DAC-IPAD
2 approval to expand looking at the composition to
3 the trial counsel, defense counsel, and judge, so
4 I'll be asking for that approval.

5 We're also in case review going to
6 continue looking at case outcomes. We've gotten
7 a quick snapshot that's been put together by the
8 staff, which I can never say it too much, the
9 staff is remarkable, and it shows a huge
10 disparity in conviction rates between penetrative
11 sexual offenses and general offenses as a whole.

12 There's not a single service that had
13 more than a 50 percent conviction rate in
14 penetrative sexual offenses, and as Jim Schwenk
15 always points out to me, that includes pleas.
16 So, the actual trial conviction rate is going to
17 be smaller.

18 So, with the DAC-IPAD's approval, we
19 would like to continue looking at this. There
20 may need to be additional administrative help.
21 We want to look at outcomes and attrition from
22 preferral to Article 32 to court-martial, and

1 ultimately, to produce a report similar to the
2 one we did in 2019 of three years' service.

3 I know Chuck Mason has already started
4 taking a look at some of the data we have on file
5 already, but we have court-martial records for
6 these years in our database, but again, it's
7 probably going to need some more staffing to help
8 go through that.

9 And I think it's important to continue
10 to look at these outcomes, and so I certainly
11 hope staffing doesn't become a roadblock to doing
12 that, but I just want -- our first one is going
13 to be the panel composition. We're already
14 starting to work on that, and then secondly,
15 we'll be looking at case outcomes.

16 And our ultimate goal is after
17 assessing the what in the case outcomes, is to
18 try to figure out the why, like we'll see what is
19 happening, but why is this happening? Why is
20 this attrition occurring? So, I'm going to ask
21 the DAC-IPAD to refer that to the Case Review
22 Subcommittee as well.

1 CHAIR SMITH: Okay, so, I guess, two
2 issues. Let's take a vote first on referring the
3 panel composition issue and the case outcome
4 issue to case review. Anyone opposed to that?
5 No opposition, so referral.

6 Now, point two is that there's been a
7 lot of talk, Ms. Bashford mentioned, with respect
8 to, I guess, the DAC-IPAD staff is also staffing
9 the other military justice committee. Did I get
10 the name right? I'm not sure. And the concern,
11 we have, what, 14 projects? How many projects do
12 we have going right now?

13 MS. TAGERT: More than usual, ma'am.
14 (Laughter.)

15 CHAIR SMITH: So, obviously we want to
16 make sure that our projects are getting the
17 attention that they need to get and that there's
18 enough staff to complete our projects,
19 recognizing that I know Audrey Critchley has left
20 and --

21 MS. TAGERT: Yes, Audrey Critchley --

22 CHAIR SMITH: Critchley.

1 MS. TAGERT: -- has left, yes.

2 CHAIR SMITH: And maybe one other
3 attorney or staffer?

4 MS. TAGERT: Yes, Pete Yob has also.

5 CHAIR SMITH: Okay, Pete, that's
6 right. So, we're down two people, plus 50
7 percent of your time presumably is being spent on
8 this other committee. We don't want to
9 overburden you, but we want our stuff done, so --

10 (Laughter.)

11 CHAIR SMITH: Just kidding. So, where
12 does that leave us? And maybe Colonel Bovarnick
13 can address that. I don't know.

14 MEMBER MARKOWITZ: Can I also just add
15 I think we only have two paralegals right now, is
16 that correct?

17 MS. TAGERT: That is correct.

18 MEMBER MARKOWITZ: So, I do want to
19 make mention of that, who are invaluable to us as
20 well, so.

21 MS. TAGERT: Yeah, we actually have
22 three paralegals.

1 MEMBER MARKOWITZ: Oh, okay, thank you
2 for the clarification.

3 COL BOVARNICK: Yes, ma'am. So, right
4 now, the DAC-IPAD term employees that are all
5 here, that's your staff, and then the staff is
6 doing some extra duty helping out the MJRP now,
7 but there's a plan in place to hire permanent
8 staff for the MJRP.

9 And the difference there is, as was
10 just noted, the DAC-IPAD term ends in 2026. If
11 it gets extended, we'll work with that at the
12 time, whereas the MJRP is a permanent body.

13 So, there is, with OGC, and has been
14 for a while, just that slow DoD hiring process to
15 hire a number of other employees to support the
16 MJRP, and so we're working through this
17 transition over the next couple of months.

18 Yes, the staff is working extra hard
19 to help out the MJRP, but their dedication and
20 devotion to the DAC-IPAD is foremost, and then
21 they're also covering extra duty with the MJRP.

22 Regarding the vacancies on the DAC-

1 IPAD term, the position vacated by Mr. Yob and
2 then recently Ms. Critchley as of the end of this
3 month, we're working with OGC to hire, backfill
4 those as term employees for the DAC-IPAD, as well
5 as an additional paralegal slot. So, we are
6 working it, and so nothing will fall aside.

7 One thing I'll note on this project is
8 that there's -- it was mentioned briefly, but
9 it's a considerable amount of work that we have
10 to rely on for the HR departments, you know,
11 upwards of potentially like 7,000 to 8,000 names
12 that we have to rely on an HR department
13 throughout the services to provide.

14 So, when you talk about court-martial
15 convening orders, as many know, any individual
16 convening order could contain about 20 names on
17 it, Captain John Smith at Fort Swampy in 2021
18 along with 20 other names, no other identifying
19 data, and so the services will have to find out
20 who is Captain Smith? What's his, obviously not
21 gender, but race and all the other demographics?

22 So, that simple statement that the HR

1 is going to help us get it, we're talking about
2 in the thousands of names, and so the time period
3 of that is going to rely on those HR departments,
4 and so then the staff, whoever it may be, will
5 get an Excel spreadsheet, then entering in a
6 number of data points.

7 So, yeah, so we're going to explore
8 getting additional help to do that, but that is a
9 considerable lift of data input, which I think is
10 probably beyond the capability of the personnel
11 we have now, but that's something that we'll work
12 through, but it's not something that's going to
13 be done in a few days. We think everyone can
14 appreciate that.

15 MEMBER BASHFORD: And I just want to
16 add though that the DAC-IPAD has always been
17 known for making recommendations based on data,
18 and so I think it's really important to have the
19 data of what these panels actually look like and
20 what the courtrooms actually look like as opposed
21 to anecdotal evidence.

22 MEMBER GOLDBERG: And just a quick

1 question, and I apologize if I missed this
2 before. We're looking at race and ethnicity, but
3 not gender of the -- oh, okay, Colonel Bovarnick
4 said something that made me think we were not
5 looking at that as well, so I just --

6 COL BOVARNICK: I just said, yeah, I
7 was making a generic statement of if there's
8 Captain John Smith on the convening order.

9 MEMBER GOLDBERG: Okay, that's what I
10 thought it might have been. I just wanted to be
11 sure I hadn't missed something.

12 MEMBER BASHFORD: Of the people who
13 are actually seated.

14 MEMBER GOLDBERG: Right.

15 MEMBER BASHFORD: But then it's a
16 yes/no were they on the original convening order?
17 So --

18 MEMBER GOLDBERG: Yes.

19 MEMBER BASHFORD: It's the actual --
20 we're looking at panel composition.

21 MEMBER GOLDBERG: And matching that
22 with outcomes or no?

1 COL BOVARNICK: It would work --
2 sorry, Ms. Bashford, but we --

3 MEMBER GOLDBERG: It's okay. We don't
4 have to go back. I understand we've moved past
5 this, so I'm happy to get caught up afterwards.

6 COL BOVARNICK: Yeah, but so, the
7 original convening order, but what the study is
8 going to be is it's going to work through who
9 actually ends up seated on the panel.

10 MEMBER GOLDBERG: Understood, yeah,
11 thank you very much.

12 COL BOVARNICK: It's not with the full
13 convening order.

14 MEMBER GOLDBERG: Appreciate it.
15 Thank you.

16 CHAIR SMITH: So, point of
17 clarification, are we looking at just the
18 original convening order, or if there were -- I'm
19 hearing from both sides that there are amendments
20 to convening orders. Are we not looking at
21 those?

22 MEMBER BASHFORD: There's going to be

1 a question for each panel member who is seated,
2 were they on the original convening order,
3 yes/no? So, the no would be if they were on an
4 interim convening order. Yes would be if they
5 were on the original one. It was deemed to be
6 just impossible to try to go through every
7 iteration of every convening order and track all
8 of that.

9 MS. TAGERT: Yeah. We spoke
10 extensively with Dr. Wells just kind of about
11 that. So we'll be able to say whether or not
12 they were on the original convening order.

13 And then depending on what the panels
14 actually end up looking like, we may want to go
15 back and say was the fallout to, you know, this
16 particular diverse or non-diverse panel a result
17 of devising or is it a result because the
18 original convening order was that. So that's
19 kind of a secondary question, but I understand
20 what you're saying, Chair.

21 And just as one other update, I did
22 receive an email from Dr. Wells today, and he has

1 created a data entry kind of website for us. So
2 that will be a lot easier on the staff as well.
3 So that's a good news story.

4 MEMBER BASHFORD: So that's our way
5 ahead and now I'm turning it back to the staff
6 for the appellate.

7 MS. TAGERT: Yes. So if you all
8 remember, we did write an appellate review study.
9 And I think that you received it. It was based
10 on an OGC tasker that we received to identify
11 recurring issues in the appellate world, and we
12 did just that. And we provided a bunch of data
13 in this report as well as the subcommittee
14 stating that going further, they're going to just
15 look at legal and factual sufficiency as well as
16 sentence appropriateness, which was statutory
17 changes in the NDAA.

18 But the subcommittee is no longer
19 going to just look at recurring issues that are
20 happening in the appellate world. But this is
21 the results of our study that the DAC-IPAD
22 actually had a lot of input in because that was

1 kind of the first couple meetings that we were
2 discussing all of these issues.

3 So I don't know if anyone has any
4 feedback or changes or edits that they are
5 interested in making in this report based on
6 reviewing it.

7 MEMBER SCHWENK: You got mine, right?

8 MS. TAGERT: Got yours, right. I made
9 your changes, yes.

10 CHAIR SMITH: Did everyone have the --
11 I don't want to call anybody out. But did
12 everyone have the opportunity to review this or
13 do you want to table that question until the
14 March 14 meeting?

15 Yeah, I think, can we do this on March
16 14? And then perhaps Colonel Bovarnick, you can
17 send an email that says these are all the reports
18 that we are going to be voting on on March 14.

19 MEMBER BASHFORD: Just to clarify, we
20 are hoping that the appellate report, while it
21 will be referenced in the annual report, will be
22 a standalone report.

1 MS. TAGERT: Okay. And so that's the
2 appellate review study, which is a little longer
3 than our annual report way ahead, which was just
4 a couple of paragraphs. But, yes, if you are
5 going to vote on that at the next meeting as
6 well, you can provide the staff any edits that we
7 can then combine for your review at the March
8 meeting.

9 CHAIR SMITH: Any questions? Okay.

10 MEMBER SCHWENK: I'd just like to
11 piggyback on what Martha said about conviction
12 rates. At Tab 9A, we have some document that
13 came in on sentencing. I mean, you find
14 conviction data in the weirdest places, but this
15 is on sentencing, this study apparently.

16 And on Page 15 of it in the footnote
17 at the bottom, it talks about these are cases
18 they found with the new sentencing rules that
19 took effect at the beginning of 2019. And it
20 says there were 784 cases that they found. And
21 of those, they found 711 cases that went to
22 verdict. And of those 589 were pleas, and 122

1 were contested. And of the 122 that were
2 contested, they managed to get 50 convictions.
3 And this is of every different type, which is 40
4 percent.

5 So that's another indicator that
6 numbers are not real high on convictions, which
7 is good or bad, I don't know, but just to bolster
8 what Martha was saying. Thank you.

9 MEMBER GOLDBERG: If I could just jump
10 in and add that I thought the observation that we
11 heard from the previous panel was interesting
12 about prosecutors underestimating their cases and
13 perhaps everybody involved, either over or
14 underestimating.

15 It seems like there may be more
16 complications in addition to the ones we already
17 know about in sexual assault cases that would
18 lead the numbers to be different from what they
19 might be for other types of cases.

20 Obviously, we don't know, and you will
21 learn much more when we do the deep dive into the
22 data. It's just to underscore that there seems

1 to be a lot going on potentially here.

2 MEMBER BASHFORD: Since we seem to
3 have wrapped this part of the presentation up,
4 there is something that I just want to bring up
5 that, I've mentioned this before, but we don't
6 have any of the investigators in the DAC-IPAD as
7 a committee member. And I think it's really
8 important to have that investigatory experience
9 helping to inform our decision.

10 Similarly, we no longer have the
11 enlisted perspective. And I think that's very
12 important to continue to have that perspective
13 shared with us, particularly since the cases
14 we're examining, most of the accused and most of
15 the victims come within those enlisted ranks. So
16 I would -- we have room to expand the panel. And
17 I would urge the Office of General Counsel to try
18 to do that.

19 In some of the site visits I've made,
20 we've gotten some recommendations of people who
21 are retired military investigators. I'll search
22 through notes and send them on to you and to

1 Colonel Bovarnick.

2 MEMBER ANDERSON: I think Colonel
3 Bovarnick has --

4 COL BOVARNICK: Yes. General Anderson
5 is one step ahead of us. So Retired Command
6 Sergeant Major -- excuse me? Oh, Retired Command
7 Sergeant Major -- so you've got the senior
8 enlisted part and a civilian police detective and
9 criminal investigator. So I think we could start
10 with that recommendation going forward to the
11 Office of General Counsel to nominate to the
12 Secretary of Defense for appointment.

13 So if the full panel concurs, we'll
14 take that recommendation forward, and I'll
15 prepare the packet.

16 CHAIR SMITH: Anyone opposed? Hearing
17 no opposition. Perfect. So we are an hour
18 ahead. So should we just --

19 COL BOVARNICK: Ma'am, I could --

20 MEMBER SCHWENK: Keep moving.

21 CHAIR SMITH: Should we just keep
22 going and then --

1 COL BOVARNICK: Yes, ma'am. Because
2 it's kind of similar to what we just on the Fifth
3 Annual Report I can cover and then we can talk
4 about confirming some of the way ahead for the
5 June meeting.

6 So for the Fifth Annual Report, so my
7 initial proposal will be no later than next week
8 so that the committee has two weeks. But we'll
9 have the revised version of the two standalone
10 reports that were just discussed, the
11 modifications from the discussion today for the
12 Policy Subcommittee and Case Review Subcommittee,
13 two standalone reports.

14 I think what we've come to the
15 conclusion of today is those will be voted on as
16 standalone reports. So I think even though there
17 was no vote today, I think the Committee all
18 agrees that there is going to be two standalone
19 reports to review. Okay?

20 More importantly, in my opinion
21 because it's a statutory requirement, is the
22 Fifth Annual Report, a draft of which was

1 provided previously. And I will just note a
2 couple of recommended changes to what you
3 reviewed, one of them being the three chapters --
4 I actually got to look real quick whether it's
5 two and three, but the ones that were labeled --
6 yeah, so Chapter 1, 2 and 3, so I'm referring to
7 Tab 10, even if you are just looking at the Table
8 of Contents, that those chapters should be
9 renamed as a Special Projects Subcommittee for
10 number one, Chapter 2 being Case review
11 Subcommittee and Chapter 3 being Policy
12 Subcommittee.

13 And to the extent that those
14 individual chapters have to be modified slightly,
15 it would only be that those are actually just
16 updates from the subcommittees as opposed to the
17 way at least Chapters 2 and 3 are styled, really
18 focused on the two standalone reports and the
19 summary.

20 So the staff will work on just kind of
21 slightly modifying this so the three chapters
22 line up as essentially subcommittee updates

1 without much of the substance that you see in
2 there changing. So that was kind of a
3 recommendation from General Schwenk.

4 So if the members want to just -- I
5 guess if you concur with General Schwenk's
6 recommendation, and more importantly the
7 subcommittee chairs that those three chapters are
8 just slightly revised without any change to
9 substance but just kind of the format of them.
10 So that would be my initial proposal.

11 I'm just making it clear that each of
12 them are subcommittee updates, and they're kind
13 of formatted in the same manner because I think
14 one of them, you know, it starts right out with
15 talking about the report, the individual reports.

16 And then the second recommendation
17 from General Schwenk is making sure that the
18 chapters are lined up with links to what will
19 ultimately be those standalone reports so clear
20 references to them. Because I think at the time,
21 I mean, the timing of it is when the Fifth Annual
22 Report is issued, those other reports would be

1 have been finalized, voted on and, you know, be
2 placed on the public website.

3 So clearly just making it evident
4 these are tied into these two standalone reports
5 for those particular chapters and then having a
6 link to them. So that was the second
7 recommendation.

8 And I have a lot of other
9 recommendations from General Schwenk on poor work
10 by me with a few typos that we'll fix up. And
11 then --

12 MEMBER SCHWENK: Yeah, I'm really
13 value added. I found two places where they can
14 insert the word two.

15 COL BOVARNICK: That's two too many
16 for me though. But are there any other comments?
17 Again, this will be revised slightly and sent out
18 to the members with at least two weeks to review
19 prior to that vote. And then even at the vote,
20 if there are still changes there, you know, that
21 will be our immediate priority to make any
22 updates, especially on the Fifth Annual Report,

1 so it's ready for transmission to Congress by
2 March 30.

3 MEMBER SCHWENK: Speaking just from my
4 perspective, when we vote on March 14, if
5 somebody sent in edits, you know, like insert a
6 two here or something, I personally don't have to
7 see that rewrite, you know.

8 But if it is something substantive
9 that we're really changing, then I think we do
10 need to see that before the 14th if somebody came
11 in with a comment that said, you know, I don't
12 like this at all. It should be that. We need to
13 see that. But otherwise, I'm happy with letting
14 the editors edit and be done with that.

15 CHAIR SMITH: Can we agree that if
16 anyone has substantive suggestions, if we can
17 kind of have a cut-off date? That might be
18 better. So the 14th, I think, is a Wednesday.
19 Is that right? What day of the week is that?

20 COL BOVARNICK: Yes, I believe it --

21 CHAIR SMITH: Is it a Tuesday?

22 COL BOVARNICK: Also if the members

1 want to discuss a particular time for that day.
2 The 14th, I believe, is a Tuesday.

3 CHAIR SMITH: So would Thursday, the
4 Thursday before make sense as a cut-off or is
5 that too late? Wednesday?

6 PARTICIPANT: Sure.

7 CHAIR SMITH: Let's say Wednesday.
8 What's that date?

9 PARTICIPANT: The 8th.

10 CHAIR SMITH: Okay. So by the 8th,
11 close of business, if you have any substantive
12 suggestions if you could send those to Colonel
13 Bovarnick, that would be great. And that can't
14 be sent to everyone, right? Can the substantive
15 suggestions be sent to everyone?

16 COL BOVARNICK: I think if they come
17 directly to me then I could repackage it to go
18 out --

19 CHAIR SMITH: Okay.

20 COL BOVARNICK: -- to the full
21 committee.

22 CHAIR SMITH: All right. So people

1 could be prepared to weigh in. All right.

2 MEMBER GARVIN: And are we getting a
3 new version over email or is it --

4 COL BOVARNICK: I'm going to resend
5 you a PDF or I guess a Word version is easier.

6 MEMBER GARVIN: Word is better if you
7 can.

8 COL BOVARNICK: Word versions of the
9 three revised reports, the Victim Impact
10 Statement, the Appellate Review and then the
11 Fifth Annual Report. I can send those out as
12 Word documents.

13 MEMBER GARVIN: Perfect. And with a
14 reminder of our deadline.

15 CHAIR SMITH: The 8th.

16 COL BOVARNICK: And I'll put that in
17 --

18 MEMBER GARVIN: I meant in the email.

19 CHAIR SMITH: Oh, oh, oh. You're not
20 going to remember that?

21 COL BOVARNICK: So, yeah. No later
22 than Tuesday the 28th, I'll send those out --

1 MEMBER GARVIN: Oh, okay. Awesome.

2 COL BOVARNICK: -- and so two weeks
3 prior to the final, the voting date. And then
4 I'll put in that email with the three Word
5 documents, please provide any substantive and/or
6 typo comments direct back to me no later than the
7 8th.

8 If there are any substantive changes,
9 I will repackage that up and immediately send it
10 back out to the members and then we can kind of
11 figure out what do we need to do from there.

12 You know, we'll have to just play that
13 be ear, and hopefully, there are no major
14 substantive changes. But understood if there
15 are, we'll work through that. Okay.

16 CHAIR SMITH: All right. And the time
17 for the 14th?

18 COL BOVARNICK: Do you want to propose
19 a time and then see if anyone is opposed?

20 CHAIR SMITH: How long do you think we
21 need?

22 COL BOVARNICK: I think if we go

1 through this process, iterative process, I feel
2 like it won't be that long, but I defer to the
3 members.

4 CHAIR SMITH: But we also have --
5 (Simultaneous speaking.)

6 MEMBER TOKASH: And the Special
7 Projects Subcommittee would like to beg some time
8 to be able to give our presentation now that
9 we've voted out of committee --

10 CHAIR SMITH: Okay.

11 MEMBER TOKASH: -- subcommittee.

12 CHAIR SMITH: So two hours?

13 MEMBER TOKASH: I think that that's
14 right given our discussion yesterday on the
15 Special Projects Subcommittee.

16 CHAIR SMITH: Okay, 1 o'clock East
17 Coast Time, the 14th, 1:00 p.m. or 1300. That's
18 for Mr. Sullivan who handles the comm.

19 MEMBER SCHWENK: For Mr. Sullivan, it
20 will be the big hand is on --

21 COL BOVARNICK: Okay. Tracking. So
22 with that business, I just want to recap. I

1 think the potential group of panels for the next
2 meeting in June.

3 So as part of the -- and I'm not
4 speaking on behalf of, but I took copious notes.
5 The committees that met, the combined committees,
6 I believe policy and case review, we are talking
7 about the panel composition, Article 25 issue,
8 senior enlisted panel. So this again going to be
9 for the full committee. I'm just throwing this
10 out, anyone stop me. And then special victim
11 counsel on this panel selection issue. Staff
12 judge advocates who, you know, go in and advise
13 convening authorities on panel selection.

14 And then an SME with experience in
15 both civilian and military panel selection of
16 which we've identified somebody that will be
17 phenomenal, much experience in the military,
18 National Guard, prosecuting military cases. And
19 then civilian, everything from, you know,
20 district attorney to I think attorney general. I
21 don't want to misstate but incredible experience
22 in the civilian sector.

1 So that's what I took away just
2 listening in for potential panels that may
3 benefit the full Committee on this Article 25
4 issue or is that going to be pushed to the
5 subcommittee? I'm just throwing that out.

6 MEMBER BASHFORD: The one question I
7 have is it seems like we're on a very short
8 timeline on the provision of material to the
9 VLCs. They want that by December. Is that
10 assigned to anybody or are we going to have
11 testimony? That should --

12 MEMBER TOKASH: This is Meghan Tokash.
13 I was going to suggest that we have prosecutors
14 or representatives from the OSTCs and then other
15 judge advocates for non-covered and related
16 offenses to be able to give their perspectives on
17 the release of the three categories of materials
18 that are identified in the NDAA with respect to
19 victim information to hear their perspective on
20 what impact, if any, that might have on the
21 practice.

22 And then I think likewise it would be

1 important to hear from victim's counsel as well
2 so they can articulate the need and, you know, to
3 that end for parity, defense perspective so that
4 we can get all sides to weigh in on that issue so
5 we can inform our recommendations for the report,
6 which is due the end of the year. Thank you.

7 MEMBER BASHFORD: Policy is handling
8 that.

9 MEMBER TOKASH: Handling?

10 MEMBER BASHFORD: That issue.

11 MEMBER SCHWENK: Special projects.

12 MEMBER TOKASH: Special projects.

13 MEMBER BASHFORD: I'm sorry. I do
14 that all the time.

15 MEMBER TOKASH: That's okay. Yes.

16 MEMBER GARVIN: If I might add, Ms.
17 Tokash, I also think the three items identified
18 in the request, they might specifically lend
19 themselves to also hearing from victims
20 themselves about that because it is their medical
21 reports. It is their information. And so
22 hearing about how they feel about their own

1 lawyer having access to the information might be
2 useful.

3 MEMBER TOKASH: Fantastic idea. All
4 in.

5 COL BOVARNICK: So, Ms. Tokash, yours
6 is full committee? Those panels that you are
7 describing are for the full committee?

8 MEMBER TOKASH: Yes.

9 MEMBER SCHWENK: I also recommend that
10 we have some deliberation time built in. Like
11 today we ended early so we're able to have this
12 discussion, which I find very valuable. And
13 we'll be able to discuss other issues, you know,
14 from those panels and whatever to keep us all
15 informed. So if at the end of it -- I guess
16 we're going to do subcommittees the first
17 morning. Is that where we're at now?

18 COL BOVARNICK: Does the committee
19 want to follow a similar format to this meeting?

20 MEMBER SCHWENK: Okay.

21 COL BOVARNICK: Then break out?

22 MEMBER SCHWENK: Then I guess we try

1 to -- you know, you're going to have to try to
2 fit all of the interviews in as best you can that
3 afternoon, the first day in the morning and the
4 second day and then free up as much time as you
5 can in the afternoon so we can talk about
6 everything and spend some time.

7 COL BOVARNICK: I want to throw one
8 more wrench into it then because there is another
9 group that the committee had asked for, or
10 groups, that we didn't get to this time but
11 perhaps in June. But perhaps now this has to get
12 pushed up because I know it's an issue of
13 importance to the committee. This is kind of a
14 group of folks who talk about the diversity now.

15 As I mentioned at the outset, the IRT
16 on diversity within the investigative and
17 military justice systems could not at this time.
18 But also there was a discussion or a request from
19 LULAC, the League of United Latin American
20 Citizens. However, as was noted at the last
21 panel, we wouldn't have just that group. But
22 there are other potential groups like the

1 National Association of Minority Veterans. The
2 VA has a Center for Minority Veterans. So there
3 are other organizations and services. Each have
4 their own diversity office.

5 So I guess the question would be based
6 on the request for the panel selection and stuff
7 with respect to the special trial counsel that
8 Ms. Tokash just noted, would we want to push
9 those? I guess they like to schedule with the
10 subcommittee session on the first morning, time
11 on the second day in the afternoon. We really
12 kind of have two blocks of time for these other
13 panels, which is either afternoon of day one and
14 the morning of day two.

15 I just want to make sure the committee
16 acknowledges that. And if you want these folks
17 in, we'll just have to kind of look at the
18 schedule. I'm throwing that back to the
19 committee.

20 MEMBER SCHWENK: Yeah. Speaking on
21 the PSC, I think the first four categories that
22 you mentioned of the four panels were all from

1 the Article 25 study. And I think I said earlier
2 to the staff on the PSC that if you can't fit,
3 they can pick the two that they think would be
4 most helpful to the members to hear now and then
5 we can do two more the next time.

6 COL BOVARNICK: Okay.

7 MEMBER SCHWENK: And that way maybe it
8 will free up some time. Because I do think the
9 minority panel is a good panel to have.

10 COL BOVARNICK: Absolutely. Okay.
11 We'll work it in. I got the Committee's intent.
12 I think we can fit this all within the time
13 frames that we have.

14 MEMBER GOLDBERG: If I might add on
15 that, as you're looking through lists of possible
16 sources of speakers from organizations, I can't
17 remember if you have this already, but that
18 Service Women's Action Network would be a
19 valuable source, I think.

20 And also as I think about, you know,
21 your good point about having victims speak, it
22 may be that current service members are not

1 inclined to speak. Maybe that they are, but if
2 they're not perhaps SWAN would be -- which is
3 their acronym -- would be a useful source for
4 people who might present their views based on
5 their own experience.

6 COL BOVARNICK: And we do have one
7 specific request from Mr. Johnson who is the
8 civilian attorney who came in with the two -- I
9 believe the name was Perry, the Perry's last
10 time. He also has an active duty victim who is
11 willing to come in before the panel so.

12 Mr. Guilds has a -- he has requested
13 on behalf of one of his clients, a victim, who is
14 also willing to come in.

15 So my interpretation of that it is
16 beyond a little bit more than the public comment
17 kind of five minute allotment we provide. And so
18 there is a potential victim willing to come in
19 and talk as well. I just wanted to note that.
20 But we'll put together a draft agenda to run by
21 the chair to get in as many of these groups as we
22 can.

1 CHAIR SMITH: When would we be fitting
2 in Mr. Guilds and his client?

3 COL BOVARNICK: I think around the
4 public comment session. I just was alerting that
5 it may be potentially more than five minutes.
6 But we'll work through the details of that to see
7 how long it might be. It may just be five
8 minutes. But it was kind of a specific request
9 well in advance of what we normally get for the
10 public comments. Not that we don't get those
11 well in advance, but it was a specific request.

12 MEMBER GOLDBERG: And just a thought,
13 I mean, I'm sure that the Committee has a lot of
14 experience with this, and this may be -- that
15 request may be different from other requestors
16 that we have for public comments.

17 But to the extent the person is
18 positioned, similarly positioned as a public
19 commenter, it would seem that the same rules
20 should apply of the five minutes otherwise we
21 could have a lot of lawyers coming in with their
22 clients and asking for more time.

1 So I note that not in response
2 specifically to that request to speak, but
3 because that person may also fit on another panel
4 that we have in a very helpful way. But just in
5 general for fair process for anybody who might
6 want to --

7 COL BOVARNICK: I agree.

8 MEMBER GOLDBERG: -- sign up for a
9 public comment.

10 COL BOVARNICK: And I may have
11 misstated a little bit. There was really no
12 discussion about the time limit although Mr.
13 Guilds is probably aware of that five minute. I
14 think it's the fact that it's an actual active
15 duty, current active duty member as opposed to, I
16 believe we haven't had a current active --

17 MEMBER GOLDBERG: I see.

18 COL BOVARNICK: -- duty member come
19 in. It has been folks that are after the fact.
20 Well, the other thing it's a victim as opposed to
21 -- I'm not going to characterize. I'm going to
22 stop there.

1 MEMBER GOLDBERG: It was more just a
2 general process point to make sure that we're --

3 COL BOVARNICK: Yes, ma'am.
4 Understood.

5 MEMBER GOLDBERG: Yeah.

6 COL BOVARNICK: And I guess the last
7 thing I would note is I just want to do a final
8 confirmation check on the request from the Court
9 of Appeals for the Armed Forces from Judge Maggs.
10 Ms. Goldberg graciously offered to, in her own
11 capacity, talk about what the DAC-IPAD is doing.
12 But I don't know if any other members either want
13 to defer to Ms. Goldberg or have any other
14 comments.

15 CHAIR SMITH: I think Ms. Goldberg
16 just needs to make sure it works on my calendar.

17 COL BOVARNICK: Oh, right. Sorry. We
18 can do that.

19 CHAIR SMITH: So if you could just
20 remind me of the time, and maybe we could sort it
21 out. I'll find if I can't do it, maybe somebody
22 else nearby can. And I think the staff was going

1 to draft something for you to --

2 COL BOVARNICK: Yes, ma'am. Yeah,
3 I've got the dates here somewhere. Well, we'll -
4 -

5 MEMBER TOKASH: And Colonel Bovarnick
6 -- oh.

7 COL BOVARNICK: That's all I have
8 though, ma'am. If you have any --

9 MEMBER TOKASH: Madam Chair, I just
10 have --

11 COL BOVARNICK: -- oh, sorry.

12 MEMBER TOKASH: -- a couple questions
13 regarding court-martial observations, course
14 attendance. And I also was wondering about the
15 NDAA congressionally mandated updates to Congress
16 with respect to the OSTC if it would be possible,
17 I think it would be helpful, for at least our
18 subcommittee to be able to know when those are
19 happening so that they can either attend in
20 person or listen virtually just, you know, listen
21 to the virtual link so if there are any updates
22 on that. I sent an email to you, Colonel --

1 COL BOVARNICK: Yes, ma'am. I'm going
2 to --

3 MEMBER TOKASH: -- Bovarnick to that
4 effect.

5 COL BOVARNICK: -- yes, ma'am. I'll
6 link up with the main POC that coordinates that -
7 -

8 MEMBER TOKASH: Okay.

9 COL BOVARNICK: -- for the OGC.

10 MEMBER TOKASH: Thank you.

11 CHAIR SMITH: Court-martial updates,
12 you're asking when there are court-martials to be
13 observed?

14 MEMBER TOKASH: Yes.

15 CHAIR SMITH: Okay.

16 MEMBER TOKASH: I see Tab 11 has
17 docketed cases for May.

18 CHAIR SMITH: Mm-hmm. I think Terry
19 with a Y, right, doesn't she coordinate this? I
20 got that from you. I think she'll be the one who
21 updates us on court-martials, right?

22 MS. GALLAGHER: Absolutely, yes. If

1 we need a new list, particularly if you have any
2 dates in mind or locations, just let me know, and
3 I can pull out what is important.

4 MEMBER BASHFORD: Do we have any in
5 Honolulu coming up?

6 MEMBER MARKOWITZ: Yes. Next week.

7 CHAIR SMITH: And then what was number
8 two on your list?

9 MEMBER TOKASH: Training courses for
10 members to observe.

11 CHAIR SMITH: Oh, okay. I don't know
12 who is in charge of that training options.

13 COL BOVARNICK: Yeah. There is one
14 coming up for the Navy. And I apologize. I
15 forget which member was kind of already linked up
16 to potentially attend that. I just don't
17 remember off the top of my head.

18 It has actually raised a good point.
19 I just remembered. So the Army's -- so on the
20 special -- the lead special trial counsel, so
21 your request about the special trial counsel
22 coming in in June, the Army is -- the big two

1 week training course for the special trial
2 counsel, of which the lead special trial counsel,
3 at least two, perhaps three of the four of them,
4 will be at the Army JAG School in
5 Charlottesville. That course runs the week prior
6 to the DAC-IPAD meeting and then the week of will
7 be the second week of that training course.

8 So I can explore -- so twofold, one of
9 them I can explore if there are opportunities if
10 members want to go down to observe some of that
11 training that week. I believe it will be the
12 first week in June.

13 And then second is it may be
14 difficult, again just coming to my mind now, that
15 to get, which special trial counsel is going to
16 be at that training, at least for a couple of the
17 services?

18 But we can dig more into that. And if
19 anything, potentially they can break from their
20 training and come on by VTC. I know that's not
21 optimal, but I just wanted to throw that out to
22 you Ms. Tokash. I was just kind of reminded of

1 that.

2 CHAIR SMITH: Anything else?

3 MEMBER SCHWENK: Topics for the future
4 to put on our hold pattern, Conviction Integrity
5 Unit.

6 CHAIR SMITH: Mm-hmm.

7 MEMBER BASHFORD: That's something
8 I've been considering in the way down the way for
9 case review. We've had a number of public
10 comments, more pointedly in this session but in
11 other meetings.

12 I was on my office's first Conviction
13 Integrity Review Unit and was involved in the
14 planning of it. Virtually, every large
15 prosecutor's office has one.

16 Again, this is down the road, but I
17 think that would be something that would be
18 interesting to explore, whether it's -- we would
19 not be the people, but to explore how one would
20 set it up, what it would look like, should it
21 even happen, I think, is something that we might
22 want to look at in the future.

1 CHAIR SMITH: So I was going to ask --
2 I was thinking the same thing. But is that
3 something for the MJRP Committee or is that
4 something that we, as the DAC-IPAD, down the road
5 can look at?

6 And then kind of piggybacking on that,
7 it's not the same thing, but there was a lot of
8 talk today about independent judges, the need to
9 have judges, you know, not be moving to be a
10 prosecutor and a defense attorney, but an
11 independent judiciary within the military. And I
12 don't know, that's kind of along the lines again
13 of the MJRP Committee. But is that something
14 that we can --

15 MEMBER BASHFORD: It strikes me as
16 stuff that the DAC-IPAD could look at and then
17 make a recommendation to the MJRP rather than
18 just saying why don't you guys take a look at it?

19 CHAIR SMITH: All right. So down the
20 road, both of those things, if everyone agrees.
21 Anyone opposed?

22 MEMBER TOKASH: Madam Chair, can I --

1 I apologize, Jim.

2 MEMBER SCHWENK: No, go ahead.

3 MEMBER TOKASH: Can I ask a question
4 of our DFO? Mr. Sullivan, can you give us the
5 left and right guides with respect to this
6 Committee's interaction with the Military Justice
7 Review Panel?

8 For example, something that we may be
9 working on, you know, may we share with them?
10 They can do whatever they want with it. They can
11 say, thank you very much and throw it in the
12 garbage can or they can say this is very helpful.

13 What are the rules, understanding that
14 we are subject to FACA, they are not, but what
15 are the rules, if any, with respect to our
16 relationship with the large -- the body that is
17 setting the system overall?

18 MR. SULLIVAN: Right. So the Federal
19 Advisory Committee is subject to FACA. This
20 Committee operates in the public and provides
21 recommendations. And as we all know, the MJRP
22 was established so that FACA does not apply. The

1 Federal Advisory Committee Act does not apply to
2 the MJRP. So the rules are a lot different for
3 the two.

4 I would say there is no restriction on
5 this Committee making recommendations to the MJRP
6 at all. That is an appropriate enterprise for a
7 Federal Advisory Committee to be engaged in. And
8 I can't perceive any legal limitations on this
9 Committee saying, hey, MJRP, we recommend you do
10 X, Y, Z at whatever level of detail this
11 Committee thinks is appropriate.

12 And, obviously, this point has come up
13 a number of times over the past two days. You
14 know, this Committee itself is also statutorily,
15 you know, there is a statutory mission for this
16 Committee. So that's also a left and right
17 guiding point.

18 MEMBER TOKASH: Thank you. I knew you
19 would know the answer so I knew you would forgive
20 me for putting you on the spot. Thank you.
21 Thank you.

22 MEMBER SCHWENK: So, Dwight, so if a

1 subcommittee wanted to talk to somebody from the
2 MJRP about some issue or whatever, the
3 subcommittee could just invite them into a
4 subcommittee meeting and talk to them like we do
5 anybody else we invite in and then they would say
6 whatever they wanted to say and then armed with
7 that information we could go from there.

8 MR. SULLIVAN: Certainly. Again, with
9 the recognition that they are going to be
10 somewhat constrained in what they can reveal, you
11 know. Since they are not subject to the Federal
12 Advisory Committee Act, they have access to some
13 information that they are not allowed to share
14 outside of -- you know, they aren't allowed to
15 share in a Federal Advisory Committee context
16 because of its openness rules.

17 And then, of course, the other thing
18 that I would note, which you all know very well,
19 and that is that under the Federal Advisory
20 Committee Act, a subcommittee of the parent
21 committee may make a recommendation only to the
22 parent committee. Otherwise, all the Federal

1 Advisory Committee rules that otherwise constrain
2 the parent committee apply to the subcommittee.

3 So I know you all know this, but it
4 was just to foot stomp, as we used to say in
5 Naval Justice School, you know, the subcommittee
6 could only take anything it learned and report
7 that back to this parent committee.

8 MEMBER SCHWENK: Another issue,
9 travel. We were talking about travel when we
10 were so rudely interrupted. I'm talking about
11 travel to military bases around the world. And
12 also where to travel to -- I'm not talking about
13 Martha's frequent forays to Italy. You know,
14 military bases around the world and also the
15 other thing was whether it's worth sending a
16 couple people to foreign countries to talk about
17 all the different issues and sexual assault
18 stuff.

19 And so working backwards, if the DAC-
20 IPAD, as we know and love it, you know, has an
21 expiration date of early 2026. So we would want
22 to have the report with whatever we learned and

1 then analyzed and then made recommendations out
2 in 2025, then it takes a year for us to ever --
3 on interesting issues, it takes us a year to hold
4 the meetings, get the witnesses and go forward.
5 That's 2025.

6 And so then you're into 2024, if you
7 went that summer. Then you only have the fall to
8 figure out the issues and then give them to
9 subcommittees and get them launched the next
10 year. So it's not too early for us to be
11 thinking about when we want to do that kind of
12 stuff, I think. So I just thought I -- since I
13 always mention it, I'll mention it again.

14 MEMBER GOLDBERG: And if I could
15 mention an adjacent point that struck me when we
16 were thinking about the next meeting, which is
17 less, like I said, adjacent, not the same.

18 But I wonder if in the past the DAC-
19 IPAD has called on any experts in comparative law
20 or the comparative policies of the services.
21 Because as we were talking about the evidence
22 that victims might be interested in accessing or

1 victim's counsel might be interested in accessing
2 it, it struck me that to the extent that the U.S.
3 has learned for other allied forces in terms of
4 developing the program that we have, maybe it
5 would be useful to hear from somebody who knows
6 something about what the other services are
7 doing. That doesn't replace at all going and
8 learning directly and in-depth, but wondering if
9 we have access to that kind of a comparative
10 expert.

11 COLONEL BOVARNICK: We can definitely
12 look at that. I'm sure we can do a little bit of
13 research. The staff can find somebody and make
14 proposals. We possibly could get foreign nation
15 experts as well whether it's by VTC or, you know,
16 have them come to meet the full committee.

17 MEMBER GOLDBERG: Or even possibly in
18 our own Armed Forces, just somebody who knows
19 something in-depth about how it's working
20 elsewhere.

21 CHAIR SMITH: All right. So anything
22 else? I think we're ready to adjourn.

1 MR. SULLIVAN: This public meeting of
2 the DAC-IPAD is closed.

3 (Whereupon, the above-entitled matter
4 went off the record at 1:48 p.m.)

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A		
a.m 1:10 4:2 39:5,7 144:10	33:16 36:11 40:3 147:1 155:17 212:1 213:12,20	advising 115:9 advisor 40:19 advisory 1:1,9 4:5 19:16 66:3 211:19 212:1,7 213:12,15,19 214:1
aberrant 34:16	action 6:14 7:17 52:15 67:9 200:18	advocate 37:10 50:22 52:7 62:10 73:10 84:13 95:17 96:17 106:9 107:3
ability 92:20 100:4 111:8 126:1	actions 67:1 97:13	advocates 58:12 194:12 195:15
able 10:7 33:11 36:15 61:14,22 62:11 70:10 107:15 108:5 137:10 142:22 153:18 167:3 168:12 178:11 193:8 195:16 197:11,13 205:18	active 41:6 201:10 203:14,15,16	advocating 103:16
above-entitled 144:9 217:3	actual 81:14 85:1 93:19 94:7 98:11 99:5,9 105:22 141:15 149:16 149:18 169:16 176:19 203:14	Afghanistan 107:11
absence 8:8	ad 78:4	afraid 43:7
absolutely 83:8 105:13 112:12 200:10 206:22	add 44:14 66:20 72:9 84:8 106:3 124:21 134:4 136:12 172:14 175:16 182:10 196:16 200:14	African 87:12,20,22 88:4,7,9,21
abstract 103:12	added 188:13	afternoon 144:16 145:15 198:3,5 199:11,13
abusive 128:5	addition 72:7 155:19 182:16	age 86:13 115:5 162:11
accept 80:16 81:22	additional 38:17 52:4 52:19 118:21 127:19 128:3 149:14 154:4 167:8 169:20 174:5 175:8	agencies 63:15
access 18:22 125:10,22 126:9,18,22 127:12 128:2,8 197:1 213:12 216:9	address 30:21 34:18 55:6 61:21 67:3,12,21 68:8,15 143:4 172:13	Agency 13:12 23:2
accessing 215:22 216:1	addressed 80:6 112:1	agenda 201:20
accident 88:13	addresses 38:16	aggravated 142:2
accidents 88:18	addressing 68:3	aggravating 24:12
accomplish 6:3	adjacent 215:15,17	aggravators 24:13
accounts 74:11	adjourn 216:22	ago 6:13 31:18 146:2 149:13 156:7
accumulating 168:17	Adjourned 3:9	agree 46:8 47:12,19 55:8 58:20 66:19 70:4 70:8 79:18 80:9 82:10 85:22 97:18 98:3 103:18 120:14 121:20 126:14 133:8 163:11 189:15 203:7
accurate 10:12	adjudication 33:2	agreed 13:14
accused 6:10,11,19 7:13,16,18,22 8:1,4,5 8:14 9:1 26:18 27:11 28:14 45:19,22 58:6 63:21 69:15 80:4 84:1 85:2 87:17 88:6 90:6 96:3 120:20 122:2,11 122:14,16 123:2,17 127:7 128:10 135:9 135:10 163:14 166:18 168:10 183:14	adjust 143:18	agreement 8:8
accused's 124:17	adjusted 79:13	agrees 185:18 210:20
achieve 100:20 141:16	adjustment 35:20 79:15 143:19	ahead 109:6 126:20 164:22 179:5 181:3 184:5,18 185:4 211:2
acknowledge 24:22	adjustments 36:2	aid 72:22
acknowledges 199:16	administrate 103:8	aim 36:5
acquittal 167:20,22	administrative 41:1 67:1 80:7 169:20	Air 11:15 41:12,13 50:19 52:12 56:21 59:21 85:5
acquittals 128:19 129:18 132:17	administrator 80:13,15 81:6 82:7 92:19 143:10	akin 58:18 139:2
acquitted 7:7 29:1 88:14 124:18	admiral 73:10,20 115:18	albeit 154:14
acronym 5:22 13:3 31:19 201:3	advance 81:16 202:9 202:11	alcohol-facilitated 130:4
Act 6:7,10 7:22 10:18 11:1 12:9,10 13:22 15:7 16:4,6,19 18:20	adverse 41:1	alerting 202:4
	advice 47:8 115:11	algorithm 91:18
	advise 115:13 116:10 147:15 148:3,9 194:12	algorithms 91:19
	advised 84:12 115:3	all's 108:18
		all-male 80:4
		allegations 45:7,8
		alleged 68:3
		allied 216:3
		allies 157:4,7,12 159:7
		allocute 27:5 120:18
		allocution 26:17
		allotment 201:17
		allow 60:3 68:18 74:15 74:16 85:13 110:2 112:4 113:17 114:16 139:17 151:19 152:7 152:9
		allowances 9:6
		allowed 13:8 108:16 110:14 112:15 113:2 113:3 119:3 148:7 213:13,14
		allowing 10:4 43:11 68:5 93:6 118:6 120:11
		allows 15:7 68:1
		alpha 72:2
		alternate 104:20
		alternative 145:20 152:13 154:7 155:15 159:16
		amended 117:19
		amendment 160:16
		amendments 16:21 177:19
		amends 157:4
		American 87:12,20 88:1,7,9,21 198:19
		Americans 88:5
		amorphous 116:4
		amount 8:12,12 59:1 104:9 174:9
		analysis 138:22 168:13
		analyze 139:13
		analyzed 215:1
		and/or 192:5
		Anderson 1:13 12:2 30:3,5,8 114:17,18 184:2,4
		anecdotal 175:21
		anecdotally 56:22
		announce 15:1
		annual 3:5,6,7 31:20 146:7,8 165:18 180:21 181:3 185:3,6 185:22 187:21 188:22 191:11
		answer 5:14 25:22 33:11 34:5 35:2 48:21 89:17 99:18,21 109:22 117:14 136:10 139:18 146:21 212:19
		answering 99:17 100:2
		answers 99:14 113:15
		anybody 18:10 65:13

90:17 180:11 195:10
203:5 213:5
anybody's 30:21
anymore 95:22 135:18
anyone's 73:7 75:10
anyway 78:22 129:21
aperture 124:11 153:17
apologize 24:22 30:7
36:22 46:5 138:14
176:1 207:14 211:1
apologized 24:20
apparently 51:14 84:6
181:15
appeal 7:17 14:9 43:12
44:5,5 50:1 88:15
101:4 129:19
appealable 44:2
appeals 12:3 14:8
18:12 39:22 41:5
42:20 98:17 131:10
204:9
appear 46:22
appearance 45:4 51:3
70:7 117:3,7 140:6
appearances 51:8 69:1
71:13
appeared 87:7 131:18
139:6
appearing 41:21
appellant 6:16 7:16
appellate 6:15 41:7
43:6,8,14,17 44:22
52:1,3 63:21 95:9
114:12 139:9,13
152:3 164:20 165:16
179:6,8,11,20 180:20
181:2 191:10
application 124:22
applies 9:17
apply 86:11 104:12
123:8 124:6 141:3
150:20 202:20 211:22
212:1 214:2
applying 84:15
appointed 49:1 51:22
appointment 184:12
appreciate 70:16
165:11 175:14 177:14
approach 116:2 143:15
appropriate 30:1 36:16
58:8 59:18 94:14
96:18 106:7 116:3
119:5 121:8,10
152:17 161:6 212:6
212:11
appropriateness
179:16
approval 14:18 25:14

169:2,4,18
approve 146:13
approved 17:3 158:8,11
164:3
area 40:9 77:10 92:7
139:2
areas 73:14 95:8
110:16 148:9
argue 98:18
argument 121:6 140:15
Arlington 1:9,10
armed 1:2 4:6 12:3
18:12 98:17 157:22
204:9 213:6 216:18
army 2:3 4:22 15:15
31:16 32:7,7 34:9
37:21 39:22 40:4
42:19 50:20 77:22
107:1,5,8,21 133:7
134:9 207:22 208:4
Army's 11:8 31:7 39:20
207:19
arrived 24:2 48:7 49:16
arrives 127:5
art 25:20
article 15:14,16 29:20
54:13 58:10,12 61:8
62:20 63:1,11,16
64:20 65:9,14,22
67:14 68:1 70:13
72:10 73:5 84:11 86:7
86:11 89:13 98:19
103:16,20 106:5
114:21 116:6,15
117:16,19 130:17
136:18 145:3,10,22
159:18,22 160:7,16
163:21 167:14 169:22
194:7 195:3 200:1
articulate 121:12 125:5
126:13 196:2
articulating 90:14
as-is 153:9
aside 174:6
asked 36:22 91:1 109:9
125:9 128:10 147:14
148:16 163:1,1 198:9
asking 35:5 84:2 91:4
134:18 144:22 145:5
145:13 155:19 164:10
164:10 169:4 202:22
206:12
aspect 66:4 86:5
160:15
aspects 14:2 145:9
156:19
aspersion 88:11
assault 1:1 4:6 67:13

69:18 70:1 76:9,12
101:22 102:1,6
128:19,20 129:9
130:5,14 131:18
132:18 136:1 156:20
166:4,15 182:17
214:17
assemble 63:18
assembled 39:9 78:4
assess 73:7 161:11,18
assessing 170:17
assigned 58:14 159:22
164:21 195:10
assignment 52:15 53:8
assignments 51:16
52:19
assists 40:21
associated 10:8 35:10
80:8 81:10 96:6,9,22
105:13
Association 199:1
assuming 76:17
assumption 76:6
astray 148:9
attend 205:19 207:16
attendance 205:14
attention 21:1 28:15
33:8 110:3 171:17
attorney 2:5,5,6,6,7
40:19 48:13,19 87:10
142:3 172:3 194:20
194:20 201:8 210:10
Attorney's 41:18
attorneys 133:17 142:4
attrition 169:21 170:20
Audrey 171:19,21
AUSA 80:19
Australia 157:9,13
Australian 157:22
authorities 14:1 76:22
77:11 79:22 80:14
84:12 91:13 115:13
194:13
authority 63:18 64:16
66:1,14 68:1 71:3,8
74:22 75:1,15 79:9
81:5 82:3 83:19 93:9
96:2 100:22 105:19
115:2,10 129:15
142:11 143:6 145:1,6
163:20
Authorization 10:18
12:9 16:6 147:1
155:17
automatically 98:1
availability 82:2 89:9
143:7,8
available 8:13 23:1

39:15 64:15 67:12
75:8 78:9 81:22 82:9
83:6 93:8 105:18
106:1
Avenue 1:10
average 134:10 135:1
aware 20:18 110:12
119:13,14 137:8
156:11 203:13
Awesome 192:1
awkward 71:8 124:19
AWOL 29:2,7 32:22

B

back 14:3 21:9 24:19
33:1 39:7 41:10 48:13
48:19,19 60:13 61:14
61:21 62:14 63:12
68:21 74:9 92:4,12
101:22 106:20 107:8
114:20 117:20 133:11
138:13 140:2,9 141:1
143:1 146:22 148:22
155:16 162:18,22
168:12 177:4 178:15
179:5 192:6,10
199:18 214:7
backfill 174:3
background 114:3
backwards 214:19
bad 7:19 9:14 43:8,9
90:17 111:9 134:7,21
134:22 138:2 182:7
balance 100:21 101:10
103:9
balanced 101:9
banc 110:22
bandwidth 63:8
bar 117:1 137:8
base 78:3 81:8 82:5
104:6 105:22
based 14:12,15 20:16
32:5 42:12 43:21 53:8
64:14 76:5 81:9 99:10
126:19 153:5 156:13
157:6 166:1 175:17
179:9 180:5 199:5
201:4
baseline 46:21
bases 214:11,14
Bashford 1:14 32:19
101:14 125:8 132:5
163:9 165:4 168:15
168:16 171:7 175:15
176:12,15,19 177:2
177:22 179:4 180:19
183:2 195:6 196:7,10
196:13 207:4 209:7

210:15
basic 114:2
basically 63:1 82:2,5
 119:22
basis 126:10 129:19
 163:15
battlefield 12:21
Bay 41:16
Bearden 11:21
becoming 142:13
bee 74:8
beg 193:7
beginning 181:19
behalf 26:17 27:6
 139:12 194:4 201:13
behavior 67:3 68:9
belief 109:19
believe 26:5 28:11
 36:14 37:22 44:4 49:7
 51:20 55:11, 14 57:15
 57:21 58:7, 13 59:16
 63:6 67:19,22 68:17
 72:21 74:19 88:16
 90:5 95:12 96:8,12
 100:5 125:17,19
 126:1 131:1 134:9
 136:18 189:20 190:2
 194:6 201:9 203:16
 208:11
believed 10:1,10 45:14
believer 72:21 100:4
bench 41:3 45:10 47:6
 51:17,22 52:3 53:19
 108:12 114:1
beneficial 56:14 62:2
benefit 53:17 54:6
 55:16 141:7 195:3
benefits 95:19
best 27:16 36:7 78:17
 109:20 120:1 126:5
 162:2,2 198:2
better 13:3 46:7 57:20
 111:20 160:2 189:18
 191:6
beyond 63:3 67:17
 96:14 120:20 121:13
 121:14 130:7 175:10
 201:16
BGen(R) 1:18
bias 45:4 93:19,22 94:2
 94:5,16 95:4 98:12,12
 99:5,9 104:13 110:12
biases 90:19 92:2
big 71:18 98:5 100:4
 113:12,14 161:12
 193:20 207:22
bigger 56:10 102:8
 137:11

biggest 56:2
Bill 108:22
billet 47:15,15
binary 67:6
biography 5:9
bios 39:10 138:14
bit 8:17 28:17,21 30:13
 31:6 89:9 101:10
 109:4 115:19 123:5
 126:17 153:18,19
 201:16 203:11 216:12
Black 69:15 84:6 90:20
 91:2
blends 126:3
block 31:12
blocks 199:12
board 5:6,6,21 6:1 11:6
 11:14 12:6,7,10,22
 13:10,14,22 14:4
 16:11,17,18,19 17:1,1
 17:13,19 18:17 29:13
 33:18 34:1,12 35:18
 49:6
body 46:20 95:20 96:6
 173:12 211:16
Boggess 165:9
bolster 182:7
bottom 149:2 181:17
bounce 47:14
Bovarnick 2:3 4:13,14
 144:12 155:6 164:7
 172:12 173:3 176:3,6
 177:1,6,12 180:16
 184:1,3,4,19 185:1
 188:15 189:20,22
 190:13,16,20 191:4,8
 191:16,21 192:2,18
 192:22 193:21 197:5
 197:18,21 198:7
 200:6,10 201:6 202:3
 203:7,10,18 204:3,6
 204:17 205:2,5,7,11
 206:1,3,5,9 207:13
 216:11
box 65:18
branches 138:18
brand 116:20
brand-new 131:12
 133:18
break 39:2 197:21
 208:19
breaking 144:6
brief 39:12 46:14
briefed 43:22
briefing 163:22
briefly 31:22 114:22
 174:8
bring 28:14 70:7 133:20

144:17 183:4
broad 13:8 36:14
 114:15,16 128:8
 160:4
broaden 143:17,18
broadened 58:1
broader 104:15 123:5
broke 23:3
brought 102:14 137:3
browbeaten 18:4
budget 75:12
build 137:11
builds 47:18
built 48:4 100:19
 197:10
bunch 117:4 179:12
burden 141:9
burdensome 57:3
business 190:11
 193:22
bust 102:19 104:11
 105:2
butter 117:1
byproduct 112:5

C

CA's 92:20
calculated 46:13 47:1
calculates 46:21
calendar 204:16
call 12:6 28:1,2 30:14
 31:18 98:15 148:11
 180:11
called 28:12 215:19
calls 98:20
calmed 31:4
Camp 40:17 57:8
Canada 157:9,10,13
Canadian 157:22
Canal 73:12
capability 175:10
capacity 204:11
capital 1:9 24:12
CAPT 54:22 62:3 70:21
 72:9 76:1 85:21 89:5
 89:20 90:11 97:4 98:3
 108:21 129:2 131:11
 132:1 138:1
Captain 6:14 11:12,16
 41:2 133:14 174:17
 174:20 176:8
care 85:5 114:5
career 5:2 52:20 107:3
carefully 73:2
Carson 2:4
case 3:6 27:5 34:16,19
 35:10 45:21 50:1,3
 55:2,5,7,20 57:19

60:15 61:20 62:8,9
 66:2,16 67:8 82:6
 91:19 97:7 99:13,13
 104:3 110:17 111:12
 116:21 117:5 118:20
 121:13 126:2,6,10,10
 128:12 131:4,18
 132:8,9 133:18,21
 134:7,7,21,21,22,22
 135:2,12 136:1,9
 137:7,14,16 140:3
 141:17 145:1,10
 152:8 162:9 163:15
 163:15 164:7,18
 165:8 169:5,6 170:15
 170:17,21 171:3,4
 185:12 186:10 194:6
 209:9
cases 24:12 33:6 34:15
 34:18 41:15 50:2 51:9
 54:15 56:10 57:13
 59:6,8,9 61:6,11 62:5
 62:14 66:14 101:4
 102:18 103:9 104:8
 110:5 111:21 112:2
 128:18,19,20 129:4
 129:12 130:3,9,11,13
 130:13 131:7,9
 132:11,17 133:10
 134:19,20 135:16
 136:16,20 137:6,11
 138:2 150:3,11 156:3
 162:15 165:21 166:1
 167:16 168:1 181:17
 181:20,21 182:12,17
 182:19 183:13 194:18
 206:17
Cassara 1:14 21:2,5,10
 21:15,20 22:4 28:16
 29:4 32:14,17 87:4
 89:16 90:5 97:10
 108:7,22 109:1 112:8
 112:11 113:8,12
 164:14
Cassara's 32:20
cast 82:12
casting 83:14 88:10
 93:1
categories 13:15 35:22
 36:12 38:18 195:17
 199:21
category 13:19
caught 177:5
cause 22:16 50:5 61:5,9
 61:13 64:8,9,11,13
 65:15,17 66:2,17
 67:19 93:17,18 96:4
 96:19 102:2 104:13

104:22 114:11 129:13
129:14 130:22
caused 96:10
CCA 99:4,7,12
CCAs 44:2 99:1
CDR 44:16 46:4,8 54:8
65:21 72:12,15 74:4
82:10 90:12 109:4
115:14 120:14 124:15
124:21 126:11 130:1
136:12
cede 87:3
Center 199:2
certain 26:7 35:20
49:16 54:9 85:3 96:16
97:16 101:18 109:7
110:8 118:6 140:21
168:6
certainly 17:18 20:12
32:9 33:16 35:18
44:11,16 49:2 56:13
71:20 90:13 94:22
95:18 170:10 213:8
cetera 20:9 48:20 50:20
52:5 61:16 67:13
84:20 90:19 118:7
139:18
chain 82:22
chair 1:10,13 4:11,18
5:4 11:13 15:22 16:11
20:6 26:14 27:22 38:8
38:19 39:1 41:20
44:14 46:2,6 48:9
50:7 90:16 118:1,12
138:7 142:17 144:4
145:16 152:17,19,22
153:2 154:3 155:1,7,9
162:20 163:10 164:1
164:6,13,16 171:1,15
171:22 172:2,5,11
177:16 178:20 180:10
181:9 184:16,21
189:15,21 190:3,7,10
190:19,22 191:15,19
192:16,20 193:4,10
193:12,16 201:21
202:1 204:15,19
205:9 206:11,15,18
207:7,11 209:2,6
210:1,19,22 216:21
chairs 145:2 187:7
challenge 76:6 79:8
93:17 96:4,19 102:2
challenges 50:5 69:14
93:18 102:13 103:22
104:12,13,22 105:6
chance 44:17 77:14
90:2

change 15:2 38:15 44:1
55:15 56:5,6 85:14
101:7,8 106:21
160:22 187:8
changed 79:11 130:17
136:19
changes 6:8 40:2 43:21
46:9 62:19 70:11
106:19 131:16 161:10
179:17 180:4,9 186:2
188:20 192:8,14
changing 103:7 187:2
189:9
Chapter 186:6,10,11
chapters 186:3,8,14,17
186:21 187:7,18
188:5
characterization 12:13
characterize 203:21
charge 7:2 9:8,10 25:12
32:21 152:6 207:12
charged 6:16 122:12
137:3
charges 64:13 90:8
Charlottesville 38:3
208:5
cheating 50:8
check 166:19 204:8
chief 2:4 4:22 5:1 11:15
11:16 15:14 41:12
47:6 60:16 74:7
chiefs 83:21
child 167:16
choice 90:7
choose 79:22 116:20
chooses 157:21
chose 113:4
Chuck 11:14 170:3
churn 79:13,14
circle 114:20
Circuit 39:21 41:12,14
circumstance 128:7
circumstances 68:18
119:1
Citizens 198:20
City 41:9
civil 40:14
civilian 11:4 12:14,19
15:4 26:6,8 29:18
42:16 45:2 58:22 67:7
68:12 94:4 100:12
104:19 139:3 166:10
184:8 194:15,19,22
201:8
civilian-ized 107:20
civilians 101:2
clarification 173:2
177:17

clarify 97:18 180:19
clarifying 153:1
clear 64:22 82:18
111:12 139:20 187:11
187:19
clearly 28:18,18,20
43:2 67:19 188:3
clerk 37:5,6
client 27:6 202:2
clients 29:1 147:15
201:13 202:22
close 21:1 36:4 62:4
97:22 98:15,20 110:3
145:19 190:11
closed 129:10 150:3
217:2
closely 97:2 98:22
141:15
closer 46:3 158:5
Coast 11:16 193:17
code 11:1 13:17 14:14
22:11 65:4
Cohen 41:8 50:14 52:10
58:20 61:2 66:19
68:22 83:9 84:9
103:13 113:1,10,14
116:6 118:16 139:15
coin 22:13
COL 4:14 5:17 15:7
16:4,17 17:6,12 18:16
19:7 20:5,12 21:4,9
21:13,16 22:2,19
23:16 24:9 25:9,12
26:4 27:8 28:7 29:3,9
30:4 31:7 32:16 33:3
33:15 34:11 35:13,16
36:7,9,19 37:19 38:14
38:22 50:14 52:10
58:20 61:2 66:19 84:9
103:13 113:1,10,14
116:6 118:16 139:15
144:12 155:6 173:3
176:6 177:1,6,12
184:4,19 185:1
188:15 189:20,22
190:16,20 191:4,8,16
191:21 192:2,18,22
193:21 197:5,18,21
198:7 200:6,10 201:6
202:3 203:7,10,18
204:3,6,17 205:2,7,11
206:1,5,9 207:13
collateral 17:13
colleague 126:12
colleagues 83:11 87:2
114:1
collect 20:14
collected 13:11 23:3

collection 20:14 145:12
colonel 2:3 4:13,21 5:9
5:15 11:14,17,22
15:15 21:2 38:21
39:19 40:15 41:8
51:19 68:22 83:9 85:7
85:8,9,10 93:12 94:21
164:7 172:12 176:3
180:16 184:1,2
190:12 205:5,22
216:11
colonels 77:15
color 69:16 153:4
Columbia 13:7
combination 91:8,10
143:13
combine 181:7
combined 95:14 194:5
come 5:22 16:2 18:6,14
22:16 28:4 33:6,12
38:5 58:11 67:2 69:8
69:10 78:20 83:17
86:12 89:20 91:22
92:8 104:15 105:10
109:18 112:18 119:8
121:13 142:6 146:20
159:15 167:8 183:15
185:14 190:16 201:11
201:14,18 203:18
208:20 212:12 216:16
comes 8:17 80:10 92:9
92:11 96:5 165:10
comfort 154:15
comfortable 110:8
134:2 153:22
coming 34:13 43:21
47:20 62:19 95:6
114:18 120:16 133:11
151:4 202:21 207:5
207:14,22 208:14
comm 193:18
command 33:1 86:5
184:5,6
commander 40:6 68:2
78:8,13,21 79:4,18
86:9,12 108:4 110:20
115:15,21 116:20
121:21
commander's 72:22
commanders 59:21,22
129:3
commanding 73:10
commands 73:3 74:18
comment 42:22 54:5
81:13 84:10 92:5,13
113:1 129:7 136:17
154:22 189:11 201:16
202:4 203:9

- commented** 120:19
commenter 202:19
comments 14:11 18:10
 66:19 80:8,20 144:2
 188:16 192:6 202:10
 202:16 204:14 209:10
commission 17:9 19:15
 41:15 156:16,17,22
committee 1:1,9 4:5,19
 14:10 18:2 19:9 20:10
 26:20 70:10 118:8
 145:16 146:13 159:2
 163:1 164:17 165:14
 171:9 172:8 183:7
 185:8,17 190:21
 193:9 194:9 195:3
 197:6,7,18 198:9,13
 199:15,19 202:13
 210:3,13 211:19,20
 212:1,5,7,9,11,14,16
 213:12,15,20,21,22
 214:1,2,7 216:16
Committee's 200:11
 211:6
committees 194:5,5
common 60:18 134:17
community 137:2,14
comparative 215:19,20
 216:9
compared 59:4 84:7
comparing 167:1
comparison 58:21
compilation 133:1
complaining 71:10
 126:8
complete 71:21 127:1
 171:18
completed 7:12 154:19
completely 68:14 88:20
 109:2 119:9
completion 158:16
complex 60:15 111:21
 128:22
complicated 55:20
complications 182:16
composed 11:6
composition 69:9,11
 70:4 85:13 101:19,19
 145:11 163:12 165:3
 166:2 169:2 170:13
 171:3 176:20 194:7
comprehensive 111:10
computerized 72:22
concentrate 167:14
concentration 40:9
concept 116:4
concern 69:10 70:5,9
 80:5 81:18 89:18
 90:13 108:2 111:2
 119:6,17 127:2
 153:16 160:10 171:10
concerned 21:1 124:16
 132:10 166:13
concerning 23:8 31:13
 128:14
concerns 30:21 125:1
 162:1
concludes 142:22
 144:5
conclusion 150:22
 185:15
conclusions 49:19
concur 106:4 187:5
concurrence 54:2
concurrently 8:16 9:13
concurs 184:13
conduct 7:19 9:14
 97:15 111:8 114:12
 114:15 123:11
conducting 165:3
conducts 113:20
configuration 160:14
confined 9:7,9,11
confinement 8:22 9:12
 9:17 10:21 11:2 13:15
 13:19 55:3 58:2,3,7
 60:6
confines 36:16
confirmation 204:8
confirming 185:4
Congress 19:3 26:1
 147:2 149:19 151:12
 152:16 156:8 189:1
 205:15
congressionally
 205:15
congressionally-man...
 5:6
conjunction 33:14
connection 69:1 70:7
conscrip 107:5,21
consider 13:21 19:6
 24:3,8 29:22 60:7
 68:5 91:13 113:7
 116:12 117:11,12
 124:8 125:9,21
considerable 174:9
 175:9
consideration 13:9,14
 22:20 29:6 33:5 89:11
 121:8,18 136:11
considerations 86:18
 89:15 163:6
considered 13:11 16:15
 18:18 24:16 26:22
 116:14 119:10 157:19
considering 18:8 19:12
 23:15 25:4,6 26:6
 89:14 91:14 103:17
 106:22 115:10 116:11
 121:12 122:7 209:8
considers 105:20
consist 84:22
consistent 136:14
 140:18
constantly 137:12
consternation 30:14
constrain 214:1
constrained 213:10
construct 92:19 141:19
consult 13:22 18:20
consultation 131:5
consulted 32:3
contain 174:16
Contents 3:1 186:8
contest 134:10
contested 7:1 128:18
 136:1 166:3 182:1,2
contests 134:12
context 48:1 69:18
 213:15
continuance 92:15
continue 15:6 16:12
 17:2 19:20 20:11
 23:20,21 35:18 66:4
 89:3 169:6,19 170:9
 183:12
continues 10:20 145:11
continuing 17:11 18:1
 20:1
control 111:14 114:8,13
 114:14 126:2
controlled 6:17
controversial 154:9
convening 63:18 64:16
 66:1,13 68:1 71:3,8
 74:22,22 75:15 76:21
 77:11 79:9,22 80:14
 81:5 82:3 83:19 84:12
 88:4,8 91:13 93:9
 96:2 100:22 105:19
 115:2,9,13 129:14
 143:6 162:13 166:2
 168:8,18,20 174:15
 174:16 176:8,16
 177:7,13,18,20 178:2
 178:4,7,12,18 194:13
conversation 70:19
 118:4 146:11
conversion 61:8
convicted 29:2 32:21
 45:19 120:21 138:4
convicting 138:3
conviction 167:19,22
 169:10,13,16 181:11
 181:14 209:4,12
convictions 129:18
 133:11 182:2,6
convince 132:2 137:15
cooperation 67:4
 137:10
coordinate 145:8
 206:19
coordinated 162:6
coordinates 206:6
coordinating 145:4
coordination 145:1
copious 194:4
Corps 27:12 40:16,20
 41:4,7 47:7 56:20
 57:9,10 60:1 79:17
 106:9,10 132:21
 133:6
Corps's 81:17
correct 22:1 164:8
 172:16,17
corrected 43:12
correctly 47:1
correlative 22:10
cost 75:11
counsel 14:7 27:3,10
 27:13,14,19 28:14
 37:2,3,14,15,15 38:2
 40:10,22 47:17 64:5
 65:9,9 97:5,8 108:15
 109:5 110:2,15 111:1
 111:9,16,19 112:14
 112:19,20 115:1
 117:9 126:4 131:6
 134:9,13,15,18 135:7
 136:13 137:18 141:11
 141:12,16 147:10,19
 147:21 148:1,15
 149:1,3 163:2,3,16,17
 169:3,3 183:17
 184:11 194:11 196:1
 199:7 207:20,21
 208:2,2,15 216:1
counsels' 111:8
counter-revolution
 64:3
counteract 96:1
counteracting 100:20
counterpart 12:14
 29:18
counterproductive
 125:18
counterview 106:17
countries 214:16
country 57:13 75:4 91:3
 134:18
County 41:18 59:10

61:4 113:19
couple 11:11 42:21
 49:5 59:7 75:8 105:16
 146:2 147:9,12
 149:12 151:16 164:19
 173:17 180:1 181:4
 186:2 205:12 208:16
 214:16
course 6:6 7:8 11:8
 20:18 26:9 31:9,14
 32:7 38:2 42:10,16
 148:14 162:15 205:13
 208:1,5,7 213:17
courses 207:9
court 9:4 12:3 14:8
 18:12 39:22 41:5
 42:19 44:7 52:1 61:4
 80:13,15,21 81:5 82:7
 87:7 92:19 98:16,19
 100:1 117:18 120:12
 124:13 129:15 137:6
 137:7 143:9 204:8
 206:11
court- 78:3 117:21
 137:3 166:3
court-martial 78:20
 81:14 86:1 101:18
 107:17 108:5 117:17
 151:18 156:5 163:18
 167:17 169:22 170:5
 174:14 205:13
court-martials 86:3
 107:12,14 108:3
 128:17 206:12,21
courtroom 87:13,14,18
 87:21 88:3,22 108:19
 109:13 112:15 129:22
 163:18
courtrooms 175:20
courts 10:13 14:9 24:11
 24:17 30:10 40:22
 42:16 93:13 100:18
 114:12 124:1 139:9
 139:13 152:3
courts- 166:15
courts-martial 42:15
 86:21 123:9 131:15
 135:20,21
cover 36:9 185:3
covering 173:21
craft 73:1
create 50:21 51:2 71:6
 72:18 90:9 101:9
 107:7 137:1 140:20
created 6:7 55:13 63:13
 101:12 137:13 179:1
creates 43:5 102:17
creating 43:8 49:18

creative 82:13
creatively 143:3
credibility 62:7 99:16
credible 100:2
crime 147:5 151:10
crimes 12:21 46:15
criminal 12:14 14:8,9
 39:22 41:5 42:20
 56:16 63:14 129:9
 135:15 137:7 184:9
Critchley 171:19,21,22
 174:2
criteria 5:5,7,21 10:15
 11:4,14 12:5,15,17,19
 13:19 14:17 16:2,22
 17:16 22:21 24:1,10
 24:16 25:14 26:2
 28:20 29:14 31:10,13
 32:1 33:21 38:6 47:20
 48:2,6 70:13 72:10
 73:5,6 75:14 77:18
 81:10 84:11 85:3
 106:6 116:7,15,17
 161:11,13,18 162:8
criterion 72:10
critical 19:22 68:6 83:2
 128:4
cross 135:10 166:19
Cuba 41:16
culminated 40:2
culture 44:11
curious 22:8,14 37:16
 48:14 95:3 108:11,17
 138:20 139:5
current 5:13 56:11
 57:14 61:2 63:15 64:7
 71:22 79:3 82:1 113:3
 119:19 148:6 160:11
 160:13 161:3 162:11
 162:22 200:22 203:15
 203:16
currently 4:21 5:7
 18:17 20:20 40:4,13
 40:18 41:16 59:19
 62:22 84:10 85:11
 153:12 159:1
cut-off 189:17 190:4
CVRA 139:4
cycle 53:9
cynical 133:13
cynicism 133:9

D

D.C 77:10
DAC- 4:8 144:22 158:9
 158:22 173:22 214:19
 215:18
DAC-IPAD 1:2 2:2 4:7

69:4 118:4 125:8
 151:12 155:19,21
 156:10 157:3 158:5
 159:11 163:11,20
 165:21 169:1 170:21
 171:8 173:4,10,20
 174:4 175:16 179:21
 183:6 204:11 208:6
 210:4,16 217:2
DAC-IPAD's 169:18
daisy 82:22
Dale 2:4
dampening 125:1
data 13:11 20:14,16
 22:22 23:3 76:5,17
 101:21 129:11 145:12
 166:22 167:2 168:8
 168:16 170:4 174:19
 175:6,9,17,19 179:1
 179:12 181:14 182:22
database 170:6
date 17:17 18:14 19:21
 19:22 21:11,11,12,13
 32:10 144:17 158:16
 189:17 190:8 192:3
 214:21
Dateline 73:11
dates 205:3 207:2
daughters 76:11
Dave 12:2
day 3:2 4:4 47:15,16
 48:12 51:9 53:10
 60:13 73:14 78:3 85:9
 90:22 105:18 121:22
 189:19 190:1 198:3,4
 199:11,13,14
days 81:16 82:19 133:2
 175:13 212:13
DDG 74:13
deadline 191:14
deal 50:9 141:19 160:10
dealing 55:2
debate 115:6
decades 18:3
December 14:3 16:8,10
 17:17 21:18 123:18
 146:12 147:9,12
 160:18 161:1 195:9
decide 54:3 71:11 78:8
 78:16,18 129:3
decided 38:12 128:13
decides 25:2
deciding 79:4
decision 43:9 49:17
 54:1 63:19 78:14,22
 80:10 81:7 82:2 90:7
 108:1 115:16,22
 123:1 125:19 126:7

130:20,22 131:3
 136:4 183:9
decisions 23:7 33:4
 51:15 58:3 59:14 60:4
 63:21 66:15 119:12
dedication 173:19
deemed 178:5
deep 182:21
defective 33:7
defendant 85:2 101:17
 102:5
defending 110:5
defense 1:1,1 4:4,6
 6:15 10:18 12:9 13:12
 14:7 16:6,21 23:1
 27:13,13 37:3,14
 40:10,11,20,21 41:7
 47:17 48:13 63:14
 64:1,5,12 65:9 83:21
 83:21 88:18,19 97:5,8
 104:21 108:15 115:1
 134:8,13,15 135:7
 137:8 139:22 146:22
 147:19,20 148:15
 149:3 155:17 156:15
 157:21 158:7,11
 163:3,17 169:3
 184:12 196:3 210:10
defense's 21:9
defer 193:2 204:13
definitely 20:22 59:17
 99:12 161:16 166:11
 216:11
degree 112:1
degrees 75:5
delay 154:8 155:14
deliberate 22:20 90:7
deliberately 31:2
deliberation 197:10
Deliberations 3:7
deliberative 42:14 47:2
delicately 30:14
delineate 33:19
delineated 13:18
demand 54:11
demographic 20:16
 71:9 85:17 167:4
 168:8
demographics 84:17
 162:10,21 163:2
 166:7,20 174:21
denied 102:3
depart 15:8,11 25:2,5
 33:17 125:4
departed 31:2
department 40:5,14
 174:12
Department's 63:14

departments 174:10
 175:3
departure 25:3,7 33:17
 33:19 46:11
departures 15:21 25:17
 31:4 33:10,13,20 34:7
 34:9,12,17,20 35:4,7
 35:9 36:5 48:5
depend 62:18 86:20
dependent 110:19
depending 178:13
depends 63:11 103:13
deploy 74:14
deployed 78:11 107:5
deployment 78:19
Depot 40:17 57:9,11
deprive 57:17
depriving 56:8
Deputy 2:4
describe 62:4
described 90:1
describing 197:7
design 69:6
Designated 2:1 4:9
designed 123:6,13
desk 127:16
detail 212:10
detailed 58:13
details 109:16 202:6
detective 184:8
detention 54:4
determination 93:7
 119:11 126:5 143:7
 143:10
determine 64:20 66:17
 98:14 161:5 167:10
determined 156:4
determining 58:6 92:14
developed 13:6
developing 13:10 216:4
development 10:14
 143:20 161:15
deviate 34:16
deviates 44:3
deviations 82:1
devising 178:17
devotion 173:20
DFO 211:4
difference 113:12,14
 130:19 173:9
different 8:17 42:18
 45:2 52:17 54:20
 67:21 68:8 70:14 79:3
 90:9 100:12 106:11
 131:19,21 133:13
 150:20 182:3,18
 202:15 212:2 214:17
differently 150:21

difficult 103:7 130:3,8
 130:12 131:8 133:18
 133:21 208:14
dig 98:15 208:18
diligently 12:7 16:9
dire 76:10,13 93:15
 101:4 108:10,13,14
 108:22 109:6 110:2
 110:15,22 111:2,8,10
 111:14,17 112:17
 113:18,21 114:4,9,13
 114:16,16
direct 22:10 192:6
direction 139:9
directions 134:20
directly 23:19 52:11
 190:17 216:8
Director 2:3,4 41:6
disagree 44:21 106:17
 126:12 136:19 141:4
discharge 7:19 9:14
discharged 9:13
discipline 116:17 161:7
disclosed 127:6
discovery 127:6
discretion 8:10 17:19
 25:7 33:14 71:2,7
 72:4 92:14 111:13
 114:15 126:15 131:2
 136:15 137:19,22
discretionary 25:3
 26:12
discuss 17:15 46:22
 109:10 190:1 197:13
discussed 14:13 27:21
 30:12 114:21 143:4
 185:10
discusses 24:11
discussing 165:2 180:2
discussion 13:13 18:19
 46:12 114:19 185:11
 193:14 197:12 198:18
 203:12
disparate 19:18 20:8,8
disparities 20:15,16,19
 20:21
disparity 75:20 169:10
disposition 167:22
disproportionate 94:1
disproportionately
 69:21
disqualify 95:16
dissuade 132:16
distinguishing 24:14
district 13:7 41:18
 46:15 61:3,4 80:21
 100:18 113:19 124:1
 124:12 194:20

dive 182:21
diverse 77:1,5,14 79:20
 81:4 85:18 178:16
diversity 84:5 89:8,8
 92:8 93:3 198:14,16
 199:4
division 6:15 41:7 77:3
 77:16 145:7
doable 79:11
docket 102:21 135:17
docketed 206:17
document 153:3 181:12
documents 168:3
 191:12 192:5
DoD 158:10,12,15
 159:13 166:6,8
 173:14
doing 6:2 18:8,10 19:6
 27:9 32:13 43:19
 52:21 64:19 85:15
 103:18 107:4 144:18
 144:20 160:5 161:9
 170:11 173:6 204:11
 216:7
dollars 75:11
domain 70:19
doubt 67:18 130:7
downward 25:16
Dr 167:6 168:12 178:10
 178:22
draft 14:4 106:22 146:3
 146:17 147:6 149:5
 149:15 151:6 185:22
 201:20 205:1
drafted 153:9
drag 109:14
dramatic 71:16
draw 71:4
dubbed 63:1
due 127:6 196:6
duration 49:2
dust 75:12
duty 17:13 41:6 82:14
 85:15,15 104:10
 105:18 106:1 173:6
 173:21 201:10 203:15
 203:15,18
Dwight 2:1 4:8 11:22
 19:10 22:16 212:22
dwindled 25:21
dynamic 96:20

E

E 1:14
E-1 9:6
E-4 87:12
E-5 87:20
E-6 85:4

E-8 87:16
E-9 87:16
ear 192:13
earlier 61:19 68:22 92:5
 92:13 107:18 114:10
 133:1 143:2 200:1
early 39:2 136:6 197:11
 214:21 215:10
easier 179:2 191:5
easiest 152:20
easily 128:7
East 193:16
Eastern 41:14 46:15
easy 99:13
ebb 44:13
echelon 55:17
echo 19:13
edit 189:14
edited 120:15
editors 189:14
edits 180:4 181:6 189:5
education 75:7 86:14
 115:5
effect 16:3,5 42:18
 114:11 181:19 206:4
effective 17:16 21:11
 61:10 105:1 106:14
 160:18 161:1
effectively 59:19 161:5
effects 16:12
efficiencies 55:1
efficiency 61:17
efficient 55:6 105:8
 106:14 114:6
effort 162:6
efforts 120:7
egregious 68:12
eight 87:21
either 13:18 49:22 54:2
 69:7,22 71:11 76:2
 93:18 97:20,21 101:1
 109:12 121:17 134:3
 182:13 199:13 204:12
 205:19
Eleanor 2:5 165:7
elect 8:6
elected 7:2,3
elects 8:14
eligible 92:6,6
eliminate 90:13
email 154:5 178:22
 180:17 191:3,18
 192:4 205:22
emailed 165:19
emerging 139:2
empaneled 162:14
emphasis 32:9,12
employ 30:20

employed 54:13
employees 173:4,15
 174:4
en 110:22
enactment 16:5 29:5
 50:17
encompassing 45:3
encouraging 19:20
endeavor 17:18
ended 197:11
ends 173:10 177:9
engage 142:14 159:3
engaged 212:7
engagement 157:5,19
engaging 17:22
enjoyed 47:2
enlarge 85:13
enlisted 84:1,2,6 88:7
 88:21 183:11,15
 184:8 194:8
ensure 91:22 110:3
 111:15
enter 109:19
entering 175:5
enterprise 212:6
entertain 14:19
entire 31:11 59:5 75:1
 81:8 107:3 111:4
 123:21 124:5 155:2
entity 93:6
entrusted 115:22
entry 179:1
envelope 140:22
environment 109:13
envision 103:20
envisioned 140:19
equal 91:6
equation 92:3
error 43:3 99:2
errors 101:4
especially 25:21 26:9
 32:10 74:20 151:3
 188:22
essence 38:6
essentially 28:13 61:6
 64:1 186:22
EST 1:10
establish 12:11
established 142:1
 156:15 211:22
estimated 158:16
et 20:9 48:20 50:20 52:4
 61:15 67:13 84:20
 90:19 118:7 139:18
ethics 45:8
ethnicity 20:15 176:2
evaluating 97:15
evening 6:21

event 142:6
eventually 166:3
everybody 87:10,15
 154:20 182:13
everybody's 154:15
evidence 42:13 63:18
 64:15 118:20,21
 123:8,12,22 124:6,11
 125:14,22 126:19
 127:21 128:9,9,13
 133:21 135:8 137:9
 156:3 175:21 215:21
evident 188:3
evidentiary 62:21
 127:18 135:5
evolving 139:2,4
exactly 15:16 51:5,6
 61:7 140:16
examinations 75:9
examine 135:10
examining 183:14
example 9:3 32:20
 50:15,19 52:10,17
 53:18,20 95:18 104:3
 118:19 127:5 152:9
 211:8
Excel 175:5
excellence 70:5
excessive 16:14,14
excited 165:13
excusals 101:6
excuse 147:21 184:6
excused 69:21 76:18
 78:15
excuses 80:22
Executive 2:3
exercise 25:7 126:14
 136:15 137:19
exercised 105:6
exercising 33:13 86:4
 131:2
exist 46:19 138:21
exists 54:10 55:12
 84:11 100:9,9 138:21
expand 48:15 71:20
 92:6 111:14 163:14
 169:2 183:16
expansive 152:4
expect 147:20
expectation 36:5
 112:19
expectations 112:14
expected 28:5 34:10
expedition 110:10
expeditions 110:14
experience 9:18 27:12
 40:7 41:3 45:10 53:4
 54:19 56:3,9 57:10

62:11 72:15 73:3
 75:18,22 76:5,19
 86:13 94:6,7 95:5
 96:14,15 97:3 107:2
 108:11 109:15 110:18
 112:3 115:5 127:11
 134:17 135:13 136:5
 183:8 194:14,17,21
 201:5 202:14
experienced 56:10 70:1
 76:12 97:21 131:3
experiences 44:20
 93:19 95:17 158:1
expert 5:2 93:13 216:10
experts 37:11 215:19
 216:15
expiration 214:21
expire 159:1
explain 15:1 28:17,18
 42:1 43:13,15 44:9
 45:16 46:10 47:19,22
 98:10 115:17,19
 116:5 120:21 140:3
explained 45:11
explaining 15:5 42:3
 43:6,18,19 44:12
explanation 15:9,11,20
 48:7
explanatory 147:1
 155:18
explore 175:7 208:8,9
 209:18,19
exploring 110:16
expressed 160:9
expressing 89:17
extended 173:11
extension 86:8
extensive 40:7
extensively 178:10
extent 15:10 22:21 23:6
 26:7 29:9 35:3 56:5
 67:22 86:19 141:9
 158:9 160:17 186:13
 202:17 216:2
extra 89:14 173:6,18,21
extraordinary 94:20

F

FACA 211:14,19,22
face 62:22
faced 76:13
fact 6:18 30:22 47:22
 49:19 50:3 52:16
 61:11 67:11 68:7 80:2
 80:20 110:21 147:15
 163:9 203:14,19
factor 115:10 161:12
factors 13:20 24:3,5,7

24:14 25:5 29:12,20
 29:21 84:15 86:15
facts 35:10 45:12
 110:17 131:10
factual 129:19 179:15
fair 36:6 76:8 91:6
 102:3,7 103:11
 109:11 110:1 203:5
fairly 71:15
fairness 49:10 92:10
 93:1 116:12 142:15
faith 116:18
fall 78:1 174:6 215:7
fallback 154:16
fallout 178:15
familiar 32:3 53:5
familiarity 46:17
family 81:1 120:22
Fantastic 197:3
far 45:13,15 75:16
 86:19 107:19 111:7
 115:20 121:13 138:16
 166:5,12
fascinating 114:19
fashioning 24:15
father 102:1 121:1
fault 155:10
favorite 18:13
fear 47:13
FEBRUARY 1:7
federal 2:1 4:9 17:9
 18:5 19:15 20:3 22:11
 28:3 30:10 37:6,6
 44:7,8 46:17 53:21
 58:19 80:21 100:17
 124:1 137:6,7 139:4
 211:18 212:1,7
 213:11,15,19,22
feedback 14:12,15 32:4
 32:5 180:4
feel 94:14,17 110:8
 121:16 148:8 193:1
 196:22
felt 120:21 125:4 136:9
female 97:13
females 84:19
fewer 43:14
field 65:7 78:11 108:4
Fifth 185:2,6,22 187:21
 188:22 191:11
fight 108:6
fighting 137:15
figure 37:7 120:1 166:9
 170:18 192:11 215:8
file 170:4
final 41:5 147:6 148:20
 149:5,16 192:3 204:7
finalized 188:1

finally 18:4 19:16 31:4
find 23:5 29:18 61:9
 75:16 77:5 98:11,12
 98:21 99:4,8 104:22
 113:5 114:2 127:14
 129:12 174:19 181:13
 197:12 204:21 216:13
finding 26:16 98:13
findings 8:5 23:18
 27:17 49:19
fine 74:6 75:3 101:11
finer 8:22 9:18,18
 10:21
first 4:16 6:4 10:3,22
 24:19,19 37:17 47:5
 48:22 49:12 52:18
 57:11 64:20 87:11
 132:2 133:19 136:1
 137:18 141:22 149:20
 166:13 170:12 171:2
 180:1 197:16 198:3
 199:10,21 208:12
 209:12
fiscal 10:17 146:22
 150:3 158:16
fishing 110:10,13
fit 198:2 200:2,12 203:3
fitness 73:7
fitting 202:1
five 11:7 36:12 77:6,15
 102:22 146:14 201:17
 202:5,7,20 203:13
fix 65:12 188:10
fixed 20:3
flag 98:2
fleet 40:9 75:19
flew 41:9
flip 22:13
floor 4:10
flyers 131:17
focus 60:21 72:16
 162:7 167:9
focused 85:14 186:18
focusing 162:10
fold 59:4
folks 12:4 83:2,6 94:1
 97:19 198:14 199:16
 203:19
follow 16:15 36:20 93:3
 93:12 132:6 197:19
follow-up 70:17
following 32:19 112:18
 147:8,12
follows 9:7 66:20
followup 17:4
foot 214:4
footnote 181:16
forays 214:13

Force 11:15 41:12,13
 50:19 52:12 56:21
 59:21 85:5
forced 45:22
forces 1:2 4:7 12:3
 18:12 72:19 74:15
 98:17 100:20 157:22
 204:9 216:3,18
foregoing 39:6
foreign 214:16 216:14
foremost 173:20
forensic 125:14,14
forfeit 9:6
first 4:16 6:4 10:3,22
 24:19,19 37:17 47:5
 48:22 49:12 52:18
 57:11 64:20 87:11
 132:2 133:19 136:1
 137:18 141:22 149:20
 166:13 170:12 171:2
 180:1 197:16 198:3
 199:10,21 208:12
 209:12
fiscal 10:17 146:22
 150:3 158:16
fishing 110:10,13
fit 198:2 200:2,12 203:3
fitness 73:7
fitting 202:1
five 11:7 36:12 77:6,15
 102:22 146:14 201:17
 202:5,7,20 203:13
fix 65:12 188:10
fixed 20:3
flag 98:2
fleet 40:9 75:19
flew 41:9
flip 22:13
floor 4:10
flyers 131:17
focus 60:21 72:16
 162:7 167:9
focused 85:14 186:18
focusing 162:10
fold 59:4
folks 12:4 83:2,6 94:1
 97:19 198:14 199:16
 203:19
follow 16:15 36:20 93:3
 93:12 132:6 197:19
follow-up 70:17
following 32:19 112:18
 147:8,12
follows 9:7 66:20
followup 17:4
foot 214:4
footnote 181:16
forays 214:13

195:3 197:6,7 216:16
full-time 63:8
fully 52:5 123:8
Fulton 41:2 54:22 62:3
 70:21 72:9 76:1 85:21
 89:5,20 90:11 97:4
 98:3 108:21 129:2
 131:11 132:1 133:14
 138:1
function 66:8 86:8
functioning 20:11 86:4
fundamentally 100:12
further 32:4 67:9
 123:11 140:3 142:22
 179:14
futility 113:9
future 10:17 18:19 49:8
 50:2 118:14 159:10
 209:3,22
FY 155:16

G

Gallagher 2:6 159:19
 160:2 164:4 206:22
GAO's 20:18
garbage 211:12
garrison 105:14
Garvin 1:15 17:4,7
 19:13 24:18 25:11,18
 36:20 38:7 138:10
 152:22 153:3 191:2,6
 191:13,18 192:1
 196:16
gather 63:17
gathered 32:4
GCMCA 78:2
gears 68:21
gender 20:9 71:17 89:8
 162:12 166:18 174:21
 176:3
general 14:22 51:1 52:7
 62:9 110:22 112:16
 114:2,6 116:16 133:5
 135:20 137:3 145:21
 156:18 159:19 162:18
 169:11 183:17 184:4
 184:11 187:3,5,17
 188:9 194:20 203:5
 204:2
generally 17:14,20
 27:10 28:10 35:21
 36:15 48:6 65:8 69:16
 91:6 107:13 111:9
 150:15
generic 176:7
Gentile 1:16
gentlemen 89:3
gentlemen's 108:11

getting 19:21 135:8
 171:16 175:8 191:2
gist 154:10
give 9:2 39:16 50:4 52:4
 55:18 57:10 77:15
 101:1 115:6,11 119:5
 119:22 125:10 133:17
 133:19 139:7 145:19
 150:12 160:4 165:5
 168:11 193:8 195:16
 211:4 215:8
given 17:16 41:10
 63:22 71:2,7 78:3
 94:15 96:3 105:18
 119:14 142:18 162:1
 193:14
gives 7:22 9:15 33:16
 47:21 67:15
giving 22:15 27:3 56:8
 99:14,18
go 23:19 24:19 26:15
 27:18 33:20 46:6
 49:15 50:13 61:21
 63:3,12 68:15,21
 78:19 81:3 83:3,4,4
 84:17 86:19 90:14
 92:22 93:9 107:6,22
 112:13,15 116:6,9
 118:22 119:2 124:22
 127:16 128:13 129:15
 130:10,10,12,12
 131:7,20 133:4 140:2
 142:16 143:1 154:7
 158:21 167:11 170:8
 177:4 178:6,14
 190:17 192:22 194:12
 208:10 211:2 213:7
 215:4
goal 170:16
goes 72:4 75:15 92:22
 96:7 117:7 118:20
 123:19 149:17 168:21
going 4:14 12:6 15:2,6
 20:6,10 23:12 27:14
 27:17 30:19 34:4 35:7
 37:9,13 39:12 41:10
 44:12 48:12,18 49:15
 57:2,3 60:1,2 62:11
 62:18 67:16 68:21
 71:3,4,6,11,13,14,15
 73:18 74:17 75:4 76:4
 76:6 78:8,11,12,13,21
 79:12 80:12,16,17
 81:14 82:20,21 89:15
 89:20 90:3,22 92:4,8
 92:12,17 98:4,10
 99:21 100:15,16
 103:5 104:5,11 105:2

105:10 106:16 107:21
 108:7 109:14 110:14
 112:20,21 117:1,15
 119:17 121:17 127:3
 129:6 131:9 134:17
 136:22 137:12 138:4
 138:12,12 140:4,20
 140:21,22 144:13
 145:17 148:9 149:18
 153:7 159:17,20
 160:3 161:20 162:7
 164:18 165:1,2,4,5,15
 166:21 167:14,15,16
 168:2,11,14,17,19
 169:5,16 170:7,12,20
 171:12 175:1,3,7,12
 177:8,8,22 179:14,14
 179:19 180:18 181:5
 183:1 184:10,22
 185:18 191:4,20
 194:8 195:4,10,13
 197:16 198:1 203:21
 203:21 204:22 206:1
 208:15 210:1 213:9
 216:7
Goldberg 1:15 33:9
 34:3 35:1,15 36:3,8
 36:18 68:20 71:19
 72:14 74:2 76:3 83:8
 87:1 142:17,18
 175:22 176:9,14,18
 176:21 177:3,10,14
 182:9 200:14 202:12
 203:8,17 204:1,5,10
 204:13,15 215:14
 216:17
good 4:3,11,12,18 5:18
 5:18,22 21:2,4 30:3,4
 31:19 32:17 42:4,5
 43:18 44:18 47:8
 48:16 50:13 53:1 58:9
 91:13,21 116:16
 120:11 134:7 142:8
 145:15 153:10 161:6
 179:3 182:7 200:9,21
 207:18
gotten 88:3 111:9 169:6
 183:20
government 27:7 44:5
 45:17 65:17 121:1
 125:13 128:12 131:9
 133:10
government's 121:6
governs 123:10
graciously 204:10
gradations 72:1
grade 9:5
graduate 75:5

grand 133:15,18
grant 92:15 95:15,21
 96:1,8 98:11 99:3,7
 101:3,5
granted 127:1
gravitate 84:15,16
great 8:9 24:6 25:11
 32:11 67:15 73:6
 134:21,22 141:19
 160:9 190:13
greater 36:13 103:11
greatest 22:21 23:6
greatly 24:16 112:22
green 87:13,13
grew 99:5
Grimm 1:16
groundbreaking
 166:12
group 9:22 10:10 13:2
 38:12 40:1 104:15
 194:1 198:9,14,21
groups 19:16 198:10,22
 201:21
Guantanamo 41:16
Guard 11:16,21 194:18
guess 36:3 41:22 50:12
 86:19 93:21 94:9
 171:1,8 187:5 191:5
 197:15,22 199:5,9
 204:6
guidance 25:4,6,16
 141:6
guideline 22:12
guidelines 11:5 12:8
 13:6 14:4 17:3 20:4
 22:6 25:2 30:12 31:2
 33:13 37:7 46:18
guides 211:5
guiding 212:17
Guilds 201:12 202:2
 203:13
guilt 8:5 23:12,19 27:17
guilty 6:22 7:6,8 9:1
 91:9 122:2,11,14
 123:2
guys 53:10 210:18

H

hack 88:18,19
hair 95:18
half 21:21,22
hand 4:15 193:20
handful 29:17
handle 56:10
handles 193:18
handling 196:7,9
hands 114:13 137:20
happen 22:3 62:8 71:3

85:22 94:3 98:18
 104:5 125:16 209:21
happened 37:12 65:3
 67:20 151:13 156:8
 156:14
happening 71:12 94:11
 170:19,19 179:20
 205:19
happens 37:2 78:6 85:9
 90:4 135:9,9
happy 14:19 37:19 38:5
 51:5 140:11 153:21
 154:2,6 177:5 189:13
harassment 67:13
Harbor 131:13
hard 28:21 73:13 101:8
 102:18 166:9 173:18
harder 132:2
Hayes 15:16
head 207:17
head's 144:21 145:12
headed 6:5
heading 41:11
Headquarters 14:8
healing 157:20
hear 43:4 56:19 57:5
 72:5 73:21 75:3 83:9
 83:11 91:12 99:18
 118:19 140:11 144:1
 146:8 162:15 195:19
 196:1 200:4 216:5
heard 7:14 14:21 56:21
 69:12 70:15 71:22
 87:5 119:4 142:9,9,11
 147:11 148:15,17
 149:8,12 151:15,22
 153:13,14 160:6
 182:11
hearing 18:6 43:16
 54:17 56:20 58:13
 60:12,19,22 61:9,13
 62:12 63:2,4,12 64:8
 64:9,11 65:15,19,22
 129:13 144:19 164:2
 177:19 184:16 196:19
 196:22
hearings 17:10 54:14
 61:6
heart 47:10
heavily 24:10 29:21
 123:16
hell 107:2
help 54:5 84:4 89:7
 156:2 169:20 170:7
 173:19 175:1,8
helped 20:2,3
helpful 10:7 13:5 28:5
 34:1 72:5 83:10

113:15 120:9 140:1
 143:22 200:4 203:4
 205:17 211:12
helping 86:12 173:6
 183:9
helps 113:16 117:14
hesitant 142:1
hesitation 15:17
hey 117:3 212:9
Hi 21:4
high 35:12 74:20 182:6
higher 35:21 56:13,15
 76:10,18 84:3,16
 128:20
hire 173:7,15 174:3
hiring 173:14
Hispanic 84:6 90:20
 91:3
historic 40:2
historical 117:20
historically 65:3
history 10:22 25:20
 90:18
hoc 78:4
hold 209:4 215:3
hole 102:21
holistic 161:19
homicide 41:17 59:3
 104:3
homogeneous 71:5
 77:17
Hon 1:10,13,15,16,17
honest 141:8
Honolulu 207:5
honor 109:20
hope 170:11
hopefully 145:19
 192:13
hoping 180:20
hour 142:19 144:7
 184:17
hours 193:12
HR 174:10,12,22 175:3
HRC 168:6
huge 49:1 169:9
human's 100:4
hundred 112:10
husband 151:17
husbands 76:11
hybrid 109:5 113:22
hyper 110:3

I

idea 9:15 48:17 49:13
 59:20 67:15 96:1 97:1
 117:11 146:4 164:2
 197:3
ideal 62:4 63:5

- identified** 29:14,17
 83:15 194:16 195:18
 196:17
identify 10:7 57:19
 82:16 143:12 179:10
identifying 19:18 83:6
 162:11 174:18
ignore 124:19
imagine 7:10 87:17
 102:2
immediate 188:21
immediately 88:1 192:9
impact 17:11 19:18
 20:8 118:3,5 122:1
 125:2 132:10 145:18
 146:1,3,5,10 147:5,17
 148:17 149:4,19
 150:2,5,7,11,14,19
 151:10,18,20 152:1,7
 152:10 155:20 191:9
 195:20
impacted 6:9
impactful 121:4
impacts 80:17 105:12
impartial 46:20
impartiality 92:10 116:4
impeach 122:19
impermissible 42:22
impetus 19:14
implement 111:11
implementation 32:10
 160:21
implemented 30:13
Implicit 97:4
implied 98:12 99:5
 104:13
importance 112:6
 198:13
important 45:16 55:21
 66:3 104:1 111:18,19
 115:16 116:13 117:8
 117:8,9,10 120:21
 121:19 125:7 128:11
 137:18 140:7 141:13
 160:15 161:2 170:9
 175:18 183:8,12
 196:1 207:3
importantly 50:1
 185:20 187:6
impose 8:15,20,21 11:2
 30:16 36:15
imposed 9:19 35:19
 46:1 122:10
imposing 29:22 136:2
imposition 46:9
impossible 178:6
impressive 39:10
improve 10:20 112:22
- improving** 37:22
in-depth 216:8,19
inadmissible 119:9
inappropriate 67:20
incentives 103:7
inclined 201:1
include 25:8 32:15 58:3
 126:8 141:20 146:18
 148:11,20 149:5,13
 149:16 153:20 154:1
included 39:10 95:13
 148:13 150:10,18
includes 151:6 169:15
including 72:2 157:5
incorporated 146:6
increase 10:3 85:16
 103:2 104:16
increased 105:15
increasing 108:3
incredible 194:21
incredibly 126:13 130:2
independence 49:9
independent 37:21
 50:21 51:3,14 53:12
 156:16 210:8,11
indicated 163:21
 168:22
indicator 182:5
indicia 124:2
individual 14:1 45:12
 45:16 50:18 51:16
 92:2 108:14 111:2
 112:17 113:18 174:15
 186:14 187:15
individualized 13:9
individuals 81:8 96:13
inexperience 112:5
infantry 77:3,16
influenced 127:4
inform 23:7 64:15
 162:16 183:9 196:5
information 5:11 10:12
 22:16 118:19 126:18
 127:9,22 146:19
 147:8,16 148:4,12,20
 149:7,14 151:7 153:6
 158:17 159:6,8 167:4
 168:3,5,6,12 195:19
 196:21 197:1 213:7
 213:13
informative 144:6
informed 62:7 66:15
 197:15
infrequent 36:6
inherent 47:18 51:10
initial 49:3 58:3 104:2
 167:5 185:7 187:10
initially 30:12 104:4,15
- injury** 10:8
input 3:5,6 20:2 140:12
 175:9 179:22
Inquiring 164:14
inquiry 109:12
insert 188:14 189:5
insolvable 77:21
installation 82:6 93:2
 105:15,17
installations 40:12
 167:3,4
instance 122:20
instances 88:17 150:6
 150:13
institution 81:2
institutional 14:1 69:6
instruction 31:12 42:11
instructions 95:10 98:8
insufficient 129:19
integrity 49:9 109:20
 209:4,13
intended 86:6 125:19
intent 200:11
intentions 90:17
interaction 211:6
interconnected 101:9
interest 160:10
interested 56:20 104:8
 143:11 160:5 180:5
 215:22 216:1
interesting 15:13 48:10
 51:12 56:19 57:5 90:3
 99:1 119:20 182:11
 209:18 215:3
interim 13:2 178:4
International 73:11
interpret 141:3
interpretation 201:15
interpreting 147:3
 149:21
interrupted 214:10
intersecting 69:9
intervening 156:6,9
interviews 198:2
intimate 97:21
introduce 4:16 165:6
introducing 4:20
introduction 24:21
 39:12
invaluable 172:19
invested 37:21
investigation 1:1 4:5
 28:2 60:14 63:17 64:8
 127:1,3,20
investigations 129:10
investigative 63:15
 198:16
investigator 184:9
- investigators** 125:12
 183:6,21
investigatory 63:17
 128:8 183:8
invite 97:12 213:3,5
inviting 44:18
involved 37:1 88:12
 111:21 150:5 182:13
 209:13
IO 62:14
IPAD 4:9 145:1 158:10
 159:1 174:1 214:20
 215:19
Iraq 107:11
IRC 158:3 159:6
irrespective 106:1
IRT 198:15
Island 40:18 57:9,11
Israel 157:8
issue 43:8 54:1,3 55:4
 67:10 82:6 84:5 93:22
 94:13 95:14 106:8
 117:7 132:18 143:8
 145:5,22 151:13
 152:11,18 155:15
 162:21 171:3,4 194:7
 194:11 195:4 196:4
 196:10 198:12 213:2
 214:8
issued 42:20 187:22
issues 43:4,6,15,17
 55:3 57:19,20 58:1,2
 61:15 62:21 69:8,10
 70:18 79:10 88:15
 95:9 96:21 98:8
 103:15 111:21 143:4
 160:13 167:12 171:2
 179:11,19 180:2
 197:13 214:17 215:3
 215:8
Italy 214:13
items 196:17
iteration 178:7
iterative 193:1
-
- J**
- JAG** 27:12 60:1 106:9,9
 107:3 119:13 208:4
JAGC 2:3
James 1:18
January 14:16 167:7
Jeff 2:3
Jenifer 1:17
Jennifer 1:16,17
Jim 169:14 211:1
JMJAT 31:19 32:6
job 62:12 78:18 82:15
 83:5 91:14 100:6

John 9:4 11:17 174:17
176:8
Johnson 201:7
joint 12:1 14:10 18:2
19:8 31:20 147:1
155:17
Josh 11:20
judge 4:10,22 5:1,12
8:7,9,18,19,20 10:19
11:15,17,18 13:21
15:8,15 16:1,7 22:7
24:3,8 25:1 29:6,22
33:16 37:21 39:20,21
40:8,16 41:4,13,14
42:2,12,17,17 43:6,8
44:3,12 45:5,17 46:22
47:6,16 48:7,12,18,19
50:6,7,22 52:7,17,22
53:1 54:1,18 55:1
58:12 60:16 61:5,12
62:6,10 64:14 65:15
65:19 66:11,16 73:9
78:16 84:13 88:14
95:7 98:4,5,20 100:4
100:7 101:19 107:3
109:2 110:6,13,19
112:17 113:8,20
117:9 119:5,7 120:13
120:17 121:12 122:6
123:19 124:18 125:4
125:5 131:13 134:5
135:22 138:17 141:3
143:9 150:6,14 151:3
153:14 160:21 163:16
169:3 194:12 195:15
204:9
judge's 123:1
judge- 119:2
judge-alone 118:10,12
118:16,22 119:17
120:10
judge-made 98:16,19
judges 3:4 10:20 11:2
14:10,22 15:4,4,10,17
24:15 25:16 28:13
29:10 30:15,17,20
31:1,9,14,18,20,21
32:2,7,15 34:2,14
36:15 37:14 39:10
42:3,9,15 43:14 45:9
47:21 48:17 49:1,2,21
52:2,3,6 53:7,13
55:18 56:6,9 57:18
60:11,21 61:4,18 63:7
63:7,8 77:6,10 79:12
80:21 92:12,13 93:7
95:12 96:10 101:5
108:12,15 111:12

112:4,9 113:4 114:8
114:12,13,15 115:12
117:16,18,21 118:18
121:22 124:12,13
138:16 141:20 142:13
147:2 149:9,11,20
150:11,20 151:9
152:3 153:7,8 163:2
210:8,9
judges' 32:6
judgment 91:1
judicial 39:21 86:14
115:8
judiciary 41:13 47:7,14
49:21 50:21,22 51:3
51:13,13,20 53:4,12
80:13 92:19 93:6
210:11
Julie 2:4
jump 4:15 41:22 42:7,8
63:10 83:20 182:9
June 31:15 185:5 194:2
198:11 207:22 208:12
junior 88:21
juries 94:5 100:18
166:10
jurisdiction 58:19
119:19
juror 109:11
jurors 85:1 115:4
jury 42:17 75:8 85:18
86:6,6,8 95:10 104:10
105:18 106:1 119:9
119:10 132:7 133:16
133:18 145:3,11
jury's 119:12
justice 6:7,8,9 7:21
9:22 10:9 11:1 12:4
13:17 14:3,5,14 18:21
40:1,3,5,14 49:11
53:16 54:10 56:2,16
58:16 72:16 80:11
106:15 107:7 111:6
116:16 135:15,18
145:20 152:14 155:16
155:22 156:1 157:15
159:16 161:7 166:12
171:9 198:17 211:6
214:5
justifications 161:3
justifying 31:4

K

K 2:4
Karla 1:10,13
Kate 2:5 4:16 5:17
keen 97:9
keep 72:19 86:18 97:9

106:20 184:20,21
197:14
keeping 73:17 141:1
151:11 158:22
kick 97:6
kicked 94:2,5
kicks 98:20
kidding 172:11
kind 22:7 28:5 34:8
35:7 48:15 62:9 65:3
65:19 85:12 89:8,10
115:11 123:18,20
140:19 160:3,5
162:20 166:9 178:10
178:19 179:1 180:1
185:2 186:20 187:2,9
187:12 189:17 192:10
198:13 199:12,17
201:17 202:8 207:15
208:22 210:6,12
215:11 216:9
kindly 80:22
kinds 51:17 53:6 67:4
140:5
King 11:22
Kingdom 157:8
kits 125:14 127:17
knew 90:6 212:18,19
know 6:6 10:5 16:13
18:2,9,14,15 19:5
21:12 22:8,12,13,14
23:2 25:13,22,22
26:22 27:4,14,15,16
27:19 28:2,3,22 29:15
30:21 31:1 33:12 34:5
35:6,14 38:18 44:1
48:18 54:15 55:9,20
55:21 59:7,10 60:13
61:8 75:1 79:20 83:11
87:6 88:11 89:2,3
91:17 95:14 98:10
101:5 104:7 105:5,9
105:14 111:11,17
113:2 116:22 120:4
121:2 122:5 123:20
124:18,19 128:22
129:20 132:3,3
133:17 134:1,7
135:11 136:7 138:19
140:4,6,14,19 142:3
143:5,5 146:11,18
147:2,14,14,16 148:3
148:5,10,12,16 150:4
150:4,5 151:4,10,16
152:8 153:12,16,21
154:6,10,15,18 156:3
157:19 158:1,20
159:6 161:2,20,20

163:4 164:15 165:7,9
170:3 171:19 172:13
174:10,15 178:15
180:3 182:7,17,20
187:14 188:1,20
189:5,7,11 192:12
194:12,19 196:2
197:13 198:1,12
200:20 204:12 205:18
205:20 207:2,11
208:20 210:9,12
211:9,21 212:14,15
212:19 213:11,14,18
214:3,3,5,13,20,20
216:15
knowing 48:11 90:21
91:2
knowledge 112:6
known 4:7 11:4 21:6
83:18 106:3 175:17
knows 216:5,18

L

L 2:4
labeled 186:5
labor 145:7
labor-intensive 120:7
lack 56:3 67:3 112:6
Lake 41:9,18 59:10 61:3
113:19
landscape 160:22
lane 29:16 33:4
language 153:22 154:2
154:4
larceny 6:16 7:1,6,7
large 47:13 57:17 75:19
80:1 96:13 141:9
209:14 211:16
largely 75:19 96:7
152:12
larger 82:4 93:2 105:11
largest 40:9
lastly 10:9
late 24:21 117:19 190:5
lateral 112:21
Latin 198:19
Latino 69:15
latitude 111:1,13 139:7
laughter 19:4 21:8
22:18 28:19 32:18
39:18 56:17 77:8
89:19 94:12 109:3
113:11 138:9 155:11
171:14 172:10
launched 215:9
law 5:2,3 14:8 15:13
49:19 75:6,7 85:8
87:8 95:20 96:6 98:16

98:19 111:12 119:15
139:2,8 141:3 215:19
lawyer 197:1
lawyers 202:21
lay 70:18
lead 23:11 40:8 81:13
147:18 182:18 207:20
208:2
leader 157:22
leading 97:15
leads 10:17
League 198:19
learn 55:1,3 61:20
182:21
learned 6:19 7:12 19:9
95:7,7 214:6,22 216:3
learning 37:16 216:8
leave 78:13 80:17 82:14
82:19 137:21 172:12
leaving 91:16 93:17
98:6
led 19:17
left 17:19 112:20
171:19 172:1 211:5
212:16
legal 13:12 23:1 59:14
59:16 60:2,3 89:14
116:8 126:3 130:19
136:18 179:15 212:8
legally 86:3
legislative 25:20
Lejeune 40:17 57:8
lend 196:18
length 86:13
lengthy 31:3
lent 96:18
lesson 19:9
let's 70:21 171:2 190:7
letting 120:13 189:13
level 154:15 212:10
liberal 95:15,21,22 96:8
98:11 99:3,7 101:3
liberally 96:4
Libretto 40:16 47:5
48:21 51:20 57:7
62:17 79:16 92:4 95:6
98:4 110:18 112:10
112:12 121:20 125:17
132:20 141:18
lieutenant 11:20 39:19
40:15 51:19 85:7,7,9
85:10 116:21
life 88:14 91:20 116:1
lift 175:9
light 28:4 47:14 92:15
151:3 161:11
likelihood 67:17 136:21
137:21

likewise 195:22
limit 120:15 150:6,11
150:14 203:12
limitation 122:8,10,22
150:13
limitations 122:18,22
212:8
limited 6:10 13:11
22:22 58:17 75:21
112:4 137:5
limiting 111:7 149:22
limits 112:21
line 58:4 60:8 101:22
186:22
lined 187:18
lines 29:8 70:4 120:6
210:12
link 188:6 205:21 206:6
linked 207:15
links 187:18
list 29:20 78:2 207:1,8
listed 29:19
listen 145:13 205:20,20
listened 93:14
listening 144:16 195:2
lists 200:15
litigated 54:18
litigation 40:7,19 45:4
50:5 62:10
litigator 40:14
litigators 46:21
little 8:17 28:17,21 31:6
46:3 89:9 101:10
110:21 117:1 123:5
126:17 133:21 153:18
161:15 181:2 201:16
203:11 216:12
live 71:13,14
lives 89:9
local 92:7
locations 207:2
logical 76:19
logistical 77:19 79:10
80:7 102:17 103:5
107:17 108:3
logistically 103:6
logistician 58:5 60:18
loneliest 102:15
long 1:16 25:20 27:10
34:15 51:16 81:2,21
90:15 92:22 93:9
112:13 122:4 125:1
132:22 138:12 142:7
192:20 193:2 202:7
longer 50:18 52:14 53:7
78:22 119:12 142:5
179:18 181:2 183:10
longitudinally 55:7

look 16:12 17:8 20:1,7
22:9 35:18 37:6 60:5
71:8 76:2,17 84:17
86:15 88:18 99:21
103:18 108:8 116:19
134:11,12 148:2
151:12 155:20 156:18
158:5,10,10,12
159:14 162:4 166:1
166:10,15,17 167:10
169:21 170:4,10
175:19,20 179:15,19
186:4 199:17 209:20
209:22 210:5,16,18
216:12
looked 77:5 86:13
129:8 150:4 157:7,7
157:11 159:6
looking 5:7 17:11 22:6
26:21 35:7 53:3 97:11
99:11 101:20 103:14
103:15 104:14 114:12
118:8 123:4 144:19
145:9 152:1 161:19
163:5,8,12,13 166:21
167:15,16 168:1
169:2,6,19 170:15
176:2,5,20 177:17,20
178:14 186:7 200:15
looks 166:7
loosened 152:2
lose 72:16 95:1
loser 137:14
loses 131:10
loss 62:5
lost 65:4 66:7 130:13
lot 13:3 43:13 46:12
64:4 66:7 69:4 71:22
72:12 75:20 83:16
92:14 93:14,15,16
95:1 101:1,3 107:12
107:14 111:1 113:6
113:16 114:4 118:3
120:7 128:19 131:9
151:13 158:3 159:8
160:6 161:4 165:12
171:7 179:2,22 183:1
188:8 202:13,21
210:7 212:2
lot's 156:8
lots 79:12
love 59:20,21 106:9
214:20
low 35:12 46:4
lower 35:21
Lowery 21:3
LTC 42:8 55:8 63:10
76:4 77:9 98:9 102:16

106:16 114:8 115:12
117:14 123:4 124:16
128:3 133:7
LTCOL 47:5 48:21 57:7
62:17 79:16 92:4 95:6
110:18 112:10,12
121:20 125:17 132:20
141:18
LULAC 198:19
lunch 144:7
lurking 135:5
lying 100:4

M

ma'am 28:16 171:13
173:3 184:19 185:1
204:3 205:2,8 206:1,5
Madam 145:16 152:16
163:9 205:9 210:22
Magers 2:5
Maggs 204:9
magistrate 53:18,22
54:11,16 55:11 57:16
57:22 58:8,18 59:17
60:7,11 63:5 66:12
magistrates 54:3 56:8
56:22
main 72:19,19 206:6
maintain 49:8 111:13
major 184:6,7 192:13
majority 5:1 96:13
150:10
making 43:9 62:7 66:15
80:10 115:22 119:12
124:8 126:4 136:4
139:11 143:6,10
175:17 176:7 180:5
187:11,17 188:3
212:5
male 87:16,20
males 80:2
manage 82:16,22
managed 182:2
mandate 95:15,21 96:1
96:8 98:11 99:3,7
101:3
mandated 205:15
mandatory 8:11 38:10
38:11,14,17
manner 187:13
March 155:3,4 164:8
180:14,15,18 181:7
189:2,4
Marcia 1:13 30:8
114:17
marginal 129:4
marijuana 6:18,21 7:1,9
7:20

- Marine** 11:18 40:16,19
41:7 47:7 56:20 57:9
57:10 79:17,20 81:17
132:21 133:5
- Mark** 41:2
- Markowitz** 1:17 93:11
94:13 97:17 172:14
172:18 173:1 207:6
- Martha** 1:14 145:2
181:11 182:8
- Martha's** 214:13
- martial** 9:5 10:13 24:11
24:17 41:1 78:4
172:22 137:4 166:16
206:11
- martials** 166:4
- Mason** 170:3
- mass** 107:6
- massive** 136:14
- matching** 176:21
- material** 159:11 195:8
- materials** 39:11 146:18
148:1,13 195:17
- Matt** 11:22
- matter** 39:6 49:3,17
51:8 54:14 90:2
126:21,21 144:9
217:3
- matters** 51:10 52:14
119:4 124:20
- maximum** 8:12 160:17
- mean** 19:8 22:8,11 35:1
36:4 48:16 50:12 55:1
61:7 65:15 71:20
81:14 86:2,5 89:11
90:2 91:19 92:7 95:20
98:10 102:18 108:12
111:11 115:19 120:9
121:21 122:19 125:3
130:1 131:22 132:15
133:16 137:5 138:4
142:4 148:2 160:6
181:13 187:21 202:13
- meaning** 168:3
- means** 42:17 81:3 99:7
106:14 117:11
- meant** 191:18
- measure** 93:4 100:11
- meat-and-potatoes**
62:9
- mechanism** 82:4
111:15
- median** 23:5
- mediation** 156:1
- medical** 125:12 126:19
127:12,13 196:20
- meet** 17:2,20 85:3
157:21 216:16
- meeting** 1:4 3:8,8,9 4:4
5:10 17:8,14,21 18:6
18:11 146:12 147:9
147:12 151:15 154:14
159:10 167:7 180:14
181:5,8 185:5 194:2
197:19 208:6 213:4
215:16 217:1
- meetings** 18:19 159:11
180:1 209:11 215:4
- Meg** 1:15
- Meghan** 1:18 2:6 23:9
38:9 53:14 154:13
156:17 195:12
- member** 12:1 14:21
17:4,7,22 19:2,8,13
21:2,5,10,15,20 22:4
23:9,22 24:18 25:11
25:18,19 28:16 29:4
30:3,5 32:14,17,19
33:9 34:3 35:1,15
36:3,8,18,20 38:7,9
40:1 42:17 52:6 53:14
56:18 60:9 65:6 68:20
69:5 71:19 72:14 74:2
76:3 78:14,19 83:8,20
85:19 87:1,4 89:16
90:5 93:11 94:13
96:22 97:17 98:6,14
98:21 99:14 101:14
102:12 108:7 109:1
110:9 111:3 112:8,11
113:2,8,12 114:17
118:10,14 125:8
128:15 129:5 131:21
132:5 138:10 142:18
144:15 152:22 153:3
154:12,18 161:18
162:1 163:9,19 164:1
164:14 168:16,18
172:14,18 173:1
175:15,22 176:9,12
176:14,15,18,19,21
177:3,10,14,22 178:1
179:4 180:7,19
181:10 182:9 183:2,7
184:2,20 188:12
189:3 191:2,6,13,18
192:1 193:6,11,13,19
195:6,12 196:7,9,10
196:11,12,13,15,16
197:3,8,9,20,22
199:20 200:7,14
202:12 203:8,15,17
203:18 204:1,5 205:5
205:9,12 206:3,8,10
206:14,16 207:4,6,9
207:15 209:3,7
- 210:15,22 211:2,3
212:18,22 214:8
215:14 216:17
- members** 4:19 5:18
6:11,12 7:2,4,5 8:6,9
8:14,15 11:6,7,8,12
11:20 17:12,20 20:18
40:22 42:15 69:12
70:6 73:4 76:22 84:2
86:1,22 87:22 89:2
95:10 98:8 99:9,20
100:10,14 101:1
105:7 109:17 114:3
116:11 117:17,21
131:14 133:13 144:13
145:16 150:17 151:16
152:16 156:18 161:9
163:13 164:17 166:8
187:4 188:18 189:22
192:10 193:3 200:4
200:22 204:12 207:10
208:10
- members'** 7:10 131:13
- memorandum** 27:4
- men** 76:10 97:14,14
- mention** 31:17,22 33:15
36:11 39:12 97:20
172:19 215:13,13,15
- mentioned** 159:20
171:7 174:8 183:5
198:15 199:22
- mentors** 40:21
- merit** 54:15 137:4
- merits** 55:5 106:12
- message** 43:1
- met** 1:9 158:19 167:6
194:5
- method** 48:18
- methodology** 167:13
- methods** 157:3
- MG(R)** 1:13
- Michael** 40:15
- microphone** 46:3 165:4
- midst** 129:11
- militarily-sensitive**
73:14
- military** 3:3,4 5:2,3,5,8
5:13,20 6:7,8,9 7:19
7:21 8:7,18,19 9:22
10:4,9,19 11:1 12:4
13:17,20 14:3,5,9,14
14:22 15:4,8 16:7
18:21 22:7 24:15
25:15 26:9,15 28:7,13
29:5,6,10,22 31:8,20
32:6 34:1 36:15 39:9
39:20 40:1,3,8 41:13
41:14,15 42:9,13 45:1
- 45:5 46:20 47:4 49:10
50:6 52:6 53:11,16,20
54:6,10,18 55:18 56:2
56:6 57:16,18,22 58:8
58:16,18,22 59:5,8
60:10,11,21 61:18
62:1,6 63:5,6 66:11
66:21 67:11,14 68:7
68:16 72:16 76:2,9
77:6,10 78:16,17
79:12 80:11 84:18
85:2,15 87:8 91:5
94:17 95:7,12 96:10
104:6 105:12 106:15
107:7 108:12 110:6
110:13,19 111:6,12
120:16 123:9,22
124:6,12 134:5
135:17 141:20 147:2
149:9,11,20 150:6,14
151:3,9 161:7 162:1
163:2 166:12 171:9
183:21 194:15,17,18
198:17 210:11 211:6
214:11,14
- military's** 72:17 156:19
- military-specific** 12:20
24:4 30:1
- mind** 73:20 106:21
151:11 158:22 207:2
208:14
- minds** 164:14
- mine** 180:7
- minimizing** 104:8
- minimum** 8:11 36:12
- minimums** 38:11,11,15
38:17
- minorities** 20:20 84:19
- minority** 80:3 84:6 91:3
199:1,2 200:9
- minute** 81:20 102:6
114:20 201:17 203:13
- minutes** 39:1,4 145:17
202:5,8,20
- minutia** 108:16
- mirrors** 44:6
- misconduct** 67:3,12
68:3,3,8,12
- misdemeanor** 135:17
- misjudge** 134:19
- misreading** 42:13
- missed** 138:14 176:1
176:11
- missing** 24:21 147:7
- mission** 6:2,3 72:17
73:16,18,18 78:17
80:17 212:15
- Mississippi** 40:12

misstate 194:21
misstated 203:11
MJRP 173:6,8,12,16,19
 173:21 210:3,13,17
 211:21 212:2,5,9
 213:2
Mm-hmm 206:18 209:6
mobilization 107:6
model 133:5
modeled 26:8
modeling 17:8
modernization 162:8
modest 37:4
modifications 185:11
modified 158:8 186:14
modifying 186:21
moment 65:18 90:1
 138:13 142:21
moments 37:5 71:6
money 75:11
monitor 17:11
monsters 135:4
month 74:14 82:17
 102:20 174:3
months 9:9,11 78:7,7
 80:2 102:22,22
 173:17
morning 4:3,11,12,18
 5:18 21:2,4 30:3,4
 41:21 44:18 148:19
 197:17 198:3 199:10
 199:14
motion 55:19 64:12
 140:10
motions 53:22 140:15
motor 58:5
mouthful 5:21
move 46:2 48:12
 138:12 145:20
moved 138:17 177:4
moving 184:20 210:9
multiple 56:14 132:11
myopic 19:3

N

N 1:10,13
name 171:10 201:9
named 152:6
names 174:11,16,18
 175:2
narrow 113:16 126:18
 151:2
narrowly 147:3 149:21
nation 216:14
national 10:18 11:21
 12:9 16:6 73:18
 146:22 155:17 194:18
 199:1

natural 138:5
naturally 85:16
nature 44:22 49:20 54:4
Naval 214:5
Navy 40:7,10,11,13
 41:3 79:17,19 107:13
 207:14
Navy- 41:6 47:6
Navy-Marine 41:4
NDAA 25:21 179:17
 195:18 205:15
nearby 204:22
necessarily 18:22
 59:12 70:5 81:17,18
 95:15 97:6,7 104:6
 106:13 111:22 126:11
 136:8 142:10 152:5
necessary 10:1 35:20
 49:8 57:16
necessitate 106:13
necessities 106:5
necessity 74:11 84:22
 106:4
need 5:21 27:15 50:11
 51:4 56:9 65:12 67:21
 68:18 106:18 108:4
 118:17 119:18 121:17
 125:4 130:2 131:6
 143:21 154:19 161:4
 169:20 170:7 171:17
 189:10,12 192:11,21
 196:2 207:1 210:8
needed 110:11 140:14
needs 53:11 80:6 106:2
 106:2 107:9,15
 122:10 204:16
negates 119:18
net 82:12 83:15,17 93:2
Network 200:18
never 47:8,10 74:6
 77:12 90:4 107:21
 108:21 110:15 113:5
 119:10 120:15 132:21
 169:8
nevertheless 67:18
 141:15
new 31:14 35:14 42:12
 44:13 46:9 69:5 107:7
 116:20 135:4 138:19
 138:20,21,22 141:6
 141:18 160:16 181:18
 191:3 207:1
news 179:3
night 88:5
nine 11:6 80:2 87:21
nominate 73:3 184:11
nominating 74:18
nominees 75:15

non-commissioned
 89:1
non-concurrence 54:2
non-covered 195:15
non-diverse 178:16
non-military 26:1
non-sexual 128:20
non-solvable 79:11
non-voting 11:7,19
Norfolk 74:12
normally 202:9
note 39:14 142:20
 174:7 186:1 201:19
 203:1 204:7 213:18
noted 150:17 173:10
 198:20 199:8
notes 183:22 194:4
notice 18:9
noticed 52:16
noticing 50:15
notion 97:5
nuanced 167:11
number 29:14 31:1 35:5
 35:7 59:4 65:7 70:14
 70:15 79:17 84:3 94:1
 95:9,10 102:4,15
 103:2,3,11 104:16
 105:9,11 128:18
 134:11,12 138:3
 173:15 175:6 186:10
 207:7 209:9 212:13
numbering 108:8
numbers 29:15 163:4
 182:6,18
numerous 88:17

O

o'clock 193:16
O'Connor 1:17
O-5 87:16
O-6 87:16
oath 109:18
objection 127:15
 147:19
objectionable 118:7
objectives 141:16
obligation 47:22
observation 79:19
 121:21 182:10
observations 45:6 49:4
 205:13
observe 207:10 208:10
observed 206:13
observing 131:16
obtain 166:14
obtained 125:15
obvious 167:15
obviously 46:11 80:5
 86:17 128:21 143:7
 171:15 174:20 182:20
 212:12
occasion 121:16
occur 21:18 90:3 91:11
occurred 21:21 45:14
 61:15 130:7 131:1
occurring 170:20
occurs 29:5 129:21
off-limits 39:16
Off-mic 154:22
offender 157:16
offenders 156:2
offense 7:14 8:22 10:5
 10:22 12:14 13:16,18
 13:19,20 21:11,14
 22:9,10 23:6 27:1
 30:2 34:14 36:10
 38:18 45:13,18 88:7
 122:11 124:17 129:16
 131:1
offenses 8:16 12:12,12
 12:15,16,17,18,18,20
 12:21 14:13 16:8,10
 21:17,18,21 22:1,3
 23:5 24:4,10,12,16
 26:2,3,10 27:2 28:20
 29:14,17 35:21 123:2
 169:11,11,14 195:16
offer 106:16
offered 204:10
office 28:10 41:18
 46:19 50:16 136:13
 137:17 183:17 184:11
 199:4 209:15
office's 209:12
officer 6:14 7:17 58:4,5
 60:8,19 62:12 73:16
 74:1,3,4,6 76:1 88:6
 89:1 129:13
officer's 66:1
officers 60:12,22 71:1
 73:17 75:4 83:2 84:7
 89:1 115:20
officers' 71:1
offices 168:7
Official 2:1 4:9
offshoot 108:9
oftentimes 96:18 134:6
OGC 11:22 164:21
 173:13 174:3 179:10
 206:9
oh 22:4 32:19 46:6
 135:8 144:21 173:1
 176:3 184:6 191:19
 191:19,19 192:1
 204:17 205:6,11
 207:11

okay 21:15 48:22 50:10
71:12 103:19 112:11
112:18 113:13 135:6
138:8 144:8,12,15
145:15 152:16 155:3
155:8,9,9,12 164:9,13
171:1 172:5 173:1
176:3,9 177:3 181:1,9
185:19 190:10,19
192:1,15 193:10,16
193:21 196:15 197:20
200:6,10 206:8,15
207:11
old 21:21 155:16
once 15:1 100:15
104:12 105:4 119:2
124:20 128:12 140:5
one-third 84:3
ones 61:5 88:17 90:1
91:14 133:19 136:22
182:16 186:5
ongoing 19:17
onus 121:11
op 74:20
opaque 18:3
open 20:17 124:10
opened 153:18
opening 136:10
openness 213:16
operates 211:20
operating 73:11 74:15
operational 72:19
74:11 86:17 89:9
92:17 106:2,2,4,5
operations 73:16
opinion 89:4 122:13
125:16 185:20
opinions 31:3 39:17
42:21
opportunities 20:2 83:7
208:9
opportunity 26:17 27:3
28:1 46:14 47:9,21
57:18 68:16 79:16
96:4 110:6 111:16
122:17 123:20 139:14
180:12
opposed 48:17 60:8
66:15 90:7 91:17 93:8
152:20 164:2 171:4
175:20 184:16 186:16
192:19 203:15,20
210:21
opposition 164:3 171:5
184:17
optimal 208:21
option 84:1 154:13
options 6:11 8:1,4

66:22 68:6 72:1
207:12
order 54:2 88:4,8
116:16 161:5,6,22
168:19 174:16 176:8
176:16 177:7,13,18
178:2,4,7,12,18
orders 162:13 166:2
168:20 174:15 177:20
Organization 40:20
organizations 199:3
200:16
original 168:18 176:16
177:7,18 178:2,5,12
178:18
OSTC 205:16
OSTCs 14:6 195:14
ought 96:3 97:1 126:15
130:21 138:3
outcome 27:16 167:18
171:3
outcomes 167:1 169:6
169:21 170:10,15,17
176:22
outset 198:15
outside 29:16 33:4
125:1 147:17 148:4
213:14
overall 211:17
overblown 94:18
overburden 172:9
overlooked 111:22
overly 96:10 123:14
overview 3:2 160:4
162:17
overwhelmed 57:2
overworked 56:7

P

P-R-O-C-E-E-D-I-N-G-S
4:1
p.m 144:11 193:17
217:4
package 127:18
packages 45:8
packet 155:2 184:15
packing 90:13
page 151:6 181:16
paid 110:3
painful 37:5
panel 7:15 38:12 39:3,9
42:14,17 54:20 69:11
69:12 70:4,6 71:1,5
74:7 75:17 76:1,22
77:1,4,7,16,17 78:14
78:19 80:12 81:4,16
82:21 83:11 84:22
86:1,13,16 87:15,22

88:5 90:13 94:2,17
95:11 96:2 97:2,6,9
97:12,14 98:6,14,21
99:9,13,20 100:10
101:1,18 102:7,19
103:4 104:10 105:2,7
110:22 111:4 117:2
117:17,21 123:6,15
131:13 132:18 133:11
133:12,13 134:10,12
142:21 143:2,19
144:5 145:22 161:5,8
162:1 163:12,13
165:3 166:8,19,22
167:17,21 168:9,17
170:13 171:3 176:20
177:9 178:1,16
182:11 183:16 184:13
194:7,8,11,13,15
198:21 199:6 200:9,9
201:11 203:3 211:7
panelist 42:2
panels 69:20,22 75:18
77:14 79:18,19,20
80:1,3,4 81:15,19
85:14 86:18,22 89:7
93:17 94:20 95:2
132:7,21 133:8
162:11,22 166:15
167:10 175:19 178:13
194:1 195:2 197:6,14
199:13,22
paper 63:1 99:14,22
148:19
paradigm 84:10 85:12
103:14
paragraph 148:21
149:1
paragraphs 181:4
paralegal 174:5
paralegals 172:15,22
parameter 12:17,18
13:18 16:13 24:1,8
parameters 5:5,8,20
10:15 11:3,14 12:5,11
14:17 15:8,18 16:2,22
17:15 22:6,20 23:8
25:13 26:1,3 31:10,13
32:1 33:21 34:13 35:8
35:11 36:17 38:6 44:3
46:10,13 47:20 48:1,6
124:22 125:4
parent 213:20,22 214:2
214:7
parents 93:16 94:21
152:8,9
parity 196:3
Parris 40:17 57:9,11

part 15:19 19:14,17
26:5,12 27:21 34:22
42:11 45:5 55:22
62:17 64:11 66:6
70:19 74:21 75:7
82:17 87:5 104:1
107:10 127:17 129:2
150:1 156:12,21
165:8 183:3 184:8
194:3
PARTICIPANT 160:1
164:11 190:6,9
participant's 121:5
participants 56:3
participating 1:20
69:22
participatory 139:12
particular 16:13 23:6
26:19 29:19 35:10
67:10 69:16 82:15
109:9 110:9 117:4
131:10 141:17 157:12
167:13 178:16 188:5
190:1
particularly 10:13
17:16 27:2 47:14
72:18 83:1 94:19
111:20 130:3 156:2
183:13 207:1
parties 140:13
partner 97:22
party 139:21
pass 165:4 168:14
passed 117:15
passing 46:16
pattern 209:4
patterns 50:3
Paul 1:16
pay 9:6 21:1
PDF 191:5
Pearl 131:13
penetrative 129:9,15
169:10,14
Pennsylvania 46:16
people 37:22 60:17,22
64:22 65:7 71:17
73:19 74:19 78:2,6
81:5 82:13,16 83:18
86:18 89:7 90:18,22
91:21 92:6 93:2 94:5
98:20 100:5 103:4,8
104:4,9,15 105:5,16
108:5 109:20 115:2
116:17 120:11 130:5
131:19 133:1,22
134:6 136:4 138:3
154:6 162:14 164:9
168:8 172:6 176:12

183:20 190:22 201:4
209:19 214:16
people's 92:2 135:22
perceive 212:8
perceived 93:19,22
94:2,5
percent 84:4 88:9
112:10 169:13 172:7
182:4
percentage 34:9 35:4
35:17 84:3 105:21
128:18
perception 49:10,21
90:10 91:7 92:1,9,10
93:1 94:16 95:4 96:21
101:15,16 102:8
110:12 116:12 121:3
137:1,13 142:15
perceptions 102:10,10
peremptories 101:2
102:5,17 103:2,10
104:17
peremptory 102:13
103:22 104:20,21
105:6
perfect 66:11 115:4
155:13 164:13 184:17
191:13
period 53:7 156:12
175:2
periods 80:18
permanent 63:7 173:7
173:12
permission 145:6
permitted 110:21 122:5
122:12 142:9
permitting 147:4 151:9
Perry 201:9
Perry's 201:9
person 69:16 78:9 90:8
90:20,20,21 91:2,3,16
99:11 100:1 102:3
106:19 110:11 115:21
158:2 202:17 203:3
205:20
person's 79:4,5 137:20
personal 44:20
personally 189:6
personnel 168:7 175:10
perspective 52:4 57:8
59:11 66:21 80:5
81:18 183:11,12
189:4 195:19 196:3
perspectives 56:19
57:5 195:16
persuasive 123:15
pertaining 127:21
pertains 15:21

pertinent 110:16
Pete 172:4,5
Peters 2:6
phase 23:12,12 27:18
phenomenal 59:22
194:17
pick 75:14 76:22 78:5
105:20 200:3
picking 77:3 105:21
picks 100:22
picture 55:9
piece 101:8 122:17
125:7 142:3 147:8
148:19 149:7
pieces 147:7
piggyback 181:11
piggybacking 210:6
pin 83:10
place 31:15 57:22 95:22
100:13 122:21 161:13
173:7
placed 188:2
places 181:14 188:13
plainly 44:4
plan 20:7 173:7
planned 81:1
planners 73:16
planning 209:14
plans 16:15
play 163:4 192:12
plea 8:8 46:1
pleas 169:15 181:22
please 8:3 28:17 97:17
192:5
pleasure 4:20 74:8
144:16
pled 6:22 7:8 45:12
plenty 87:1
plus 172:6
POC 206:6
point 18:18 19:1 24:6
36:4 56:16 58:11 81:7
88:13 97:20 105:4
114:22 121:17 131:12
138:20 152:17 167:9
168:5,16 171:6
177:16 200:21 204:2
207:18 212:12,17
215:15
pointedly 209:10
points 169:15 175:6
police 184:8
policies 108:18 125:22
215:20
policy 3:5 125:10
130:20 144:14,18
145:8 150:1 158:19
159:4,15,21 162:7,16

163:19 164:5 185:12
186:11 194:6 196:7
policymakers 10:12
politically 73:13
pontificate 108:16
pontification 89:16
pool 75:13 77:1,5,10
81:4,7,11 82:17 85:18
85:19 92:6 105:20
poor 188:9
population 75:2 79:21
81:21 82:5,8 105:22
pose 69:14
posed 146:21
position 174:1
positioned 202:18,18
possession 125:13
possibility 83:22
possible 23:7 27:16
78:16 92:3 120:5
160:18 200:15 205:16
possibly 216:14,17
potential 194:1 195:2
198:22 201:18
potentially 82:21 85:18
105:17,20 147:18
167:2,11 174:11
183:1 202:5 207:16
208:19
potentials 52:1
Potomac 1:10
powerful 45:15 125:3
practical 121:18 130:20
136:20
practice 14:22 42:5,5,6
44:8 58:22 59:1 61:2
61:19 71:22 82:1 95:8
109:4 138:6 139:3
195:21
practices 162:2
practicing 87:8 132:22
practitioners 10:11
pre-decisional 158:18
pre-judge 161:14
predated 63:13
predecessor 15:14
predecessors 13:1
predecisional 22:15
predominantly 88:4
prefer 112:8
preferral 21:12 169:22
prejudice 153:16
prejudices 90:19
prejudicial 123:15
preliminary 54:13
60:12,19,22 61:12
62:12 63:2 65:19
129:12

prepare 26:17 27:3,15
27:19 64:2,5 184:15
prepared 27:11 139:16
149:2 191:1
prepares 28:11
preparing 27:15
prerecorded 125:11
preferential 58:1
prerogative 80:12
present 1:12 2:1 159:11
201:4
presentation 30:6
126:6 144:22 183:3
193:8
presented 119:4 126:20
164:20
presentence 28:1,11
120:5
presentencing 122:18
presents 133:10
preside 58:12
President 16:20 25:14
36:1
President's 156:15
presidential 14:18
presiding 1:11 41:15
50:2 110:17
pressed 57:1
presumably 91:8 172:7
pretrial 53:22 58:2 60:6
pretty 31:5 62:4 71:8,18
87:6 89:21 90:3
104:12
preventing 43:17
previous 12:22 182:11
previously 61:15,22
186:1
Primarily 113:20
primary 55:16
principle 96:7
prior 6:9 19:9 21:22
41:11 52:3 130:6
188:19 192:3 208:5
prioritized 17:18
priority 188:21
probable 61:5,9,13 64:8
64:9,10,13 65:15,16
66:2,17 67:19 129:13
129:14 130:22 138:5
probably 21:16 24:5
26:4 38:15 43:3 44:1
45:21 46:12 55:5
56:11 59:3 62:15 75:2
78:7 96:7 100:16
103:11 112:5 133:15
138:2 161:10 170:7
175:10 203:13
probation 28:10 46:19

- problem** 56:1 74:21
78:5 98:21 124:8
135:14 136:2
- problematic** 99:22
- problems** 56:2 76:13
77:20 80:8 95:10
102:17 111:5
- procedure** 123:9
- procedures** 53:5
- proceedings** 41:1
58:10 139:7
- process** 23:21 30:19
42:14 47:3 51:10,21
61:20 70:6 80:11 91:4
91:17 92:18 93:5 96:5
103:21 112:22 114:5
115:19 118:4 123:21
133:20 143:13,20
157:20 160:14 173:14
193:1,1 203:5 204:2
- processes** 37:22 53:5
88:12 140:4 160:8
161:19 162:2,9
- produce** 170:1
- product** 79:21
- professionalism** 116:3
- program** 53:18 55:11
57:16,22 58:9,18
59:17 63:5 75:7
158:13,15 216:4
- programs** 60:11 141:22
155:22 157:6,8,12,13
158:4,6 159:7,9,14
- progress** 141:19
- prohibited** 110:15
- prohibitions** 148:6
- project** 13:4 164:21
165:5,13 174:7
- projection** 62:7
- projects** 171:11,11,16
171:18 186:9 193:7
193:15 196:11,12
- promise** 158:3
- Promotable** 11:20
- proof** 132:13,13,14
- proper** 61:4
- property** 125:15
- proponent** 49:1
- proposal** 149:15 185:7
187:10
- proposals** 14:15 32:5
216:14
- propose** 64:19 149:5
161:17 162:4 192:18
- proposed** 12:8 14:4,17
16:21 17:2 25:13
30:13 33:21 36:13
38:16 109:5 151:5
160:4
- proposing** 89:17
165:22
- proposition** 133:5
- prosecute** 46:14 67:8
- prosecuted** 87:11
131:5
- prosecuting** 194:18
- prosecution** 1:1 4:5
20:20 66:22 85:6
104:20 139:22 141:10
- prosecutor** 40:8 47:17
48:13 50:16 52:11
73:22 87:11 125:20
126:2,10,16 127:15
130:14 131:2 135:4
141:11 210:10
- prosecutor's** 209:15
- prosecutorial** 126:15
136:15
- prosecutors** 62:22
134:6,14 135:1
182:12 195:13
- protest** 22:17 31:3
- prove** 130:3 131:8
- provide** 5:12 10:11
15:11 25:3 66:4 114:2
127:8,19 146:19
149:13 151:20 154:3
158:17 168:5,7,13
174:13 181:6 192:5
201:17
- provided** 111:16 128:1
128:2 130:16 148:18
151:18 155:13 179:12
186:1
- provides** 10:18 16:4,19
211:20
- providing** 25:15 125:21
146:16
- province** 109:8
- proving** 130:6
- provision** 32:22 195:8
- PSC** 199:21 200:2
- public** 1:4 3:9 5:10 10:4
18:1,3,6,6 51:9
160:11 188:2 201:16
202:4,10,16,18 203:9
209:9 211:20 217:1
- public's** 18:22 117:12
- publishing** 18:5,9
- pull** 75:2,13 85:17
207:3
- pulled** 75:9
- pulling** 71:1 100:16
- pulls** 74:13
- punishment** 8:10,11,12
8:13
- punishments** 10:5,13
- pure** 26:12 70:22
- purpose** 58:9,14 63:11
63:16 64:7,21,22 65:4
65:10 67:15 101:12
117:20 135:15
- purposes** 167:5
- pursue** 163:21
- push** 140:22 199:8
- pushed** 195:4 198:12
- put** 50:17 66:10 72:3
79:7 81:10,19 83:9
86:16 89:7,13 97:10
109:21 114:13 117:2
120:15 123:14 133:2
134:3 159:9 161:13
169:7 191:16 192:4
201:20 209:4
- puts** 121:11
- putting** 212:20
- puzzle** 125:7
- PX** 6:20
-
- Q**
-
- qualifications** 114:21
115:3 161:21
- qualify** 136:17
- quasi-prosecutor**
126:4
- question** 17:5 19:15
22:5 23:22 24:18 25:1
30:9 33:10 34:4 35:2
35:6 36:20,21 38:10
38:16 48:22 49:12,14
64:6 70:3 76:7 83:17
84:21 89:11 93:12,21
94:9 97:5 99:1 110:7
112:16 117:15 124:5
126:17 128:21 130:15
138:8 142:20 143:17
148:16 149:20 151:8
153:1,10 158:20
176:1 178:1,19
180:13 195:6 199:5
211:3
- questioning** 110:4
- questionnaires** 113:2,3
114:7
- questions** 5:14 14:20
38:8,19 39:14 69:13
70:17 76:10 83:12
87:2 99:17 100:3
108:17 109:6,7,9,22
110:9 113:16,17
114:4 126:20 136:8
138:8 139:16,17
146:21 147:10 152:14
159:16 162:18 167:8
181:9 205:12
- quick** 30:9 89:21
104:12 169:7 175:22
186:4
- quite** 30:13 127:7 128:1
153:19 159:8
- quo** 72:8
- quote** 35:17
-
- R**
-
- race** 20:9,15 69:12
71:17 72:7 162:12
166:17 174:21 176:2
- racial** 89:8
- radar** 75:11
- raise** 77:20 88:15
- raised** 33:8 69:14
160:13 207:18
- raises** 130:15
- raising** 84:2
- random** 71:5 72:21 79:6
90:2,7,12
- randomization** 70:12
70:22 71:21 72:8
77:15,18 95:20 96:5
160:17 162:3
- randomized** 92:11
- randomly** 75:13 78:10
81:9 82:8
- randomness** 79:7
- range** 8:10 12:11 68:5
143:4
- ranges** 13:8,15 36:14
- rank** 84:16,17 85:1,10
85:14 162:11
- ranks** 183:15
- rape** 29:1 125:14
- rare** 45:7
- rarely** 9:19
- rate** 76:10 94:20 169:13
169:16
- rates** 76:18 94:3 169:10
181:12
- ratio** 134:15
- rationale** 85:22
- RCM** 29:21 123:10
124:5 147:3 149:21
- re-look** 123:21
- read-ahead** 5:10 39:11
- ready** 189:1 216:22
- real** 60:14 64:6 76:14
84:21 182:6 186:4
- reality** 52:21 59:22 85:4
91:8 92:1 101:15
104:14 105:19 114:3
- realizing** 106:11
- really** 6:10 8:10 9:18,21
12:20 15:20 17:19

- 20:13 22:13 26:6,7
27:1 29:17 32:3 33:4
34:12,17 37:8 51:2
52:22 53:3 60:5 63:13
64:10 80:10 83:16
86:5 94:17 95:22
97:14 110:7 114:19
120:2 123:6 126:2,21
139:1 140:19 141:2
152:11 160:12 166:6
166:13 175:18 183:7
186:17 188:12 189:9
199:11 203:11
reason 34:6,11,17,19
43:18 75:10 139:19
reasonable 67:17,18
130:7
reasoning 43:7
reasons 10:2 56:14
96:14,16 150:8 160:6
167:15,20
recap 193:22
receive 26:18 178:22
received 137:10 179:9
179:10
recessing 102:20,21
reclama 74:15,16
recognition 213:9
recognize 75:21
recognizing 25:19
171:19
recommend 56:12
70:10 143:14 148:7
152:18 197:9 212:9
recommendation 9:21
120:4 157:2 158:8,12
159:5,13 184:10,14
187:3,6,16 188:7
210:17 213:21
recommendations 36:1
53:21 143:19 146:14
146:19,20 152:15
157:1 163:6 175:17
183:20 188:9 196:5
211:21 212:5 215:1
recommended 130:10
130:11 158:4 186:2
recommending 106:19
record 15:9,12 23:10
39:6,7 53:15 121:16
144:10 217:4
recording 168:2
records 125:12 126:19
127:12,13 139:10
170:5
Recruit 40:17 57:9,11
recurring 179:11,19
red 148:21 149:2
redlining 118:5
redoing 103:16
reduced 9:5
reevaluate 124:5
refer 103:9 129:3
170:21
reference 61:14
referenced 61:19
180:21
references 187:20
referral 33:3,7,7 63:19
130:18,22 136:5
171:5
referring 90:8 128:12
referring 33:1 66:15
171:2 186:6
refined 14:14 32:5
refinement 10:14
reflect 162:2
reform 6:4 162:3
refuse 88:16
regard 57:15 139:11
regarding 15:20 20:19
143:19 149:4 173:22
205:13
regardless 109:17
167:18
regards 54:13
region 74:1
regional 74:22
Register 18:5
regretted 47:11
regular 17:7,10
regularly 16:20
regulations 160:19
regulatory 55:12
reiterate 163:7
rejecting 65:1
rejections 65:2
relate 75:22 109:16
related 34:7 35:2 42:3
69:9 70:11 93:19,21
95:4 97:3 195:15
relates 95:4
relationship 94:6 128:5
130:6 211:16
relatively 56:6 69:5
136:6
release 54:4 195:17
released 156:22
relevant 110:5 122:6
123:1 166:22
reliability 124:2
relied 22:22 24:10
118:18 146:20
relieve 83:3,4
reluctance 47:18 48:11
48:14 49:13 121:15
reluctant 68:13 112:4
121:22 142:1
rely 174:10,12 175:3
relying 29:21 51:15
168:4
remain 23:14,17 51:14
126:15 130:21
remains 66:3
remarkable 169:9
remedial 100:10
remember 30:11 36:21
37:4,8 62:14 131:12
131:16 179:8 191:20
200:17 207:17
remembered 207:19
remembering 37:5
remind 204:20
reminded 208:22
reminder 165:20
191:14
remove 110:11
removed 64:6 92:3
94:20 141:9
Renaissance 1:9
renamed 186:9
repackage 190:17
192:9
repeat 115:18 131:14
135:14
repeatedly 90:18 91:5
replace 216:7
report 3:5,6,7 20:19
28:11 52:7,8,8 66:1
104:9 120:5 145:18
146:4,4,6,7,8,17,17
147:6,6 148:21 149:6
149:10,16,19 150:1
150:10 152:15,21
154:19 156:22 157:1
165:18 170:1 179:13
180:5,20,21,22 181:3
185:3,6,22 187:15,22
188:22 191:11 196:5
214:6,22
reports 52:11 53:20
68:4 180:17 185:10
185:13,16,19 186:18
187:15,19,22 188:4
191:9 196:21
representative 11:9
12:2 75:17,19
representatives 14:2
147:11 195:14
represented 11:10
representing 40:22
represents 11:21
reps 57:14
request 151:12 156:8
156:15 159:21 196:18
198:18 199:6 201:7
202:8,11,15 203:2
204:8 207:21
requested 155:21
201:12
requesting 128:9
requestors 202:15
requests 163:20
require 10:20 18:20,22
59:14,15 63:4
required 33:22 49:18
50:8 55:15 79:15
85:11
requirement 48:4 52:2
98:16 165:21 185:21
requirements 62:20
requires 11:2 12:10
13:22 36:11 79:7
requiring 160:17
research 57:19 166:6
216:13
resend 191:4
Reserve 32:15
reside 92:18 126:9
resides 81:7
residing 93:5
resolved 152:12
resource-limited
115:20
resources 28:9,13,15
respect 20:9 49:12
51:16 52:1 59:13
67:10 84:13 103:20
140:8,15 171:7
195:18 199:7 205:16
211:5,15
respectful 110:4
respective 14:6
responds 50:22
response 38:20 151:5
152:15 156:19 203:1
responses 147:22
148:17,22 149:18
responsibilities 141:14
responsibility 45:18
63:9 68:2 161:10
responsible 31:8 40:11
rest 125:20
restorative 156:1 157:5
157:14,18
restricting 111:7
restriction 212:4
restricts 123:11
rests 82:2
result 67:2 138:5
178:16,17
resulting 132:17

- results** 71:14 133:10
 179:21
resumed 144:10
reticent 45:9
retired 30:11 39:9,17,19
 40:3,6,13,15,18 41:2
 41:8 66:6 77:6,10
 183:21 184:5,6
retirement 41:11
return 131:11
reveal 213:10
reversal 98:5
reverse 99:8 101:3
reversed 99:6 129:18
reversible 99:2
review 3:6 9:22 10:10
 14:11 15:13 18:1,2,10
 40:1 45:1 59:2 60:8
 114:9 116:9 119:7
 145:2,10 155:21
 156:13,16 161:16,17
 161:19 162:9 164:7
 164:18 165:8,17,22
 168:13 169:5 170:21
 171:4 179:8 180:12
 181:2,7 185:12,19
 186:10 188:18 191:10
 194:6 209:9,13 211:7
reviewable 43:16 125:6
reviewed 59:5 98:22
 99:22 150:2 186:3
reviewing 59:12 99:2
 165:20 180:6
reviews 166:1
revised 160:20 162:13
 185:9 187:8 188:17
 191:9
rewrite 189:7
Reyes 11:13
rid 124:4
right 4:15 19:21 22:4,4
 23:16,20 27:18 34:16
 41:22 43:11 44:10
 49:4 56:4 58:4 60:22
 63:12 64:11,22 71:21
 72:17 77:5,9 78:17
 81:15 89:5 94:4 95:20
 98:15 99:14,15,16
 100:8 101:11 102:18
 103:4 105:8 107:1
 108:1 112:14,20
 114:10 117:17 120:13
 122:19 123:7 124:19
 127:2 128:6 132:3
 133:9 134:8 135:17
 136:9 138:19 139:1,3
 139:8 143:22 144:4
 155:10 160:3 164:1
 164:11 171:10,12
 172:6,15 173:3
 176:14 180:7,8
 187:14 189:19 190:14
 190:22 191:1 192:16
 193:14 204:17 206:19
 206:21 210:19 211:5
 211:18 212:16 216:21
right-hand 165:10
rights 63:22 138:21
 139:1
ripe 161:16
rise 50:4
road 62:20 89:21
 209:16 210:4,20
roadblock 170:11
roads 86:20
robbery 22:9
robust 53:17 60:11 63:4
 63:15 102:4 146:11
 153:5
role 70:2 86:22 96:16
 138:15,17 139:10
 141:2 163:4
roles 141:14 161:9
room 77:12 157:17
 183:16
roster 72:2,3
roughly 34:8
routinely 118:18 139:15
row 102:14
rudely 214:10
rule 42:13 51:6,7 55:14
 64:14 123:10 124:9
 142:11 147:18 148:5
 148:7 151:2
rules 22:11 24:10,17
 44:13 66:4 68:18
 113:3 119:21 123:6,8
 123:12,22 124:6
 140:9,20 150:16
 160:20 181:18 202:19
 211:13,15 212:2
 213:16 214:1
rulings 43:16 139:11
run 8:16 55:18 201:20
runs 208:5
-
- S**
-
- sage** 47:8
sailors 73:12
Salon 1:9
Salt 41:9,18 59:10 61:3
 113:19
SANE 127:16
sat 61:12 77:12
Saunders 2:7 145:15
 153:10 154:5,17
 155:4,8,12
sausage 94:10
save 55:4 129:6
saw 43:22 44:11 135:4
 139:16 158:3
saying 50:9 64:12
 91:12 99:21 103:17
 153:6 154:12 178:20
 182:8 210:18 212:9
says 42:14 102:3,7
 135:7 180:17 181:20
SC 3:5,6
scale 116:2
scared 135:2
scenario 90:21
schedule 199:9,18
scheduled 78:12 80:18
 159:1
school 75:6 78:12
 208:4 214:5
Schwenk 1:18 14:21
 17:22 19:2,8 25:19
 52:6 60:9 65:6 83:20
 102:12 118:10,14
 128:15 129:5 131:21
 144:15 145:21 156:18
 159:20 162:19 163:19
 169:14 180:7 181:10
 184:20 187:3,17
 188:9,12 189:3
 193:19 196:11 197:9
 197:20,22 199:20
 200:7 209:3 211:2
 212:22 214:8
Schwenk's 187:5
scope 58:2,17 121:14
 147:18 148:4 150:19
 161:17 162:5
scrutinize 97:12
scrutinous 114:11
se 95:16
search 183:21
seat 102:18
seated 166:3 167:17,21
 176:13 177:9 178:1
second 10:6 22:5 34:22
 48:22 50:10 69:17
 78:5 116:20 131:19
 132:6 151:8 187:16
 188:6 198:4 199:11
 208:7,13
secondary 178:19
secondly 170:14
Secretary 16:21 50:19
 50:20 52:12 156:14
 158:7,11 184:12
Secretary's 156:12
section 149:9
sector 11:4 12:19 26:6
 26:8 94:4 104:19
 194:22
security 73:18
see 21:17 34:15 35:20
 54:21 55:16,19 60:16
 60:16 75:20 79:14
 88:22 94:4 97:19
 119:8 121:9 126:17
 128:7 131:9 145:5
 154:20 157:2 159:12
 170:18 187:1 189:7
 189:10,13 192:19
 202:6 203:17 206:16
seeing 51:9 66:14
 73:20 101:18
seen 88:3 130:9,11
 132:22 141:10,19
 151:22
segmented 8:19,21
 9:16,17,20 10:1,10,20
select 71:17 79:1 81:6
 100:10,14,18
selected 72:3 74:7
 78:10 81:9 86:10 88:5
 90:22 104:2,5 162:12
selecting 75:14 77:2
 82:8 96:2
selection 71:5 72:6,7
 72:22 80:12 81:13
 92:11 96:22 103:21
 143:3 145:3,22 160:7
 161:18 162:8 167:1
 194:11,13,15 199:6
selections 49:4
send 18:10 73:4 78:3
 180:17 183:22 190:12
 191:11,22 192:9
sending 43:1 73:15
 214:15
sends 98:1
senior 27:13 39:21
 40:10 73:22 83:2 85:1
 85:10 86:9 88:22
 157:21 184:7 194:8
seniority 161:4
sense 34:8 35:3,11
 76:19 86:9 115:4
 116:3 139:21 152:10
 190:4
sensitive 60:15 95:13
 96:11
sent 14:4 53:1 74:5
 146:2 147:7,9 188:17
 189:5 190:14,15
 205:22
sentence 7:13 8:15,21
 8:21 9:16 10:8 15:2

15:20 24:15 26:19
 29:7 30:1 36:16 44:6
 44:8,12 45:11,18 46:1
 48:8 49:17 119:11
 121:8 148:8 161:6
 179:16
sentenced 6:12 7:5,16
 7:18 8:6,7
sentences 9:5,12 10:21
 15:1 30:16 35:19 42:3
 42:10 43:1,5,20 44:1
 47:19 153:13
sentencing 3:3 5:5,7,13
 5:20 6:4,8 8:18,20
 9:17,21 10:1,4,10,14
 10:19 11:3,5,13 12:5
 12:8,11 13:2,6,11
 16:1,7,12,22,22 17:9
 19:15,19 20:4,9,21
 23:12,19 24:1,2,8
 26:16 27:4,18 30:12
 31:10,13 32:1 37:7
 46:17 47:3 48:5
 118:11,13,15,17
 119:3,18,19,21
 120:11 123:5,6,9,11
 123:19,21 124:1,7,11
 124:22 151:4 153:15
 160:22 161:9 181:13
 181:15,18
separation 141:14
September 32:8
sergeant 85:5 184:6,7
serious 27:2 45:13
 137:9
seriously 109:19
serve 58:9,16 75:8
 81:22 125:19
served 9:13 39:21
 47:11 57:8 70:2
 138:15
serves 5:4 40:18
service 7:12 9:14 14:10
 18:2 19:9 31:21 40:22
 55:13 57:1 86:14
 169:12 170:2 200:18
 200:22
services 11:9 13:12
 14:7 23:1,4 32:13
 38:5 40:11,20 51:1
 57:12 58:16 83:22
 133:4 167:2 168:4
 174:13,19 199:3
 208:17 215:20 216:6
services' 14:6 168:6
servicing 4:21 62:14
 92:21
session 164:12 199:10

202:4 209:10
sessions 139:18
set 50:15 51:13 52:13
 61:22 120:7 133:3
 164:9,11 209:20
sets 83:3
setting 20:1 112:13
 211:17
setup 100:8
sex 166:4
sex/gender 72:10
sexual 1:1 4:6 67:13,13
 68:12 69:18 70:1 76:9
 76:12 93:20 94:7,8
 95:5 97:21 101:22
 102:1,6 128:19 129:9
 129:16 130:5,14
 131:18 132:17 136:1
 156:19 166:15 169:11
 169:14 182:17 214:17
shadow 135:5
shadows 89:12
Shane 41:8
share 49:16 144:2
 165:13 211:9 213:13
 213:15
shared 183:13
sharp 116:22 117:1
she'll 206:20
sheet 152:6
shift 68:21 85:12
 101:10 118:1
ship 62:5
ships 107:14
shocked 87:15
short 153:12 195:7
shortly 32:11 146:9
show 67:8
showing 103:4 131:14
shown 90:18
shows 128:17 169:9
side 101:1 162:20
sides 116:1 177:19
 196:4
SIG 13:2
sign 203:8
significant 53:4 94:16
 143:8 156:11
significantly 134:13
similar 12:19 29:10
 50:3,3 52:13 54:6
 61:18 62:1 68:10
 110:20 113:22 133:15
 157:14 170:1 185:2
 197:19
similarly 183:10 202:18
simple 13:7 133:19
 174:22

simply 79:21 90:6
 151:2
Simultaneous 108:20
 124:14 193:5
single 112:16 116:8
 169:12
sister 32:13 38:4
sit 73:7 76:14 77:4,6,16
 79:17 82:21 103:4
 132:8,9 161:22
site 183:19
sits 61:13
sitting 48:17 49:1 57:18
 63:7 71:9,10 93:13
 95:11,11 97:2 132:11
 153:8
situations 60:6
six 9:9 80:2 132:8
 146:14
size 85:16 104:1 105:15
SJA 86:11 115:3 129:14
skeptical 131:22 134:2
 135:3
sketchy 133:22
skewing 35:21
skill 83:3
skilled 53:13
slide 8:2
slightly 45:1 68:21
 186:14,21 187:8
 188:17
slot 174:5
slow 173:14
small 105:21
smaller 169:17
smart 91:21
smarter 91:21
SME 194:14
smiling 21:5
Smith 1:10,13 4:10,11
 4:18,21 5:1,12,15,17
 9:4 15:7,22 16:4,11
 16:17 17:6,12 18:16
 19:7 20:5,6,12 21:4,9
 21:13,16 22:2,19
 23:16 24:9 25:9,12
 26:4,14 27:8,22 28:7
 29:3,9 30:4 31:7
 32:16 33:3,15 34:11
 35:13,16 36:7,9,19
 37:19 38:8,14,19,22
 39:1 41:20 42:2 44:14
 46:2,6 48:9 50:7
 90:16 118:1,12 138:7
 142:17 144:4 152:19
 153:2 154:3 155:1,7,9
 162:20 164:1,6,13,16
 171:1,15,22 172:2,5

172:11 174:17,20
 176:8 177:16 180:10
 181:9 184:16,21
 189:15,21 190:3,7,10
 190:19,22 191:15,19
 192:16,20 193:4,10
 193:12,16 202:1
 204:15,19 206:11,15
 206:18 207:7,11
 209:2,6 210:1,19
 216:21
Smith's 5:9
smoked 6:20
smoothly 142:16
snapshot 163:17 169:7
society 26:10 109:21
solution 89:2 120:11
 135:13
solve 82:13
solved 77:20
somebody 29:7 32:21
 58:13 93:8 97:22
 132:11 189:5,10
 194:16 204:21 213:1
 216:5,13,18
someone's 115:17
 116:1 140:21,22
somewhat 12:18 17:13
 29:10 213:10
soon 74:16
sorry 7:6 34:21 35:13
 88:10 94:10 113:8
 124:15 152:22 155:6
 177:2 196:13 204:17
 205:11
sort 33:12 35:3,9 54:11
 83:12 89:14 108:9
 121:18 126:1 127:8
 137:1 204:20
sound 155:2
sounds 9:2,16 36:4
 155:12
source 168:3 200:19
 201:3
sources 200:16
South 1:10
space 34:6 142:8
spare 73:4 74:19
speak 31:16 44:19
 200:21 201:1 203:2
speaker 4:16
speakers 160:12
 200:16
speaking 23:18 77:22
 80:19 108:20 121:1
 124:14 189:3 193:5
 194:4 199:20
special 14:7 26:10 38:2

- 50:16 52:11 124:9
135:20 136:13 137:17
186:9 193:6,15
194:10 196:11,12
199:7 207:20,20,21
208:1,2,15
Specialist 9:4
specialized 59:14,16
60:2
specific 10:5 13:20
24:3,7 29:12 35:5
113:17 148:8 201:7
202:8,11
specifically 18:20
27:21 83:14 116:7
196:18 203:2
specification 7:20 9:8
9:10
specified 33:18
speculation 26:4,12
spend 198:6
spending 82:20
spent 5:1 87:9 106:10
172:7
spoke 24:20 178:9
spot 18:13 97:11
212:20
spousal 128:5
spouse 128:6 151:19
spouses 93:16 94:22
spreadsheet 175:5
squirrelly 97:14 98:7
squishy 115:7
stack 117:3
Stacy 165:9
staff 2:2,4,5,5,6,6,7
12:1 73:9,19 77:5
84:13 159:8 169:8,9
171:8,18 173:5,5,8,18
175:4 179:2,5 181:6
186:20 194:11 200:2
204:22 216:13
staff's 74:8
staffer 172:3
staffing 170:7,11 171:8
stage 136:6
stakeholders 14:5
18:21
stand 91:1 95:18
standalone 146:3,5
165:18 180:22 185:9
185:13,16,18 186:18
187:19 188:4
standard 44:4,6 124:3
130:17,20,21 136:3
136:18,20 137:20
150:18,21
standards 114:9
- standing** 16:18 17:1
132:7,18,21 133:7
138:22 140:8,10,16
standpoint 140:6
start 15:4 39:3 65:16
100:15 104:10 105:8
105:10 144:14 165:1
184:9
started 70:20,22 164:18
170:3
starting 52:22 77:4
146:1 170:14
starts 187:14
state 5:13 22:10 29:15
67:10
statement 45:14 120:16
120:20 121:4,5,15
125:2 136:10 145:18
146:3,10 147:1
149:19 150:12,12,15
151:19,21 152:7,10
155:18 174:22 176:7
191:10
statements 118:2,3,5
121:7 122:1,4 125:11
127:20 146:2,5
147:17 148:2,17
149:4 150:3,5,7 152:2
155:20
States 4:22 5:8
stating 179:14
stations 82:14
statistics 128:16
status 72:8 139:12
statute 79:7 140:9
142:11
statutorily 212:14
statutory 55:12 160:16
165:21 179:16 185:21
212:15
stay 51:17 57:14 99:19
stays 58:6
stealing 6:19
steeped 12:4
Stefan 39:19
stems 49:13
step 10:16 29:16 71:18
136:14 137:18 166:13
184:5
Stephen 11:12
Stephens 11:17
stepping 24:21
steps 90:4
stomp 214:4
stood 19:16 45:19
120:20
stop 60:15 105:3,3
194:10 203:22
- storm** 41:10
story 7:5 179:3
straight 26:15
stressed 6:20
strictly 72:20
strike 122:1
strikes 103:11 210:15
strings 100:16
struck 88:1 215:15
216:2
structure 13:8 55:12
64:16
study 156:21 157:3
159:22 160:5,7
162:16 163:21 165:2
165:16,17 166:7,12
167:14 177:7 179:8
179:21 181:2,15
200:1
studying 158:15
stuff 91:22 123:14
162:4 165:11 172:9
199:6 210:16 214:18
215:12
styled 186:17
sub-Article 89:10
subcommittee 144:14
144:18 145:2,9,10
150:2 152:11 158:19
159:15,21 162:7,9
163:20 164:5,19
165:8 167:7 169:1
170:22 179:13,18
185:12,12 186:9,11
186:12,22 187:7,12
193:7,11,15 195:5
199:10 205:18 213:1
213:3,4,20 214:2,5
Subcommittee's 159:4
subcommittees 101:20
186:16 197:16 215:9
subject 95:8 211:14,19
213:11
subjected 76:8
subjective 137:20
submarines 73:10
submit 16:20 48:3
109:5 138:11
submitted 14:17
substance 6:18 187:1,9
substantial 136:21
137:21
substantially 134:20
substantive 189:8,16
190:11,14 192:5,8,14
substituted 153:5
succeed 137:9
success 67:17 136:21
- 137:21
such-and-such 18:14
Suez 73:12
sufficiency 179:15
sufficient 62:12 156:4
suggest 19:5 123:4
195:13
suggested 83:22
suggestions 189:16
190:12,15
Sullivan 2:1 4:3,8 11:22
193:18,19 211:4,18
213:8 217:1
summary 146:7 148:22
149:2,15 186:19
summer 215:7
superior 100:1
supervisor 41:17 59:3
supplement 153:11
supplemental 147:10
supply 74:1,4
support 52:5 55:11
64:13 173:15
supporter 70:2
supporting 69:7
suppose 70:21 71:16
72:11
supposed 25:6 86:7,15
119:15 160:1
suppress 118:19
suppression 43:15
54:17 55:4,19
sure 17:6 38:4 39:15
50:11 57:14 70:16
76:16 87:2 90:4 116:7
120:6 123:14 152:19
153:2,21 154:1,17
171:10,16 176:11
187:17 190:6 199:15
202:13 204:2,16
216:12
surprise 7:11
surrounding 95:21
survivors 157:4
suspect 32:12
suspended 156:11
Suzanne 1:15
SVC 37:3 138:16 163:3
SVC/VLC 138:13,21
SVCs 125:10 126:4
139:6
swallow 124:7
Swampy 174:17
SWAN 201:2
sweeping 6:7
system 14:3 28:3 45:1
45:2 46:20 49:11
51:11 53:17,21 54:7

54:10,12 56:11,12,16
58:17 62:1 67:6 69:2
69:8 70:8 72:16,18,21
73:2 74:10,12,13,17
79:2,6 89:4 90:12
100:17 101:10,13
103:6 106:11,12,19
106:21 107:4,7,14,17
107:19 108:8 111:6
112:9 116:13,18
117:13 120:8 134:1,8
135:15,18 141:8
142:15 160:11 161:4
161:14 211:17
systems 100:13 119:21
198:17

T

tab 5:10 39:11,15
146:17 147:22 148:13
181:12 186:7 206:16
table 71:10 180:13
186:7
TAD 75:11
Tagert 2:5 4:16,18
164:17 171:13,21
172:1,4,17,21 178:9
179:7 180:8 181:1
tail 78:22 103:5 107:17
tails 108:3
tainted 111:3
tainting 111:4
take 21:16 29:6 31:14
33:6 39:2 44:16 45:22
80:22 89:12 90:3
92:20 93:5 109:18
138:12 141:5 156:4
158:5 159:5 171:2
184:14 210:18 214:6
taken 67:9 98:6 114:5
121:8 127:22 152:4
takes 16:5 17:9 65:10
126:1 215:2,3
talk 6:1,4 37:10 38:12
42:10 43:5 83:12
101:16 108:10 122:13
132:4 134:19 140:2
142:4,22 143:21
145:17 149:10 158:1
159:18 171:7 174:14
185:3 198:5,14
201:19 204:11 210:8
213:1,4 214:16
talked 65:6 69:3 70:12
70:13,14 89:6 108:9
114:10 136:7 143:6,9
145:21 162:21 167:6
talker 46:4

talking 59:7,9 61:7 83:1
101:16 102:9,11
107:16 109:8,15
130:4 143:2 163:10
164:22 165:15 166:6
175:1 187:15 194:6
214:9,10,12 215:21
talks 181:17
tardy 30:7
task 27:21 33:18 66:12
tasked 34:13 163:12
tasker 179:10
taught 42:9
TBD 36:6
team 165:8
technical 85:5 145:9
technically 33:22 42:22
Tedd 11:16
tell 6:13 35:8 43:10 59:1
97:8 116:20 158:14
166:5
telling 30:15
tells 86:7 99:17
temperament 86:14
115:8
tempo 74:20 92:17
tenant 78:1
tend 65:21 73:4
tended 95:15 131:14
135:2
tendency 141:10
tends 83:18 84:14
tens 59:9
term 173:4,10 174:1,4
terms 21:10 26:22
49:18 64:18 65:2
69:11 72:1 93:4 126:6
143:2 163:5 216:3
Terri 2:7
terribly 100:3 154:9,10
terrific 39:9
Terry 159:17 206:18
Terrys 144:17
testified 151:17,17
testify 147:4 151:10
testifying 124:17
testimony 160:11,12
195:11
thank 5:17 20:5 25:18
30:5 33:9 34:3 36:18
38:7,21,22 41:20
44:18 46:7 57:6 68:20
113:13 114:18 129:7
144:5,6 145:14
163:22 164:6 173:1
177:11,15 182:8
196:6 206:10 211:11
212:18,20,21

therapeutic 109:13
Theresa 2:6
thing 18:9 27:6 52:16
72:19,20 78:16
101:15 104:18 106:18
120:2,13 152:20
174:7 203:20 204:7
210:2,7 213:17
214:15
things 20:13 28:4 37:7
42:1 43:13 49:20 50:4
50:14 51:18 53:6 54:4
54:14 59:13 60:6
61:18,20,21 67:1,5
68:10 70:14 79:12
81:12 91:10 92:17
101:11 118:6 120:10
122:1,2,14 129:8
140:5,21 142:5,10,16
147:13 152:2 163:10
210:20
think 12:6 18:15 26:10
30:16 34:5,21 35:6
42:12 43:3,9,22 44:6
44:10,22 45:3,9 46:10
46:11,18 47:1,3,13,18
47:21 48:4 49:13,20
50:2,7 53:16 54:6,11
54:12,22 55:5,22 56:1
57:2,4,17 58:8,15,21
60:10 61:17 62:1,3,4
62:9,13,15,16,17 63:3
63:4,20,21 64:21,22
65:6,21 66:3,8,10,11
66:12 70:21 71:17
72:4 73:6 74:21 75:16
77:11,22 78:15 80:9
81:3,17 82:3,11,12
83:5,16 85:4,21 86:21
86:21 87:6,20 89:5,7
90:14,16 92:5,8,20,22
93:4,5 94:15 96:20
97:7 99:18 101:17
102:9 103:13,22
104:1,18 106:8
109:11,17 110:5
111:5,10,18,19
112:13,21 114:8,16
117:7,11,20 118:16
119:2,6,16,18 120:9
120:10 121:2,6,7,10
121:11 122:7,9,21,22
124:10,20 125:5,6
126:3,7,12,21,22
127:14 128:4 130:2
130:18,19,21 131:20
132:15 133:22 135:3
135:6,11,12 136:11

136:12 137:17 138:15
138:16,16 140:18
141:8,13 142:6,7,13
142:14,16,18,19
143:3,11,15,16,16,21
148:3 152:19 153:14
154:8,10 155:4 157:9
157:15 159:4 162:22
170:9 172:15 175:9
175:13,18 176:4
179:9 180:15 183:7
183:11 184:2,9
185:14,16,17 187:13
187:20 189:9,18
190:16 192:20,22
193:13 194:1,20
195:22 196:17 199:21
200:1,3,8,12,19,20
202:3 203:14 204:15
204:22 205:17 206:18
206:20 209:17,21
215:12 216:22
thinking 17:10 34:9
50:10 99:6 105:9
107:18 210:2 215:11
215:16
thinks 212:11
third 113:18 131:20
149:7
thought 6:3 7:11 10:6
26:11 33:22 45:15
51:6 70:6,18 87:17
110:1 115:21 121:19
128:3 130:13 134:21
134:22 135:1 136:5
139:5 141:7 176:10
182:10 202:12 215:12
thoughtful 47:3
thoughts 42:4 61:1
65:14,20 70:9,16 72:6
83:13 95:3 102:13
118:2,9 128:16 129:1
thousand 59:8 105:16
thousands 59:9 175:2
three 10:2 31:11 49:2
52:18,22 53:8 75:6
80:3 81:15 88:16
133:2,10 147:7
151:11,13 156:7,9
170:2 172:22 186:3,5
186:21 187:7 191:9
192:4 195:17 196:17
208:3
three-week 31:9
threw 84:7
throw 198:7 208:21
211:11
throwing 154:21 194:9

195:5 199:18
Thursday 190:3,4
tidbit 129:6
tie 137:19
tied 188:4
Tim 15:15
time 5:15 7:3 10:22
 15:15 21:17 23:11
 24:19 28:21 30:18
 31:22 32:2 33:20 38:1
 44:10 45:11 47:7
 52:18,21 53:7,19 55:4
 59:5 63:20 65:11 66:7
 66:18 74:6 80:18
 81:13 82:20 88:2
 92:18 103:6 106:10
 109:6 116:8 120:3,19
 126:20 127:5 133:12
 133:22 134:5 137:6
 138:7 144:7 156:6,12
 164:8,9 168:21 172:7
 173:12 175:2 187:20
 190:1 192:16,19
 193:7,17 196:14
 197:10 198:4,6,10,17
 199:10,12 200:5,8,12
 201:10 202:22 203:12
 204:20
timeline 195:8
times 19:3 52:18 97:18
 135:19 142:2 164:19
 212:13
Timidity 129:2
timing 126:22 128:4,11
 187:21
TJAG 50:18
today 4:17 5:19 11:12
 14:22 39:8 74:18
 109:10 114:18 117:10
 144:3 149:9,14 153:4
 153:8,13,14 154:1
 164:21 178:22 185:11
 185:15,17 197:11
 210:8
Tokash 1:18 23:9,9,22
 38:9 53:14,14 56:18
 154:12,13,18 156:17
 193:6,11,13 195:12
 195:12 196:9,12,15
 196:17 197:3,5,8
 199:8 205:5,9,12
 206:3,8,10,14,16
 207:9 208:22 210:22
 211:3 212:18
Tokash's 155:10
told 87:10 109:21
 116:10
tool 64:2

tools 64:4 67:12
top 207:17
topic 39:15
Topics 209:3
tough 131:3
tour 41:5
track 178:7
Tracking 193:21
tracks 122:5
tradition 106:13
traditionally 86:2,3
train 37:17,20 38:5
 55:17
trainers 37:17
training 30:17 31:8,20
 32:8,12,14 36:21 37:2
 37:9,13 38:2 59:15,16
 60:2 86:15 134:6
 207:9,12 208:1,7,11
 208:16,20
trains 40:21
transcript 99:10
transformed 64:1
transit 82:14,19
transition 173:17
transmission 189:1
transparency 10:3
transport 58:5
travel 214:9,9,11,12
tremendous 41:3
trenches 106:11
Trexler 2:4
trial 4:22 6:16,18,22
 7:15 11:15,17,18 14:7
 15:15 37:2,14,21
 39:20 40:8,16 41:4,13
 43:14 44:11 45:21
 47:6,7,13 52:2 54:1
 55:18 61:14,15 64:2,5
 64:11 65:8,16 66:16
 67:18 78:6,9 79:1
 81:16 87:10,11,19
 88:6 98:5 100:12
 102:21 115:1 118:22
 131:7,12 133:2
 134:18 135:22 136:13
 137:18 163:2,16
 169:3,16 199:7
 207:20,21 208:1,2,15
tried 6:11 7:2,4 23:4
 82:7 87:19
troubling 65:11
true 15:3,3 76:18,20
 90:11 135:4 151:3
truly 94:19 95:1
trust 51:11 69:2,7 70:8
 91:4 99:15 100:1
 116:22 117:13 136:3

142:15
trusted 115:15
trusts 131:2
try 36:9 65:17 77:13
 101:9 110:10 135:16
 137:15 141:1 153:7
 170:18 178:6 183:17
 197:22 198:1
trying 57:13 100:20
 112:2 117:3 137:6
 138:1 140:22 167:10
Tuesday 189:21 190:2
 191:22
turn 5:16 65:15 159:17
turning 162:18 179:5
twelve 36:13
Twenty-five 87:9
twice 102:14
two 4:4 9:10 12:16 15:3
 16:5 17:15,20,21
 31:17 48:16 52:17
 53:8 69:8,9 73:19
 77:19 81:15 95:8,10
 109:9 129:18 132:8
 133:2 138:8 143:14
 144:17 171:1,6 172:6
 172:15 185:8,9,13,18
 186:5,18 188:4,13,14
 188:15,18 189:6
 192:2 193:12 199:12
 199:14 200:3,5 201:8
 207:8,22 208:3 212:3
 212:13
two-day 29:2,7 32:22
two-star 77:2
twofold 208:8
Tyesha 4:21
type 54:7 97:21 117:4
 136:3 182:3
types 68:4,8 95:16
 112:2 124:11 158:4
 182:19
typical 34:10,14,18
 35:5 36:10
typically 157:15
typo 192:6
typos 188:10

U

U.S 2:3 133:16 216:2
UCMJ 63:13 117:16
ugly 31:5
Uh-hum 35:15
ultimate 150:22 170:16
ultimately 55:6 107:1
 146:13 148:10 170:1
 187:19
unanimously 13:14

unapologetic 88:20
unavailability 92:16
unavailable 79:5,5
unaware 20:21
unclear 150:20
uncomfortable 109:15
uncommon 102:19
 128:5 135:22
unconsciously 132:12
underestimating
 182:12,14
underscore 182:22
understand 28:19 54:5
 100:9 103:2 115:7
 127:7,10,17 128:2
 133:3 177:4 178:19
understandable 68:14
understanding 26:14
 28:9,22 62:19 80:20
 107:13 166:14,22
 211:13
understood 76:3 109:1
 115:18 177:10 192:14
 204:4
undertake 63:9
undertook 96:16
unfairness 102:9
unfettered 122:17
unfortunate 68:11
unfortunately 68:14
 74:5
uniform 11:1 13:17
 14:14 112:9 125:10
 125:22
uniformed 40:21
unique 26:9 28:8 59:13
 66:21 67:11 68:17
 166:8
uniquely 68:7
Unit 41:17 59:3 209:5
 209:13
United 4:22 5:8 157:8
 198:19
units 78:1
universal 51:11
unpack 72:13
unreasonable 44:4,9
unspoken 89:10
unsuitable 12:13
unusual 104:3
up-to-speed 30:20
upcoming 159:11
update 3:3,5,6 5:12
 144:14 145:20 164:19
 178:21
updated 155:13
updates 165:5 186:16
 186:22 187:12 188:22

205:15,21 206:11,21
upset 87:16
upward 25:16
upwards 174:11
urge 183:17
use 6:17,22 7:8,20
 24:15 91:19 113:4
useful 13:9 62:16 83:14
 143:16 197:2 201:3
 216:5
uses 8:19 104:20,21
usual 171:13
usually 101:17 105:16
 123:16
Utah 59:10 61:3
utility 113:6,9,10
utilization 84:14
utilized 59:18

V

VA 199:2
vacancies 173:22
vacated 174:1
vacation 81:1
valid 65:2
validity 160:13
valuable 54:12 73:1
 197:12 200:19
value 46:18 47:4 62:13
 65:22 66:8 188:13
value-added 62:15
various 14:2 51:1 63:14
 156:18
vast 150:10
venire 73:1,8 75:14
 104:2 105:4
verdict 122:19 181:22
versa 47:17
version 185:9 191:3,5
versions 191:8
versus 24:1 58:22 72:7
 72:8 101:15
vest 92:12,13
vet 109:6
Veterans 199:1,2
vetting 51:21
vice 11:13 47:17
victim 10:7 14:7 37:15
 38:2 45:14 69:19
 95:17 96:17 97:13
 102:1,1,6 118:2,5
 119:3 120:15 121:9
 122:1,12 124:7,17
 125:11 126:3,9 127:9
 127:11 128:6 131:5
 140:2 141:17 145:18
 146:1,3,5,10 147:17
 148:16 149:4,19

150:2,5,7,11,14,19
 151:18,20 152:1,6,7,9
 153:17 155:20 157:16
 157:20 163:14 168:9
 191:9 194:10 195:19
 201:10,13,18 203:20
victim's 45:14 120:22
 121:4 141:11,12,16
 148:11 196:1 216:1
victims 109:8 118:6
 124:9 139:12 148:7
 149:22 156:2 157:20
 166:18 183:15 196:19
 200:21 215:22
victims' 118:1 147:10
 147:21 148:1 149:1
view 1:9 56:1 64:19
 75:21 152:4
views 70:15 201:4
violated 85:8 99:3
violating 99:6
violence 93:20 94:7,8
 95:5 97:22
violent 46:15
Virginia 1:10
virtual 205:21
virtually 1:20 154:14
 205:20 209:14
vision 37:20
visits 183:19
vital 73:17 83:5
VLC 126:3 138:17 163:3
VLCs 139:6 195:9
voir 76:10,13 93:15
 101:4 108:10,13,14
 108:22 109:6 110:2
 110:14,22 111:2,8,10
 111:14,16 112:17
 113:18,20 114:4,9,13
 114:15,16
volume 55:10 56:13,15
 59:6 66:12
voluntary 13:6
volunteering 57:12
vote 152:18 154:8,20
 155:14 165:17 171:2
 181:5 185:17 188:19
 188:19 189:4
voted 146:13 185:15
 188:1 193:9
voting 11:7 153:22
 180:18 192:3
VTC 208:20 216:15
vulnerabilities 96:9,22
vulnerable 95:9
Vuono 2:5 39:8 165:7

W

wait 102:6 144:21 155:1
 158:22
walk 88:22 91:20
walked 87:12,14,18,20
 88:2
walking 90:20 101:17
want 15:10 24:19,22
 27:5 29:15,16 30:6
 39:2 44:14 51:2 53:6
 55:13 57:1 62:6 73:7
 82:11 83:9 86:19
 89:12,13,22 97:10,12
 97:13,19 99:18
 101:14 106:3,5 108:5
 111:3,4 114:20
 120:12 129:3 132:5
 132:16 138:11 144:2
 158:21,21 159:2,3,12
 159:13 163:6,11
 164:14 166:14,17
 167:9 168:21 169:21
 170:12 171:15 172:8
 172:9,18 175:15
 178:14 180:11,13
 183:4 187:4 190:1
 192:18 193:22 194:21
 195:9 197:19 198:7
 199:8,15,16 203:6
 204:7,12 208:10
 209:22 211:10 214:21
 215:11
wanted 26:1,7 51:6
 73:21 110:7 143:1
 165:6 176:10 201:19
 208:21 213:1,6
wanting 34:6 142:3
wants 97:6 148:11
war 106:22 107:6,9
warranted 135:3
warrants 59:2,4
wartime 12:21
wasn't 75:10,10 86:6
 88:13 109:14 110:7
 119:15 157:14
waste 66:18
watch 73:17 94:19
 132:4
watched 93:15 129:1
watching 94:10
way 21:9 27:9 41:11
 47:20 49:7 50:13 51:6
 52:14 55:6,17 64:17
 67:21 71:16 72:2
 73:15 77:13 89:4
 90:15 91:11 92:22
 93:9 94:18 96:14
 99:16 100:2,3 107:22
 112:13 114:6 121:17

125:1 133:13 134:3
 142:7 146:21 153:15
 164:22 179:4 181:3
 185:4 186:17 200:7
 203:4 209:8,8
ways 82:13 91:22
 100:11 133:9 143:3
we'll 18:11 35:22 39:3
 41:22 120:1 154:7
 155:13,14 168:1
 170:15,18 173:11
 175:11 178:11 184:13
 185:8 188:10 192:12
 192:15 197:13 199:17
 200:11 201:20 202:6
 205:3
we're 4:14 6:5 18:9
 20:13 21:5 22:5 25:10
 25:15 27:17 37:19
 39:1 58:11 59:7,9
 60:2 61:7 67:6 71:13
 71:14 80:16 98:7
 102:9 103:15 104:18
 105:2 112:2 117:12
 144:6,13 145:17
 154:13 164:17,21
 165:13,15 166:21
 167:3,15 168:2,11
 169:5 170:13 172:6
 173:16 174:3 175:1,7
 176:2,20 183:14
 189:9 195:7 197:11
 197:16,17 204:2
 216:22
we've 6:2 14:21 21:6
 27:9 28:22 29:13,16
 31:19 34:16 56:21
 60:20 63:1 69:3 70:12
 70:13,14 71:22 79:11
 80:3 101:15 104:21
 107:19 108:8 111:7,8
 142:6 143:6 146:16
 151:22 164:20 165:12
 169:6 177:4 183:20
 185:14 193:9 194:16
 209:9
weak 131:18
weaponized 45:8
weave 153:7
website 179:1 188:2
Wednesday 1:6 189:18
 190:5,7
week 38:1,3 80:19
 112:15,18 165:19
 185:7 189:19 207:6
 208:1,5,6,7,11,12
weeks 17:15,21,21
 31:11,17 75:9 78:6

146:2 185:8 188:18
192:2
weigh 123:16 124:12
191:1 196:4
weighing 132:12
weight 77:18 94:15
115:5 119:5,14
weighty 115:22
Weiland 40:6 44:16
46:4,8 47:12 54:8,8
65:21 72:12,15 74:4
82:10 90:12 109:4
110:21 115:14 120:14
121:21 124:15,21
126:11 130:1 136:12
Weiland's 79:18
weirdest 181:14
welcome 3:2 4:4 20:17
36:19 41:19
well-thought- 75:12
Wells 167:6 168:12
178:10,22
went 6:21 13:16 39:6,6
52:19 75:6 77:13,14
88:14 120:20 140:9
144:10 181:21 215:7
217:4
weren't 88:12
west 40:12
whatnot 127:18
White 69:13 80:1,4
87:15,22 88:6 89:1
wholeheartedly 80:9
82:10 126:14
wholesale 103:19
wholly 82:2
wide 111:13
wider 82:12 83:15
153:18,19
Wiedie 11:15
William 1:14
willing 43:10 81:3,22
109:10,22 117:12
142:14 201:11,14,18
willingness 141:20
win 130:13
window 123:19
wise 48:3 136:14
wish 68:10
wishing 37:8
witness 67:4,7 68:13
71:10 92:16 126:6,8,8
witnesses 136:7 147:4
151:9 215:4
wives 76:12
Wolfe 39:20 42:8 55:8
63:10 76:4 77:9 93:13
94:21 98:9 102:16

106:16 114:8 115:12
117:14 123:4 124:16
128:3 133:7
woman 69:19 76:15
165:10
women 69:20,21 76:8
76:17 93:15 94:19
95:1 97:6,9,13
women's 97:15 200:18
won 130:12
wonder 128:15 129:20
215:18
wonderful 27:11 52:20
52:20
wondering 33:12
129:21 205:14 216:8
word 188:14 191:5,6,8
191:12 192:4
work 12:22 13:4,5
15:19 16:18 19:17,21
30:10 54:16 56:8
95:17 106:22 107:5,9
107:21 120:2 141:15
145:2,11 162:3
165:12 170:14 173:11
174:9 175:11 177:1,8
186:20 188:9 192:15
200:11 202:6
worked 59:21 88:14
133:16
worker 74:8
working 12:7 13:2 16:9
20:13 25:10,15 35:9
69:7 73:12 128:6
145:4,7 173:16,18
174:3,6 211:9 214:19
216:19
workload 54:9
works 22:8 40:4 41:16
133:9 204:16
world 21:21 43:11 67:7
68:13 73:14 166:10
179:11,20 214:11,14
world's 40:9
worry 33:7
worst 78:15
worth 19:12 145:5
214:15
wouldn't 59:11 73:20
119:14 120:17 127:8
127:11,19 135:12
136:17 137:19 198:21
Wrap-Up/Preview 3:8
wrapped 183:3
wrench 198:8
wrinkle 134:4
writ 139:14
write 179:8

writs 141:5
written 15:9,14 33:17
116:8 140:15 144:2
wrong 98:13 138:18
wrongful 6:17,22 7:8,20
wrote 31:3

X

X 212:10

Y

Y 206:19 212:10
yeah 159:19 172:21
175:7 176:6 177:6,10
178:9 180:15 186:6
188:12 191:21 199:20
204:5 205:2 207:13
year 6:14 10:17 21:7
59:8 134:10 146:22
150:4 151:5 158:16
196:6 215:2,3,10
years 6:13 7:18 16:5
49:3,5 52:18,22 53:8
55:10 66:5 75:6 87:9
87:9 88:19 93:14
132:8 149:12 151:11
151:14 156:7,9 170:6
years' 170:2
yes/no 168:19 176:16
178:3
yesterday 87:5,10
114:22 148:14 149:3
158:20 193:14
Yob 172:4 174:1
young 87:12

Z

Z 212:10
zero 110:21 156:12
Zoom 144:13

0

05s 77:3
06s 77:3

1

1 98:19 186:6 193:16
1:00 193:17
1:48 217:4
10 186:7
10-year 22:12
100 104:4
1001 123:10 124:5
1001(c) 147:3 149:21
1004 24:17 29:21
1004(c) 24:11
11 206:16
11:32 144:10

12 105:21
12:30 144:7
12:33 144:11
120 167:14
122 181:22 182:1
13 104:10 155:3
1300 193:17
13th 154:14
14 155:3,4 164:9 171:11
180:14,16,18 189:4
144 3:5
14th 155:6,7 164:8
189:10,18 190:2
192:17 193:17
15 39:1,4 93:14 181:16
15-minute 39:2
15-year 22:12
16 7:18 151:6
164 3:6
18 9:11
185 3:7
194 3:8
1950 63:12 161:13

2

2 186:6,10,17
2,000 129:8
20 174:16,18
20- 59:3
20-year 22:13
2014 47:6
2016 6:7,10 7:22 40:3
2017 129:10
2018 40:13 66:6
2019 40:4 170:2 181:19
2020 40:18 146:22
155:16
2021 150:4 174:17
2022 10:17 12:9 16:6
2023 1:7 16:8 17:17
21:19 123:18 161:1
2024 160:18,21 215:6
2025 215:2,5
2026 159:1 173:10
214:21
2027 158:16,22
20th 14:16
22 1:7
22nd 31:15
25 70:13 72:11 73:5
84:11 86:7,12 89:10
89:13 103:16,20
105:20 106:5 114:21
116:7,15 117:16,19
145:3,10,22 159:18
159:22 160:7,16
163:21 194:7 195:3
200:1

27th 16:8,10 17:17
21:18

2800 1:9

28th 191:22

3

3 186:6,11,17

30 87:9 88:19 189:2

32 54:13 58:10,12 61:8

62:20 63:1,11,16,22

64:7,20 65:9,14,20,22

66:20 67:14 68:1

169:22

34 130:17 136:19

39 3:4

3rd 61:3

4

4 1:9 3:2

4.3(e) 157:2

40 182:3

412 139:1

45 82:19

4th 39:21

5

5 3:3

50 84:4 169:13 172:6

182:2

50-meter 25:12

509 42:13

513 139:1

589 181:22

5th 3:7

6

6 5:10

60s 117:19

6b 138:21 139:1

6s 117:4

7

7,000 174:11

70 88:8

711 181:21

77 129:17

784 181:20

7A 39:11

7B 39:15

8

8,000 174:11

8:55 1:10

8:56 4:2

80 129:12,17

802 139:17

8b 146:17

8th 190:9,10 191:15

192:7

9

9/11 41:15

9:31 39:5

9:44 39:7

9:45 39:4

90 82:19

90-day 156:16

9A 181:12

9th 31:15

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In the matter of: Public Meeting

Before: DAC-IPAD

Date: 02-22-23

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

Court Reporter

NEAL R. GROSS

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