

1 what charges go to the courts-martial? The
2 convening authority. And who decides who is
3 going to sit as members, jurors on the courts-
4 martial? The convening authority. So, the
5 perception among some people has been, and the
6 criticism that flows from that has been hey,
7 you've got one person making all the decisions.

8 And the jurors are either handpicked
9 -- well, they are handpicked, they're handpicked,
10 and they know what their job is, so how is there
11 justice? So, that was one thing that they were
12 told. They were also told that -- and then here,
13 we've heard testimony from some women victims who
14 looked at their panel, and it was all older white
15 men, no women, nobody of color.

16 And that concerned some of those
17 victims that talked to us. We also heard from
18 accused who were convicted, and came in, and said
19 I'm a minority, and I was convicted by a panel of
20 older white men, and that bothered me. It wasn't
21 a cross section of the Army, Navy, Marine Corps
22 that I have in my unit. And so, those things all

1 got our attention, and we started looking at
2 well, what, if anything, can you do about it?

3 Now, that commission two years ago
4 recommended that there be a randomization process
5 to select members, and Congress in its infinite
6 wisdom, and being as wonderful as Solomon,
7 decided to split the blanket by saying to the
8 Department of Defense, go ahead, and put in
9 randomization to the extent you can, but keep the
10 Article 25 criteria, and the convening authority
11 figuring people out.

12 You know, making the selection using
13 those criteria. And so, DOD is grappling with
14 that right now. So, with that all as background,
15 one of the -- Ms. Acevedo had the observation,
16 leave that to voir dire, but a lot of people have
17 -- not a lot. Some people have said you should
18 make a recommendation as the DAC-IPAD that they
19 just do a complete randomized selection.

20 Because as many of you have pointed
21 out, you already have qualified people who could
22 be plenty smart enough, plenty -- with enough

1 integrity to be that impartial finder of fact
2 that you're looking for. So, go ahead, and do
3 that, and leave the rest of it to voir dire. You
4 all have a lot of experience with voir dire on
5 the civilian side, and on the military side.

6 What are your thoughts on that kind of
7 more -- a fundamental change to the way things
8 are currently done?

9 MS. ACEVEDO: I don't think that would
10 be sufficient to provide that fair cross section,
11 and I speak this having acted as -- or having
12 served as an acting SJA, working with convening
13 authorities on a daily basis. I've never met a
14 convening authority that did not have a goal of
15 justice, but every individual who looks at who
16 they deem to be qualified is bringing their
17 biases into the job.

18 Whether these are known biases, or
19 inherent biases, they have their own idea of who
20 is going to be a fair juror, and that may not
21 consider things aside from education, such as
22 life experience, and background.

1 BGEN. SCHWENK: Okay, other thoughts?

2 LTC. BEARDEN: To your initial point
3 about Congress' infinite wisdom, I think when you
4 look at the Article 25 factors, and
5 randomization, they're actually incompatible,
6 when you start trying to input certain data
7 that's been at least argued as constitutionally,
8 on its face, invalid to some degree. And you
9 start trying to put that into a randomization
10 process, that kind of defeats somewhat of the
11 purpose.

12 So, if you're eliminating factors that
13 are already kind of met on the front end by
14 virtue of my opening comments, relative to
15 people's age, and experience, and judicial
16 temperament, how do you get to a randomization
17 process I think is the ultimate question, without
18 it affecting the overall readiness, and
19 efficiency in various environments that we
20 operate in.

21 Is it going to have an impact on
22 mobilizations, and deployments that have some

1 kind of secondary impact on national security?
2 And I think that's a question that hasn't really
3 necessarily been answered, or thought out, and
4 I'm not smart enough necessarily to give you the
5 rationale of how that can be done. But I think
6 it's an important question.

7 We say this in the military, you have
8 great initiative, but bad judgement. And it's a
9 great initiative, I think in my overall opinion
10 as being a state, and federal prosecutor for most
11 of my life, I operate within the realm of
12 randomization every day on how juries are
13 selected. I mean we've got voter motor rolls,
14 and diverse panels across all ages, demographics,
15 socioeconomic backgrounds.

16 So, I think the intent in having
17 diverse panels to that degree, randomly selected,
18 is the right approach. But the consideration has
19 to be what are the secondary effects of trying to
20 implement that? Is it logistically feasible?
21 How can it be implemented without necessarily
22 impacting the primary purpose of these commands

1 in terms of their ability to stay ready for the
2 ultimate purpose of defending, and protecting the
3 country in a variety of environments?

4 I don't know that we have fleshed that
5 out. I don't know that we can do that today, but
6 I think that's the ultimate question that a lot
7 of practitioners have. I think in reading Dean
8 Skenk's (phonetic) comments, and her response to
9 you all, I think some inquiries were sent out.
10 She essentially said the same thing. What's the
11 secondary impact in doing this?

12 If we go to alpha rosters, if we do a
13 variety of different things? But by, and large,
14 I don't think the factors themselves in Article
15 25, and having a randomization process in, and of
16 itself are compatible. And so, you've got to
17 start with that, and resolve that issue as to
18 whether can we eliminate Article 25, and go
19 strictly to randomization process that includes
20 everybody, what does that look like?

21 And how can we keep it from impacting
22 our ability to maintain a level of readiness, I

1 think is the ultimate question.

2 BG. CHRISTINE: I would carry on with
3 that line of thinking. Are we going to maintain
4 a deployable system of justice? I think that's
5 one threshold question. Now, we see some
6 operations, we see some formations that do, and
7 quite frankly we talk about a deployable system
8 of justice. I tried amongst the first courts-
9 martials in Iraq, perhaps not the first, but
10 amongst the first.

11 That was a deployable system of
12 justice there in 2003. But we don't always see
13 that. We see a lot of stuff quit with the
14 baggage, and we're going to hold that until we
15 get back to home station. Which brings second,
16 and third order problems as Lieutenant Colonel
17 Bearden mentioned, I mean you've got different
18 forces.

19 National guardsmen, reservists, and
20 what have you, and the different rules that apply
21 to them depending on the mobilization, and the
22 end of those mobilizations. So, the one question

1 is how would a complete randomization affect that
2 deployability? And I'm not suggesting you not
3 move in that direction, just thinking we've got
4 to define the framework.

5 Are we going to be able to make a
6 deployable system of justice, and have the
7 initiatives that we're suggesting, whatever
8 initiatives that you suggest at the end? So, if
9 you move in the direction of randomization, which
10 I don't think is inappropriate, but then again, I
11 have a great level of confidence in our soldiers,
12 and sailors, and airmen across the spectrum.

13 Because I just believe it is a
14 phenomenal jury pool for both prosecution, and
15 defense. Because if the issue is, if the
16 objective is getting to justice, as said so very
17 well in our opening comments, then what
18 recommendations does this committee make that
19 enhance that value? I think it also has to --
20 you also have to have that discussion in your
21 deliberations that is not just occurring in the
22 military justice system, but across the spectrum.

1 Do we trust our commanders? You can't
2 go to a promotion board anymore without relooking
3 at previous investigations which have long since
4 been resolved, either founded, or unfounded.

5 Well, would we be doing that if we trusted
6 commanders? Perhaps there are issues beyond the
7 science of this chancery that need to be resolved
8 systemically in DOD.

9 To say well, if we're going to base
10 our system of justice on significant input from
11 commanders, we've got to resolve that threshold
12 question first. Do we trust our commanders? And
13 if so, then some of these other things, perhaps
14 the order of importance of some of these changes
15 that you all might suggest we make get graded
16 differently depending on the answer to that
17 primary question.

18 Which again, just isn't in the
19 criminal justice space, it's across the spectrum
20 in DOD. If we're looking at a system that can be
21 compatible with a deployed system of justice,
22 which I would recommend we keep, I have a comfort

1 level, and I don't advocate for it, and I only
2 speak for Bobby, but I have just such a faith in
3 our human capital that I think a randomized
4 system is going to get to justice as well as the
5 systems that we currently have.

6 Which I'm not advocating changing,
7 because I think we do a pretty good job in that
8 regard, the military does a pretty good job in
9 that regard. Then again, balance that with the
10 fact that I've picked 250 juries in my civilian
11 career thereabouts, and the threshold voir dire
12 is y'all ain't wanted by the law, are you?
13 That's kind of, okay, he's qualified.

14 So, it's a relatively low threshold
15 before our voir dire there. What's the
16 objective? We define the objective, and then
17 nest any recommendations in that, and I think the
18 deployability is a big question. Because if it's
19 truly a randomized selection, you're going to be
20 pulling in your chiefs of staff, and then your
21 motor pool sergeant, and what have you, and in
22 the deployed environment, that can have impact.

1 MS. MULDOON: Very briefly, because a
2 lot has been said already. I think you have to
3 balance the readiness of your military with a
4 purely randomized jury selection. I don't know
5 how that can actually happen. There would have
6 to be some limitations of who is being deployed,
7 and I'm going to say it wrong, I don't have all
8 my military terms right, so I apologize.

9 But if you're going to be deployed in
10 a different sense was just said, deployable
11 military justice, but being deployed to whatever
12 crisis is happening in the world. Being deployed
13 for training. In the civilian world, that
14 doesn't matter, it doesn't exist. That kind of
15 national security is not at the forefront of
16 selecting your juries in whatever city, or state
17 across the nation.

18 You might be considered excused if
19 you're about to have finals in college, that
20 might get you off the jury panel, but not being
21 deployed. I think it has too much of an impact.
22 So, the reason I bring this up, if you're going

1 to purely randomize the process, think of the
2 second, and third order effects of when, how is
3 this randomization going to occur?

4 And how is that going to affect the
5 big picture. That's what I have seen over, and
6 over again in trying to take the civilian model
7 of prosecution, and putting it -- having those
8 models inserted on, or in the military. You have
9 two different systems that are drastically
10 different. As I have said to my people, you're
11 comparing apples, and elephants.

12 You can't, it all doesn't fit. But
13 taking the concepts of being more randomized to
14 get a cross section of the community, and just to
15 ease some of the concerns of handpicked in
16 addition to everything that has been said,
17 looking at those criteria, and my biggest concern
18 is looking at the second, and third order effects
19 of whatever process is instituted be considered
20 as we're doing it.

21 Because it is such a different
22 community than say Chicago, or Atlanta, or any

1 place else in the United States. That's all I
2 have on that.

3 BGEN. SCHWENK: Thank you all very
4 much.

5 MS. GOLDBERG: Thank you very much,
6 and just a quick question that I think follows on
7 what you've shared. We have heard some about
8 some of the potential costs of moving away from
9 Article 25, that Article 25 produces kind of a
10 blue ribbon panel of people who are respected by
11 their peers. And then when they go back into
12 their -- to their colleagues that they are able
13 to sort of carry with them some of their
14 experiences, and so forth.

15 And that the idea of the command
16 selecting people gives the convening authority
17 more ability to pull them in, and make them show
18 up. And at the same time, there's a suggestion
19 that maybe there are some costs to having Article
20 25, like not everybody has the opportunity,
21 especially when it's -- we know at least in
22 civilian jury service, that serving on a jury can

1 really reinforce a person's sense of membership
2 in the civic community.

3 And faith in the system of justice, so
4 when you think about those various points, how do
5 you come out on the costs, and benefits of moving
6 away from Article 25? And one factor in Article
7 25 I just want to set to a side is rank, and
8 we'll assume some years of experience, but just
9 random selection apart from thinking about
10 questions of rank, and a minimum of years of
11 experience, and vetting for other serious issues.

12 LTC. BEARDEN: I think our overall
13 purpose that we've looked at in distinguishing
14 the primary difference between military courts,
15 and Article 3 courts for example is the need to
16 adhere to good order, and discipline. There's
17 this misconception that perhaps these factors are
18 necessary to drive kind of that point home. But
19 I think perhaps maybe even the opposite is true.

20 When you allow people to participate
21 in a process that they trust, that they've given
22 an opportunity to serve, one other factor that's

1 not included in 25 by the way, is each of the
2 individuals that serve have sworn to uphold the
3 Constitution of the United States of America
4 against all enemies foreign, and domestic.

5 There's not many people sitting on a
6 civilian jury that have necessarily had to do
7 that. So, I think at the end of the day,
8 providing that framework to allow people to
9 participate allows for a just system, and justice
10 complements discipline. And I think at the end
11 of the day people are more inclined to follow a
12 process that they believe in, that they trust in,
13 and that they're fully allowed to participate in.

14 One of the factors that we talked
15 about just a moment ago I wanted to touch on real
16 quick is this common denominator that we have had
17 historically, since our beginning, since our
18 founding. Is this constant grapple between the
19 role of commanders, convening authorities, the
20 role of the military judge, and the influence
21 that these parties have in the process.

22 And I think that there may be some

1 space in between random selection, and everything
2 that we talked about by holding accountable at a
3 greater level convening authorities to do the
4 things that they're mandated to do. One thing
5 that I've had an opportunity to do over the
6 course of the last year is work with Mr.
7 Sullivan, for example, on the Military Sentencing
8 Parameters and Criteria Board.

9 Where what we have seen is the
10 improvement, and the increased value of including
11 the military judge in sentencing. But by, and
12 large, involving participants like the military
13 judge at a greater level, and maybe requiring
14 convening authorities, and commanders to do their
15 job at a greater level with maybe some bigger
16 oversight might actually be some space in between
17 this, and pure randomization.

18 It's just a thought. We're concerned
19 about keeping a force that's capable of
20 mobilizing, deploying, and being operational,
21 while also taking into consideration the needs of
22 having a diverse panel. And the expectation is

1 that we have convening authorities that follow
2 that mandate, that we have people that are
3 willing to serve, that are allowed to serve.

4 That are chosen not because they're
5 the CA's friend, or the commander's friend, but
6 they're a part of a diverse force that's willing
7 to participate. Maybe there's a solution in
8 between.

9 MS. ACEVEDO: I wanted to expand for
10 a second about fairness. Because I believe the
11 diversification would not only actually make the
12 courts-martial more fair, but it would also
13 increase the perception of fairness in the
14 system. Right now you have a system where the
15 same person who is pre-qualifying the jurors is
16 also bringing the charges.

17 And from at least my limited
18 experience trying jury cases in the military,
19 there were very few jury trials, or panel trials
20 at my first duty infantry station, because people
21 just believed there was no point, because if they
22 went before a panel, they would be convicted,

1 that the system was not fair. And I think having
2 that randomization, and making the system also
3 appear more fair would give more people security
4 in the system.

5 DR. SPOHN: So, I'd like to return to
6 the issue of diversity in the jury selection
7 process. In the civilian system, a lot of the
8 blame, if that's the correct word, for the lack
9 of diversity, racial, ethnic, and even gender
10 diversity on juries is placed on the use of the
11 peremptory challenge to eliminate people of
12 color.

13 Particularly in cases where the
14 defendant is also a person of color. And if we
15 assume that the anecdotal, and empirical evidence
16 that we've heard, and reviewed of lack of
17 diversity on juries in the military justice
18 system is accurate, and given that peremptory
19 challenges, it's my understanding that they're
20 much more limited in the military system than
21 they are in the civilian system.

22 What are your suggestions? I know you

1 talked a little bit about this in your opening
2 statement, but first, do you think that the lack
3 of diversity is an issue that we should be
4 concerned about? And if so, what do you think
5 the causes of that lack of diversity are?

6 MS. ACEVEDO: I can't speak as to the
7 numbers for diversity in the military panels, but
8 I think military panels have actually a greater
9 chance than civilian panels of achieving
10 diversity in the pool. This is something that we
11 encounter frequently in D.C., which is that the
12 pool of people that the jurors are selected from
13 does mirror the community. The pool of people
14 that comes to jury service does not necessarily
15 do so. And in the military, you do have the
16 benefit of forcing jurors to come to service,
17 which I think would help with the issue of
18 diversity.

19 BG CHRISTINE: I would submit that
20 anything that the panel does that increases the
21 comfort level of the participants on both sides
22 of the ball, prosecution and defense, that

1 increases the comfort level of the panels is
2 going to be a net gain for the system because
3 it's all a voluntary system. I mean, the whole
4 social order is really based on our willingness
5 to subject ourselves to it. So I think there's
6 inherent value in comfort, quite frankly, and the
7 optics of it.

8 As the distinguished panel member
9 pointed out, in the civilian panels, our pool is
10 statistically weighted so that we know that when
11 we sent out and we bring in through jury summons,
12 we're going to get that statistically
13 representative sample.

14 Now, I live in a very diverse
15 community in the Deep South. My juries are more
16 diverse, my trial juries, after de-selecting. I
17 don't call it jury selection. There's an element
18 of de-selection. After de-selection, my juries
19 tend to be much more diverse, but that's a
20 function of my community.

21 So I think a result in a different
22 community that has different numbers can still be

1 a result, a panel that raises the level of
2 comfort at the beginning of trial. They can
3 still be displeased at the end of the trial, and
4 I think we have to observe that, as well. And we
5 have to approach some of the analysis with, well,
6 there's going to be disgruntled at the end of the
7 process by one side or the other in nearly every
8 case, but I don't think the panel should fear
9 taking a step which leads to comfort amongst all
10 the participants.

11 I analogize it to my time in the
12 magistrate court, which is probably part I'm
13 going to start leaving out because magistrate
14 court, where I'm from, whew, that's only a court
15 in the most esoteric terms. One of my jobs in
16 the civil, the small claims, the low-level civil
17 disputes was to resolve the dispute in my
18 courtroom such that it didn't get resolved in the
19 parking lot, and what I learned from thousands of
20 those magistrate court civil cases is people's
21 belief that they are getting fairness and justice
22 here, without regard to the result, that's what

1 perpetuates the system.

2 And so I would say, you know, maybe
3 looking at it from the other end of the funnel,
4 anything the panel does that leads to a higher
5 level of comfort in the likelihood that justice
6 will be received is something I think you ought
7 to seriously consider.

8 But I get back to my initial point,
9 which is I have great confidence in all the
10 persons in DoD who might be called, without
11 regard to where they fall on the rank structure.

12 MS. MULDOON: If I can, I think you
13 have to look at your jury pool in the first
14 place, civilian world, depending if it's, pick
15 your city, large city, smaller jurisdiction.
16 It's going to be representative of that section.
17 If you're a minority in that section, you're
18 going to feel, I think, you're in the minority
19 and your jury pool is not going to look like you,
20 et cetera. Understood. And I am in no way
21 suggesting -- I am for more diversity, but let me
22 get to my point here.

1 If you look at the military, primarily
2 white male. I don't have the statistics. The
3 numbers I looked up are antiquated. But,
4 primarily, walk on any base, I can tell you on
5 Camp Lejeune what am I looking at? There are not
6 many women in the military. If you're pulling
7 from an infantry battalion for a special court-
8 martial, how many females are going to be there?
9 Is the victim female? Is the accused female?
10 How is that going to -- and then you can apply
11 that to any other minority, race, ethnicity, et
12 cetera.

13 So you have to look at that to start
14 with. Like, that's where you need to pull your
15 diversity from, not the panel itself. The Fifth
16 Amendment doesn't get you a panel of your choice.
17 You have to start with a diverse venire, the
18 section that are going to come in and be
19 questioned, right. So you need to do that in the
20 military, and I do think the perception is very
21 important to make sure that, whether it's a
22 randomization, it's going to be randomization,

1 there's going to be randomization, but how that
2 is to take steps to ensure that you're getting
3 the widest catch to come to the venire is going
4 to, I think, instill a trustworthiness to the
5 process for everybody involved: the command, the
6 accused, the attorneys, the victims, the
7 witnesses. Entirely.

8 So to cast a wide net to get that
9 venire in is I think where the goal is and where
10 to look at making sure you have diversity at that
11 level, corresponding to what you have to start
12 with.

13 LTC BEARDEN: I would agree with that
14 in principle. I think you would have to broaden
15 the scope of the potential available individuals
16 that can serve, and that's essentially what we
17 kind of faced, as General Christine just
18 mentioned. You have some communities that are
19 not diverse or they're largely statistically not
20 available. It's just depending on the community.

21 Fortunately, we've had a number of due
22 process measures that have been put into place

1 over the years, whether it be Batson or Taylor or
2 all of these variety of constitutional challenges
3 that have gone forth. You know, we've had an
4 opportunity to improve the military judge in what
5 I mentioned earlier to be a part of the process
6 to ensure that the actual panel itself represents
7 the community, a cross-section, if you will.

8 And so there needs to be a measure in
9 which, as he indicated earlier, can we figure out
10 a way to expand the population that can be drawn
11 from and then apply a weighted percentage to be
12 able to draw from that where you get an adequate
13 number of people that represent the individual
14 that's charged. And that's not just respect to
15 diverse populations; from a gender standpoint, as
16 well. Somebody mentioned earlier sexual assault
17 cases and imagine being a sexual assault victim
18 and not having a female opportunity to serve on
19 your actual jury pool that fully understands what
20 you're going through in a lot of respects. It's
21 problematic. But I think the only way you get
22 there is by expanding the number of people that

1 are available.

2 MS. ACEVEDO: And I think -- is it Dr.
3 Brown? I can't read that far. I can't see your
4 name tag that far away; I'm sorry. I think that
5 two things I mentioned will have to change.
6 There would need to be more peremptory challenges
7 and, likely, there would need to be more of a
8 focus on Batson challenges if we switched to a
9 diverse system, a diverse selection.

10 MG ANDERSON: Thank you for coming
11 today. My question kind of follows on to what
12 General Schwenk said earlier talking about the
13 convening authority and their role in impacting
14 the diversity of the panel, the randomization.
15 Article 25, paragraph F, has something that I
16 just noticed that, to me, could dilute the
17 ability to get a diverse panel. It provides
18 that, before a court-martial was assembled for
19 the trial of the case, the convening authority
20 can excuse a member. Obviously, that's one
21 level, and we've done a good job, we do a good
22 job of vetting our commands, so we understand

1 what we're getting there.

2 However, it also then allows the
3 convening authority to delegate this authority
4 under this subsection to the staff judge
5 advocate, okay, but then or legal officer or to
6 any other principal assistant. Now we've gotten
7 into an area where there hasn't been a lot of
8 vetting for, you know, the kind of traits we want
9 our leaders and commanders to have, and now we're
10 allowing a lower level, I shouldn't say lower
11 level but certainly someone else to step into the
12 process and excuse members which could, in fact,
13 I think result in a less diverse panel. Not that
14 we're trying to do that, but it sort of leaves
15 that door open for that to occur.

16 Have you ever had an experience where
17 convening authority has delegated beyond or to
18 staff judge advocate or even to a lower level?

19 BG CHRISTINE: I have not.

20 LTC BEARDEN: I haven't, but what I
21 would say is, you know, you start with the
22 initial perception that those individuals have

1 interest, the interest of justice in mind in
2 doing their job. You know, across the various
3 forces, whether you be in Air Force or the Navy
4 or Army, these matters are handled quite
5 differently. I was surprised to learn in talking
6 to some of my colleagues in the Air Force that
7 the prosecutor in a lot of instances in the Air
8 Force plays a large role in determining that
9 initial vetting process, whereas in the Navy, in
10 talking to colleagues, they have absolutely no
11 involvement whatsoever.

12 So there's not a lot of consistency
13 and continuity in how it's addressed. I think
14 you have to start with the initial premise that
15 those individuals that are part of the process
16 are above board attempting to do the right thing.
17 They've sworn an oath to the Constitution, as
18 we've previously indicated, and that they have
19 the intent of the command in mind, unless
20 otherwise proven; and I haven't heard a lot of
21 instances in which somebody that's been delegated
22 to do this task is somehow created some nefarious

1 action to prevent people from being a
2 participant.

3 MS. MULDOON: I have not had any, I'm
4 not aware of any cases where it was delegated to
5 the SJA or legal officer. I know that the legal
6 officer and SJA sometimes assist the convening
7 authority in finding the individuals who meet
8 that Article 25 criteria, and then the convening
9 authority makes the final decision. So going up
10 the chain as opposed to delegating downward, I'm
11 not aware of any situation.

12 MS. ACEVEDO: I just had a thought.
13 I'm wondering what that section is meant to
14 handle situations, kind of like in the civilian
15 sector you have jury offices that can be make
16 limited excusals. So, for example, if somebody
17 is having surgery on the day of their service,
18 they can be excused from service rather than them
19 having to go through the convening authority.

20 HON. WALTON: Yes, I mean, this is a
21 very difficult challenge, I think, that the
22 military has, as does the civilian world. I've

1 been a judge for over 40 years now, and I think
2 one of the biggest challenges that I face both as
3 a local D.C. judge and now a federal judge for
4 over 20 years is trying to ensure that there was
5 a perception of fairness because perception is
6 very important and perception, I think, is
7 impacted to a significant degree from where you
8 sit. The perspective of a judge as to fairness
9 is very different than the perspective of defense
10 counsel, the prosecutor, the victims, the
11 witnesses, and the community, and it's very
12 difficult, I think, to appease all of those
13 segments of society.

14 And there's no question,
15 unfortunately, that there are factors that come
16 into play that impact on the fairness of our
17 process that are, unfortunately, ingrained in
18 American society, one of those being race. And
19 the reality is that, if you are prosecuting
20 someone and that individual is being prosecuted
21 by an entirely white system, there's going to be
22 a perception, whether correct or not, that the

1 process is not fair. And I know we've heard from
2 several individuals who have testified before
3 this committee who have felt that they did not
4 get a fair shake because they were being
5 prosecuted on a base, especially if you're
6 talking about an officer in certain services,
7 where there were no other minorities like them
8 and they ended up being convicted. And whether
9 they were guilty or not, I can't say, but they
10 feel that they did not get a fair determination.

11 And I know there are significant
12 challenges that you face, and I don't know how
13 you necessarily resolve them. But I think, I
14 mean, the one thing when I was a prosecutor in
15 the District of Columbia years ago, we used to
16 have jurors that would sit for an entire month,
17 and you would see the conviction rate go up the
18 longer they sat. And now we have jurors who are
19 one and done, and the conviction rate is less.
20 And, obviously, there are psychological reasons
21 that come into play that impact on those
22 statistics, and, again, I don't know what the

1 ultimate answer is. I understand the logistical
2 problems that the military has in randomization,
3 but I do think there has to be a desire to try
4 and ensure that a jury panel that's hearing a
5 case is representative of, at least to some
6 degree, the individuals who are involved in the
7 litigation itself. And, again, I don't know how
8 you necessarily resolve that, but it's a
9 challenge that I think you face in the military
10 and the civilian world faces also.

11 And I guess the one thing I do feel is
12 important is that I don't know if education
13 itself dictates whether somebody is going to be a
14 good juror because I think good common sense
15 sometimes trumps intelligence as far as academic
16 achievement is concerned. And so I think it's
17 important, I think one of the problems that we
18 have is judges too often try and rush the process
19 of jury selection. They don't really scrutinize
20 the individuals to the extent that they should
21 who are being selected, and a lot of times the
22 pressures of the case load is a product of that.

1 And as a result of that, I think many times we
2 empanel juries who are not really prepared to
3 administer justice the way they should.

4 So I don't know. It's a hard issue.
5 It's something that I think this country, both in
6 the civilian world and the military world, faces.
7 And how we can resolve it I don't necessarily
8 know, but it's something that we have to continue
9 to fight because there is a perception in a
10 significant portion of our society who feel that
11 our criminal justice system, whether it's in the
12 military or the civilian world, is not fair and
13 just.

14 MR. CASSARA: I have a very simple
15 practical question. The military has one
16 peremptory challenge. I don't know what you
17 all's practices are in the civilian world. I
18 suspect every court is different. I suspect it's
19 more than one in at least most, if not all, of
20 them. Military courts are a panel of eight for
21 what you would call felony cases.

22 Any thoughts on, you know -- the issue

1 of unanimous juries as going through the courts
2 right now, I'm intimately familiar with that.
3 Putting that aside, any thoughts on a minimum
4 panel size of 12 and/or more peremptory
5 challenges to both sides?

6 BG CHRISTINE: If we are, as some of
7 the points said earlier, leaving a lot of these
8 things to be addressed in voir dire, then I would
9 increase the number of peremptory challenges,
10 which is going to be, you know, a whole lot of
11 appellate law is going to be made there going
12 through the Batson issues and what have you.

13 But if you're going to leave a lot of
14 these issues to be resolved through voir dire, as
15 opposed to how we're directing folks or just
16 taking a randomized sample, then I think justice
17 is going to cry out that you're going to need to
18 increase the number of peremptory challenges.

19 LTC BEARDEN: I agree with that, in
20 expanding it. I think, to the extent you have a
21 command that has the capability from a number
22 standpoint to be able to do that, I think that's

1 the ultimate question is, you know, you hear the
2 joke we just would really like to be able to have
3 enough warm bodies to actually sit, and that's an
4 unfortunate statement to have to make. But in
5 some cases, that's a practical reality for some
6 commands to be able to get enough people who are
7 qualified. So foreseeing that potential problem,
8 increasing numbers might exacerbate that
9 particular issue.

10 But to the judge's point, to the
11 extent you expand the number of people that can
12 sit on the venire that can adequately reflect the
13 accused and provide enough challenges to be able
14 to get there I think is the ultimate objective
15 because I think we're all here for that principal
16 purpose is to figure out a way to administer
17 justice and promote fairness. And by doing
18 exactly what you just said might be the answer.

19 MS. MULDOON: I can tell you that in
20 Chicago we had a jury panel of 12, two
21 alternates, on every jury, seven peremptories,
22 and unlimited cause obviously, maybe not

1 obviously. Seven peremptories. And depending on
2 the case, maybe you used them, maybe you didn't.

3 Military, we have, for felony level,
4 eight members. Often, 12 are sent over, 16 are
5 sent over. That's the extent of our venire,
6 where in Chicago we're getting panels of 40 to
7 come to that number of, ultimately, 14. We have
8 one peremptory in the military.

9 But also remember that there is a
10 liberal mandate for cause. Many, many more
11 challenges for cause I see are granted in the
12 military than would be in the civilian world, and
13 it comes to how they're rehabilitated. Again,
14 you're kind of comparing very different jury
15 pools again, but, with that, you're starting with
16 a smaller number, maybe 12 for a panel of 8. And
17 oftentimes they can't get to that number, and the
18 term is they bust quorum and we have to have the
19 convening authority send more people over and we
20 continue with the voir dire, and that's fine.
21 That's how we're going forward, and, if it's
22 enlisted, they have the right to enlisted on the

1 panel of one-third, which is 2.666 enlisted
2 people. It was very important when you didn't
3 have the limit of eight or you had to have eight,
4 so that one-third was more meaningful than it is
5 now.

6 And with that, the other difference
7 that hasn't really been spoken about, at least in
8 Chicago because I didn't do the research all
9 over, it's a unanimous jury verdict. The
10 military it's not. So that's another impact that
11 you're comparing to the whole process, and it all
12 impacts all of it. It's all interrelated with
13 that.

14 So if you are doing a more randomized
15 less selected member from the convening
16 authority, I think more peremptories are going to
17 be needed in order to sort out the members that
18 have been sent over in the venire and continuing
19 from there. So, again, interwoven, complicated
20 issues that are impacting at all different levels
21 in the selection process.

22 MS. ACEVEDO: I agree with my

1 colleagues and wanted to add that a lot of this
2 could depend on training given to judges. I've
3 picked juries in 30 minutes, and I've picked
4 juries in three days. So as one of our speakers
5 said, how much time a judge gives to question
6 these jurors and how much time a judge gives to
7 rehabilitate a juror is going to impact things
8 greatly.

9 HON. WALTON: With the difficulties
10 the military faces, could you realistically
11 operate the system if you had the number of
12 peremptories that are available in the civilian
13 world?

14 MS. MULDOON: They'd have to send over
15 a larger pool in the first place. And if it's
16 randomized, you're going to have, I would think,
17 more people will be selected in that, and that's
18 just my opinion based on no facts, which is what
19 that is. But you would have to have a bigger
20 panel, and it might take longer. But we would
21 seek, I concur, you can sit a jury, I've never
22 done it in 30 minutes, but a half a day or a day

1 it might take, depending on who comes over. So
2 more time, I think, has to be allotted for that
3 during the process.

4 But it's feasible, I think it is
5 feasible, and we just have to work towards that
6 common goal as we're looking at how we're, you
7 know, planning our trial schedules. Does that
8 answer your question? Can I elaborate more? I'm
9 sorry.

10 HON. WALTON: -- number of peremptory
11 challenges, so I know, I appreciate the
12 challenge.

13 LTC BEARDEN: And to that point, I
14 don't think all commands are built the same, you
15 know. You have some that are larger-populated
16 TRADOC type commands, a lot of folks available.
17 You may have other regionalized commands that may
18 not have enough participants that may have to
19 broaden their base of the potential pool as a
20 consideration.

21 HON. WALTON: I know when we had this
22 discussion previously and it was someone from the

1 Coast Guard, and they have, obviously, a smaller
2 number of military personnel. And they said, in
3 order to try and have a greater diversity, they
4 would bring individuals from other bases to hear
5 a case. I don't know if that's a feasible way to
6 operate in the other branches or not.

7 MS. ACEVEDO: And it doesn't mean that
8 we have to go as far as other courts' peremptory
9 challenges. If I remember correctly, prosecutors
10 get six peremptory challenges in District court
11 currently. Presumably, once the panel is picked,
12 that panel is qualified to hear that case, and
13 peremptory challenges should only be used really
14 for style or for gut feelings.

15 HON. SMITH: So moving away from
16 randomization for a minute because the discussion
17 about having a deployable system of justice and
18 balancing that, that's not something that we
19 think about in the civilian world. Looking just
20 at Article 25 and thinking about this idea of
21 having, of the perception of having a pool of
22 your peers, right, if you're the accused. And,

1 obviously, the convening authority picking the
2 pool is one thing, but what happens if Article 25
3 no longer has that, as Judge Walton said, the
4 education requirement but also the judicial
5 temperament piece because, in my mind, judicial
6 temperament is subjective based on whoever it is
7 who's making the call, right. The convening
8 authority is looking at this list saying, well, I
9 don't think this person has the judicial
10 temperament. What happens if that's not part of
11 the Article 25 equation? Does that change, does
12 that help change the perception of the accused
13 and also of just this idea of the military system
14 being fair while, at the same time, perhaps,
15 along with the education piece, increasing the
16 diversity of the prospective venire?

17 LTC BEARDEN: I totally agree. As I
18 mentioned at the outset, I think a lot of the
19 factors that are identified in Article 25 are
20 largely kind of, at least as a baseline, are
21 already established in terms of age, you've got
22 some training, you have some education.

1 Completely agree that judicial
2 temperament is a very subjective thing, you know.
3 Left to the beauty in the eye of the beholder, I
4 think it was United States v. Smith. It's never
5 really been clearly defined, but I think it was
6 Smith that said it's judgment and ability to be,
7 you know, respect, you've gained the respect of
8 your peers, so to speak. Well, that's very
9 subjective. I think, once you start kind of
10 taking that particular factor and some of those
11 factors off the table and you have a more diverse
12 pool, I think, of people without that
13 subjectivity, I think you're greater inclined to
14 have, you know, perhaps maybe not people who are
15 coming in for initial training. They're in
16 basic, they're in AIT, they're in OCS, they're in
17 a variety of different training programs.
18 They've established themselves as part of the
19 command. You know, they may not have necessarily
20 shown everybody else entirely what their judicial
21 temperament is per se, but they meet a lot of the
22 other criteria. And I think in broadening the

1 numbers of people by eliminating those factors is
2 going to improve your diversity of the pool
3 because you take the subjectivity out, if that
4 makes sense.

5 BG CHRISTINE: I'd summarize it a
6 little tighter and say it's either randomized or
7 it ain't, right. I mean, and I guess we said
8 that a little earlier. If we're going to keep
9 those criteria, if Congress says keep those
10 criteria but randomize, well, then that's really
11 not random, is it? We can define the objective
12 and then try to color in the lines, but we're
13 going to get a broader spectrum of the potential
14 pool or not. We're going to leave it to the
15 commander to determine temperament, or we're
16 truly going to randomize it. I'm not advocating
17 a position. I'm saying that those two -- you
18 can't have both, in my opinion.

19 But, again, I have a great deal of
20 confidence because I believe the pool is a
21 wonderful pool. From the newest enlistee, I have
22 great confidence in the pool. That's why I don't

1 fear a true randomization if you can make the
2 numbers work.

3 HON. SMITH: I think we're going to
4 thank all of you for being here today and
5 answering all of our questions. We appreciate
6 it.

7 COLONEL BOVARNICK: We'll just change
8 out for a couple of minutes here for the next
9 panel, the senior enlisted leaders.

10 Okay. I think we're ready. Ms.
11 Gallagher is going to introduce our next panel.

12 MS. GALLAGHER: And she's going to
13 keep it very short. I want to turn your
14 attentions to Tab 7, which contains the
15 biographies and some topics for discussion for
16 this panel. And then I want to point out that
17 this is the first time the DAC-IPAD has invited a
18 panel of senior enlisted leaders to provide their
19 perspective on an important aspect of military
20 justice, and so I am honored to briefly introduce
21 these assembled leaders before passing the floor
22 over to very brief introductory remarks, followed

1 by questions from the members.

2 First, we have Command Sergeant Major
3 Michael Bostic, the Regimental Command Sergeant
4 Major of the United States Army JAG Corps. We
5 have next Master Chief Tiffany George. She is
6 the first dedicated Command Senior Enlisted
7 Leader to the Commander of the Naval Legal
8 Services. We have Master Gunnery Sergeant
9 Christopher Pere who is the Legal Services Chief
10 of the Marine Corps. And we have Chief Master
11 Sergeant Laura Puza who is the Senior Enlisted
12 Advisor of the Air Force Judge Advocate General
13 Corps.

14 And with that, please give some brief
15 introductory background, and I'll turn it over
16 for questions.

17 CSM BOSTIC: Good afternoon, ladies
18 and gentleman. I'm Command Sergeant Major
19 Michael Bostic. First, I want to thank you all
20 for this opportunity to be here today, and I also
21 want to thank you for your support to our
22 military service members.

1 I am the Regimental Command Sergeant
2 Major for the Army JAG Corps. I currently advise
3 the Judge Advocate General for the Army on all
4 things military paralegals and all three
5 components for about 4,000 soldiers, Army
6 Reserve, National Guard, and active duty that are
7 paralegals that support attorneys throughout our
8 regiment worldwide. I've served in the Army for
9 over 29 years in and out of the branch, whether
10 that's an instructor, whether that's a first
11 sergeant, whether that's an army recruiter during
12 one point in my career, or as a battalion command
13 sergeant major where I had the opportunity to
14 advise two commanders on all things Army, not
15 necessarily JAG Corps, you know, mission.

16 Finally, I will say that, during that
17 time, I had a chance to put a different lens on
18 from being a legal mind or a paralegal in my
19 career to actually being a leader and trying to
20 help that commander figure out some of the
21 challenges that faced soldiers concerning our
22 mission, and that is, in the Army, to fight and

1 win wars or, in that particular assignment that I
2 had, was to help command support wars or support
3 a warfighter.

4 And, again, I appreciate your time
5 this afternoon.

6 MASTER CHIEF GEORGE: Good afternoon,
7 ladies and gentlemen. My name is Master Chief
8 Tiffany George. As the introduction had stated,
9 I've been in the Navy now for 22 years. I will
10 be at the 23-year mark in August. I've been a
11 paralegal now since 2003, March. I graduated
12 from the Legalman School in Newport, Rhode
13 Island. Prior to doing so, I came into the Navy
14 undesignated, so, basically, we come in and we
15 are firemen and we work in engineering with or
16 without training. However, I decided that legal
17 was my thing, wanted to do that. My mom was the
18 clerk of court for the United States Virgin
19 Islands, and that kind of led to me where I'm at
20 today in wanting to be a legalman in the United
21 States Navy.

22 While in the Navy, as a legalman, I

1 have worked more on the prosecution side, so the
2 regional legal service offices is what we call
3 them. And I was honored to be the first
4 dedicated senior enlisted leader back about two
5 months ago for the Commander of Navy Legal
6 Service Command. Basically, what we do is we
7 oversee all the legal offices throughout the Navy
8 all over the world, and we ensure that we provide
9 services to the fleet.

10 So I'm honored to be here today. And
11 also I appreciate the fact that you all decided
12 to have the senior enlisted leaders enlisted
13 representation here to provide our side of it
14 because a lot of times we forget that we are a
15 big component of this military organization. So
16 thank you so much for having us.

17 MGYSGT PERE: Good afternoon, ladies
18 and gentlemen. I'm Master Gunnery Sergeant
19 Christopher Pere. I've been in the Marine Corps
20 26 years now. I've been a legal services
21 specialist since I joined in 1997. I've served
22 in law centers all over the United States, Camp

1 Lejeune, North Carolina; Miramar, California;
2 Camp Pendleton, California; Hawaii. In those law
3 centers, I've served in trial, billets, defense,
4 administrative law, post-trial review, legal
5 assistance which is our family law practice.

6 I've served as senior enlisted advisors to staff
7 judge advocates and 3rd Marine Aircraft Wing in
8 Afghanistan in 2012, we went forward; and at
9 Marine Forces Reserve in New Orleans.

10 I've served as a recruiter in north
11 Texas, and I was a recruiter substation commander
12 in training junior recruiters whenever they came
13 out on the streets to recruit. That was 2007 to
14 2010, during the Marine Corps' ramp-up to 200 to
15 2,000 marines. So that was an interesting time
16 for us.

17 When I was in the 8, I was an field
18 manager for the enlisted paralegal MOS in the
19 Marine Corps, which is like our HR division so
20 managing the assignments of the enlisted marines.
21 I augmented the inspector general of the Marine
22 Corps during that time as an inspector, and I'm

1 currently serving as the Legal Services Chief of
2 the Marine Corps, so I support the SJA of the
3 commandant, Major General David Bligh, and we
4 oversee the legal services of the Marine Corps.

5 I'm grateful for the opportunity to
6 speak here today. Thanks.

7 CMSGT PUZA: Good afternoon. I'm
8 Chief Master Sergeant Laura Puza, the Senior
9 Enlisted Advisor to the Judge Advocate General.
10 I was recently the paralegal career field manager
11 in the Air Force. Prior to that, I was the
12 paralegal functional manager at two major
13 commands. I have also spent time as a
14 superintendent at Air Force Office of Special
15 Investigations and the Senior Enlisted Advisor at
16 the Military Commissions Defense Organization. I
17 have spent time as a paralegal and a
18 superintendent at the installation level or base
19 level legal offices, as well as a paralegal where
20 I worked in civil law military justice.

21 I have been in the Air Force about 24
22 and a half years now. I retrained to be a

1 paralegal in 2005, and I just want to thank you
2 for the opportunity to be here today.

3 MR. CASSARA: Thank you. Since we
4 have all of these great enlisted minds here, two
5 of the questions that we've been debating and
6 part of our recommendation is with regards to
7 enlisted representation on court-martial panels.
8 Current requirement, as you all know this, the
9 one-third requirement if the accused selects
10 representation or enlisted representation on the
11 panel.

12 Any thoughts about either, you know,
13 changing that number higher? Because one of the
14 issues that we've all been grappling with, as you
15 walk in with a client who is a young E-4 and
16 everybody on the panel is an E-8, E-9, or 0506,
17 and there is a perception, I think, of
18 unfairness, and sometimes perception becomes
19 reality.

20 Any thoughts about possibly increasing
21 that number or/and any thoughts about allowing an
22 accused to be tried by an enlisted panel should

1 he or she so desire? In 30 years of trying
2 court-martials, I had one case in which they were
3 all enlisted members on the panel, but that's, as
4 you know, a rarity, an exception and not the
5 rule. So I would like all of your thoughts on
6 those two issues, please. Thank you.

7 BGEN SCHWENK: That was pretty good.
8 I like the way you did that. Look to your left,
9 look to your right, don't put your finger on the
10 button. And it looks like the Regimental Command
11 Sergeant Major lost.

12 CSM BOSTIC: Ladies and gentlemen, I
13 think you all already know how we're going to
14 respond to this question. However, yes, an
15 accused can request an enlisted panel if he or
16 she chooses, and, in my experience, yes, I've
17 seen them. I've seen more than one, and I've
18 heard things about them, you know, for whatever
19 reason. But at the end of the day, the accused
20 has that right, and it's just that, it's their
21 right to request an enlisted panel.

22 In regard to the number, again, I

1 don't know of any reason why the one-third rule,
2 if it's an issue or not. I would like to see
3 what you all know to make it think it's not
4 right. And if I remember correctly, the entire
5 panel can be enlisted. I don't remember seeing
6 anything in the code that says it cannot. It's
7 just, you know, off the top of my head, so please
8 excuse me. Counsel, you know, determine, from
9 the way I see things, what the panel is composed
10 of after voir dire anyhow, so the convening
11 authority sends the requisite number of people
12 there and both counsel determine who actually
13 sits on the panel at the end of the day.

14 MASTER CHIEF GEORGE: So to answer
15 your question, I wholeheartedly believe that the
16 enlisted component on the court-martial members
17 should absolutely stay. What that number, what
18 that fraction may look like, right now it's a
19 third, as we know. However, I don't see why it
20 shouldn't increase.

21 MR. CASSARA: I'm sorry. You said you
22 don't know it why should or should not? We're

1 having a hearing issue here; that's all that is.

2 MASTER CHIEF GEORGE: I don't see why
3 it should not increase. I think there's favor to
4 increase the number. Enlisted personnel think
5 very differently than the officer component. I
6 think that's a given. I think we see that. I
7 think we understand that. There's reasons for
8 that.

9 What I think sometimes is that we look
10 at that as a disadvantage a lot of times for
11 enlisted members, whereas it should not be, just
12 based on the fact that very many years ago our
13 enlisted personnel were not as educated as our
14 officer component. But I will tell you today
15 they come in highly educated compared to what
16 they were before, so I personally believe they
17 can sit and stand head-to-toe with anyone next to
18 them with that educational background.

19 So to have them on as members is
20 valuable. They understand the intricacies or the
21 things that we do sometimes when we make the
22 silly mistakes that we make, and now they have to

1 go ahead and face the music.

2 So having them on there is very much
3 something that we need to continue. But I do
4 agree or, I should say, my suggestion and
5 recommendation would be, if we can increase it,
6 let's do that.

7 As far as the pay grade difference
8 where you mentioned that you have seen a very
9 junior E-3 and then there's an E-8 or an E-9 on
10 the panel, that is very intimidating to that
11 accused. But I don't believe that that's the
12 purpose of them being there for that to be
13 someone that's intimidating. But, however, I
14 think the person who is accused of whatever the
15 case may be, I think they still feel comfortable
16 knowing someone like them that wear the same
17 stripes understands what's happening.

18 MGYSGT PERE: So, sir, what I will
19 tell you is I don't want a panel of all enlisted
20 Marines judging me. You know, the Marine Corps
21 probably has a little different culture than the
22 rest of the services in that we eat our own

1 sometimes. I think officers see things through a
2 different lens. I think they tend to be more
3 empathetic sometimes.

4 And I think, you know, with regard to
5 the seniority of the panel, I think, you know,
6 experience, maturity, that all comes into
7 consideration. I don't think junior enlisted
8 Marines or service members on a panel is going to
9 do anybody any justice. That's just my opinion.

10 HON. SMITH: What do you mean by
11 junior? Just expand a little on that.

12 MGYSGT PERE: I'm sorry. Time in
13 service. So not necessarily rank, right, but
14 maybe members with less than three years, two
15 years in service, you know, wouldn't have the
16 hindsight that somebody with 10 or 15 years would
17 despite rank, right. They've been around,
18 they've been in a bunch of commands. Maybe
19 they've experienced what the accused is on trial
20 for with another set of circumstances before.
21 Maybe they've seen it, know somebody that's been
22 through it, something like that. Just have

1 experience and wisdom to draw from.

2 CMSGT PUZA: I don't have a problem
3 with increasing the amount of enlisted members on
4 a panel. I don't know that I would go to 100
5 percent enlisted because I do feel that officers
6 bring a different perspective as they're
7 deliberating over things that have happened and
8 just brings that open-mindedness and, again,
9 offers a different perspective to what an
10 enlisted member might seem.

11 I have also heard that enlisted
12 members are harder on their own. I think we hold
13 them to a higher standard versus an officer
14 potentially looking at a junior airman might be a
15 little more lenient on them, as well.

16 HON. WALTON: So, Master Sergeant, are
17 you saying that you don't think anyone who has
18 not been in the Corps for at least three years
19 should serve on a panel?

20 MGYSGT PERE: No, sir, I don't think
21 it should be a blanket statement, but I think it
22 should be, you know, circumstantial decision.

1 That's why I think Article 25 comes into play
2 where a commander's discretion, you know, maybe
3 there's an officer that's older, maybe they have
4 a graduate degree of some sort, right, you know,
5 they've been around the world a little bit, but
6 they joined the Marine Corps later. Maybe that
7 could be considered.

8 MS. TOKASH: Have any of you served as
9 a court-martial panel member, just for our
10 reference?

11 MGYSGT PERE: I have not.

12 MS. TOKASH: Okay. Thank you.

13 MS. GOLDBERG: Thank you so much for
14 being here. I have several questions, but I'll
15 just start with one on Article 25, picking up on
16 the conversation we were just having which is it
17 would be very helpful to hear your views on the
18 importance of the specific Article 25
19 qualifications as a basis for selection of panel
20 members. I want to set aside the question of
21 years of service right now because I think, for
22 reasons we've heard across the afternoon, there

1 are maybe particular reasons for that point but
2 wondering if you have any thoughts on either the
3 benefits or the costs of keeping Article 25 in
4 place as it is.

5 CSM BOSTIC: I'll start with that. If
6 I heard you correctly, the benefits to keeping
7 Article 25 as it is, I don't quite know what is
8 wrong with the way Article 25 is laid out. The
9 way I understand, through my experience, how
10 panels are selected by the convening authority, a
11 lot goes into that. The legal team for that
12 convening authority or that SJ's legal team, we
13 get the rosters from the command group, we
14 determine who is going to be available for how
15 long we want that panel to sit on that court-
16 martial convening order, and then we give the
17 commander a list. I don't want to say the word
18 random, but it is a scrubbed list of who would be
19 available. And then the commander, through their
20 counsel, go through and they come back with
21 whatever that number is that gets turned in.

22 And through the experience, through

1 education, through service requirements, again,
2 all of that stuff is, my words, that's our
3 standard that we try to come with that list. But
4 at the end of the day, like, there's more to it
5 than that.

6 For instance, say a junior soldier is
7 on that panel and now they've got to show up for
8 court and sit in the panel box. This is the voir
9 dire part. There's a lot of things that junior
10 soldiers have to go through, and I don't know
11 whether it's, you know, jury duty, for lack of a
12 better term, is that would I want a junior
13 soldier having to worry about when they've only
14 been in the Army a little bit of time. Just
15 because they join as a specialist, you know, they
16 could have a four-year degree and now they're
17 coming as a specialist, but we're looking at the
18 rank. Like my colleague said, yes, that's just
19 their rank, but how long have you been on that
20 rank, what does your experience bring to that
21 panel? Yes, you're an E-5 or an E-4 on the
22 panel, and, yes, the convening authority has made

1 sure you're experienced, but what does that truly
2 mean? Counsel is going to weed that out during
3 voir dire, but did we just waste that soldier's
4 time because we put them on a list that they
5 should not have been on to start with?

6 Again, I believe our process, as it
7 stands currently, works. I haven't heard of
8 anyone complain in my experience, like the panel,
9 it's just the wrong panel. Well, how did that
10 panel come about?

11 And judicial temperament is the only
12 thing I would probably question. Like, is that
13 defined anywhere? Because when I think of
14 judicial temperament, as I know my junior
15 soldiers that I've served with -- as an example,
16 like Private Bostic of 2023. What is his social
17 media page look like when we say judicial
18 temperament? Like, to me, that's a decision that
19 a person made to do whatever they're doing, but
20 now you're saying this soldier, you know, though
21 when they take the uniform off, they may not have
22 the right judgment calls, but we want them to sit

1 on a panel to determine someone's career, the
2 fate of someone's career.

3 So, again, just my first take on that.

4 MASTER CHIEF GEORGE: I think the
5 system in reference to how we wrote the Article
6 25 is it works. I think, with anything that we
7 do, there's always room for improvement, but I
8 think we have to ask ourselves what type of
9 improvement should we go towards and what's our
10 end goal? What are we really trying to change it
11 for if we were to change it?

12 Right now, I think it works in the
13 fact that we select members as, you know, my
14 colleagues here were stating, we go through a
15 very rigorous process to do so. We don't just
16 pick up a sheet of paper or a stack of papers and
17 say, here, here you go, figure it out. There's a
18 lot of detail and attention to detail that goes
19 into selecting those members.

20 One of the things I will say, judicial
21 temperament is something, as I've stated and sat
22 here before and heard in the previous testimony

1 today, is it is subjective. Do you really know
2 how to truly define judicial temperament, and
3 what does that look like by just looking at a
4 piece of paper that filled out?

5 So I think we need to be very, very
6 careful with that particular aspect of it that
7 we're looking for. Something that just came out
8 recently as of either yesterday maybe or earlier,
9 later last week, I think it came from the SECNAV
10 in reference to the military justice system and
11 the fairness or unfairness of, you know, people
12 of color. You know, that is part of the Article
13 25. That definitely needs to stay because,
14 clearly, it has shown now that we have some
15 issues.

16 So I think we need to be very careful
17 when we start peeling back on things that have
18 been working for so long. And I get it that just
19 because it's been working for so long doesn't
20 mean that we can't tweak it or change it. I
21 think we can tweak some of it, but we need to be
22 very careful in trying to revamp the entire

1 system.

2 MGYSGT PERE: I concur with a lot of
3 what my colleagues are saying right now. I think
4 Article 25, as written, is adequate but
5 absolutely can be improved upon. You know, I
6 think all of us know that judicial temperament,
7 it's ill-defined, it's not defined, you know.
8 It's very subjective. Every commander is going
9 to see that very differently. You know, senior
10 enlisted folks are going to see that a little
11 differently. What I think is a judicial
12 temperament may be different than the chief
13 master sergeant next to me.

14 I'll also offer that, you know, with
15 diversity, a lot of questions in here defer to
16 that. I think it's worth considering that maybe
17 we provide the accused or the victim an option to
18 elect then their race or their gender, similar to
19 the enlisted option to elect enlisted members on
20 the panel. Just put in the accused's lap, right.
21 That way, it's not constricting the commander,
22 it's not constricting the system.

1 CMSGT PUZA: I agree with my
2 colleagues in that I don't know what is wrong
3 with Article 25. I think it's been effective as-
4 is. I do think the best qualified by reason of
5 age, education, training, experience, and length
6 of service is built into the system and that,
7 with the rank requirement, if we keep that where
8 the members must be a higher rank of the accused,
9 I think that's built in where they're going to
10 have the time and service, the education, the
11 training, at least to the extent of the accused.
12 And so I think, like I said, it's kind of built
13 in there.

14 I agree with the judicial temperament.
15 If it's in there, I think it should be defined
16 what is the convening authority looking at when
17 they are taking judicial temperament into
18 consideration.

19 HON. SMITH: Are there any, aside from
20 the age, education, experience, length of
21 service, and judicial temperament, are there any
22 qualifications you think that a panel member

1 should have that, a qualification not included in
2 Article 25?

3 MASTER CHIEF GEORGE: I think a lot of
4 times when we have an accused and we have members
5 who haven't sat in the accused's shoes or done
6 tours where the accused may have, I think that is
7 something that we should look at and take into
8 account, the jobs that they've had, the positions
9 they've held, where they've been stationed, what
10 they were doing while they were there in that
11 particular job assignment. I think that's
12 important because a lot of times, too, people
13 commit, you know, misconduct sometimes based on
14 what they have gone through and what they're
15 currently going through. So I think that is
16 something that we should consider.

17 Also, backgrounds, where people come
18 from, things like that I think are important to
19 sometimes make a decision on whoever it is that
20 may be sitting there. It may not be the overall
21 totality of the decision point, but I think it
22 should be taken into consideration.

1 CMSGT PUZA: I don't think anything
2 else needs to be added.

3 MGYSGT PERE: I think I concur with
4 the Master Chief in that, you know, a lot of the
5 culture does come into consideration. You know,
6 culture of a command, culture of the service,
7 making sure that's reflected in the accused and
8 the panel would be important for a fair trial.

9 BGEN SCHWENK: Before I ask my
10 question, let me just pass along some of the
11 criticism we've heard about the panel selection
12 process and the ultimate end result of panels.
13 The major criticism that I've heard for 50 years
14 of the Article 25 criteria is the fact that there
15 is an Article 25. That means that why is the
16 convening authority who already decided there was
17 going to be a court-martial and decided what
18 specific charges are going to go to that court-
19 martial, he or she now turns around and picks the
20 members that are going to go judge guilt or
21 innocence and, if there's a guilty finding, the
22 sentence, although that will change in the near

1 future.

2 And so people have criticized probably
3 before I was ever in the Marine Corps, have
4 criticized that process because it's like having
5 judge, jury, and executioner in their view all in
6 one person, and the hand-picked jury does exactly
7 what they're supposed to do. And when we had
8 conviction rates that were through the roof,
9 there was, you know, there was data that they
10 could point to to support that. Now we have
11 acquittal rates that are through the roof, so,
12 you know, the shoe is on the other foot. That's
13 one criticism of Article 25.

14 And then the result, the criticism
15 we've had, we've had white female victim or
16 female victims of any race or ethnicity come in
17 and tell us what their panel was all older, from
18 their perspective at 20 years old, older white
19 males, and they didn't feel like they had any
20 rapport with any of those members who were trying
21 to understand what happened that night or that
22 day in their lives that was so traumatic to them.

1 And so they were looking for diversity on the
2 panel.

3 And then we heard from a number of
4 minority accused who were convicted by, they
5 said, all older white male panels. And, again,
6 they looked and said, you know, I don't feel that
7 there's any compatibility, any good relationship
8 between me and these panel members where they'll
9 be understanding of my situation.

10 So those are criticisms of the end
11 result, diversity of the process itself that the
12 convening authority has so much power.

13 I guess I should say that Meghan and
14 I were on the IRC two years ago where we
15 recommended some changes. But even though we
16 recommended what's now the STCs, you know, the
17 special trial counsel, we still had the convening
18 authority decide on the members.

19 So all that said, there's the
20 criticism. The issue is nobody has mentioned
21 diversity on a panel or that a panel should
22 reflect the composition of the force or anything

1 like that, and I wondered, I'll just ask
2 specifically what do you think? Should it,
3 shouldn't it? The Court of Appeals of the Armed
4 Forces had a case a number of years ago where
5 that tissue came up, and they concluded that
6 convening authorities, although it's not an
7 Article 25 criteria, convening authorities could
8 take race, ethnicity, gender, sex, into account
9 in trying to put panels together that reflected
10 the diversity of that command. Now there's
11 another case up there, and nobody knows what the
12 answer is going to be until it comes out on the
13 same issue.

14 So what are your thoughts on the
15 importance, the lack of importance, of diversity,
16 you know, race, ethnicity, gender, sex, whatever,
17 on court-martial panels? Thank you.

18 HON. SMITH: Can we also add in what
19 your thoughts are on how it's viewed among
20 enlisted members of the service?

21 MGYSGT PERE: So ladies and gentlemen,
22 I do think it's important. And, you know, to the

1 statement I made just a little while ago, I think
2 a really good idea one of my colleagues brought
3 up, one of my E-9, you know, Marine paralegals,
4 is that it should fall to the accused to elect
5 their race and gender if they so choose, right?

6 Because, you know, what's important to
7 me may not be important to my colleagues here at
8 the table. Every accused won't be different,
9 right? Some people will be indifferent to them.
10 Some people may feel very strongly. So, I mean,
11 I think to put it in the accused realm would be
12 beneficial.

13 BGEN SCHWENK: I know there's a split
14 on admin discharge boards, admin separation
15 boards. I think it was the Navy and the Marine
16 Corps that actually have a provision that says
17 that the respondent, you know, the person that's
18 potentially going to be thrown out, if a minority
19 could ask for minority representation on the
20 panel, which that's been brought up to us as an
21 example of a way to deal with this issue. And it
22 sort of goes to you having the accused, you know,

1 make that request if we wanted to make that
2 request.

3 But, anyway, that's an admin
4 discharge, but facing maybe an other than
5 honorable discharge, an honorable discharge
6 board, which is nothing to sneeze at and two
7 services, but I don't remember the two. I think
8 it was the Navy and Marine Corps. Have you guys
9 at the Army done that? Okay. Whichever the ones
10 are, that's been out. And I just throw that out
11 as something to think about.

12 CSM BOSTIC: Ladies and gentlemen, I
13 can answer -- I think there was two questions
14 thrown at us. Yes, I believe diversity is
15 important. I don't think there is any military
16 leader that wouldn't say that. However, I just
17 think we have to be careful because I know prior
18 to today we were talking about randomization.
19 Again, in the military mind, we do a lot of
20 things deliberately. Random is, you know, how we
21 operationalize random. But, yes, it is important
22 to have diversity. But, again, how do we shape

1 that for a panel?

2 And then, yes, sir, our administration
3 separation board, the respondent, on those
4 boards, can ask for a minority member sit on that
5 panel, that board, to determine their separation.

6 MGYSGT PERE: Sir, to the criticisms
7 about, you know, the commanders involvement time
8 and again, I think, it's important to remember
9 that, you know, the purpose of a court-martial is
10 to uphold good order and discipline, which is a
11 little bit different than a civilian trial,
12 right?

13 The commander owns his unit, he owns
14 his people, he owns, you know, good, bad or
15 indifferent the results of that trial. So he is
16 invested in choosing a panel that is going to do
17 justice, legit justice, whether that's an
18 acquittal, whether it's a conviction, right, he
19 owns that. So I would just offer that.

20 MASTER CHIEF GEORGE: I think for me,
21 ladies and gentlemen, I will look at diversity in
22 several lens because diversity isn't just one

1 thing. Diversity isn't just race. It could be
2 sexual orientation. It could also be the things
3 that you've done in the past, life before coming
4 into military.

5 So when you look across the spectrum
6 of any command that you may be a part of or any
7 civilian organization, there is something
8 different that you see from every person that you
9 work with. That in itself is diversity.

10 So when we look at diversity or when
11 we say the word diversity, I think we need to
12 start looking at it from many different lens and
13 not just one. I think the one that we go towards
14 the most right away when we say diversity is
15 race, but I think we need to expand that a little
16 bit.

17 Also diversity and having that as part
18 of member selection is very important because
19 diversity in itself is our strategic advantage in
20 the United States military across all services.

21 When you look at our enemies and when
22 we look at our competition out there, they are

1 less diverse than we are. And because of that,
2 there are disadvantages to that but there are
3 advantages for us because we think differently,
4 we do things differently and that's how we win
5 wars.

6 Therefore, this should be looked at no
7 different. But at the same time when we do
8 select members and we have those commanders
9 making those decisions, we also have to think
10 about those attorneys who go in the courtroom,
11 and they decide at that point for the interest of
12 the government or their client, who am I going to
13 keep? Who is going to be the member that is
14 going to decide the fate for this accused or for
15 the government?

16 And as a matter of fact, if they don't
17 like any of them, they get rid of all of them,
18 and we start over. Therefore, again, I think we
19 all talked, and I think we are all in unison
20 where I think there should be some tweaks. But
21 we also have to believe in the system that we
22 have been using that there are some benefits to

1 it. We are doing very well.

2 And our mission is to uphold the good
3 order and discipline, something very different,
4 it looks very different, than what a civilian
5 court has. And while I understand sometimes we
6 need to go into alignment with what we are doing
7 on a civil side, I think a lot of times we
8 forget. We are a military organization. We're
9 built very differently. We are supposed to be
10 built very differently.

11 And I think lately we have started to
12 cross those lines and, quite frankly, they don't
13 go together. There is a reason why it's called
14 the military and not the civil sector. If it was
15 not, we would all be doing the same things.

16 CMSGT PUZA: I would just like to add,
17 I absolutely think the panel members should be a
18 diverse group. However, for the Air Force we do
19 have some smaller bases that try courts-martial.
20 And if you are focusing so much on the diversity
21 of the panel, you may not get that, and it may
22 cut down on the randomization that I know has

1 been a topic of discussion as well.

2 So I think, again, if you do focus on
3 specifically that diversity and having certain
4 members on that panel, it won't be as random and
5 we may not have the pool of folks we are looking
6 for at some of our installations.

7 SGEN SCHWENK: Let me move -- oh, go
8 ahead, Suzanne.

9 MS. GOLDBERG: I will pose my question
10 and then we can -- you can respond if you would
11 like or we can jump to my colleague's question.
12 In light of what you said and in light of what we
13 know that, or at least what we've heard, that
14 there are perceptions that the process isn't fair
15 necessarily. And this is what Jim was describing
16 before sometimes because what our panel may look
17 like if you come in as a woman or as a person of
18 color and the panel does not, you know, look like
19 people who may have shared any of your
20 experiences, although they might have as you
21 pointed out.

22 I guess the question is do you have

1 other suggestions for improving the perception
2 and the reality of fairness of the process?
3 Like, we're looking at Article 25. We're looking
4 at randomization. We're thinking about
5 diversity. And the question is do you have other
6 ideas of places or issues we should be looking
7 that are procedural or substantive and might make
8 a difference here?

9 MGYSGT PERE: Ma'am, I think it's
10 probably difficult to get to fair for everyone,
11 right? And I don't say that lightly. I mean,
12 you know, a victim's perception of what's fair,
13 the accused's perception of what's fair, the
14 government's perception of what's fair, the
15 commander's perception of what's fair, right, I
16 don't know how we do that for everyone frankly.

17 MS. GOLDBERG: I guess what I mean is,
18 you know, to the extent that people look at the -
19 - victims may look at the process and say that
20 doesn't seem fair therefore I am not going to
21 report. I know there are other reasons victims
22 don't report. But to the extent that's one, it's

1 a serious issues, which is part of what's behind
2 the question and to the extent people are either
3 convicted or not and feel the -- you know, in a
4 broad way that the process is unfair that's a
5 serious issue as well.

6 And I take your point, right? You
7 know, there is never going to be consensus on
8 fair. By fair I don't mean happy. I mean, a
9 sense that people get a fair shake and that their
10 arguments are heard with an open mind and the
11 evidence is evaluated with an open mind.

12 CSM BOSTIC: Ladies and gentlemen, I'm
13 going to comment first and then I will entertain
14 a question. As I sit here and think about words
15 like perception and what the accused thinks when
16 he or she looks across the courtroom and sees
17 that panel, and I heard someone say I think
18 earlier today, yeah, an all-white panel.

19 Well, does the accused know or not
20 that maybe that panel member is white on the
21 surface, but maybe they are married to someone of
22 color. You know, again, it's just that optic,

1 that visual.

2 Fairness, it's just that. I mean, I
3 think our processes are fair. I think our
4 systems are fair. But it also turns into what
5 that person who is viewing things. If I'm an
6 accused and I was acquitted by an all white
7 panel, again, am I going to complain? Again, I'm
8 just being -- that senior enlisted leader is
9 going to throw this stuff at you. Or if I'm, you
10 know, guilty of all charges, if that's the case,
11 then yes, I'm upset. You know, innocent until
12 proven guilty, yes, but I'm upset because I don't
13 think I have the right panel. You know, what did
14 I say to my attorney to get whoever impaneled at
15 the end of the day?

16 So again, I say this, and I think all
17 of my colleagues are saying it. We're in the
18 military. We have a system of military justice.
19 It's in our title, military, operationalized.
20 It's got to have a task. It's got to have a
21 purpose.

22 And, you know, if you give us

1 something, if you make us change something,
2 change it to what fits us when we put our uniform
3 on, when we wear the cloth of our nation, when we
4 put our flag on our shoulder, make it fit us and
5 not someone that hasn't served, someone that
6 hasn't gone through basic training, you know, to
7 be, my words, broken down and then built back up
8 in terms of their personal courage and their
9 esteem and their honor and then go through their
10 training and do those things that military
11 personnel are required to do because at the end
12 of the day, yes, I'm sitting here today.

13 A month from now I could be overseas
14 carrying a weapon wearing 50 pounds of gear that
15 I don't wear now, having to sprint 230 yards, and
16 I want to trust that the person to my left and
17 right is trusted, you know, to have my back. And
18 like I trust my commanders to make decisions on
19 behalf of all of my teammates.

20 Again, so I say that as a yes. We're
21 a military structure, a military culture. There
22 is a lot that you all -- some of you have served,

1 but there is a lot that some people don't
2 understand. And our commanders are empowered to
3 do that, to be in charge and make those decisions
4 that they are paid to do with everybody in mind.
5 You know, not everyone is going to be satisfied
6 with everything that commanders do, much less
7 judges do. What's important today is not
8 important yesterday or tomorrow.

9 And if we go about things the way we
10 are going about things, like my colleague to my
11 left said, try to change the military identity,
12 but at what end state? What end state? To get
13 at their readiness or is it to make us happy to
14 be in uniform? Again, we have to do challenging
15 things.

16 MASTER CHIEF GEORGE: I will have to
17 agree with the members here, too, in that fair is
18 different depending on what side you are sitting
19 on. And it is not just one blanket thing either.
20 And I think depending on who you talk to,
21 depending on the outcome, you will hear different
22 as to what fair is.

1 So I honestly don't think that you can
2 say that one is more fair than the other.

3 Perception is just that, a perception. And just
4 because someone has a perception, that's their
5 opinion is what I will call it, not necessarily
6 perception. It's their opinion of something.

7 But just to say blanket in my perception is that
8 the process wasn't fair, well, how?

9 I think we need to start challenging
10 people on well, how was it not fair? How do you
11 know it wasn't fair? What does your fair look
12 like? What is your definition? But I don't
13 think that we can just say that the system is not
14 fair without understanding from whoever it is
15 that is saying it's not fair, why they're saying
16 it's not fair, what made it not fair.

17 CMSGT PUZA: Nothing to add.

18 HON. SMITH: So there has been a lot
19 of discussion about randomization of the
20 selection process. So moving away from Article
21 25 and that criteria, what are your thoughts on -
22 - I mean, I know you have all kind of said the

1 same thing, which is that you think the Article
2 25 criteria is appropriate but recognizing that
3 Congress has said look at randomization as well.
4 What are your thoughts on that in terms of a
5 selection process?

6 MASTER CHIEF GEORGE: So I don't see
7 an issue with randomization on its face. I see
8 an issue with it in how we execute it. And every
9 service that is represented here today, that
10 randomization will look very different in how
11 it's executed.

12 One of the things I saw before I came
13 here today and some of the questions that were
14 potentially going to be addressed was an alpha
15 roster. Well, an alpha roster in the Navy is
16 completely different than an alpha roster in the
17 Army, in the Marine Corps, in the Air Force.

18 And the way that we will select based
19 on randomization is very different. We have to
20 start asking ourselves, okay, we can do whatever
21 it is that you ask us to do, but it may become
22 entirely -- it may be presented to you entirely

1 different than what you are really asking for.

2 What system are we going to use to
3 randomize and select these members? Where are
4 they coming from? Are they an operational
5 forward deploy capacity? Are they out in 5th
6 Fleet? Are they in Japan in the Pacific region?
7 Where are these members coming from? How are we
8 going to pay for them? Money is always a thing.
9 Budgets are always cut. And the first thing they
10 ask is how are we going to pay for it. If money
11 is no object, then I think we will get there from
12 all sides of the earth, however, at what cost to
13 the mission?

14 And, again, where are we looking for
15 these members to come from? What system are we
16 randomizing and selecting them from? And when we
17 do so, there are questionnaires that need to be
18 filled out in order for you to make a decision
19 because is it just randomize select a name and
20 you bring them in the courtroom and you ask them
21 the questions and that's how you decide your
22 member?

1 So we have to look at the second and
2 third order effects when you talk about
3 randomization in the selection process.

4 CSM BOSTIC: Something I would like to
5 offer in terms of the randomization, and I think
6 my colleague was hitting at it. This
7 randomization, is it -- it's coming from what I
8 understand. Is it going to be AI-based? Is it a
9 database? Yes, all the rosters are different.

10 And when it comes to the legal office,
11 currently my junior paralegals are the ones
12 separating all of these rosters and, you know,
13 these supporting documents for the convening
14 authority to see what experience these potential
15 panel members have. But the resources, the
16 people, again, you give us something new that you
17 want us to do, the thing you want us to do, but
18 you don't give us the ways and means to get it
19 done.

20 This is going to cost. For every OSJA
21 throughout the Army I can speak for, is going to
22 need a couple paralegals, maybe an attorney, to

1 run this database, to run this system to
2 randomize, you know, the selection process. So
3 please keep that in mind because otherwise it is
4 going to be very taxing. And to the extent that
5 we are going to be able to execute randomization
6 is going to come at a cost. You know, we don't
7 have enough paralegals to do a lot of things we
8 are charged to do now. So please keep that in
9 mind when you push us to make this happen. Yes,
10 I'm asking for people.

11 And as I think about this
12 randomization more and the court-martial
13 convening orders that are generated, maybe a way
14 to operationalize it is, yes, you take the CMCOs
15 that are currently in place, you put those in a
16 bucket or in a database so you randomize all of
17 those that have already been screened and
18 selected. You know, does that meet the
19 definition of random? I don't know.

20 But then again, I know we're exploring
21 randomization, but has anyone defined
22 randomization? Because again, I've been privy to

1 something called drug tests in the Army. And we
2 use the word random for that as well. And I'm
3 not going to elaborate how we do that, but again,
4 that's another we tap at randomization at least
5 in the Army.

6 So, again, I would prefer, yes, you
7 give us a definition which would mean
8 randomization. And before that, I would even
9 offer that, please, give us time to execute and
10 assess some of the things you've already told us
11 to execute, you know, as a military justice
12 system for the Army, and, I'm sorry, all of my
13 teammates here at the table. We've got a lot we
14 got going right now.

15 So give us some time to execute and
16 assess what you've already told us to do and then
17 give us some time to focus on whatever you define
18 randomization to be and then get at the
19 randomization.

20 MGYSGT PERE: So, ladies and
21 gentlemen, my concerns about true randomization
22 in the Marine Corps, the Marine Corps is a very

1 young service. And to the points I alluded to
2 earlier in the conversation, you know, if you
3 throw, you know, an alpha roster into the
4 gonkulator and it spits out, you know, the panel,
5 you're going to have a lot of, you know, lance
6 corporals, corporals four years into the service,
7 lieutenants, captains four to six years in the
8 service on our juries and that concerns me. Just
9 the lack of wisdom, the lack of hindsight, the
10 lack of experiences, I'm not sure that's a fair
11 panel.

12 HON. WALTON: Other than additional
13 funding and additional personnel or whatever,
14 what recommendations, if any, do you all have
15 about what we should recommend that would improve
16 the justice system in the military, if any?

17 MGYSGT PERE: So, folks, I mean, my
18 personal take is that the commander's perspective
19 is important. And I think the more we restrain
20 their hands, the worse off we're going to be. I
21 think that, you know, they are charged with good
22 order and discipline in their unit, and they own

1 that process.

2 You know, my experience has been that
3 they care. They try to get it right. They try
4 to stay within the parameters of Article 25 as it
5 is written today. And, you know, they want to do
6 justice to the accused, to the victims. They
7 genuinely do. I think they lose sleep over it at
8 night.

9 So, I don't know. I think, you know,
10 going back to the diversity issue, I think that
11 could be beneficial. I really do think, you
12 know, putting that option on the accused is an
13 important consideration.

14 MS. TOKASH: Can I follow-up on that?
15 This is Meghan Tokash speaking. Playing devil's
16 advocate, what is the difference between trusting
17 young enlisted service members with their
18 military occupational specialty competency and
19 their ability to sit, listen to the receipt of
20 facts in evidence, follow a judge's instruction,
21 deliberate and arrive at findings?

22 MASTER CHIEF GEORGE: I think there is

1 a lot to look at in reference to what you are
2 asking because as much as we would like to think
3 an 18 year old is an adult by the law, the way
4 that they think and operate daily is not even
5 after basic training. So it takes a while for
6 them to get up to speed in what adulthood is and
7 what adulting is.

8 And I would go as far to say, being in
9 the military for 22 years, you would be surprised
10 in what you see a 25-year-old and what a 30-year-
11 old do. And you will shake your head and ask
12 yourself how long have you been away from 18?
13 Because the truth is we have some folks who we
14 work with on law side that need a little more
15 attention to develop.

16 And I think we, as military personnel,
17 as leaders, we are entrusted by those parents to
18 take care of their child, their sons and
19 daughters and that's what we do. But at the same
20 time, they don't send them to us prepared. Some
21 of them don't have the maturity level that we
22 would want them to be in order to sit on a

1 members panel and be the decision-maker for an
2 accused.

3 So that in itself is, I think, the
4 reason why that you have to be careful in that.
5 And especially in the Marine Corps, they're
6 young. And their level of competency at that
7 particular time, they will get there, but they
8 are not there yet. And to have them to make the
9 decision on someone's life, I think we are
10 playing with fire.

11 MS. TOKASH: Again, playing devil's
12 advocate to follow-up, what's the difference when
13 you compare that to being on a civilian jury? I
14 mean that, you know, comparatively speaking --

15 MGYSGT PERE: Well, ma'am, if I could
16 --

17 MS. TOKASH: Please.

18 MGYSGT PERE: The difference in my
19 mind is that, you know, someone's career is
20 likely over if they are sitting at a court-
21 martial, and they are convicted. You know, in
22 the civilian world that may not be the case.

1 I mean, you've got service members who
2 have deployed. You've got service members who
3 have been in, you know, the service for a decade,
4 two decades. And you're going to entrust that to
5 someone that's been in for three or four years
6 that can't even share their face? I don't think
7 so. No, ma'am. I'm not convinced.

8 MS. TOKASH: So if I'm hearing you
9 correctly, there is an emphasis on the tether to
10 one's career/livelihood in the military and
11 that's the distinction that you're making, if I
12 read that right.

13 MGYSGT PERE: I think that's a
14 consideration. Yes, ma'am. I think it's just an
15 immaturity issue with a lot of our junior service
16 members. Officers, too, I mean, they are not
17 excluded from that. It takes a while, to the
18 master chief's point, to grow up and be able to
19 be an adult and figure out your way in the
20 military.

21 I mean, this is a unique career path,
22 right? And, I mean, it is a brave soul that

1 chooses it. And there are those that are very --
2 you know, they have a lot of aptitude, and they
3 can do well in their particular skill set and
4 their job, but they are still children for a long
5 time, yes, ma'am.

6 CMSGT PUZA: Ma'am, I would also like
7 to add when you are speaking of junior folks, we
8 have a lot of things in the Marine Corps courts-
9 martial that it's a crime in the military where
10 in the civilian sector it's not. So depending on
11 how long they've been in or what their experience
12 is, something that someone is being court-
13 martialed for, they may not think is a big deal
14 even if the judge is explaining it to them and
15 what they did wrong, again, they just -- junior
16 folks are going to potentially look at that
17 differently.

18 But, again, I think that is where the
19 diversity piece comes in and having the different
20 ranks, the officers and enlisted, and allowing
21 the different perspectives to come into play.

22 CSM BOSTIC: Ladies and gentlemen, I

1 would add in agreeance with my colleagues, I
2 don't know to what extent a junior enlisted
3 member's voice will be heard in the panel, in the
4 deliberation room. Because I know enlisted
5 teammates, and yes, officers enlisted when they
6 first join raise their hand and go to the
7 training. Everybody is different.

8 And no offense, I've seen officers not
9 do things that enlisted do better, not
10 necessarily shaving, but putting a uniform on.
11 Like you were trained how to do that. Why are
12 you not doing that right today? Enlisted
13 members, you know, it's a culture that we have.

14 And when in terms of the education,
15 their ability to conceptualize the judge's
16 instructions and the elements of defense, I mean,
17 we've already got, in my words, a measure for
18 that. And that's the ASVAB. The ASVAB tells us
19 whether they can do that or not.

20 So, yes, if they are impaneled and
21 they are junior, yes, we would expect them to do
22 it. But the commander already kind of sets us up

1 for that. You know, this soldier just arrived
2 here three months ago. Why would they be on, you
3 know, that CMC? They don't know what they don't
4 know.

5 Another example, say, there's a junior
6 soldier impaneled. Say they are 20 years old,
7 and it's a DUI case. They are not even allowed
8 to drink. They don't know what being impaired by
9 alcohol means legally, and they probably wouldn't
10 admit to it. Or say there is a junior enlisted
11 that is impaneled and they've got behavioral
12 health challenges that only their commander is
13 supposed to know about and they are, you know,
14 taken some sort of way whenever this certain
15 piece of evidence is presented before them. And
16 they just break down in tears in the panel box.

17 You know, our soldiers are, my words,
18 vulnerable to an extent by giving them the
19 opportunity to do something that some of us may
20 feel they are not ready to experience yet. Yeah,
21 we are all in the business of protecting our
22 soldiers, no matter who they are.

1 So, again, I just think we have to be
2 careful when it comes to our military culture and
3 those things we've earned and those things that
4 we take a lot of pride in before we just say,
5 hey, we'll just change this rule and let
6 everybody that wears a uniform get this
7 opportunity to do something that they are
8 probably not even qualified to do and then we end
9 up wasting their time and making their experience
10 -- their first time to experience this one of the
11 worst experiences they probably had in their
12 life.

13 HON. SMITH: All right. I don't see
14 that anyone else has any questions. So thank you
15 very much for your time and being willing to come
16 in and answer our questions. Thank you.

17 COLONEL BOVARNICK: Chair Smith, we
18 have two public commenters that are here live so
19 they each have five minutes. So if you want to
20 just proceed right with that. Okay? We'll let
21 the panel members depart here for a couple
22 minutes and then we'll bring up our first public

1 commenter.

2 Okay. We'll get started with the
3 public comment in a minute here. Is Master
4 Sergeant Silva here? Okay. For our public
5 comments, Chair, we have two presenters in
6 person, Master Sergeant Retired Lisa Silva, U.S.
7 Air Force Retired. And you have five minutes,
8 ma'am.

9 MS. SILVA: Good afternoon. Again, my
10 name is Lisa Silva. I just want to say really
11 quickly, I realize this is probably one of the
12 most -- the hardest, but the most important thing
13 I will ever do in my life. And I feel the same
14 way about you.

15 I don't want to embarrass or bash the
16 military that I love nor the Air Force that I
17 honorably served for 20 years, and I was proud to
18 be a part of. With that being said, and not to
19 contradict myself, you have no idea how long I
20 have wanted to do this, privately speak out. But
21 I have been afraid of retaliation on so many
22 levels that I don't want to get into in this

1 forum.

2 I am simply here before you today
3 because I think it is time that I finally spoke
4 out about all that I know about this sensitive
5 issue. The American people have heard only one
6 side of the story.

7 It hurts my heart to no end to see all
8 these injustices that still occur to this day and
9 no one bats an eye. All the while unfortunately
10 there are some military leaders that because of
11 the political pressures have aborted their
12 ethical obligations and have turned their backs
13 on our service men and women and the families
14 that faithfully served alongside them.

15 I don't want to be in the limelight.
16 I want absolutely no media attention. I would
17 prefer to be on the four acres in the country
18 that my husband and I have retreated to still
19 simply attempting to heal from the nightmare
20 we've personally and painfully lived through.

21 I also don't think it should be my
22 responsibility to have to come here to speak to

1 you today, but all the same my husband and I
2 drove 1,700 miles one way to get an opportunity
3 to personally get your attention for five
4 minutes.

5 Most people come here to speak about
6 their own case or their loved ones. Five minutes
7 isn't enough for them, and it is not even a
8 fraction of the time I need from you to tell you
9 about all the corruption I have witnessed.

10 So really quick, I don't know if
11 you've gotten my bio or not. But again, I served
12 in the military. I was raped when I was 17 years
13 old before I came in the military. My husband,
14 my fianc, at the time, was falsely accused and
15 wrongfully imprisoned in 2015.

16 And after that happened, I didn't know
17 what to do. I started researching some cases.
18 There was no Innocence Project for the military.
19 And the Innocence Project won't help military
20 cases because it is USMJ and other issues, I'm
21 sure.

22 So I sort of helped co-found one

1 called Save Our Heroes. There have been people
2 that have testified from Save Our Heroes who have
3 submitted to your committee prior to.

4 I came here in person hoping that you
5 will believe when I say I need your help, and
6 they need your help. We need to ensure that this
7 does not continue to destroy anyone else's life
8 like it has ours and others who have been
9 affected by the false allegations and wrongful
10 conviction in the military justice system.

11 I am requesting that whatever powers
12 may be to investigate to where it went wrong and
13 fix what has happened even if it is done quietly,
14 we owe it to those that have lived through these
15 injustices in an attempt to make them whole
16 again, not to mention the innocent service
17 members that are destined to follow behind if we
18 don't fix it and rebalance the scales.

19 So, again, I'm someone that it has
20 personally happened to. I was also -- I didn't
21 mention. I was a victim advocate for 4-1/2 years
22 at Lackland Air Force Base. So for those of you

1 that don't think false allegations happen or it
2 is not very common, you have to look at what the
3 motive is. You know, there is so much motive in
4 the military.

5 You know, it's all over in the media.
6 Believe all victims. There are VA benefits. We
7 know what motives are. There are divorce
8 disputes, custody disputes. And I want to point
9 out that there are some people that have actually
10 contemplated taking their lives or taken their
11 lives that have been falsely accused.

12 This book right here is a sergeant
13 first class that was in the Army that actually
14 attempted suicide. He wasn't successful
15 thankfully. But his case was before SOH existed.
16 And we have -- we've talked so many people off
17 the ledge, 1:00 a.m. phone calls, all the intake
18 forms that we get to our organization. We have
19 no funding whatsoever because no one -- we've
20 lobbied Congress, contacted Congressmen,
21 Senators, and nobody will hear that side.

22 I personally came here on my own money

1 a few years ago and went to 13 offices and
2 everybody says the same thing. We know it
3 happens, but there is nothing we can do. So I
4 don't understand. As someone this has happened
5 to if I blamed the wrong person and they went to
6 prison, I would feel guilty. I wouldn't be able
7 to sleep at night. And you see those cases.
8 There are cases out there that people are
9 benefitting from this. And they are false
10 allegations, but, again, no one will help.

11 The victims are the complainants. You
12 know, they get pro bono lawyers. Their mental
13 health records are protected. Our servicemen
14 can't even go to a mental health doctor without
15 worrying about his record being brought up
16 against him.

17 We have people that they've gone to
18 chaplains. I've heard people tell me that if it
19 wasn't for the chaplains or our organization,
20 they wouldn't be here anymore.

21 I have so much to say. I had 144
22 pages. That's why you don't have a submission

1 from me, but you will. And I don't know exactly
2 what my time is left.

3 But I just want to say my husband
4 honorably served our country for 28-1/2 years.
5 Almost three years of it was in a prison cell
6 wrongfully convicted. Thank God it was
7 overturned, and he is home safe with me. But he
8 will never get justice or he never got justice.
9 I won't feed you a line and tell you I don't want
10 that remedied as well, but that's not why I am
11 here.

12 It's all these stories, all these
13 families. You know, I created this organization
14 and said I would always fight. I actually had to
15 stop doing it for four years because I couldn't
16 heal myself. And I just started doing it again
17 in February when I got a linked case of a
18 civilian that was wrongfully convicted by someone
19 that convicted somebody in the military, a VA
20 nurse and an Air Force master sergeant.

21 I am asking this committee to have a
22 third-party investigator look into U.S. v.

1 Collins. And if this is what I'm seeing and
2 there is validity to it, then they need to look
3 into a lot of the other ones. And if you look at
4 it and you think that what I am saying is
5 unfounded, I will go away, and the military can
6 handle the 1:00 a.m. calls. That's how
7 passionate I am about this.

8 I want to make sure that my brothers
9 and sisters get justice, you know, whether it's
10 the accused or, you know, the complainant. And I
11 don't know. I'm sorry. I'm nervous. But,
12 again, I'm passionate about all of this. You
13 know, there is a victim-centered investigation.
14 There is misconduct in handling these cases.

15 Everything that these families have
16 been saying these submissions about the falsely
17 accused, I agree with everything they are saying.
18 I can prove it to you. That's part of my 144
19 pages that will end up getting to you, and it
20 will probably be more.

21 COLONEL BOVARNICK: Master Sergeant
22 Silva, do you have any kind of concluding

1 comments because we will provide your written
2 stuff once it is properly redacted if you just
3 want to wrap up and then if the members have any
4 questions.

5 MS. SILVA: Yes, sir. Like I just
6 said, I am pleading to you all, like looking in
7 your eyes. Just know that this is also an issue.
8 I realize that there are people that are sexually
9 assaulted in the military, but it is not to the
10 scale that is being publicized. And I am a
11 female that served, you know. And that's pretty
12 much it. Thank you for your time.

13 HON. SMITH: Thank you.

14 COLONEL BOVARNICK: Oh, Ms. Santucci
15 is going to provide public comment. I know her
16 husband is here as well, but over to you, ma'am.

17 MS. SANTUCCI: I want to thank you all
18 for letting me talk to you today. I am the
19 mother of Army Private Anthony Santucci. I told
20 myself I wasn't going to cry. And I am the
21 President of Free Our Warriors.

22 I want to know how you can fix one

1 thing by totally breaking something else. That
2 is exactly what happened when the changes were
3 made to sexual assault, how it was handled in the
4 military.

5 There needed to be changes. Women
6 were being raped. It was being ignored. But
7 instead of fixing it and bringing everything to
8 the scales equal, in doing so, the scales have
9 tipped totally towards the accuser and away from
10 the accused.

11 I stand with any woman who was
12 sexually. As a woman, I can only imagine what
13 that would be like. But it is also a horrible
14 thing to have one person wrongfully convicted.

15 I want you to know that if my husband
16 and I thought for one second that our son was
17 guilty, I wouldn't be here talking to you. But
18 after reading his record of trial many, many
19 times, the investigative notes, and during our
20 own investigation, we know that he is innocent.

21 Unfortunately, he joined the Army
22 right when all those changes were being made. He

1 was just 21 years old. A 27-year-old married
2 mother of four approached him at a bar. They had
3 drinks. They were seen dirty dancing. They were
4 seen making out. She asked him to go back to his
5 barracks and play.

6 They drove her vehicle back to his
7 barracks. They had consensual sex. At one
8 point, she said she didn't want him to take off
9 her shirt because she didn't want him to see her
10 C-section scar.

11 So they concluded their having sex.
12 And he asked for her phone number. She said she
13 couldn't give that to him because she shared that
14 phone with her husband. They kissed goodbye.
15 She got in her car, and she drove herself home.

16 Why she ended up calling this in as a
17 sexual assault is still baffling to me. She had
18 what back in my day we called hickies. How is
19 she going to explain that to a husband? Or as
20 she told the operator when she called 911, I need
21 the morning after pill. Is that the first thing
22 that you lead with when you've just been raped?

1 No.

2 She said she didn't remember what bar
3 she was at. She didn't remember who the guy was.
4 And I've been a nurse for 42 years, and it has
5 always bothered me that she allowed a full exam,
6 a full pelvic exam. She allowed pictures. She
7 allowed them to swab for STDs. She refused,
8 specifically, a DNA swab. If you had just been
9 raped, wouldn't you want to know who that was?
10 That's the only way you're going to find them if
11 you don't know who they are.

12 I think in the back of my mind I've
13 always thought that maybe she thought if I say
14 that I was sexually assaulted and that's how I
15 can explain how I have these marks on me and then
16 it will just go away. But it didn't go away. It
17 ended up with my son being convicted and
18 sentenced to 20 years at Fort Leavenworth.

19 Our lives have been on hold for nine
20 years. We have spent over \$300,000 trying to get
21 justice for our son. It's not about the money.
22 We have missed so much of his life. He could

1 have been married by now. He could have had
2 children, our grandchildren. He could have owned
3 his own business. That was always a dream of
4 his. But instead, he is sitting in this small
5 8x10 cell.

6 He has missed out on seeing his
7 brother. His nieces and nephews have grown up.
8 He's missed all of that. His three best friends
9 were his cousins. They are all married. One has
10 a child. And Anthony still sits here.

11 This has shaken my faith as a
12 Christian woman. I have prayed so hard for
13 justice. At one point I prayed all day, the
14 entire day, every free moment of my day. I came
15 home, I was so mentally exhausted, I had to go to
16 bed. But I have come to realize that maybe God
17 has a bigger plan for Anthony. Maybe if this
18 hadn't happened, instead of finding out he was
19 going to prison, we would have gotten that knock
20 on the door that many families dread that their
21 loved one was killed.

22 I have to believe in God's bigger

1 plan. Maybe his plan is to use Anthony's case to
2 help bring to light this injustice and help right
3 this wrong. My husband and I are 64 and 68,
4 respectively. Our time on this earth is growing
5 short. And it is heartbreaking that we have
6 missed so much time with our son. He has another
7 10-1/2 years left of his 20 year sentence. My
8 worst fear is that one or both of us will pass
9 away before he is finally free.

10 My husband and I don't feel that the
11 military should be handling sexual assault cases.
12 I have listened to everybody who has talked here
13 today, and I don't agree. I think this should be
14 held in a civilian court. There is too much
15 political pressure on commanders to make sure
16 that they get convictions, to make sure that they
17 have good numbers that show that the military is
18 going strong on sexual assault.

19 The investigators and the prosecutors
20 will do anything to get convictions, even going
21 so far as to bullying women into becoming victims
22 if there is not enough evidence otherwise.

1 I have letters from two women with me
2 who say just that. And their letters were
3 ignored when they turned those letters in. It
4 doesn't matter that there are innocent men being
5 sent to prison for crimes they didn't commit.

6 Having an accuser labeled a victim
7 even before there has even been an investigation,
8 how can that be? You're not a victim until it is
9 proven you are a victim. Just because I say
10 something happened does not mean it's true and
11 not just because I'm a woman.

12 A woman does lie. I have worked in
13 the female field my entire life. And I can tell
14 you for sure women will lie, they will connive,
15 they can be evil. That's not to say that women
16 are not sexually assaulted because they
17 absolutely are. But there has to be equal
18 justice on both sides.

19 In the military -- with the convening
20 authority, which they were just talking about,
21 the convening authority is the one who decides to
22 take this case to court-martial. They are the

1 ones that pick the jury basically, which you've
2 already discussed. And the convening authority
3 when they feel that this shouldn't have been a
4 conviction, they're afraid for their career so
5 they won't say anything. There has been evidence
6 to that.

7 The convening authority is the very
8 person who decides on the first clemency. In my
9 son's case, there were three jurors that were in
10 the same chain of command. One of them had a
11 prosecutor representing him in a different
12 matter. In what world is that right?

13 If a commander does decide and he has
14 political pressure to overturn a case, we have
15 politicians who say this sends the wrong message
16 to victims. Is it only justice if the accused is
17 convicted?

18 There is no investigation done on
19 behalf of the accused. Everything is done to try
20 to make sure there is a conviction. The accused
21 is guilty until proven innocent.

22 In my son's case, four times during

1 his case, the jury was told that if you can find
2 him guilty by a preponderance of the evidence --
3 the prosecutor told them that if more than likely
4 than not, you think Santucci did this, you can
5 convict him. This goes against the
6 constitutional standard of beyond a reasonable
7 doubt, which is now required in all 50 states and
8 is in direct violation of his constitutional
9 rights.

10 We are asking for there to be an
11 independent review of these cases. We are asking
12 for justice for our son and any others who are
13 wrongfully convicted. We want those responsible
14 for these injustices held accountable.

15 You've heard my voice now, and I want
16 you to hear my son's voice. This is an excerpt
17 from something he wrote when he had been in
18 prison about six years.

19 In 2012 at the age of 20, I was the
20 first member of my family to become a paratrooper
21 in the Airborne Infantry. In 2013 at the age of
22 21, I became the first person in my family to be

1 falsely accused of sexual assault.

2 Less than a year later, I sat in front
3 of a judge, who with the wave of a hand took away
4 20 years of my existence. That was 6-1/2 years
5 ago. I have had many people tell me I should
6 just go ahead and accept responsibility so I can
7 get out sooner. I would rather remain true to
8 myself.

9 In order to take the sex offender
10 class at Fort Leavenworth, Anthony will be
11 required to sign paperwork saying he is guilty.
12 He has taken every other class that is required.
13 One of the reasons given for denial of his last
14 parole was that he hasn't been properly
15 rehabilitated, referring to him having not taken
16 that class. He has told us he will spend his
17 entire 20 years before he admits to something
18 that he didn't do.

19 Only in the military prison system is
20 this a requirement. No other prison in the
21 United States requires this.

22 COLONEL BOVARNICK: Can you start to

1 wrap up? I know you're --

2 MS. SANTUCCI: I have four sentences.
3 Making someone admit guilt should be against
4 their constitutional rights. At the end of the
5 day, I'm just a mom trying to get justice for my
6 son and hopefully helping others get justice as
7 well.

8 It might be too later for my son, but
9 it's not too late for other mother's sons. And I
10 wonder why is there no committee that's holding
11 meetings for the wrongfully convicted? Why do we
12 only get five minutes to speak in a two day
13 hearing or meeting? Please take the steps that
14 need to be taken to bring the scales of justice
15 back into equal balance. Thank you.

16 HON. SMITH: Thank you.

17 BGEN SCHWENK: Both of you should know
18 that we all appreciate your comments. And number
19 two, we have heard from other people previously
20 with similar concerns. And there was one panel,
21 people who made the statements at the end of our
22 meeting, who recommended that we look at

1 conviction integrity units.

2 And so at our meeting, the last or the
3 meeting before that, one of the subcommittees was
4 directed to look at that issue. So I'm not the
5 chair of that subcommittee, but I'm on it. And
6 so I'm sure as we start looking into it later
7 this year, we will be contacting you to make sure
8 we have all the information that you want us to
9 consider and then we will evaluate whether we
10 think there should be such a thing and if so, how
11 they should proceed. So I do want you to know
12 that we do listen. Thank you.

13 MS. SANTUCCI: I appreciate it. Thank
14 you.

15 MS. TOKASH: Can I make one follow-up?
16 This is Meghan Tokash. You know, this committee
17 is the Defense Advisory Committee on the
18 Investigation, Prosecution and Defense of Sex
19 Assault in the Military.

20 And I don't want to speak for
21 everybody, but I think we are very loyal to that.
22 And part of that important piece of our mission

1 is to make sure that we hear opinions and voices
2 like yours.

3 So thank you for being here today. It
4 is very important, and your voice is important to
5 our goals and what we do here as a federal
6 advisory committee.

7 COLONEL BOVARNICK: Judge Smith, I
8 think that's it for the day.

9 MR. SULLIVAN: This public meeting is
10 closed.

11 (Whereupon, the above-entitled matter
12 went off the record at 5:57 p.m.)
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20
21
22

alternates 153:21
Amendment 141:16
America 106:3 133:3
American 148:18 217:5
amount 49:12 96:14
 175:3
ample 19:7
amplify 97:1
analogize 139:11
analysis 27:8 139:5
analytical 26:22
and/or 76:9 152:4
Anderson 1:13 9:2
 144:10
anecdotal 136:15
anecdotally 22:17 84:7
Angela 2:8
Anita 2:8 52:14
Ankele 2:17
announce 8:1
answer 10:12 42:5 53:4
 63:7 71:3,18,18 87:14
 93:19,20 94:20
 127:16 150:1 153:18
 157:8 171:14 188:12
 190:13 215:16
answered 62:19 92:3
 123:3
answering 162:5
answers 52:21 65:19
 93:19
Anthony 224:19 228:10
 228:17 233:10
Anthony's 229:1
anticipate 80:7
antiquated 141:3
anybody 114:17 174:9
anybody's 45:20
anymore 98:4 100:6
 127:2 221:20
anyway 107:15 190:3
apart 13:20 132:9
apologies 34:1
apologize 129:8
Appeals 188:3
appear 136:3
appease 148:12
appellate 103:13
 152:11
Appendix 8:6
apples 130:11
applicability 57:22
apply 26:13 125:20
 141:10 143:11
appoint 70:2,6,11 71:6
 71:14 72:2
appointing 54:20
appointment 108:18

appreciate 51:7 86:22
 104:8 118:13 157:11
 162:5 165:4 166:11
 234:18 235:13
approach 91:22 123:18
 139:5
approached 226:2
appropriate 12:12
 29:18 66:12 68:21
 69:2 76:2 111:9 202:2
appropriately 66:7
approval 8:21
approve 19:14
aptitude 212:2
archaic 85:1
archaically 81:18
area 22:9 46:14 118:5
 145:7
areas 46:15 116:16
argued 122:7
arguments 197:10
arising 55:20
Arlington 1:9,10
armed 1:2 4:7,15 5:7
 8:10 52:17 188:3
army 2:2,3,3,9,10,13
 9:16 10:20 16:9 52:7
 53:8 62:1 66:19 69:18
 71:19 73:9 76:6 80:22
 86:14 88:20 91:20
 101:21 102:3,11
 103:9 105:16 119:21
 146:4 163:4 164:2,3,5
 164:8,11,14,22
 178:14 190:9 202:17
 204:21 206:1,5,12
 220:13 224:19 225:21
arrive 208:21
arrived 214:1
Article 6:2 8:4 69:19
 70:15 75:8 77:5 78:12
 79:2 100:15 104:2
 106:10 109:1 112:21
 114:19 115:4 117:6,9
 120:10 122:4 124:14
 124:18 131:9,9,19
 132:6,6,15 144:15
 147:8 158:20 159:2
 159:11,19 176:1,15
 176:18 177:3,7,8
 180:5 181:12 182:4
 183:3 184:2 185:14
 185:15 186:13 188:7
 196:3 201:20 202:1
 208:4
articulate 112:15
articulated 65:6 86:7
artifact 110:9

as- 183:3
Ashlee 2:9 9:18
aside 121:21 152:3
 176:20 183:19
asked 11:14 60:18
 61:14 62:20 66:3 71:5
 97:4 226:4,12
asking 20:5 70:11 80:5
 202:20 203:1 205:10
 209:2 222:21 232:10
 232:11
aspect 52:18 162:19
 181:6
aspersion 99:15
assault 1:1 4:7,15 5:6
 13:14 15:20 55:21
 118:15 143:16,17
 225:3 226:17 229:11
 229:18 233:1 235:19
assaulted 224:9 227:14
 230:16
assembled 100:20
 144:18 162:21
assess 206:10,16
assessing 10:6
assigned 79:17 93:10
 108:7 110:5
assignment 165:1
 184:11
assignments 167:20
assist 7:14 51:22 147:6
assistance 52:7 167:5
assistant 102:3,20
 103:7,15 105:12
 113:6 145:6
associated 29:22 35:13
 39:17
assume 132:8 136:15
assumes 21:3
assuming 45:2
ASVAB 213:18,18
Atlanta 130:22
attached 15:4 67:15
attempt 219:15
attempted 220:14
attempting 146:16
 217:19
attended 6:14
attendee 7:8
attendees 4:12
attending 7:19
attention 50:3 120:1
 180:18 209:15 217:16
 218:3
attentions 162:14
attorney 2:14,15,15
 76:11 101:16,18,19
 102:18,21 103:7,13

103:15 108:14 110:4
 110:13 113:2,7,21
 114:10 116:18,19
 198:14 204:22
attorney's 2:2 103:8
 105:2,11 116:8
attorneys 142:6 164:7
 193:10
augmented 167:21
August 165:10
authorities 56:16
 121:13 133:19 134:3
 134:14 135:1 188:6,7
authority 29:14,15,17
 29:20 30:17 49:8
 68:14 90:6 118:22
 119:2,4 120:10
 121:14 131:16 144:13
 144:19 145:3,3,17
 147:7,9,19 154:19
 155:16 159:1,8
 171:11 177:10,12
 178:22 183:16 185:16
 187:12,18 204:14
 230:20,21 231:2,7
Authorization 5:2,19
authorize 42:8
availability 117:17
available 8:17 13:2,4,5
 75:3 142:15,20 144:1
 156:12 157:16 177:14
 177:19
availed 38:20
Avenue 1:10
avoid 7:15 72:3
aware 27:16 33:3,7,8
 38:3,11 43:17 44:5
 50:13 51:2 66:20
 147:4,11

B

B 45:7
back 31:19 37:13 38:2
 40:11 83:14 84:13
 88:11 96:21 98:16
 109:19,20 110:7
 117:4 125:15 131:11
 140:8 166:4 177:20
 181:17 199:7,17
 208:10 226:4,6,18
 227:12 234:15
backed 75:12
background 18:9
 120:14 121:22 163:15
 172:18
backgrounds 123:15
 184:17
backs 217:12

backstop 75:17 76:14
 85:10 86:20
bad 16:7 123:8 191:14
baffling 226:17
baggage 125:14
balance 128:9 129:3
 234:15
balancing 158:18
ball 137:22
bar 226:2 227:2
barracks 226:5,7
barrel 112:17
base 11:8,20 22:19
 43:15 127:9 141:4
 149:5 157:19 168:18
 219:22
based 11:16,17 13:13
 23:7,19 29:4 49:6
 56:12 97:4 138:4
 156:18 159:6 172:12
 184:13 202:18
baseline 68:20 159:20
bases 158:4 194:19
bash 216:15
Bashford 1:14 9:2
 20:17 38:17 42:18
 90:22 94:19 95:12
basic 160:16 199:6
 209:5
basically 12:5 79:15
 83:20 165:14 166:6
 231:1
basis 17:21 22:6 24:6
 36:15 37:3 39:2 44:16
 72:8 121:13 176:19
bats 217:9
Batson 143:1 144:8
 152:12
battalion 141:7 164:12
battle 36:3
Bearden 2:2 102:5
 108:2,3 122:2 125:17
 132:12 142:13 145:20
 152:19 157:13 159:17
beauty 160:3
becoming 46:21 103:12
 109:5 229:21
bed 228:16
began 101:21 103:8
beginning 97:14 133:17
 139:2
beginnings 36:1
behalf 51:5 105:16,17
 199:19 231:19
behavioral 214:11
beholder 160:3
belief 139:21
believe 17:12,16 37:15

42:19 57:19 70:22
 79:13 93:4,21 94:3,4
 106:2,16 107:7,20
 126:13 133:12 135:10
 161:20 171:15 172:16
 173:11 179:6 190:14
 193:21 219:5 220:6
 228:22
believed 135:21
bench 67:8 71:3 97:20
benchmark 116:22
 117:2
beneficial 20:1 107:20
 189:12 208:11
beneficiary 48:2
benefit 112:5 137:16
benefits 132:5 177:3,6
 193:22 220:6
benefitting 221:9
Berenson 2:17
best 92:8 93:20 94:9
 106:2 118:10 183:4
 228:8
better 29:6 37:10 47:5
 58:4,8 78:3 85:19
 105:22 178:12 213:9
beyond 67:19 127:6
 145:17 232:6
BG 2:3 104:7,13 125:2
 137:19 145:19 152:6
 161:5
BGEN 104:11 118:12
 122:1 131:3 170:7
 185:9 189:13 234:17
BGen(R) 1:17
biases 121:17,18,19
big 128:18 130:5
 166:15 212:13
bigger 134:15 156:19
 228:17,22
biggest 130:17 148:2
Bill 2:12
billets 48:3,17 167:3
bio 8:22 101:11 104:20
 113:13 218:11
biographical 10:2
biographies 162:15
bios 100:22
bit 13:15,17 20:5 23:12
 25:11 48:15 69:1 71:4
 104:10 111:6 137:1
 176:5 178:14 191:11
 192:16
blame 136:8
blamed 221:5
blanket 120:7 175:21
 200:19 201:7
Bligh 168:3

blocked 91:17
blue 112:7 131:10
board 127:2 134:8
 146:16 190:6 191:3,5
boards 189:14,15 191:4
boat 77:15
Bobby 2:3 101:5,9
 128:2
bodies 153:3
body 13:21 27:4
Boggess 2:16
bono 221:12
book 220:12
boss 110:12
Bostic 2:3 163:3,17,19
 170:12 177:5 179:16
 190:12 197:12 204:4
 212:22
bothered 119:20 227:5
bound 46:8
bounds 69:7
Bovarnick 2:13 7:20,22
 9:11 51:9 100:13
 162:7 215:17 223:21
 224:14 233:22 236:7
box 111:4 178:8 214:16
boy 104:9
branch 164:9
branches 158:6
brave 211:22
break 4:20 5:20 6:11,19
 51:10 100:9 214:16
breaking 225:1
brief 101:2 162:22
 163:14
briefly 129:1 162:20
Brigadier 101:5,9
bring 117:13 118:10
 129:22 138:11 158:4
 175:6 178:20 203:20
 215:22 229:2 234:14
bringing 42:14 121:16
 135:16 225:7
brings 125:15 175:8
broad 197:4
broaden 142:14 157:19
broadening 160:22
broader 161:13
broken 199:7
brother 228:7
brothers 223:8
brought 107:18 189:2
 189:20 221:15
Brown 144:3
bucket 205:16
Budgets 203:9
build 48:6
building 37:12

built 157:14 183:6,9,12
 194:9,10 199:7
bullying 229:21
bunch 174:18
business 214:21 228:3
bust 154:18
button 170:10
byproduct 100:1

C

C-O-N-T-E-N-T-S 3:1
C-section 226:10
CA's 135:5
California 167:1,2
call 97:3 138:17 151:21
 159:7 166:2 201:5
called 140:10 194:13
 206:1 219:1 226:18
 226:20
calling 226:16
calls 25:9 179:22
 220:17 223:6
Camp 141:5 166:22
 167:2
candidate 109:12
capability 22:22 30:20
 152:21
capable 134:19
capacity 25:19 203:5
capital 1:9 103:13
 128:3
Captain 2:8,8 52:9,14
 54:5 57:7 58:9 61:13
 64:9 65:3,20 66:22
 68:17 70:13 72:16
 74:16 76:11,19 79:6
 81:15 83:4 85:11 86:6
 89:5 92:20 94:12 95:5
 96:12 98:20 99:17
 100:5
captains 207:7
car 226:15
care 31:11 208:3
 209:18
career 25:19 101:20
 103:9 104:17 128:11
 164:12,19 168:10
 180:1,2 210:19
 211:21 231:4
career/livelihood
 211:10
careful 181:6,16,22
 190:17 210:4 215:2
Carolina 167:1
carry 125:2 131:13
carrying 46:5 199:14
case 12:18 15:9 16:21
 17:3,8,8,8,20,21 20:6

- 22:6,6 24:6,6,10
28:10 31:8 36:14,15
36:15 37:3,3 39:1,1
42:22 43:4,20 44:10
45:1,8 46:6 47:2,3
48:21,21 49:9,14,22
50:19 57:6 58:4,8,16
59:10,11 65:15 68:10
69:3 72:1,8 75:20
79:11,17 80:3 83:18
86:12 87:1 88:15,16
90:3 99:18 114:5,10
139:8 144:19 150:5
150:22 154:2 158:5
158:12 170:2 173:15
188:4,11 198:10
210:22 214:7 218:6
220:15 222:17 229:1
230:22 231:9,14,22
232:1
- case-by-** 72:7
case-by-case 44:16
case-tracking 77:19
cases 23:2 33:4 46:2,13
49:2,8,18 50:4,13
61:19 69:9 71:9,21
82:16 96:14 98:5
103:5,14 106:6
113:14 114:2 116:11
135:18 136:13 139:20
143:17 147:4 151:21
153:5 218:17,20
221:7,8 223:14
229:11 232:11
- Cassara** 1:14 16:7,14
17:3,11 20:15 45:1,14
69:8 70:5 71:2 151:14
169:3 171:21
- Cassia** 1:17
cast 99:14 142:8
catch 142:3
categories 61:14 89:6
97:9
category 55:18 60:3
62:11 79:21 97:15,16
100:4
caught 81:22 82:2
86:12
cause 96:17 153:22
154:10,11
causes 137:5
cav 109:6
caveat 57:18 68:2
caveats 79:8
cell 32:3,4 222:5 228:5
center 29:21,21
centers 166:22 167:3
centuries 108:20
- certain** 12:13 30:20
33:16 34:6 54:11 68:6
79:22 80:1,2 122:6
149:6 195:3 214:14
certainly 25:21 44:1
80:8 82:3 83:9 84:7
89:10 95:12 105:10
145:11
certification 6:14
cetera 53:7 54:21
140:20 141:12
CGIS 15:18 19:21 38:12
57:14,17
chain 12:10 147:10
231:10
chair 1:11,13 7:22 9:11
51:8 100:18 215:17
216:5 235:5
Chairman 10:19 11:4
challenge 23:7,13,14
136:11 147:21 150:9
151:16 157:12
challenges 21:11
136:19 143:2 144:6,8
148:2 149:12 152:5,9
152:18 153:13 154:11
157:11 158:9,10,13
164:21 214:12
challenging 200:14
201:9
chance 27:17 137:9
164:17
chancery 127:7
change 46:3,12 92:14
96:22 121:7 144:5
159:11,12 162:7
180:10,11 181:20
185:22 199:1,2
200:11 215:5
changed 70:9 71:4
116:18
changes 50:12 127:14
187:15 225:2,5,22
changing 49:22 104:4
115:7 128:6 169:13
chaplains 221:18,19
charge 34:8 38:14
73:20 90:18 200:3
charged 99:21 100:3
143:14 205:8 207:21
charges 12:22 13:4
34:5 57:11 59:13
73:16 77:8 87:7 88:20
89:1 90:15,21 119:1
135:16 185:18 198:10
charging 61:2,20 89:20
check 16:1
checked 111:4
- Chicago** 102:21 113:7
130:22 153:20 154:6
155:8
chief 2:5 52:15 102:7
163:5,9,10 165:6,7
168:1,8 171:14 172:2
180:4 182:12 184:3
185:4 191:20 200:16
202:6 208:22
chief's 211:18
chiefs 128:20
child 15:20,21 69:9,16
70:18,18 71:6,11,14
99:1 209:18 228:10
children 91:8 212:4
228:2
choice 141:16
choose 189:5
chooses 39:18 170:16
212:1
choosing 191:16
chosen 135:4
Christian 228:12
Christine 2:3 101:5,10
104:6,7,13 125:2
137:19 142:17 145:19
152:6 161:5
Christine's 110:11
Christopher 2:7 163:9
166:19
CIB 46:18 47:6
CID 13:1,22 41:16
circuit 83:1,2,3
circumstance 30:20
89:14
circumstances 17:2
23:6 65:14 72:10
174:20
circumstantial 175:22
citizen 114:21
citizens 112:4 115:1
city 129:16 140:15,15
civic 132:2
civil 139:16,16,20
168:20 194:7,14
civilian 3:6 5:22 6:9,11
21:6 22:7,17 46:22
47:14 48:3,5,12 49:19
50:10 70:6 73:3 105:5
106:1,3,8,19 107:3,10
107:15 114:8,20
115:13,13 118:4
121:5 128:10 129:13
130:6 131:22 133:6
136:7,21 137:9 138:9
140:14 147:14,22
150:10 151:6,12,17
154:12 156:12 158:19
- 191:11 192:7 194:4
210:13,22 212:10
222:18 229:14
CJIS 50:8,14,18
claims 139:16
clarification 96:2
clarify 23:16 40:10
class 220:13 233:10,12
233:16
classes 89:21
clean 35:14
clear 20:18 32:10 38:12
clearly 160:5 181:14
cleremy 231:8
clerk 78:2 165:18
clerks 86:14
client 32:19 33:11,13
33:18,21 43:10 59:18
85:15 169:15 193:12
clinic 99:20
clinics 21:7
close 6:3 50:3
closed 11:7 39:6
236:10
closely 78:20
closer 77:20 96:5
cloth 199:3
CMCO 214:3
CMCOs 205:14
CMSgt 2:7 168:7 175:2
183:1 185:1 194:16
201:17 212:6
co-conspirator 58:13
co-found 218:22
co-subject 58:14
Coast 2:4,8 9:22 12:21
52:15 57:8 65:20
68:18 79:6,10 89:12
158:1
code 171:6
codified 77:2,3,10 84:6
collaborative 20:1
28:13 37:5
collateral 6:20
colleague 23:21 44:17
71:19 89:13 178:18
200:10 204:6
colleague's 195:11
colleagues 15:19 20:4
23:15 39:22 42:11
45:18 72:4 95:17
131:12 146:6,10
156:1 180:14 182:3
183:2 189:2,7 198:17
213:1
colleagues' 72:17
collect 25:14
collected 15:13 24:17

56:1
collection 55:22
college 129:19
Collins 223:1
colloquially 4:7
Colonel 2:4,6,13 7:20
 7:22 9:10 51:9 52:8
 52:10,12 55:2 56:6
 59:5 60:4,7 61:10
 65:3,7 67:7 68:1 71:2
 71:8 72:3 76:22 78:4
 82:10 83:9 84:5,19,21
 87:9,13 89:22 90:22
 94:11 95:11 96:13
 97:11,18 99:16
 100:13 102:5 108:3
 125:16 162:7 215:17
 223:21 224:14 233:22
 236:7
color 119:15 136:12,14
 161:12 181:12 195:18
 197:22
Columbia 103:16
 149:15
come 23:3 47:18 67:9
 72:11 88:11 95:9 96:4
 98:1 99:11 105:1
 113:3 114:1,5 116:4
 116:15 132:5 137:16
 141:18 142:3 148:15
 149:21 154:7 165:14
 172:15 177:20 178:3
 179:10 184:17 185:5
 186:16 195:17 203:15
 205:6 212:21 215:15
 217:22 218:5 228:16
comes 20:17 25:15
 36:19 58:1 68:15 89:8
 90:4 101:9 114:6
 137:14 154:13 157:1
 174:6 176:1 188:12
 204:10 212:19 215:2
comfort 127:22 137:21
 138:1,6 139:2,9 140:5
comfortable 97:2
 173:15
coming 21:9 33:21
 39:11 50:12 60:9
 77:19 80:11 91:4
 114:7,12 115:14
 118:13 144:10 160:15
 178:17 192:3 203:4,7
 204:7
command 9:17,17
 12:11 16:4 54:6
 131:15 142:5 146:19
 152:21 160:19 163:2
 163:3,6,18 164:1,12

165:2 166:6 170:10
 177:13 185:6 188:10
 192:6 231:10
commandant 168:3
commander 54:6
 161:15 163:7 164:20
 166:5 167:11 177:17
 177:19 182:8,21
 191:13 213:22 214:12
 231:13
commander's 135:5
 176:2 196:15 207:18
commanders 127:1,6
 127:11,12 133:19
 134:14 145:9 164:14
 191:7 193:8 199:18
 200:2,6 229:15
commanding 49:7
commands 123:22
 144:22 153:6 157:14
 157:16,17 168:13
 174:18
comment 3:9 7:1,9
 68:22 197:13 216:3
 224:15
commenter 216:1
commenters 2:19
 215:18
comments 6:4 7:11
 24:15 118:13 122:14
 124:8 126:17 216:5
 224:1 234:18
commission 109:5
 118:14 120:3
commissioned 109:6
Commissions 102:8
 108:8 168:16
commit 184:13 230:5
committee 1:1,9 4:5,13
 6:5 7:16 9:12 10:11
 10:20 11:5 51:6 52:21
 55:3 100:19 110:18
 113:4 126:18 149:3
 219:3 222:21 234:10
 235:16,17 236:6
committee's 5:15 6:2
 8:2,21
Committees 8:11
common 133:16 150:14
 157:6 220:2
communicate 28:3
communications 74:12
communities 142:18
community 36:6 103:18
 112:2 117:9 118:8
 130:14,22 132:2
 137:13 138:15,20,22
 142:20 143:7 148:11

community's 103:19
comparatively 112:8
 210:14
compare 210:13
compared 172:15
comparing 114:8
 130:11 154:14 155:11
compatibility 187:7
compatible 124:16
 127:21
competency 208:18
 210:6
competition 192:22
complain 179:8 198:7
complainant 223:10
complainants 221:11
complaints 36:5 81:9
complements 133:10
complete 7:6 44:1
 49:13 94:8 120:19
 126:1
completely 37:8 65:4
 88:12 96:6,12 160:1
 202:16
completion 53:16
complex 103:5,13
complexities 49:4
complicated 91:7,8
 155:19
component 166:15
 171:16 172:5,14
components 164:5
composed 171:9
composition 187:22
compromise 56:3
compromised 18:19
con 4:9
conceive 82:18
concepts 130:13
conceptualize 213:15
concern 25:21 67:2
 70:14 74:12 80:14
 91:21 95:12,16 96:17
 130:17
concerned 91:10
 119:16 134:18 137:4
 150:16
concerning 164:21
concerns 35:20 38:11
 66:6,10 68:5 69:5
 72:21 73:7 91:19
 96:10,13 130:15
 206:21 207:8 234:20
concluded 188:5
 226:11
concluding 223:22
conclusion 32:1 42:22
 43:19,21

concur 19:20 23:15
 26:5 41:18 42:10
 46:10 67:7 68:1 82:10
 89:12,22 94:11
 156:21 182:2 185:3
concurrence 9:5
conduct 61:6
conducts 60:22
conference 4:17 83:15
confidence 126:11
 140:9 161:20,22
confinement 73:14
 77:6
confront 27:17
congratulate 104:11
Congress 6:21 120:5
 161:9 202:3 220:20
Congress' 122:3
Congressmen 220:20
connive 230:14
consensual 226:7
consensus 197:7
consider 12:9 121:21
 140:7 184:16 235:9
consideration 11:9
 17:2 111:18 123:18
 134:21 157:20 174:7
 183:18 184:22 185:5
 208:13 211:14
considerations 56:20
 57:1,3,4 72:9 88:2
considered 13:11 40:14
 129:18 130:19 176:7
considering 182:16
consistency 72:14
 146:12
consistent 54:10,10,22
 61:18 94:9
consistently 85:6
constant 133:18
Constitution 117:5
 133:3 146:17
constitutional 143:2
 232:6,8 234:4
constitutionally 122:7
constraints 78:16
constricting 182:21,22
construct 78:17 85:19
construction 86:5
consult 11:20
consultant 64:22
consultation 35:9
 42:17
consultations 35:12
contact 19:12
contacted 220:20
contacting 235:7
contain 62:22 64:12

contained 59:14 87:18
containing 26:4
contains 162:14
contemplated 220:10
contempt 83:10
continuance 74:19
continue 6:4 29:9 45:8
 49:16 56:5 80:4 151:8
 154:20 173:3 219:7
continued 55:16 104:3
continues 8:12 55:15
 78:18
continuing 101:6
 155:18
continuity 48:4,7 50:20
 146:13
continuously 78:15
contradict 216:19
contradictory 91:17
control 25:12,13
controls 108:17
CONUS 23:18
convening 49:7 118:22
 119:2,4 120:10
 121:12,14 131:16
 133:19 134:3,14
 135:1 144:13,19
 145:3,17 147:6,8,19
 154:19 155:15 159:1
 159:7 171:10 177:10
 177:12,16 178:22
 183:16 185:16 187:12
 187:17 188:6,7
 204:13 205:13 230:19
 230:21 231:2,7
conversation 176:16
 207:2
conversations 32:15
 33:15
convey 28:6 64:21
convict 232:5
convicted 119:18,19
 135:22 149:8 187:4
 197:3 210:21 222:6
 222:18,19 225:14
 227:17 231:17 232:13
 234:11
conviction 149:17,19
 186:8 191:18 219:10
 231:4,20 235:1
convictions 229:16,20
convinced 211:7
Cook 113:7
cooperating 69:14,17
 70:3
coordinations 36:9
coordinator 19:16
copied 78:7 85:9

copies 8:8,14 53:12
 82:15
copy 15:2 37:18 44:1
 55:10,20 63:18 74:8
corporals 207:6,6
Corps 2:6,6,7 37:1
 52:11 55:3 60:20
 61:18 65:5 74:22
 76:22 82:12 86:7
 102:19 103:1 113:3
 113:19 119:21 163:4
 163:10,13 164:2,15
 166:19 167:19,22
 168:2,4 173:20
 175:18 176:6 186:3
 189:16 190:8 202:17
 206:22,22 210:5
 212:8
Corps' 167:14
correct 16:12,15 54:1
 76:19 101:4 136:8
 148:22
corrected 86:10
correctly 16:9 35:6 45:2
 58:22 76:5 158:9
 171:4 177:6 211:9
correspondence 78:8
corresponding 142:11
corruption 218:9
cost 203:12 204:20
 205:6
costs 14:18 131:8,19
 132:5 177:3
counsel 3:5 6:8,14 8:9
 9:4 10:8,18,21 11:1
 11:10 12:7 13:2 16:11
 16:15,18,21 17:4,5,9
 17:10 18:1,4 19:22
 26:14,15 30:4 32:16
 33:6,9,12 34:4,10,15
 35:10,20,21 36:10
 38:19 39:2,7,12,19
 41:10,16 42:20,21
 43:2,10,19 44:6,19
 51:20 52:7,10,12,13
 53:6 54:9 56:13,19
 57:11,13,16 59:17
 60:9,22 61:6 62:5
 63:12 65:16 67:16,18
 67:21 68:3,12 71:14
 74:5,17,18 75:6 76:6
 76:10,14,15,18 77:12
 77:13 78:6,7,10,21
 79:5,8,14 80:15,19,19
 81:1,1,12 82:1,3,13
 83:1,12,15,19 84:3,8
 84:14 85:8,9,13,22,22
 86:12 90:12,13 91:3

92:5,13,21 94:14,14
 95:21 98:2,7,7 99:13
 103:4 118:10 148:10
 171:8,12 177:20
 179:2 187:17
counsel's 12:14 18:10
 19:17
counseling 83:21
counterpart 49:19
counterparts 48:16
 55:4
country 101:7 109:22
 124:3 151:5 217:17
 222:4
County 113:7
couple 48:1 58:17 71:5
 88:10 100:14 162:8
 204:22 215:21
courage 199:8
course 6:15 13:12 26:9
 34:20 46:6 59:10
 105:6 112:6,18 134:6
court 7:14 41:12,22
 42:7 54:14 65:12,17
 70:2,6,8 73:2 74:20
 76:12 77:8,14 78:2,8
 81:2,3 82:6 86:14
 95:15 97:21 101:14
 108:12 139:12,14,14
 139:20 151:18 158:10
 165:18 178:8 188:3
 194:5 229:14
court- 76:8 141:7
 177:15 185:18 210:20
 212:12
court-martial 74:10
 77:9 144:18 169:7
 171:16 176:9 185:17
 188:17 191:9 205:12
 230:22
court-martials 170:2
courtroom 139:18
 193:10 197:16 203:20
courts 78:1,1 103:17
 106:3,8 112:3,3 116:7
 132:14,15 151:20
 152:1
courts' 158:8
courts- 8:6 119:3 125:8
 212:8
courts-martial 103:10
 118:16,17,21 119:1
 135:12 194:19
cousins 228:9
cover 14:17 15:10
 35:18
covered 53:9
covers 54:3

create 25:8 28:14 60:14
 68:19
created 5:1 27:3 53:17
 146:22 222:13
creating 92:10
creation 105:8
credentials 106:15
crept 101:8
crime 29:21 103:16
 212:9
crimes 48:8 101:12
 102:16,22 113:16
 230:5
criminal 3:3 5:9,13 9:14
 9:16,20 49:5 103:8,20
 104:22 105:5 114:17
 127:19 151:11
crisis 129:12
criteria 6:3 104:2 111:7
 111:14 114:18,19
 115:21 120:10,13
 130:17 134:8 147:8
 160:22 161:9,10
 185:14 188:7 201:21
 202:2
critical 37:2 38:7
criticism 119:6 185:11
 185:13 186:13,14
 187:20
criticisms 118:19
 187:10 191:6
criticized 186:2,4
cross 31:17 36:12
 114:9 117:8,19
 119:21 121:10 130:14
 194:12
cross-section 143:7
cry 152:17 224:20
CSAM 15:20
CSM 2:3 163:17 170:12
 177:5 190:12 197:12
 204:4 212:22
culmination 12:22 28:7
 32:12 44:14,20
culture 173:21 185:5,6
 185:6 199:21 213:13
 215:2
cure 83:22
curious 21:15
current 10:14 35:19
 36:5 53:5 54:5 55:7
 57:9 68:22 103:17
 169:8
currently 11:5 19:3,22
 55:1 102:1,6 108:7
 113:1 121:8 128:5
 158:11 164:2 168:1
 179:7 184:15 204:11

205:15
custodian 14:2 21:19
 21:21 54:1 64:1 69:10
custodians 18:7 21:18
custody 220:8
customarily 65:13 78:5
cut 194:22 203:9

D

D 1:9
D.C 103:17 116:6,7
 137:11 148:3
DA 105:12,12
DAC-IPAD 1:2 2:11 4:8
 4:15 5:1 7:7 8:8,18
 120:18 162:17
DAC-IPAD's 5:3,9 10:5
DACID 17:18 39:14
 44:7
dad 71:15
daily 121:13 209:4
dancing 226:3
data 26:18 32:3,3 122:6
 186:9
database 204:9 205:1
 205:16
date 73:13 74:2
dates 77:14
daughters 209:19
David 168:3
day 7:2 24:3 113:14
 123:12 133:7,11
 147:17 156:22,22
 170:19 171:13 178:4
 186:22 198:15 199:12
 217:8 226:18 228:13
 228:14,14 234:5,12
 236:8
days 84:11 93:11 156:4
DC 2:2 80:1
DC's 79:9
DD-2911 53:15
de-selecting 138:16
de-selection 138:18,18
deadlines 74:1
deal 60:13 69:14 110:14
 114:3 161:19 189:21
 212:13
dealing 69:8,16
Dean 124:7
debating 169:5
decade 211:3
decades 211:4
decide 62:4 187:18
 193:11,14 203:21
 231:13
decided 120:7 165:16
 166:11 185:16,17

decides 118:21,22
 119:2 230:21 231:8
decision 11:20 41:17
 41:19 42:14,16 43:15
 61:3 87:6 90:16 147:9
 175:22 179:18 184:19
 184:21 203:18 210:9
decision-maker 210:1
decisions 41:10 56:19
 119:7 193:9 199:18
 200:3
decreasing 117:18
dedicated 163:6 166:4
deem 121:16
deemed 13:20
Deep 138:15
defeats 122:10
defendant 63:15 136:14
defending 106:4 124:2
defense 1:1,1 4:5,6,13
 4:14,22 5:2,4,5,19
 8:10 32:9 63:12 64:22
 67:18 74:5 75:6,10,11
 76:11 78:6 80:19 81:1
 81:21 85:10 94:14
 99:12 105:6,9 107:2,3
 107:3 108:14 120:8
 126:15 137:22 148:9
 167:3 168:16 213:16
 235:17,18
Defense's 8:5
defer 182:15
deference 39:3
define 126:4 128:16
 161:11 181:2 206:17
defined 160:5 179:13
 182:7 183:15 205:21
defining 40:18
definitely 29:8 39:19
 116:18 181:13
definition 201:12
 205:19 206:7
degree 115:12 122:8
 123:17 148:7 150:6
 176:4 178:16
degrees 115:11
delay 82:7 84:2
delayed 49:9
delegate 145:3
delegated 30:17 145:17
 146:21 147:4
delegating 147:10
deliberate 86:11 208:21
deliberately 190:20
deliberating 175:7
deliberation 6:22 213:4
deliberations 126:21
deliver 80:19

demographics 123:14
demonstrations 79:12
denial 233:13
denials 37:13
denied 36:21
Dennis 2:4 52:12 56:6
 59:5 60:4 65:7 68:1
 72:3 78:4 84:19,21
 87:9,13 95:11 96:13
 99:16
denominator 133:16
depart 215:21
department 21:20 36:2
 37:17 102:12 120:8
depend 34:7 40:17
 156:2
dependent 70:18
depending 15:10 23:5
 43:8 68:7 79:21 96:14
 125:21 127:16 140:14
 142:20 154:1 157:1
 200:18,20,21 212:10
depends 14:6 15:1 68:2
 87:14
deploy 203:5
deployability 126:2
 128:18
deployable 125:4,7,11
 126:6 129:10 158:17
deployed 103:11
 127:21 128:22 129:6
 129:9,11,12,21 211:2
deploying 134:20
deployments 122:22
derived 55:12
describe 24:18
described 80:18
describing 195:15
designated 2:12,12 4:4
 114:9
designee 72:2
desire 150:3 170:1
despite 174:17
destined 219:17
destroy 219:7
detail 180:18,18
detective 88:10
determination 11:15
 17:9 29:17 149:10
determine 58:12,16
 109:17 161:15 171:8
 171:12 177:14 180:1
 191:5
determining 146:8
detriment 50:1
develop 91:15 209:15
development 52:4
deviations 96:16

devil's 208:15 210:11
DHA 14:3
dictates 150:13
Diego 49:12,15
difference 21:8,13,14
 21:17 132:14 155:6
 173:7 196:8 208:16
 210:12,18
differences 116:14
different 13:18 22:12
 32:16 38:8 40:14
 46:14 56:22 87:1 94:3
 96:6,19 97:3,5 102:10
 109:22 110:1 113:6
 124:13 125:17,20
 129:10 130:9,10,21
 138:21,22 148:9
 151:18 154:14 155:20
 160:17 164:17 173:21
 174:2 175:6,9 182:12
 189:8 191:11 192:8
 192:12 193:7 194:3,4
 200:18,21 202:10,16
 202:19 203:1 204:9
 212:19,21 213:7
 231:11
differently 23:5 127:16
 146:5 172:5 182:9,11
 193:3,4 194:9,10
 212:17
difficult 37:6 71:21
 147:21 148:12 196:10
difficulties 4:20 156:9
difficulty 32:19
dig 45:19
diligence 98:9
dilute 144:16
dire 115:15 118:11
 120:16 121:3,4
 128:11,15 152:8,14
 154:20 171:10 178:9
 179:3
direct 232:8
directed 235:4
directing 152:15
direction 36:9 126:3,9
directly 10:22 12:6 33:6
 43:18 55:12,13 56:18
 57:2 68:4,7 78:9
director 2:14 102:3
dirty 226:3
disadvantage 172:10
disadvantages 193:2
disc 15:6
discharge 189:14 190:4
 190:5,5
discipline 132:16
 133:10 191:10 194:3

207:22
disclose 55:15 88:22
 89:5,15,20 98:3
disclosed 98:6
disclosing 87:6
disclosure 27:13 41:8
 67:10 69:5,6 73:11
 87:3,5 88:3 98:13
disclosures 60:12
discovery 64:16 67:1,9
 75:16 98:8
discretion 7:12 52:5
 90:6 176:2
discretionary 42:16
discuss 5:15 6:2,18
 12:12
discussed 69:16
 115:19 231:2
discussing 17:14 78:21
discussion 26:21 83:20
 101:1 126:20 157:22
 158:16 162:15 195:1
 201:19
disgruntled 139:6
dispense 110:10
displeased 139:3
disposition 8:5 72:9
 86:3
dispute 139:17
disputes 97:21 139:17
 220:8,8
disseminate 67:19
dissemination 64:6,20
 64:20 67:6,12 69:15
 69:19
distant 98:5
distinction 38:18 39:11
 39:15 211:11
distinguished 101:20
 104:16 138:8
distinguishing 132:13
distribute 81:17
distributed 8:8,15
distribution 8:12 11:9
district 101:16,19
 103:15 105:1 110:13
 149:15 158:10
Ditto 72:16
diverse 110:19 123:14
 123:17 134:22 135:6
 138:14,16,19 141:17
 142:19 143:15 144:9
 144:9,17 145:13
 160:11 193:1 194:18
diversification 135:11
diversity 6:12,17
 116:21 117:10,11,12
 136:6,9,10,17 137:3,5

137:7,10,18 140:21
 141:15 142:10 144:14
 158:3 159:16 161:2
 182:15 187:1,11,21
 188:10,15 190:14,22
 191:21,22 192:1,9,10
 192:11,14,17,19
 194:20 195:3 196:5
 208:10 212:19
division 5:9 9:17
 167:19
divorce 220:7
DNA 27:13 55:22 227:8
docket 72:22 73:4,22
 74:22 77:16 78:14,15
 79:18
docketing 73:22 74:19
doctor 221:14
document 15:13 16:19
 21:18
documentary 17:22
 53:11 55:12
documentation 17:22
 18:8 22:15
documents 14:1,2
 16:10 21:20,21 62:2
 62:10,12 63:14,17
 204:13
DoD 8:9,14,15 13:12
 21:3 105:17 106:17
 118:14 120:13 127:8
 127:20 140:10
DOD's 6:17
doing 14:7 34:13 56:3
 78:11 93:9 105:5,8
 124:11 127:5 130:20
 146:2 153:17 155:14
 165:13 179:19 184:10
 194:1,6,15 213:12
 222:15,16 225:8
domestic 99:1 133:4
Donna 2:20
door 24:11 105:21
 145:15 228:20
doubt 232:7
download 15:22
downward 147:10
Dr 1:16,17 13:7 20:22
 23:16 24:12 27:22
 62:18 136:5 144:2
draft 26:20 43:5,14 90:1
drastically 130:9
draw 38:17 143:12
 175:1
drawn 143:10
dread 228:20
dream 228:3
Drie 2:18

drill 106:10
drink 214:8
drinks 226:3
drive 48:20 132:18
drives 48:11
drop 50:6
drove 218:2 226:6,15
drug 206:1
due 6:20 18:2 98:9
 142:21
DUI 214:7
DUIs 113:14
duties 65:18 104:4
duty 47:22 48:15 50:9
 74:17 75:3,7 76:12
 81:16 103:9,14
 113:10 115:14 135:20
 164:6 178:11
Dwight 2:12 4:4

E

E-3 173:9
E-4 169:15 178:21
E-5 178:21
E-8 169:16 173:9
E-9 169:16 173:9 189:3
eager 104:14
earlier 32:14 40:12
 67:14 85:17 86:1
 143:5,9,16 144:12
 152:7 161:8 181:8
 197:18 207:2
early 18:6 58:9 81:22
 91:10,18
earned 215:3
earth 203:12 229:4
ease 130:15
easier 41:8,16,19
eastern 103:4 113:2
easy 71:13
eat 173:22
edit 14:17
educated 106:17,21
 107:6,8,10,14 112:8
 172:13,15
education 37:11 106:12
 106:19 107:21 115:4
 115:9 118:9 121:21
 150:12 159:4,15,22
 178:1 183:5,10,20
 213:14
educational 117:16
 172:18
effect 46:12 55:1
effective 95:22 96:21
 183:3
effects 29:1 123:19
 130:2,18 204:2

efficiency 122:19
efforts 106:13 107:12
eight 151:20 154:4
 155:3,3
either 7:12 15:2,6 23:22
 35:12 57:5 64:13 68:9
 70:17 108:5 112:1
 119:8 127:4 161:6
 169:12 177:2 181:8
 197:2 200:19
elaborate 157:8 206:3
Eleanor 2:15
elect 182:18,19 189:4
elected 105:12
electronic 8:7,12 76:1
 79:18
element 138:17
elements 213:16
elephants 130:11
elevate 42:13
eliminate 24:9 124:18
 136:11
eliminating 122:12
 161:1
else's 45:11 219:7
Elston 109:21
email 4:22 81:19 83:14
 85:1 86:10
emails 81:12
embarrass 216:15
emotional 29:1
empanel 151:2
empathetic 174:3
emphasis 211:9
emphasize 93:17
empirical 136:15
empowered 94:5 200:2
encounter 137:11
encounters 25:8,10
endeavors 50:22
ended 149:8 226:16
 227:17
enemies 133:4 192:21
enforcement 23:12
 88:1 96:5 99:5
engaged 25:7
engagement 78:20
 85:17
Engaging 68:21
engineering 165:15
enhance 126:19
enlisted 3:8 6:1 109:2
 154:22,22 155:1
 162:9,18 163:6,11
 166:4,12,12 167:6,18
 167:20 168:9,15
 169:4,7,10,22 170:3
 170:15,21 171:5,16

172:4,11,13 173:19
 174:7 175:3,5,10,11
 182:10,19,19 188:20
 198:8 208:17 212:20
 213:2,4,5,9,12 214:10
enlistee 161:21
ensure 19:8 22:22
 35:10 36:12,15 75:18
 85:6 142:2 143:6
 148:4 150:4 166:8
 219:6
ensuring 75:11 78:6,11
entering 111:3
entertain 197:13
entire 43:1 44:2 149:16
 171:4 181:22 228:14
 230:13 233:17
entirely 142:7 148:21
 160:20 202:22,22
entries 77:17
entrust 211:4
entrusted 209:17
environment 128:22
environments 122:19
 124:3
equal 225:8 230:17
 234:15
equation 159:11
equipped 105:22
Equity 6:17
equivalent 105:7
Erin 2:5 9:20 30:1
error 86:9 101:4
esoteric 139:15
especially 39:15 83:12
 131:21 149:5 210:5
essence 76:5 80:18
essentially 82:22 112:7
 116:6 124:10 142:16
establish 24:5
established 112:6,21
 159:21 160:18
establishing 5:17 8:3
esteem 199:9
et 53:7 54:21 140:20
 141:11
etcetera 21:7
ethical 217:12
ethnic 136:9
ethnicity 141:11 186:16
 188:8,16
Europe 49:10
evaluate 235:9
evaluated 197:11
evaluation 27:1 50:2
event 93:11
events 92:14,19
eventually 49:15

everybody 58:18 80:2
 108:15 124:20 131:20
 142:5 160:20 169:16
 200:4 213:7 215:6
 221:2 229:12 235:21
evidence 16:1 18:1
 27:1,18 28:16 53:11
 54:13 55:12,21 57:5
 65:10 88:4 89:6 96:3
 114:3 136:15 197:11
 208:20 214:15 229:22
 231:5 232:2
Evie 2:17
evil 230:15
evolve 78:18
evolved 30:10
exacerbate 153:8
exact 31:18 47:11
exactly 25:1 31:6 34:6
 34:21 45:16 65:5
 77:21 153:18 186:6
 222:1 225:2
exam 13:8,11,12,14
 14:15 21:3 27:4 54:14
 61:9,12,16 64:18
 227:5,6
examination 10:17 12:8
 15:5 38:1 53:15,17
 56:2 60:1 62:8 63:9
 64:3 89:16 100:2
examinations 53:6
examiner 15:1
example 19:15 23:4
 27:19 31:4 32:3 45:5
 69:13 87:5,12 132:15
 134:7 147:16 179:15
 189:21 214:5
exception 99:5 170:4
exceptional 100:20
excerpt 73:20 232:16
exchange 81:12
excluded 211:17
exculpatory 28:16
 31:16,19
excusals 147:16
excuse 73:5 144:20
 145:12 171:8
excused 129:18 147:18
execute 202:8 205:5
 206:9,11,15
executed 202:11
executioner 186:5
exhausted 228:15
exhibits 65:12,15
exist 29:16,16 97:16
 129:14
existed 220:15
existence 233:4

existing 54:11
exists 57:18
expand 135:9 143:10
 153:11 174:11 192:15
expanding 143:22
 152:20
expect 54:9 83:5 85:18
 85:18 86:3 213:21
expectation 134:22
expected 79:13
experience 3:7 5:22
 18:11 22:18 23:20
 24:8 26:6 29:6 38:10
 38:15 44:18 67:20
 70:8 71:20 81:6 88:8
 95:20 100:22 101:12
 101:22 102:15,20
 105:4 106:1,4 110:14
 111:6 113:5,22 116:5
 117:15 121:4,22
 122:15 132:8,11
 135:18 145:16 170:16
 174:6 175:1 177:9,22
 178:20 179:8 183:5
 183:20 204:14 208:2
 212:11 214:20 215:9
 215:10
experienced 83:13
 116:16 174:19 179:1
experiences 20:8 80:21
 117:20 131:14 195:20
 207:10 215:11
experiencing 113:10
expert 103:2 113:20
expertise 113:19
experts 5:10 51:22
explain 58:6 226:19
 227:15
explaining 212:14
explanation 88:18
exploring 205:20
expose 95:13
expressed 97:14
expressing 107:15
extended 47:21
extensive 100:21
 101:11,22
extent 57:20 64:16 67:3
 68:11 94:2,7,9,15
 99:22 118:3 120:9
 150:20 152:20 153:11
 154:5 183:11 196:18
 196:22 197:2 205:4
 213:2 214:18
external 13:20 15:22
extra 84:3 93:7
extremely 89:19
eye 160:3 217:9

eyes 224:7

F

F 144:15
face 78:15 122:8 148:2
 149:12 150:9 173:1
 202:7 211:6
faced 142:17 164:21
faces 150:10 151:6
 156:10
facilitate 50:19
facilities 21:5 22:19
facility 22:5,7,17 53:20
 98:3
facing 74:22 190:4
fact 18:2 39:17 54:16
 71:9 121:1 128:10
 145:12 166:11 172:12
 180:13 185:14 193:16
factor 132:6,22 160:10
factors 109:1,20 110:8
 110:17 111:1,2 117:7
 117:10,21,22 118:9
 122:4,12 124:14
 132:17 133:14 148:15
 159:19 160:11 161:1
facts 11:17 72:7 109:17
 156:18 208:20
fail 83:2
failing 81:21
fair 114:15 115:18,22
 117:8,19 121:10,20
 135:12 136:1,3 149:1
 149:4,10 151:12
 159:14 185:8 195:14
 196:10,12,13,14,15
 196:20 197:8,8,9
 198:3,4 200:17,22
 201:2,8,10,11,11,14
 201:15,16,16 207:10
fairly 109:16
fairness 135:10,13
 139:21 148:5,8,16
 153:17 181:11 196:2
 198:2
faith 128:2 132:3
 228:11
faithfully 217:14
fall 60:3 62:11 75:14
 140:11 189:4
falls 77:12 79:7
false 219:9 220:1 221:9
falsely 218:14 220:11
 223:16 233:1
familiar 19:18 75:22
 152:2
families 217:13 222:13
 223:15 228:20

family 20:1 167:5
232:20,22
far 22:2 24:15 27:19
62:7 75:6 79:19 144:3
144:4 150:15 158:8
173:7 209:8 229:21
fate 180:2 193:14
favor 69:10 172:3
fear 139:8 162:1 229:8
feasibility 5:16
feasible 123:20 157:4,5
158:5
February 222:17
federal 2:12,12 4:4 78:1
100:21 108:5,16
110:21 112:1,3 116:7
116:9,11,14 117:22
123:10 148:3 236:5
feed 222:9
feedback 20:19
feel 34:2 69:1 92:15,17
93:22 94:5 97:2
140:18 149:10 150:11
151:10 173:15 175:5
186:19 187:6 189:10
197:3 214:20 216:13
221:6 229:10 231:3
feeling 72:20
feelings 158:14
feels 19:2
felony 151:21 154:3
felt 30:21 149:3
female 141:9,9 143:18
186:15,16 224:11
230:13
females 141:8
fewer 49:2
fianc 218:14
field 30:18,21 50:16
65:14 167:17 168:10
230:13
fielded 37:21
Fifth 141:15
fight 151:9 164:22
222:14
figure 108:20 143:9
153:16 164:20 180:17
211:19
figured 36:3
figuring 120:11
file 15:9,12,14 16:6 31:8
44:2 56:13 64:4,7
67:19 75:7 85:1 87:7
filed 73:3 75:10 80:20
files 26:14 43:20 44:10
53:22 76:18
filing 37:17,18 54:14
74:1,7 75:13,21 81:2

81:4,17,19 82:14
84:16 85:10 86:15,16
86:17,20
filings 73:2 75:6,8 76:2
76:14 78:6,9 81:7,11
filled 181:4 203:18
final 43:14 147:9
finalized 8:7
finally 74:7 164:16
217:3 229:9
finals 129:19
find 71:22 92:8 117:3,7
227:10 232:1
finder 121:1
finding 147:7 185:21
228:18
findings 16:20 27:9
208:21
fine 154:20
finger 170:9
fire 210:10
firemen 165:15
first 9:8 10:14 18:1
26:20 53:2 55:5 62:11
81:16 83:20 90:12
93:22 94:7,18 97:5,22
101:4 113:19 125:8,9
125:10 127:12 135:20
137:2 140:13 156:15
162:17 163:2,6,19
164:10 166:3 180:3
197:13 203:9 213:6
215:10,22 220:13
226:21 231:8 232:20
232:22
Fiscal 5:2,19
fit 130:12 199:4
fits 199:2
five 48:14 51:10 215:19
216:7 218:3,6 234:12
fix 219:13,18 224:22
fixing 225:7
flag 199:4
fleet 166:9 203:6
fleshed 124:4
flexibility 12:9 18:18
19:4 20:9 72:7,13
87:2
flexible 18:15
floor 103:22 104:6
162:21
flows 11:8 119:6
fly 50:18
Flynn 2:4 9:22 10:19
13:22 16:13 17:7,18
21:16 23:19 24:19
29:19 31:6,15 34:3
35:7 39:14 40:19

41:12,15 44:7 45:10
46:16 47:10 51:8
focus 6:12 100:15
144:8 195:2 206:17
focused 6:10 51:19
78:19
focusing 113:17 194:20
FOIA 10:21 14:5,6
21:17 30:12 31:13
39:9 44:3,22 54:1
56:16 57:16 62:16
63:22
folks 51:15 104:16
105:13 152:15 157:16
182:10 195:5 207:17
209:13 212:7,16
follow 13:7 31:14 32:1
41:7 49:8,16 50:13
54:10,21 83:2 133:11
135:1 208:20 219:17
follow-up 62:19 81:10
208:14 210:12 235:15
followed 5:14 6:1,9
162:22
following 5:20 48:18
83:1
follows 131:6 144:11
foot 186:12
force 2:4,7,9 9:19 18:21
24:8 35:17 36:3 42:20
44:17 52:13 56:7 59:5
65:7 68:18 78:5 85:12
134:19 135:6 146:3,6
146:8 163:12 168:11
168:14,21 187:22
194:18 202:17 216:7
216:16 219:22 222:20
forces 1:2 4:7,15 5:7
125:18 146:3 167:9
188:4
forces-wide 52:17
forcing 137:16
forefront 129:15
foreign 133:4
forensic 10:16 12:8
13:8,11,14 21:2 26:21
27:8 53:14 56:2 60:1
62:7 63:9 64:3,22
65:10 100:2
forensics 58:1
foresee 90:5
foreseeing 153:7
forget 166:14 194:8
forgets 94:21
form 18:20 83:8
formal 18:14
formations 125:6
formerly 15:21

forms 220:18
Fort 227:18 233:10
forth 37:13 73:10,20
111:14 131:14 143:3
forthcoming 88:13
Fortunately 142:21
forum 217:1
forward 8:22 69:4 90:17
154:21 167:8 203:5
forwarded 30:12
forwarding 86:10
forwards 82:1
found 105:20
founded 127:4
founding 133:18
four 34:1 50:9 207:6,7
211:5 217:17 222:15
226:2 231:22 234:2
four-year 178:16
fraction 171:18 218:8
frame 47:9,10,11
framework 126:4 133:8
frankly 110:5 125:7
138:6 194:12 196:16
free 224:21 228:14
229:9
frequency 46:12
frequently 46:3 49:18
106:7 118:4 137:11
Friday 8:7
friend 27:13,15 135:5,5
friendly 79:4,20
friends 228:8
front 23:21 79:18
122:13 233:2
fulfill 65:17
fulfilled 79:3
full 69:6 94:8 227:5,6
fully 69:14 133:13
143:19
function 76:7 138:20
functional 168:12
fundamental 109:14
110:16 121:7
funding 207:13 220:19
funnel 140:3
furnish 76:13
further 29:4 64:6,20
67:5,12
furthermore 28:21
future 67:3 186:1

G

gain 138:2
gained 160:7
Gallagher 2:14 100:16
100:18 162:11,12
gamut 115:13

gathered 34:16
gear 199:14
gender 136:9 143:15
 182:18 188:8,16
 189:5
general 8:9 9:1,4 101:5
 101:9 102:2 104:6
 106:22 110:11 142:17
 144:12 163:12 164:3
 167:21 168:3,9
generally 46:1 59:15
 81:7 88:21 89:2
 106:17 107:7,10
generated 205:13
generous 66:9
genital 13:19
gentleman 163:18
gentlemen 165:7
 166:18 170:12 188:21
 190:12 191:21 197:12
 206:21 212:22
genuinely 208:7
George 2:5 163:5 165:6
 165:8 171:14 172:2
 180:4 184:3 191:20
 200:16 202:6 208:22
Georgia 101:17,20
 105:18 110:14
Georgian 105:19
getting 21:11 33:5 78:3
 126:16 139:21 142:2
 145:1 154:6 223:19
give 21:22 31:4 36:18
 52:17 53:4,12 63:18
 73:10 74:18 84:17
 90:2 99:20 123:4
 136:3 163:14 177:16
 198:22 204:16,18
 206:7,9,15,17 226:13
given 10:4 64:13 73:15
 73:18,19 74:3,14,17
 91:15 92:7 111:6
 118:1 132:21 136:18
 156:2 172:6 233:13
gives 80:9 131:16 156:5
 156:6
giving 10:22 20:9 30:6
 30:7 39:3 64:15 80:9
 84:8 91:10 96:21
 214:18
glass 93:1,6
Glen 2:6 52:11 76:21
global 48:10,10
go 9:3 13:3 14:1,5 18:1
 25:18 39:8 40:11
 43:15 45:21 53:3 69:4
 69:19 70:5 79:13,16
 83:11 84:13 90:16

92:2 95:7 98:8,9
 117:4 119:1 120:8
 121:2 124:12,18
 127:2 131:11 147:19
 149:17 158:8 173:1
 175:4 177:20 178:10
 180:9,14,17 185:18
 185:20 192:13 193:10
 194:6,13 195:7 199:9
 200:9 209:8 213:6
 221:14 223:5 226:4
 227:16,16 228:15
 233:6
goal 38:8,8,9 48:20
 114:14 115:21 117:2
 117:6 121:14 142:9
 157:6 180:10
goals 46:19 236:5
God 222:6 228:16
God's 228:22
goes 177:11 180:18
 189:22 232:5
going 9:7 17:5 29:1
 35:11 36:6 41:3 45:21
 49:12,13 51:15 58:16
 60:21 61:5,18,21
 62:21 65:17 69:4
 70:21 72:19 76:8
 77:20,21 80:6,8 84:17
 88:17 90:16,18 94:19
 96:21 98:9 100:8,15
 101:10 103:21 104:10
 106:11 107:13,22
 109:2 119:3 121:20
 122:21 125:3,14
 126:5 127:9 128:4,19
 129:7,9,22 130:3,4
 138:2,12 139:6,13
 140:16,18,19 141:8
 141:10,18,22 142:1,3
 143:20 147:9 148:21
 150:13 152:1,10,11
 152:11,13,17,17
 154:21 155:16 156:7
 156:16 161:2,8,13,14
 161:16 162:3,11,12
 170:13 174:8 177:14
 179:2 182:8,10 183:9
 184:15 185:17,18,20
 188:12 189:18 191:16
 193:12,13,14 196:20
 197:7,13 198:7,9
 200:5,10 202:14
 203:2,8,10 204:8,20
 204:21 205:4,5,6
 206:3,14 207:5,20
 208:10 211:4 212:16
 224:15,20 226:19

227:10 228:19 229:18
 229:20
Goldberg 1:15 24:14
 26:8 32:15 35:2 45:15
 47:8,17 51:3 66:1,17
 131:5 176:13 195:9
 196:17
gonkulator 207:4
good 4:3,11 9:11 10:19
 11:4 12:3,20 18:21
 22:8 35:2 36:3 42:20
 52:22 55:2 56:6 57:7
 86:17 91:13,14,14
 100:18 108:2 111:14
 112:19,22 116:2,22
 128:7,8 132:16
 144:21,21 150:14,14
 163:17 165:6 166:17
 168:7 170:7 187:7
 189:2 191:10,14
 194:2 207:21 216:9
 229:17
goodbye 226:14
gotten 98:21 99:3 145:6
 218:11 228:19
governing 56:16
government 55:14
 62:13 74:8 82:1,3
 97:11 99:10,11
 103:12 193:12,15
government's 53:21
 73:19 196:14
graciously 79:10
grade 173:7
graded 127:15
graduate 176:4
graduated 165:11
graduates 115:10
grandchildren 228:2
grant 84:1
granted 154:11
graphic 14:12
grapple 91:5 133:18
grappling 120:13
 169:14
grateful 168:5
great 19:21 20:10 24:12
 50:15,21,22 107:17
 110:14 123:8,9
 126:11 140:9 161:19
 161:22 169:4
greater 134:3,13,15
 137:8 158:3 160:13
greatly 156:8
grievous 101:4
ground 18:12
group 177:13 194:18
grow 48:19 211:18

growing 229:4
grown 228:7
guarantee 115:22
Guard 2:4,8 9:22 12:21
 52:15 57:8 65:20
 68:18 79:6,10 89:13
 102:4,11 105:8,17
 158:1 164:6
guardian 70:7
guardsmen 125:19
guess 10:13 34:7 37:6
 39:4 40:10 41:21 46:9
 59:21 97:17 107:11
 150:11 161:7 187:13
 195:22 196:17
Guidance 8:6
guidelines 38:11
guilt 109:17 185:20
 234:3
guilty 149:9 185:21
 198:10,12 221:6
 225:17 231:21 232:2
 233:11
Gunnery 163:8 166:18
gut 158:14
guy 227:3
guys 190:8

H

half 105:5 113:15
 156:22 168:22
hand 9:7 100:16 213:6
 233:3
hand-picked 186:6
handful 71:9
handle 13:16 23:2
 147:14 223:6
handled 22:3,4 23:5
 29:5 146:4 225:3
handles 116:8
handling 13:19 21:9
 30:13 223:14 229:11
handoff 50:15
handpicked 119:8,9,9
 130:15
hands 41:20 100:7
 115:6 207:20
Hansen 2:5 9:20 11:4
 14:13 18:13 22:2
 24:20 35:16 38:6,22
 40:10 41:18 43:3
 45:13 47:21 51:1
Hansen's 40:11
happen 12:17 35:11
 48:9 83:21 84:8 85:22
 88:17,21 129:5 205:9
 220:1
happened 49:11 93:13

113:12 175:7 186:21
218:16 219:13,20
221:4 225:2 228:18
230:10
happening 34:8 129:12
173:17
happens 16:22 69:20
98:14 159:2,10 221:3
happy 52:16 197:8
200:13
hard 8:14 20:13 46:4
151:4 228:12
harder 175:12
hardest 216:12
harm 107:19
haste 110:11
hate 87:13
Hawaii 167:2
head 171:7 209:11
head-to-toe 172:17
headquarters 38:14
heal 217:19 222:16
health 99:3 214:12
221:13,14
hear 5:20 6:6,11,13
72:19,21 73:7 80:14
97:13 104:14 109:16
153:1 158:4,12
176:17 200:21 220:21
232:16 236:1
heard 7:12 46:17 74:14
75:9 80:13 81:8
119:13,17 131:7
136:16 146:20 149:1
170:18 175:11 176:22
177:6 179:7 180:22
185:11,13 187:3
195:13 197:10,17
213:3 217:5 221:18
232:15 234:19
hearing 35:6 42:5 58:22
73:18 77:7,7,7 89:7
150:4 172:1 211:8
234:13
hearings 75:5
heart 217:7
heartbreaking 229:5
Heather 2:9 52:8
held 184:9 229:14
232:14
help 43:10 79:1 114:1
137:17 159:12 164:20
165:2 218:19 219:5,6
221:10 229:2,2
helped 218:22
helpful 26:4 68:21
70:21 72:15 176:17
helping 93:1 234:6

helps 92:17
Heroes 219:1,2
hey 119:6 215:5
Hi 12:3
hiccup 23:13
hiccups 24:2
hickies 226:18
high 115:9
higher 106:8 140:4
169:13 175:13 183:8
highlighted 15:8
highlights 72:5
highly 103:1 113:20
172:15
hindsight 174:16 207:9
Hines 2:6 52:11 55:2
60:7 61:10 65:3 67:7
71:2,8 76:22 82:10
83:9 84:5 89:22 91:1
94:11 97:12,18
HIPAA 99:5
historically 108:8
133:17
history 104:12
hit 90:14
hits 24:10
hitting 204:6
hold 31:19 125:14
175:12 227:19
holding 134:2 234:10
holed 17:20
holistic 35:17
home 79:16 125:15
132:18 222:7 226:15
228:15
Hon 1:13,15,16,18 4:10
10:13 17:12 20:12,20
29:12 51:4 52:22 63:7
86:22 87:11 88:5
100:6 147:20 156:9
157:10,21 158:15
162:3 174:10 175:16
183:19 188:18 201:18
207:12 215:13 224:13
234:16
honestly 37:3 201:1
honor 84:11 199:9
honorable 1:10 190:5,5
honorably 216:17
222:4
honored 162:20 166:3
166:10
Hood 46:17
hope 19:6 60:8 77:20
97:8 98:15
hopefully 47:6 65:19
70:16,19 83:22 98:4
99:3 111:5,8 112:14

234:6
hoping 219:4
horrible 225:13
hospital 21:19
hospitals 21:7
hot 67:21
Hotel 1:9
hour 115:20
House 8:10
HR 167:19
human 128:3
humbled 113:4
hung 117:1
hurts 217:7
husband 217:18 218:1
218:13 222:3 224:16
225:15 226:14,19
229:3,10
hypothetical 71:10,17
hypotheticals 72:10

I

idea 113:22 121:19
131:15 158:20 159:13
189:2 216:19
ideal 92:20
ideally 91:1
ideas 196:6
identical 65:21
identified 19:13 159:19
identify 10:8
identity 200:11
ignored 225:6 230:3
ill-defined 182:7
Illinois 113:8
images 54:13
imagine 72:11 89:18
104:18 143:17 225:12
immaturity 211:15
immediate 93:12
impact 27:20 36:17
57:5 68:9 82:19 88:2
122:21 123:1 124:11
128:22 129:21 148:16
149:21 155:10 156:7
impacted 87:17 148:7
impacting 123:22
124:21 144:13 155:20
impacts 155:12
impaired 214:8
impaneled 198:14
213:20 214:6,11
impartial 114:16 115:18
115:22 121:1
impartially 109:16
impede 56:3
implement 123:20
implementation 110:20

implemented 123:21
implicate 75:15
implicated 10:9
implications 11:18 52:1
importance 32:17
116:20 127:14 176:18
188:15,15
important 6:18 18:13
20:7 28:10 107:5
115:1,5,8,16,17,19
117:16 118:6 123:6
141:21 148:6 150:12
150:17 155:2 162:19
184:12,18 185:8
188:22 189:6,7
190:15,21 191:8
192:18 200:7,8
207:19 208:13 216:12
235:22 236:4,4
importantly 95:8
impressive 100:22
imprisoned 218:15
Improper 66:17
improve 143:4 161:2
207:15
improved 75:1 182:5
improvement 134:10
180:7,9
improving 78:15 196:1
inadvertent 60:12
98:13
inappropriate 126:10
inception 109:20
incident 49:10
inclined 133:11 160:13
include 36:9 54:18
56:22 66:12 81:21
107:2
included 14:22 16:3
79:10 81:4,7,8,11
101:1 133:1 184:1
includes 82:17 101:22
124:19
including 6:19 54:12
55:11,22 74:1 96:1
104:1 108:22 134:10
inclusion 6:17 15:9
incompatible 122:5
inconsistent 91:16
92:10 95:18
inconsistently 80:16
increase 103:19 135:13
152:9,18 171:20
172:3,4 173:5
increased 30:15 36:7
101:18 134:10
increases 137:20 138:1
increasing 153:8

- 159:15 169:20 175:3
incredible 111:6
increments 47:12
incumbent 81:16
independent 70:19
 232:11
indicated 29:13 143:9
 146:18
indicates 82:13
indication 42:18
indifferent 189:9
 191:15
individual 14:7 45:12
 48:21 109:15 121:15
 143:13 148:20
individuals 108:13
 110:7 112:16 133:2
 142:15 145:22 146:15
 147:7 149:2 150:6,20
 158:4
infantry 135:20 141:7
 232:21
infinite 120:5 122:3
influence 133:20
info 28:12 32:2 36:7
informal 83:21
information 5:18 10:2,7
 10:10,15,17 11:8,13
 11:14,19,21 12:1 17:5
 17:14 19:5,13,15,18
 21:9,12 24:17 25:13
 25:13,22 29:14 30:7
 31:8 32:18,20,22 33:5
 33:9,16 34:9 36:4,12
 40:17 45:3 46:17
 51:20 52:3,16 55:5
 56:1,9 57:2,21 58:3
 59:20 62:21,22 63:2,6
 63:20 64:13,15 65:8
 65:17 66:5 67:2 68:3
 68:6,12 69:6,15 72:22
 73:4,12,15 74:4,13
 76:8 78:5,22 80:16
 82:2,9 85:6 86:3 87:3
 87:6,9,10,18 88:13
 89:21 91:15,17 93:8
 94:3 97:3 99:18 235:8
informed 33:20 75:4
ingrained 148:17
inherent 121:19 138:6
initial 60:15 61:1 76:12
 96:4 109:15 122:2
 140:8 145:22 146:9
 146:14 160:15
initially 30:10
initiative 123:8,9
initiatives 110:21 126:7
 126:8
- injury** 98:22
injustice 229:2
injustices 217:8 219:15
 232:14
innocence 109:18
 185:21 218:18,19
innocent 27:12 198:11
 219:16 225:20 230:4
 231:21
input 122:6 127:10
inquiries 124:9
inserted 130:8
inside 15:3
insofar 106:14
inspection 50:2
inspector 167:21,22
installation 22:21,22
 168:18
installations 195:6
instance 45:5 56:13
 59:15,17 178:6
instances 25:2 58:2,11
 58:14 86:7 88:6 99:8
 146:7,21
instill 142:4
instituted 130:19
institutions 21:6
instruction 54:7 68:15
 208:20
instructions 4:22
 213:16
instructor 164:10
intake 220:17
integration 85:21
integrity 20:6 26:17
 27:21 28:10 33:19
 36:15 121:1 235:1
intelligence 150:15
intend 54:21
intent 123:16 146:19
intentionally 60:10
intentions 111:15
interactions 108:10
interest 15:16 26:10
 27:3 54:15,20 72:1
 146:1,1 193:11
interested 47:19 111:13
interesting 167:15
interestingly 109:3
interests 10:9 52:3 63:4
interfere 18:3 34:17
 35:10 57:21
interfering 34:18
intermixed 99:4
Intern 2:17,17,18
interrelated 155:12
interrupted 104:17
interview 27:17 28:7,19
 29:2 44:21 61:1,20
 89:11 90:13 91:13,13
 93:14,18 94:1,18 95:4
 95:7,10 96:5,6,19
interviewed 74:5
interviewees 97:2
interviews 25:9 28:18
 91:3 92:2,12 93:9
 95:22 96:3
interwoven 155:19
intimately 152:2
intimidating 173:10,13
intricacies 172:20
introduce 9:8 50:17
 51:17 52:6 162:11,20
introducing 9:13
introduction 3:2 101:3
 165:8
introductions 100:17
introductory 104:1,19
 162:22 163:15
invalid 122:8
invested 191:16
investigate 219:12
investigating 95:10
investigation 1:1 4:6,14
 5:5 11:7,11,17,19
 12:13 13:1 15:17 16:3
 18:16,17,19 25:14
 27:21 28:15,22 29:4
 32:13 33:19 34:17,19
 35:14,19 36:14,16
 39:6 44:4,9,14 49:3
 49:14 50:1 56:4 57:6
 57:22 59:1,15 68:10
 87:19 223:13 225:20
 230:7 231:18 235:18
investigations 9:19
 13:16 21:12 46:13
 48:19,22 85:20
 102:14 127:3 168:15
investigative 3:3 5:14
 9:14,16,21 10:1,9
 12:21 15:12 16:11,19
 24:16 31:22 32:12
 34:14 35:8 42:2 46:1
 47:4 57:12 58:10
 69:12 86:1 225:19
investigator 8:20 37:1
 93:2 94:21 222:22
investigators 19:3,9
 33:6 46:2,3,5 55:7
 97:11 98:3,22 229:19
invitation 116:4
invited 162:17
involve 74:13 78:9
involved 20:7 70:16
 142:5 150:6
- involvement** 146:11
 191:7
involves 81:3
involving 5:7 45:1
 134:12
Iraq 125:9
IRC 48:3,18 187:14
ironically 110:12
Island 165:13
Islands 165:19
issuance 74:16
issue 21:17 25:3,6 33:3
 34:22 40:2,15,15,18
 40:20 41:6 45:17
 71:16 85:12 124:17
 126:15 136:6 137:3
 137:17 151:4,22
 153:9 171:2 172:1
 187:20 188:13 189:21
 197:5 202:7,8 208:10
 211:15 217:5 224:7
 235:4
issued 74:21
issues 6:13 22:9 36:5
 38:16 40:4,7,9,11,16
 41:8 45:22 51:2 52:5
 60:14 67:9 127:6
 132:11 152:12,14
 155:20 169:14 170:6
 181:15 196:6 197:1
 218:20
items 38:18,19 39:3
 54:11
-
- J**
-
- JA** 11:21
JAG 103:9 109:6,12
 110:4 163:4 164:2,15
JAGC 2:13
James 1:17 2:18
Japan 203:6
Jeff 2:13
Jenifer 1:16
Jennifer 1:16
Jim 195:15
job 46:8 50:15,21 51:1
 75:12 112:19 113:20
 119:10 121:17 128:7
 128:8 134:15 144:21
 144:22 146:2 184:11
 212:4
jobs 139:15 184:8
join 9:1 178:15 213:6
joined 5:11 166:21
 176:6 225:21
joining 4:18
joke 153:2
Joshua 2:2 102:5,5,15

108:3
Jr 2:6
judge 4:8 13:3 41:10,13
 42:7 57:13 67:10,18
 68:16 70:11 75:18
 76:16 80:1 81:12 82:4
 83:5,7 84:8 85:10
 101:15 102:2 108:14
 108:16 110:3 133:20
 134:11,13 143:4
 145:4,18 148:1,3,3,8
 156:5,6 159:3 163:12
 164:3 167:7 168:9
 185:20 186:5 212:14
 233:3 236:7
judge's 153:10 208:20
 213:15
judgement 123:8
judges 84:16 150:18
 156:2 200:7
judging 173:20
judgment 111:20 160:6
 179:22
judicial 18:2,3 35:11
 41:11 42:14 111:9
 112:12 122:15 159:4
 159:5,9 160:1,20
 179:11,14,17 180:20
 181:2 182:6,11
 183:14,17,21
judiciary 75:1,10 82:11
jumbled 20:16
jump 195:11
jumped 113:9
JUNE 1:7
junior 167:12 173:9
 174:7,11 175:14
 178:6,9,12 179:14
 204:11 211:15 212:7
 212:15 213:2,21
 214:5,10
juries 106:1,18 107:10
 108:18 116:12,17,19
 118:4 123:12 128:10
 129:16 136:10,17
 138:15,16,18 151:2
 152:1 156:3,4 207:8
jurisdiction 116:7
 140:15
juror 114:16 116:1
 118:5 121:20 150:14
 156:7
jurors 114:15 116:15
 119:3,8 135:15
 137:12,16 149:16,18
 156:6 231:9
jury 100:21 106:22
 107:15 108:14 112:8

114:7,8,13,14 115:6
 115:13,13,14 116:12
 116:16,21,22 117:1,7
 117:7,20 126:14
 129:4,20 131:22,22
 133:6 135:18,19
 136:6 137:14 138:11
 138:17 140:13,19
 143:19 147:15 150:4
 150:19 153:20,21
 154:14 155:9 156:21
 178:11 186:5,6
 210:13 231:1 232:1
justice 8:11 28:11
 29:10 49:5 50:20 52:2
 52:14 56:11 102:10
 102:13 103:9,20
 105:22 106:2,7
 114:17,18 117:3
 118:20 119:11 121:15
 125:4,8,12 126:6,16
 126:22 127:10,19,21
 128:4 129:11 132:3
 133:9 136:17 139:21
 140:5 146:1 151:3,11
 152:16 153:17 158:17
 162:20 168:20 174:9
 181:10 191:17,17
 198:18 206:11 207:16
 208:6 219:10 222:8,8
 223:9 227:21 228:13
 230:18 231:16 232:12
 234:5,6,14

K

Karla 1:10,13
Kate 2:15
Kathleen 2:6 9:22
 102:17,19,22 113:1
Katie 2:4 9:22
keep 28:8 44:9,13 75:4
 120:9 124:21 127:22
 161:8,9 162:13 183:7
 193:13 205:3,8
keeping 115:3 134:19
 177:3,6
keeps 43:20
kept 16:5 78:12
killed 228:21
kind 26:3 27:18 37:13
 42:13 53:3 63:2 80:5
 91:11 96:21 98:18
 121:6 122:10,13
 123:1 128:13 129:14
 131:9 132:18 142:17
 144:11 145:8 147:14
 154:14 159:20 160:9
 165:19 183:12 201:22

213:22 223:22
kissed 226:14
kit 14:22 15:3 22:15
 55:22
kits 23:4
knock 228:19
know 15:16 18:6 20:20
 21:5 23:2 25:1 27:7
 31:6,10 34:4,21 35:19
 36:4 37:21 38:1 46:7
 46:21 47:1,4,11,11,15
 50:6 51:2 56:22 63:11
 63:14 65:10 69:11
 70:9 71:20 72:8 77:18
 77:22 80:5 81:17
 83:14,17 84:12,17
 88:16 92:14 94:22
 97:1 101:8 108:13
 111:16 119:10 120:12
 124:4,5 129:4 131:21
 136:22 138:10 140:2
 143:3 145:8,21 146:2
 147:5 149:1,11,12,22
 150:7,12 151:4,8,16
 151:22 152:10 153:1
 157:7,11,15,21 158:5
 160:2,7,14,19 164:15
 169:8,12 170:4,13,18
 171:1,3,7,8,19,22
 173:20 174:4,5,15,21
 175:4,22 176:2,4
 177:7 178:10,11,15
 179:14,20 180:13
 181:1,11,12 182:5,6,7
 182:9,14 183:2
 184:13 185:4,5 186:9
 186:12 187:6,16
 188:16,22 189:3,6,13
 189:17,22 190:17,20
 191:7,9,14 194:22
 195:13,18 196:12,16
 196:18,21 197:3,7,19
 197:22 198:10,11,13
 198:22 199:6,17
 200:5 201:11,22
 204:12 205:2,6,18,19
 205:20 206:11 207:2
 207:3,4,5,21 208:2,5
 208:9,9,12 210:14,19
 210:21 211:3 212:2
 213:2,4,13 214:1,3,3
 214:4,8,13,13,17
 217:4 218:10,16
 220:3,5,7 221:2,12
 222:1,13 223:9,10,11
 223:13 224:7,11,15
 224:22 225:15,20
 227:9,11 234:1,17

235:11,16
knowing 43:9 98:10
 173:16
knowledge 24:22
known 4:7 15:21 64:14
 79:11 121:18
knows 34:15 108:15
 188:11
Kramer 1:15 31:1,14
 32:8 58:6,17 59:21
 60:5 61:8 62:17 97:7
 97:18 98:17 99:12

L

lab 58:10
labeled 230:6
lack 72:22 86:8 136:8
 136:16 137:2,5
 178:11 188:15 207:9
 207:9,10
Lackland 219:22
ladies 163:17 165:7
 166:17 170:12 188:21
 190:12 191:21 197:12
 206:20 212:22
laid 115:4,21 177:8
lance 207:5
lap 182:20
large 24:20 111:12,13
 112:2,4 124:13
 134:12 140:15 146:8
largely 108:17 142:19
 159:20
larger 156:15
larger-populated
 157:15
late 234:9
lately 194:11
Laura 2:7 163:11 168:8
law 5:9 23:11 88:1 96:4
 99:4 110:2,5 128:12
 152:11 166:22 167:2
 167:4,5 168:20 209:3
 209:14
lawyer 87:14 94:22
lawyers 221:12
lay-down 48:5
lays 73:10
lead 23:12 48:7 226:22
leader 163:7 164:19
 166:4 190:16 198:8
leaders 3:8 6:1 145:9
 162:9,18,21 166:12
 209:17 217:10
leadership 11:16 30:21
leads 32:1,5 34:14 35:9
 139:9 140:4
leakage 24:21

leaked 25:1
learn 104:10 110:15
 146:5
learned 116:20 139:19
leave 102:12 120:16
 121:3 152:13 161:14
Leavenworth 227:18
 233:10
leaves 145:14
leaving 42:15 139:13
 152:7
led 165:19
ledge 220:17
leeway 36:18
left 81:9 103:14 160:3
 170:8 199:16 200:11
 222:2 229:7
legal 11:8 12:7 16:4,15
 16:18 17:9 38:21 39:8
 39:12 43:15,19 54:6
 55:7 74:18 76:14
 77:13 80:15 83:19
 84:3 145:5 147:5,5
 163:7,9 164:18
 165:16 166:2,5,7,20
 167:4 168:1,4,19
 177:11,12 204:10
legally 214:9
legalman 165:12,20,22
legislative 36:8
legit 191:17
Lejeune 141:5 167:1
length 183:5,20
lengthen 49:12
lenient 175:15
lens 164:17 174:2
 191:22 192:12
let's 63:9 173:6
letter 84:6
letters 230:1,2,3
letting 95:2 104:13
 224:18
level 11:16 30:3 41:11
 42:15 101:13 102:16
 106:12,19 107:21
 114:9 116:9 117:16
 124:22 126:11 128:1
 134:3,13,15 137:21
 138:1 139:1 140:5
 142:11 144:21 145:10
 145:11,18 154:3
 168:18,19 209:21
 210:6
levels 155:20 216:22
liaisons 5:10
liberal 20:5 84:1 154:10
liberty 44:15
lie 230:12,14

Lieutenant 52:8 102:4
 108:3 125:16
lieutenants 207:7
life 117:15,20 121:22
 123:11 192:3 210:9
 215:12 216:13 219:7
 227:22 230:13
lifetime 108:17
light 38:4 104:3 195:12
 195:12 229:2
lightly 196:11
likelihood 61:4 140:5
likeness 26:1
likewise 19:2 39:21
 65:8
limelight 217:15
limine 76:18
limit 64:19 67:5 74:9
 117:10 155:3
limitations 129:6
limited 24:2 33:10
 36:20 108:22 135:17
 136:20 147:16
limiting 117:17
line 4:21 27:5 53:3
 102:4 113:13 125:3
 222:9
lines 45:9 161:12
 194:12
linked 222:17
Lisa 2:20 216:6,10
list 8:13 159:8 177:17
 177:18 178:3 179:4
listen 208:19 235:12
listened 229:12
litigating 97:21
litigation 102:18 103:2
 113:2,18,21 150:7
little 13:15,17 20:16,19
 23:12 25:11 27:10
 37:6 46:17 48:2,15
 51:10 69:1 71:4
 104:10 111:5 137:1
 161:6,8 173:21
 174:11 175:15 176:5
 178:14 182:10 189:1
 191:11 192:15 209:14
live 79:13 80:7 138:14
 215:18
lived 118:5 217:20
 219:14
lives 186:22 220:10,11
 227:19
load 48:21 150:22
lobbied 220:20
local 12:10,11 148:3
located 1:10
location 48:13 73:14

74:2 118:7
locations 22:18 48:6
 50:9
lock 112:17
locked 91:18 92:15
 93:14
locks 91:12
log 80:10
logical 32:1
logistical 150:1
logistically 123:20
long 24:3 80:10 107:2
 109:4 127:3 177:15
 178:19 181:18,19
 209:12 212:4,11
 216:19
longer 46:21 48:15
 149:18 156:20 159:3
look 17:15 43:6 71:7
 72:7 109:19 110:6
 111:22 115:2 118:15
 122:4 124:20 140:13
 140:19 141:1,13
 142:10 170:8,9
 171:18 172:9 179:17
 181:3 184:7 191:21
 192:5,10,21,22
 195:16,18 196:18,19
 201:11 202:3,10
 204:1 209:1 212:16
 220:2 222:22 223:2,3
 234:22 235:4
looked 109:9,10,12
 119:14 132:13 141:3
 187:6 193:6
looking 27:19 114:18
 115:20 118:16 120:1
 121:2 127:20 130:17
 130:18 140:3 141:5
 157:6 158:19 159:8
 175:14 178:17 181:3
 181:7 183:16 187:1
 192:12 195:5 196:3,3
 196:6 203:14 224:6
 235:6
looks 37:4 98:13
 121:15 170:10 194:4
 197:16
lose 208:7
lost 47:3 60:18 170:11
lot 18:7 23:21 92:4,6
 104:22 105:13 110:21
 120:16,17 121:4
 124:6 125:13 129:2
 136:7 139:19 143:20
 145:7 146:7,12,20
 150:21 152:7,10,13
 156:1 157:16 159:18

160:21 166:14 172:10
 177:11 178:9 180:18
 182:2,15 184:3,12
 185:4 190:19 194:7
 199:22 200:1 201:18
 205:7 206:13 207:5
 209:1 211:15 212:2,8
 215:4 223:3
lots 96:22 105:10,10,11
love 216:16
loved 218:6 228:21
low 128:14
low-level 139:16
lower 145:10,10,18
lowest 42:15
loyal 235:21
LTC 2:2 108:2 122:2
 132:12 142:13 145:20
 152:19 157:13 159:17
LtCol 2:9 53:8 62:1
 63:16 66:14,19 69:18
 70:10 73:9 80:22
 81:13 86:13 88:19
 91:20 99:6,14
lunch 6:16

M

ma'am 13:22 24:19,20
 25:4 81:15 84:21
 89:22 196:9 210:15
 211:7,14 212:5,6
 216:8 224:16
Magdalena 2:2 103:6,8
 116:3
Magers 2:15
magistrate 101:14
 139:12,13,20
mail 8:15
main 48:6
maintain 107:5 124:22
 125:3
major 24:1 101:12
 163:2,4,18 164:2,13
 168:3,12 170:11
 185:13
majority 48:12 96:18
making 19:19 31:12
 41:17 81:2 85:8 119:7
 120:12 136:2 142:10
 159:7 185:7 193:9
 211:11 215:9 226:4
 234:3
male 141:2 187:5
males 186:19
manage 88:17
management 74:20
 75:20 79:11 80:3
manager 167:18 168:10

168:12
manages 44:6
managing 167:20
mandate 135:2 154:10
mandated 38:13 134:4
mandatory 50:10 99:2
manner 39:20
manual 8:6 55:8 77:2
March 165:11
Marcia 1:13
Marine 2:6,6,7 37:1
 52:11 55:3 60:20
 61:18 65:5 74:22
 76:22 82:12 86:7
 102:19 103:1 113:3
 113:19 119:21 163:10
 166:19 167:7,9,14,19
 167:21 168:2,4
 173:20 176:6 186:3
 189:3,15 190:8
 202:17 206:22,22
 210:5 212:8
marines 57:19 167:15
 167:20 173:20 174:8
mark 165:10
Markowitz 1:16 13:7
 20:22 23:16 24:12
 27:22
marks 227:15
married 197:21 226:1
 228:1,9
Martha 1:14
martial 8:7 76:9 119:4
 141:8 177:16 185:19
 210:21 212:9
martialed 212:13
martials 125:9
master 2:5 163:5,8,10
 165:6,7 166:18 168:8
 171:14 172:2 175:16
 180:4 182:13 184:3
 185:4 191:20 200:16
 202:6 208:22 211:18
 216:3,6 222:20
 223:21
match 55:22
material 15:20 31:3,16
 31:19 67:13 101:8
 104:20 107:22
matter 58:20 59:10
 60:15 100:10 108:1
 129:14 193:16 214:22
 230:4 231:12 236:11
matters 16:11 54:21
 74:19 106:11 146:4
maturity 91:9 174:6
 209:21
MCIOs 19:7,21 41:9

mean 41:12 42:12 70:7
 76:17 83:10 88:8
 97:12 110:22 123:13
 125:17 138:3 147:20
 149:14 158:7 161:7
 174:10 179:2 181:20
 189:10 196:11,17
 197:8,8 198:2 201:22
 206:7 207:17 210:14
 211:1,16,21,22
 213:16 230:10
meaningful 155:4
means 10:22 49:14
 62:14 79:19 111:2
 185:15 204:18 214:9
meant 31:21 147:13
measure 143:8 213:17
measures 67:12 142:22
MEDCOM 14:3
media 15:22 41:1
 179:17 217:16 220:5
medical 10:17 12:7
 13:8,11,12,14 14:14
 14:21 21:2 22:7,10,12
 27:5 37:22 56:2 60:2
 60:8,11,17 61:16 62:7
 62:14 64:11 65:9
 74:13 97:9 98:3,10,19
 98:20 99:3,8,22
meet 43:7 147:7 160:21
 205:18
meeting 1:4 3:2,10 4:8
 4:13,16 6:4 7:2,3,5,8
 7:20 27:2 92:1 234:13
 234:22 235:2,3 236:9
meetings 36:11 234:11
meets 19:8
Meghan 1:18 9:7 40:3
 51:18 72:18 187:13
 208:15 235:16
member 8:19 104:2
 138:8 144:20 155:15
 175:10 176:9 183:22
 191:4 192:18 193:13
 197:20 203:22 232:20
member's 213:3
members 4:12,17 5:7
 6:13 7:16 8:8,12,18
 9:6,12 10:20 11:5
 41:3 47:22 55:3 77:22
 100:19 104:4,15
 108:21 113:4 114:15
 114:22 118:2,7,16
 119:3 120:5 145:12
 154:4 155:17 163:1
 163:22 170:3 171:16
 172:11,19 174:8,14
 175:3,12 176:20

180:13,19 182:19
 183:8 184:4 185:20
 186:20 187:8,18
 188:20 193:8 194:17
 195:4 200:17 203:3,7
 203:15 204:15 208:17
 210:1 211:1,2,16
 213:13 215:21 219:17
 224:3
membership 132:1
memory 91:5 92:9
 95:21 96:8
men 119:15,20 217:13
 230:4
mental 99:3 221:12,14
mentally 228:15
mention 219:16,21
mentioned 28:4,5 30:1
 32:17 38:7 44:17
 65:10 79:8 83:4 85:11
 85:16 95:5,17 96:1
 99:17 125:17 142:18
 143:5,16 144:5
 159:18 173:8 187:20
mentors 103:3
merely 105:19
mess 35:15
message 231:15
met 1:9 121:13 122:13
MG 144:10
MG(R) 1:13
MGySgt 2:7 166:17
 173:18 174:12 175:20
 176:11 182:2 185:3
 188:21 191:6 196:9
 206:20 207:17 210:15
 210:18 211:13
Michael 2:3 163:3,19
microphone 20:18
middle 46:18
miles 218:2
military 3:3,6 5:8,13,22
 8:11 9:14 21:4 22:5
 22:13 24:2,4 46:22
 49:5 52:2,14 53:19
 56:11 67:8,10 68:16
 70:8,11 73:1 75:18
 76:15 82:4 98:2
 100:21 101:20 102:1
 102:7,10 104:3 105:3
 105:9,21 106:6,20,20
 107:3,7,21 108:6,8,19
 110:3 112:5 113:9
 114:17,22 116:5
 117:18,18 118:2,20
 121:5 123:7 126:22
 128:8 129:3,8,11
 130:8 132:14 133:20

134:7,11,12 135:18
 136:17,20 137:7,8,15
 141:1,6,20 143:4
 147:22 150:2,9 151:6
 151:12,15,20 154:3,8
 154:12 155:10 156:10
 158:2 159:13 162:19
 163:22 164:4 166:15
 168:16,20 181:10
 190:15,19 192:4,20
 194:8,14 198:18,18
 198:19 199:10,21,21
 200:11 206:11 207:16
 208:18 209:9,16
 211:10,20 212:9
 215:2 216:16 217:10
 218:12,13,18,19
 219:10 220:4 222:19
 223:5 224:9 225:4
 229:11,17 230:19
 233:19 235:19
mind 26:17,21 56:20
 95:4 115:3 146:1,19
 159:5 164:18 190:19
 197:10,11 200:4
 205:3,9 210:19
 227:12
minds 169:4
minimize 37:12
minimizing 93:3
minimum 36:13 132:10
 152:3
minorities 149:7
minority 115:2 119:19
 140:17,18 141:11
 187:4 189:18,19
 191:4
minute 158:16 216:3
minutes 4:20 51:10,14
 156:3,22 162:8
 215:19,22 216:7
 218:4,6 234:12
Miramar 167:1
mirror 137:13
mirrored 117:21
misconception 132:17
misconduct 5:7 6:20
 46:2 184:13 223:14
mishandled 26:7
missed 227:22 228:6,8
 229:6
mission 25:20 40:14
 164:15,22 194:2
 203:13 235:22
missions 48:11
mistakes 81:20,22
 172:22
misuse 24:16 66:5,6,6

66:10,16 67:1,3 68:14
68:19
mitigate 49:21
mitigating 51:1
mobilization 125:21
mobilizations 122:22
125:22
mobilizing 134:20
model 130:6
modeled 19:1
models 130:8
modest 96:10
modifications 107:17
molded 19:1
mom 69:13 71:15
165:17 234:5
moment 133:15 228:14
money 203:8,10 220:22
227:21
month 79:14 80:7
149:16 199:13
monthly 36:9,11
months 166:5 214:2
morning 9:11,12
226:21
MOS 167:18
mother 224:19 226:2
mother's 234:9
motion 74:8 75:16
76:18 81:17 82:14,15
82:17 85:7
motions 73:2 74:2
75:21 80:16,20 82:19
84:4 85:14
motive 220:3,3
motives 220:7
motor 123:13 128:21
MOU 22:20
move 4:20 126:3,9
195:7
moving 75:20 82:14
83:16 131:8 132:5
158:15 201:20
MRE 75:7,7,14 82:17
MTF 22:15 23:22 62:9
MTFs 21:11
Muldoon 2:6 102:17
112:22 113:1 129:1
140:12 147:3 153:19
156:14
multiple 7:15 45:2 47:2
89:1,3,9 90:10
murders 113:14
music 173:1
mute 4:19
mutual 38:9

N

name 7:9,17 104:9
106:14 108:2 112:22
144:4 165:7 203:19
216:10
named 101:18
Naomi 2:4 52:12
nation 129:17 199:3
national 5:1,18 13:9,13
25:20 102:3,11,13
105:7,17 123:1
125:19 129:15 164:6
nature 14:12 65:11
Naval 163:7
Navy 2:5,5,8 9:20 12:14
16:14 37:1 52:9 54:5
54:6 55:4 61:13 70:14
71:19 74:22 77:1,16
82:12 119:21 146:3,9
165:9,13,21,22 166:5
166:7 189:15 190:8
202:15
NCI 92:22
NCID 44:12
NCIS 12:3,19 19:2 26:5
30:9 39:10 43:18,20
44:9,12 48:12 49:21
93:9,14 99:2
NCORS 79:12,22 81:18
near 185:22
nearly 105:3 107:2
139:7
necessarily 100:1
111:15,16 123:3,4,21
133:6 137:14 149:13
150:8 151:7 160:19
164:15 174:13 195:15
201:5 213:10
necessary 14:17 17:21
30:2,22 65:1 132:18
need 15:15 18:15 30:5
31:9,11 42:13 49:1
59:17 72:6 77:11 81:7
82:20 85:14 94:22
96:2 97:6 98:8 104:5
110:10 111:17 112:15
117:4 127:7 132:15
141:14,19 144:6,7
152:17 173:3 181:5
181:16,21 192:11,15
194:6 201:9 203:17
204:22 209:14 218:8
219:5,6,6 223:2
226:20 234:14
needed 10:6 15:10
18:10 19:19 155:17
225:5
needlessly 92:10 95:18
needs 19:9 134:21

143:8 181:13 185:2
nefarious 99:9 146:22
nephews 228:7
nervous 223:11
nest 128:17
net 138:2 142:8
neutral 70:16,21
never 44:18,19 70:7
71:9,17 91:4 113:10
113:10 121:13 156:21
160:4 197:7 222:8,8
new 8:19,22 9:5 35:22
50:17,19 75:20 77:18
79:11 82:9 94:3 97:3
97:4 167:9 204:16
newest 161:21
Newport 165:12
nieces 228:7
night 186:21 208:8
221:7
nightmare 217:19
nine 227:19
nomination 9:3,6
non- 70:2
non-cooperating 69:21
69:22
Norfolk 49:11
normal 106:17
north 167:1,10
Northern 101:19
not-complete 44:15
note 82:4
noted 67:14
notes 225:19
notice 74:15 77:4,6,11
77:14 80:9 82:6
noticed 21:1 144:16
notification 86:9
notified 74:6
number 30:14 48:17
77:9 79:12 97:9
142:21 143:13,22
152:9,18,21 153:11
154:7,16,17 156:11
157:10 158:2 169:13
169:21 170:22 171:11
171:17 172:4 177:21
187:3 188:4 226:12
234:18
numbers 137:7 138:22
141:3 153:8 161:1
162:2 229:17
nurse 222:20 227:4

O

O'Connor 1:16
oath 146:17
object 42:12 203:11

objective 112:14
126:16 128:16,16
153:14 161:11
obligation 55:14
obligations 217:12
observance 107:5
observation 120:15
observe 105:14 108:9
139:4
obsolete 110:9
obtained 99:9
obvious 111:21
obviously 35:21 49:2
60:12,16 62:20 98:19
111:17 144:20 149:20
153:22 154:1 158:1
159:1
occasion 23:13 25:6
occupational 208:18
occur 89:18 130:3
145:15 217:8
occurred 92:19 109:4
occurring 89:14 126:21
OCONUS 23:17,20
OCS 160:16
offender 49:6 70:22
233:9
offender's 49:6
offense 99:21 100:3
104:22 213:8
offenses 116:9,9
offer 72:5,6 101:2
182:14 191:19 204:5
206:9
offering 72:14
offers 175:9
office 2:2 6:17 9:19
11:8,21 12:11,15
18:10 19:17 23:22
30:3,12,21 39:8 43:16
52:10,12,13 54:8
57:14 78:2 102:6
103:8 105:2,11 116:8
168:14 204:10
office's 6:18
officer 4:5 49:7 109:5,7
109:11 145:5 147:5,6
149:6 172:5,14
175:13 176:3
officers 110:5 115:11
174:1 175:5 211:16
212:20 213:5,8
offices 8:15 147:15
166:2,7 168:19 221:1
official 2:12,13 8:15
56:14 59:16 65:18
oftentimes 50:18 65:1
154:17

OGC 9:3,6
oh 47:10 60:18 104:9
 195:7 224:14
okay 76:20 100:13
 122:1 128:13 145:5
 162:10 176:12 190:9
 202:20 215:20 216:2
 216:4
old 109:10 114:21
 186:18 209:3,11
 214:6 218:13 226:1
older 119:14,20 176:3
 186:17,18 187:5
once 12:18 22:3,11
 26:22 39:6 43:14,22
 66:18 97:5,20 158:11
 160:9 224:2
one's 211:10
one-third 155:1,4 169:9
 171:1
ones 21:22 63:18 64:21
 65:9 73:12 86:15
 190:9 204:11 218:6
 223:3 231:1
ongoing 11:11 18:17
 36:14 39:1 43:4 47:15
 56:3
online 77:19
open 4:8 43:20 44:10
 44:13 105:21 112:15
 145:15 197:10,11
open-mindedness
 175:8
opening 118:13 122:14
 126:17 137:1
operate 122:20 123:11
 156:11 158:6 209:4
operates 77:17
operating 20:2 48:6
operational 134:20
 203:4
operationalize 190:21
 205:14
operationalized 198:19
operations 125:6
operator 86:9 226:20
opinion 106:21 107:16
 117:9 123:9 156:18
 161:18 174:9 201:5,6
opinions 236:1
opportunity 19:7 85:5
 94:9 96:8 108:9
 131:20 132:22 134:5
 143:4,18 163:20
 164:13 168:5 169:2
 214:19 215:7 218:2
opposed 11:2 17:18
 20:3 38:19 39:16

147:10 152:15
opposite 132:19
optic 197:22
optics 138:7
option 182:17,19
 208:12
or/and 169:21
order 37:18 41:13,22
 42:7 45:7 48:18 54:20
 63:11 64:2,6,19 67:5
 67:20 85:14 125:16
 127:14 130:2,18
 132:16 138:4 155:17
 158:3 177:16 191:10
 194:3 203:18 204:2
 207:22 209:22 233:9
orders 65:1 67:10,22
 74:1,20,21 205:13
ordinarily 64:11
organization 166:15
 168:16 192:7 194:8
 220:18 221:19 222:13
organizations 3:4 5:14
 6:8,10,12 9:14 21:7
 21:10 72:20
orientation 192:2
original 109:20
originally 47:13
Orleans 167:9
OSI 11:11 14:13 38:22
 43:3 45:13 47:21
OSI's 11:5
OSJA 204:20
OSTC 54:22 55:16 56:5
 77:3 85:19
OSTC's 78:17
ought 140:6
outcome 27:20 72:1
 200:21
outcomes 27:9
outlined 56:21 73:13
outlining 59:19
outset 50:7 159:18
outside 70:2 99:10
overall 22:8 48:1
 122:18 123:9 132:12
 184:20
overarching 20:3 25:3
 40:2
overcome 95:16
overcomes 96:9
overly 19:9
overseas 199:13
oversee 166:7 168:4
oversight 50:3 134:16
overturn 231:14
overturned 222:7
overview 10:4

overwhelming 114:14
owe 219:14
owned 228:2
owning 20:6
owns 191:13,13,14,19

P

P-R-O-C-E-E-D-I-N-G-S
 4:1
p.m 1:10 4:2 7:10,13
 100:11,12 236:12
PACER 77:21,22 80:8
 85:2
PACER-esque 76:7
Pacific 203:6
page 77:18 79:16
 179:17
pages 221:22 223:19
paid 200:4
painfully 217:20
panel 5:13,14,21 6:1,7
 6:9 8:12 9:8 51:11,17
 51:22 52:7 66:3 67:13
 100:7,20 104:4,15
 107:9,14,18 108:18
 113:4 114:7,15
 115:18 116:21,22
 118:6 119:14,19
 129:20 131:10 134:22
 135:19,22 137:20
 138:8 139:1,8 140:4
 141:15,16 143:6
 144:14,17 145:13
 150:4 151:20 152:4
 153:20 154:16 155:1
 156:20 158:11,12
 162:9,11,16,18
 169:11,16,22 170:3
 170:15,21 171:5,9,13
 173:10,19 174:5,8
 175:4,19 176:9,19
 177:15 178:7,8,21,22
 179:8,9,10 180:1
 182:20 183:22 185:8
 185:11 186:17 187:2
 187:8,21,21 189:20
 191:1,5,16 194:17,21
 195:4,16,18 197:17
 197:18,20 198:7,13
 204:15 207:4,11
 210:1 213:3 214:16
 215:21 234:20
panels 6:6 105:21
 106:6 108:1,11 112:7
 116:6 117:3 123:14
 123:17 137:7,8,9
 138:1,9 154:6 169:7
 177:10 185:12 187:5

188:9,17
paper 15:8 180:16
 181:4
papers 180:16
paperwork 73:2 233:11
paragraph 144:15
paralegal 2:16,16
 164:18 165:11 167:18
 168:10,12,17,19
 169:1
paralegals 164:4,7
 189:3 204:11,22
 205:7
parameters 134:8
 208:4
paratrooper 232:20
parent 69:10,17,21,22
 70:3 71:12
parents 70:15 71:11
 209:17
parking 139:19
parole 233:14
part 13:10,11 14:14
 15:11,14 16:18 18:14
 33:2 34:1,3 36:18
 47:2 56:2 59:1,8
 86:17 94:4 107:20
 109:21 112:13 114:6
 114:11,13 117:20
 118:8 135:6 139:12
 143:5 146:15 159:10
 160:18 169:6 178:9
 181:12 192:6,17
 197:1 216:18 223:18
 235:22
partial 43:13
participant 111:10,11
 112:12 147:2
participants 134:12
 137:21 139:10 157:18
participate 29:3 74:10
 112:4,16 132:20
 133:9,13 135:7
participation 29:8
 103:19
particular 13:17 15:1
 15:16 21:14 41:13
 45:4 46:5 57:2,3
 78:22 85:9,12 87:4,10
 118:7 153:9 160:10
 165:1 177:1 181:6
 184:11 210:7 212:3
particularly 13:8 15:7
 19:17 59:11 65:9 68:7
 68:14 87:21 95:2
 113:11 136:13
parties 37:7 63:1 76:3
 133:21

- partner** 79:1
party 70:16 82:14,16
83:16 111:13
pass 33:17 185:10
229:8
passed 92:6
passing 162:21
passionate 223:7,12
path 211:21
pattern 71:10
patterns 24:15
pause 105:15
pay 50:3 173:7 203:8,10
peeling 181:17
peers 131:11 158:22
160:8
pelvic 227:6
Pendleton 167:2
people 7:15 28:9 32:22
33:1 73:4 86:19 88:11
111:7,9,21 115:14
118:18 119:5 120:11
120:16,17,21 130:10
131:10,16 132:20
133:5,8,11 135:2,20
136:3,11 137:12,13
143:13,22 147:1
153:6,11 154:19
155:2 156:17 160:12
160:14 161:1 171:11
181:11 184:12,17
186:2 189:9,10
191:14 195:19 196:18
197:2,9 200:1 201:10
204:16 205:10 217:5
218:5 219:1 220:9,16
221:8,17,18 224:8
233:5 234:19,21
people's 122:15 139:20
percent 93:5 175:5
percentage 106:8
143:11
perception 119:5
135:13 141:20 145:22
148:5,5,6,22 151:9
158:21 159:12 169:17
169:18 196:1,12,13
196:14,15 197:15
201:3,3,4,6,7
perceptions 110:2
195:14
Pere 2:7 163:9 166:17
166:19 173:18 174:12
175:20 176:11 182:2
185:3 188:21 191:6
196:9 206:20 207:17
210:15,18 211:13
peremptories 153:21
154:1 155:16 156:12
peremptory 136:11,18
144:6 151:16 152:4,9
152:18 154:8 157:10
158:8,10,13
perfect 50:22 61:2
92:20 93:4
perform 30:14
period 112:6 113:15
permission 21:22
permissions 80:1,1,2
perpetual 118:19
perpetuates 140:1
person 4:16 14:7 19:14
30:6 70:19 81:16
93:13 96:15 119:7
135:15 136:14 159:9
173:14 179:19 186:6
189:17 192:8 195:17
198:5 199:16 216:6
219:4 221:5 225:14
231:8 232:22
person's 132:1
personal 24:22 199:8
207:18
personally 23:20 36:5
172:16 217:20 218:3
219:20 220:22
personnel 85:4,5,7
158:2 172:4,13
199:11 207:13 209:16
persons 140:10
perspective 17:17
52:18 104:1 109:8
112:2 148:8,9 162:19
175:6,9 186:18
207:18
perspectives 212:21
persuade 45:7
pertaining 55:13 73:21
78:8 96:2 99:22
pertains 87:15
Peters 9:7,10 51:16,18
51:18
phase 12:13,18 57:12
58:10
phenomenal 126:14
phone 25:9 32:3,4
220:17 226:12,14
phonetic 124:8
photographs 13:10,16
13:19,19,21 14:4,8,10
14:11,14,18,20 15:19
23:7 53:7 63:10,13
64:3 65:11
photos 15:3,7 64:18,22
physical 16:5 27:4
98:22
pick 34:1 116:19 140:14
180:16 231:1
picked 116:17 128:10
156:3,3 158:11
picking 106:18 159:1
176:15
picks 185:19
picture 130:5
pictures 227:6
piece 55:5 115:1 159:5
159:15 181:4 212:19
214:15 235:22
pieces 34:2
pigeon 17:20
piggyback 63:8 88:5
Pll 64:17
pill 226:21
place 22:20 41:5 51:10
90:20 91:4,14 111:7
131:1 140:14 142:22
156:15 177:4 205:15
placed 15:8 136:10
places 117:22 196:6
plan 48:3,5 54:1 228:17
229:1,1
planning 157:7
platform 41:1
play 72:12 148:16
149:21 176:1 212:21
226:5
playing 208:15 210:10
210:11
plays 146:8
plea 54:15
pleading 224:6
pleadings 74:9
please 4:18 7:9 51:16
73:6 76:21 163:14
170:6 171:7 205:3,8
206:9 210:17 234:13
pleasure 9:13 116:10
plenty 120:22,22
plus 18:7 39:17 54:15
113:8
point 11:1,19 19:12
45:16 47:14 88:15
107:16 109:9,11
110:7,11 112:1 122:2
132:18 135:21 140:8
140:22 153:10 157:13
162:16 164:12 177:1
184:21 186:10 193:11
197:6 211:18 220:8
226:8 228:13
pointed 120:20 138:9
195:21
points 40:5 132:4 152:7
207:1
police 21:20 37:17
policies 11:6,11 12:15
18:22 54:22 90:1
policy 5:17 10:6 11:2
12:4 17:13,17,19
18:14 19:6,8 20:4
21:3 26:2,11 30:9,11
34:12,12 35:17 36:8
36:18 39:16 43:3,12
44:7 52:4,14 53:9
54:5,11 55:4,7,16
56:4,7,10 57:9 61:3
61:11 65:4,21 66:9,13
68:5 72:6,12 73:10,11
77:1,2,10 90:8
political 217:11 229:15
231:14
politicians 231:15
pool 107:6 112:8
126:14 128:21 137:10
137:12,13 138:9
140:13,19 143:19
156:15 157:19 158:21
159:2 160:12 161:2
161:14,20,21,22
195:5
pools 106:22 107:9
154:15
pops 79:17
populace 106:22
population 106:16
143:10
populations 143:15
pornography 15:21
portals 23:9
portion 151:10
portions 43:7
pose 195:9
position 30:11 37:9
41:2 161:17
positions 184:8
positive 37:4
possession 55:14 60:9
60:10 62:13 97:10
98:1 99:11
possessory 74:11
possibility 34:18 40:20
possible 41:5 71:1
possibly 169:20
post 89:2 110:10
post-trial 77:9 167:4
posted 7:7 25:22
potential 28:4 131:8
142:15 153:7 157:19
161:13 204:14
potentially 19:11 25:21
86:21 175:14 189:18
202:14 212:16

Potomac 1:10
pounds 199:14
power 83:10 187:12
powers 219:11
practical 151:15 153:5
Practically 60:20
practice 10:15 16:20
 18:22 53:5 64:17
 94:12 104:21 167:5
practiced 67:17 94:13
practices 151:17
practitioner 95:13
practitioners 72:15
 124:7
prayed 228:12,13
pre- 61:19
pre-charging 89:8,10
 89:15
pre-qualifying 135:15
prefer 90:15,21 206:6
 217:17
preferral 12:22 13:4
 34:5,8 53:13 55:9
 57:11 59:12 73:16
 88:22 89:2
preliminary 73:18
premise 146:14
prepared 151:2 209:20
preparing 41:22 42:7
preponderance 232:2
presence 24:2,4,8
present 1:12 2:1,21
 67:2
presented 202:22
 214:15
presenters 4:17 103:22
 216:5
presently 75:22 89:17
President 224:21
presiding 1:11 83:4,7
press 14:10
pressure 41:9 229:15
 231:14
pressured 92:15 93:22
pressures 150:22
 217:11
presumably 26:12
 158:11
pretrial 8:2 59:12 73:14
 77:6
pretty 11:3 35:17 71:13
 77:7 80:4 81:22 83:14
 111:4 118:1 128:7,8
 170:7 224:11
prevent 147:1
preview 7:2
previous 28:12 92:16
 127:3 180:22

previously 52:16 79:8
 92:3,18 102:9 146:18
 157:22 234:19
pride 215:4
primarily 79:7 141:1,4
primary 103:12 123:22
 127:17 132:14
principal 145:6 153:15
principle 142:14
printing 8:14
prior 9:1 24:21 57:11
 88:19,22 89:4,20
 96:17 101:15 165:13
 168:11 190:17 219:3
prison 221:6 222:5
 228:19 230:5 232:18
 233:19,20
privacy 14:18 26:18
 31:13 44:2 54:20
 56:15 57:4 63:4,17
private 63:14 64:13
 67:4 74:13 75:17
 104:21 109:10 179:16
 224:19
privately 216:20
privileged 74:12
privy 50:11 205:22
pro 221:12
probably 14:5 18:11
 24:5 46:16 72:11 84:5
 87:16 94:13 96:14
 98:5,10 139:12
 173:21 179:12 186:2
 196:10 214:9 215:8
 215:11 216:11 223:20
probative 15:7
problem 18:6 81:6
 153:7 175:2
problematic 143:21
problems 24:10 28:4,5
 28:14 125:16 150:2
 150:17
procedural 196:7
procedures 8:3 11:6,12
 16:19 43:12
proceed 215:20 235:11
proceeding 7:18 43:11
 82:7
proceedings 18:2
 55:15
process 18:3 21:13,15
 32:12 35:5,12 39:9
 43:21 44:3,11 46:1
 49:17 50:3 52:2 56:9
 56:14,17,17 57:16,17
 79:3 81:9 86:1,2 87:4
 94:4 104:5 106:9
 111:10 112:13,17

116:13 118:17,20
 120:4 122:10,17
 124:15,19 130:1,19
 132:21 133:12,21
 136:7 139:7 142:5,22
 143:5 145:12 146:9
 146:15 148:17 149:1
 150:18 155:11,21
 157:3 179:6 180:15
 185:12 186:4 187:11
 195:14 196:2,19
 197:4 201:8,20 202:5
 204:3 205:2 208:1
processed 59:16
processes 13:13,18
 80:17 198:3
produce 95:18 115:22
produced 29:15 54:13
 59:7,8
produces 131:9
product 97:19 150:22
production 75:16
professional 10:1
profile 55:22
program 48:20 52:8
 79:15
programs 160:17
progresses 59:10
Project 218:18,19
Promotable 102:5
promote 153:17
promotion 127:2
proper 64:1
properly 224:2 233:14
property 58:2,11,14
 74:11 89:16
proposal 8:19,20,22
proposals 9:1
proposition 109:15
prosecuted 103:16
 148:20 149:5
prosecuting 101:12
 102:16 103:10 105:3
 106:5 148:19
prosecution 1:1 4:6,14
 5:5,22 8:3 12:11
 16:22 33:22 35:15
 57:6 68:10 85:20
 102:1,20 104:16
 105:4 126:14 130:7
 137:22 166:1 235:18
prosecutions 102:14
prosecutor 12:19 42:17
 62:10 88:8 90:2,7
 93:5,16 94:15 102:6,7
 103:18 107:1 108:4,5
 108:6,6,7 112:1
 113:13 123:10 146:7

148:10 149:14 231:11
 232:3
prosecutorial 52:5
prosecutors 3:5,6 5:15
 5:21 100:20 114:1
 158:9 229:19
prospective 118:5
 159:16
protect 63:4 65:8
protected 221:13
protecting 26:17 33:18
 124:2 214:21
protection 37:18
protective 26:11 63:10
 64:2,6,19 65:1 67:5
 67:12
protocol 13:9,13 15:2
protocols 28:14 66:8
proud 216:17
prove 223:18
proven 146:20 198:12
 230:9 231:21
proves 20:1
provide 19:5 57:9 61:21
 64:16 89:2,8,9 90:11
 90:11 93:1 103:22
 117:19 121:10 153:13
 162:18 166:8,13
 182:17 224:1,15
provided 10:2 14:20
 23:1 53:10,11,15 54:8
 54:11 55:10,20 56:22
 60:21 61:5,11 62:2,3
 62:3,10,12 63:19,20
 66:18 75:19 87:22
provides 25:16 96:7
 117:8 144:17
providing 31:9 33:9,10
 34:9 53:5 57:20 63:13
 64:10,18 96:10 97:2
 133:8
provision 26:2 189:16
provisions 26:12
psychological 149:20
public 2:19 3:2,9,10
 4:12 6:3,4 7:1,3,9
 25:3,8 78:14,15
 215:18,22 216:3,4
 224:15 236:9
public- 74:21
public-facing 77:16
publicized 224:10
publicly 25:10 75:2
pull 131:17 141:14
pulling 128:20 141:6
pure 134:17
purely 129:4 130:1
purpose 5:3 59:19

104:3 122:11 123:22
124:2 132:13 153:16
173:12 191:9 198:21
purposes 99:9
pursuant 5:1 51:21
73:15 99:4
pursue 28:11 45:8
pursued 33:22 50:7
pursuing 69:11
pursuit 29:10 50:20
push 38:2 205:9
pushes 80:11
put 22:20 24:8 30:2
31:17 41:2 67:11
71:17 77:17 85:2
97:12 111:7 120:8
122:9 142:22 164:17
170:9 179:4 182:20
188:9 189:11 199:2,4
205:15
putting 40:22 114:5
130:7 152:3 208:12
213:10
Puza 2:7 163:11 168:7
168:8 175:2 183:1
185:1 194:16 201:17
212:6
puzzlement 97:14

Q

qualification 184:1
qualifications 176:19
183:22
qualified 103:2 109:16
113:20 120:21 121:16
128:13 153:7 158:12
183:4 215:8
question 7:17 10:11,14
20:13 26:9 28:2 33:2
41:7,21 45:15 46:9
52:21 53:2 62:18,19
62:20 63:8,17 64:2
65:19 66:2,15 72:5
80:5 83:16 86:2 88:6
94:20 97:8,17,22
109:14 110:16 122:17
123:2,6 124:6 125:1,5
125:22 127:12,17
128:18 131:6 144:11
148:14 151:15 153:1
156:5 157:8 170:14
171:15 176:20 179:12
185:10 195:9,11,22
196:5 197:2,14
questioned 141:19
questionnaires 203:17
questions 26:20 34:1
45:19,22 51:5 60:13

69:11 93:1 95:1,9
100:6 132:10 162:5
163:1,16 169:5
176:14 182:15 190:13
202:13 203:21 215:14
215:16 224:4
quick 28:1 97:8 131:6
133:16 218:10
quickly 49:1 216:11
quietly 219:13
quit 125:13
quite 101:7 110:4 125:7
138:6 146:4 177:7
194:12
quorum 154:18

R

race 117:12 141:11
148:18 182:18 186:16
188:8,16 189:5 192:1
192:15
racial 136:9
raise 213:6
raised 45:22
raises 139:1
ramp-up 167:14
random 132:9 134:1
161:11 177:18 190:20
190:21 195:4 205:19
206:2
randomization 120:4,9
122:5,9,16 123:12
124:15,19 126:1,9
130:3 134:17 136:2
141:22,22 142:1
144:14 150:2 158:16
162:1 190:18 194:22
196:4 201:19 202:3,7
202:10,19 204:3,5,7
205:5,12,21,22 206:4
206:8,18,19,21
randomize 104:5 130:1
161:10,16 203:3,19
205:2,16
randomized 120:19
128:3,19 129:4
130:13 152:16 155:14
156:16 161:6
randomizing 203:16
randomly 123:17
rank 115:18 132:7,10
140:11 174:13,17
178:18,19,20 183:7,8
ranks 212:20
raped 218:12 225:6
226:22 227:9
rapport 29:9 186:20
rare 82:7 89:19

rarely 89:14
rarity 170:4
rate 106:8 149:17,19
rates 186:8,11
rationale 123:5
RCM 83:15
reach 117:1
reactions 47:20
read 99:16 104:18,19
144:3 211:12
read-ahead 54:8
read-aheads 56:21
101:2
readiness 122:18
124:22 129:3 200:13
reading 124:7 225:18
ready 32:5 124:1
162:10 214:20
real 133:15
realistically 156:10
reality 46:10,11 148:19
153:5 169:19 196:2
realize 47:18 216:11
224:8 228:16
really 31:6 50:21 96:7
104:17 105:3 123:2
132:1 138:4 150:19
151:2 153:2 155:7
158:13 160:5 161:10
180:10 181:1 189:2
203:1 208:11 216:10
218:10
realm 123:11 189:11
reason 14:16 39:5
49:18 72:6 89:15 96:9
129:22 170:19 171:1
183:4 194:13 210:4
reasonable 77:4 232:6
reasonably 84:12
reasons 36:20 90:5
149:20 172:7 176:22
177:1 196:21 233:13
rebalance 219:18
recall 93:21 94:6
receipt 73:19 208:19
receive 11:12 14:15
22:3,11,13 86:15
received 8:16 11:13
22:15,16 27:2 48:17
56:12 80:15 140:6
receives 26:13
receiving 22:10
recognized 49:22
recognizing 202:2
recommend 26:12
127:22 207:15
recommendation 35:4
120:18 169:6 173:5

recommendations 8:4
48:18 126:18 128:17
207:14
recommended 120:4
187:15,16 234:22
record 8:1 14:14 15:5
15:13 22:13 27:5
37:20 54:2 61:16
67:15 97:10 100:1,11
221:15 225:18 236:12
recorded 7:5 10:16
12:4 25:15 37:15
40:12 53:10 55:6 57:9
61:15 87:21 91:2,11
95:3
recordings 25:9
records 10:17 12:8 13:8
16:17 21:9 22:10
24:16 29:21,21 30:13
37:22 38:1 53:21
54:19 60:2,8,11,17
62:7,14 63:3 64:1,11
65:9 66:5,7,16,18
67:10 98:1,10,19,21
99:8 221:13
recruit 111:8 167:13
recruiter 164:11 167:10
167:11
recruiters 167:12
recruiting 111:8
redact 18:9 29:14,20
30:19 63:2,17
redacted 31:3,10 63:22
64:12,17 224:2
redaction 26:3 30:14
redactions 19:19 29:18
refer 101:10
reference 87:2 176:10
180:5 181:10 209:1
referral 90:19,20
referred 73:21 77:8
referring 233:15
reflect 93:13 153:12
187:22
reflected 185:7 188:9
Reforming 8:2
refresh 92:9
refreshed 95:4,21 96:8
refuse 89:20
refused 227:7
regard 10:5 64:9 128:8
128:9 139:22 140:11
170:22 174:4
regarding 12:7 17:13
65:9
regards 14:19 28:11
53:9,14 63:16 66:15
66:20 73:11 88:19

89:1 169:6
Reggie 1:18
regiment 164:8
Regimental 163:3
 164:1 170:10
region 103:4 113:3
 203:6
regional 166:2
regionalized 157:17
regulation 67:14
rehabilitate 156:7
rehabilitated 154:13
 233:15
reinforce 132:1
reinterview 93:3
reiterate 22:14
reject 86:17,19
related 28:1 57:2 85:16
 96:10 99:18 100:2
relates 45:4,16
relationship 19:21 24:5
 28:20 37:2,4,5,11
 94:17 187:7
relationships 22:6,8
 37:11 38:6 111:19
relative 110:8,17
 122:14
relatively 128:14
relaying 76:7
releasability 36:4 40:12
release 10:15 14:1,11
 17:1,14 18:5 19:14
 21:22 22:1 36:16
 38:18,20 39:5,9 40:5
 43:5,13,18 44:8,15
 45:3,6,11 53:22 56:8
 62:15 63:3,6 65:13,14
released 11:21 12:2,16
 14:8 15:15 16:4 44:18
 53:18 69:22 70:4
releaser 19:13
releases 78:5
releasing 11:18 19:18
 28:18 30:3,9 40:16
 63:21 68:12
relevant 19:5 79:16
 99:21
relinquish 103:21
reliving 28:22
relooking 127:2
remain 18:15 107:22
 111:16 233:7
remains 30:19 50:6
remarks 104:1 162:22
remedied 222:10
remember 34:22 92:18
 94:10 106:22 117:6
 154:9 158:9 171:4,5

190:7 191:8 227:2,3
reminded 118:18
renaissance 1:9 105:20
reorganization 113:12
rep 70:15 71:6
repeat 42:5
repeated 68:22
repeating 72:4
report 6:20 8:2 12:8
 14:21 16:1,2,3,5,20
 26:22 27:3 37:17 44:8
 46:17 49:9 56:1 59:14
 87:18 99:2 196:21,22
report's 8:17
reporter 7:14
reporting 15:4 23:4
 49:10
reports 26:21 27:9
 55:20
represent 85:15 143:13
representation 38:21
 166:13 169:7,10,10
 189:19
representative 6:16
 69:20 70:1,3,12,20
 138:13 140:16 150:5
representatives 5:8 6:7
 9:13
represented 55:9 57:15
 202:9
representing 68:13
 231:11
represents 106:21
 143:6
request 11:12,13 12:7
 14:7 16:16 17:2,19
 19:14 39:11 43:6,7
 44:1 53:13 54:12,17
 55:19 56:12,15 57:13
 58:20,21 59:4,16,19
 60:19,19 61:3,11,17
 62:3,8,16 89:6,8
 170:15,21 190:1,2
requested 8:14 18:8
 44:20 61:4
requesting 53:19
 219:11
requests 10:21 12:1,10
 14:5,6 19:4 30:11,13
 30:15 37:14,22 38:3
 54:19 56:9,14,18 59:2
 59:3 73:22 74:4
require 68:6 81:4 118:4
required 199:11 232:7
 233:11,12
requirement 68:8
 112:11 159:4 169:8,9
 183:7 233:20

requirements 112:20
 178:1
requires 233:21
requiring 134:13
requisite 171:11
research 155:8
researching 218:17
Reserve 164:6 167:9
reservist 101:21
reservists 125:19
resolve 106:6 124:17
 127:11 139:17 149:13
 150:8 151:7
resolved 127:4,7
 139:18 152:14
resources 19:12 30:2
 78:19 204:15
resourcing 30:16
respect 38:9 40:4 55:5
 55:18 60:7 72:22
 77:16 78:14,17 85:17
 143:14 160:7,7
respected 131:10
respectively 229:4
respects 143:20
respond 19:4 28:1 34:2
 82:9 84:9,10,18 92:22
 170:14 195:10
respondent 189:17
 191:3
response 70:13 124:8
responses 26:9 42:19
responsibilities 22:9
 79:9 101:17
responsibility 42:2
 79:7 217:22 233:6
responsible 78:10
 102:13 232:13
responsive 37:8 74:8
rest 35:1 46:7 59:14
 60:5 98:17 121:3
 173:22
restrain 207:19
restricted 23:4
restrictive 19:10
result 89:16 107:12
 117:1,2 138:21 139:1
 139:22 145:13 151:1
 185:12 186:14 187:11
results 27:13 55:21
 57:10 58:10,15 61:12
 191:15
resume 8:22
resumed 100:11
retain 90:6
retaliate 41:4
retaliation 40:21 216:21
retired 101:6,8 104:9

216:6,7
retirement 104:12
retrained 168:22
retreated 217:18
retrieve 15:2
retrieving 23:6
return 42:21 136:5
revamp 181:22
revealed 28:17
revealing 31:16
reverse 113:11
review 8:11 11:12 16:21
 47:2 61:22 73:14 84:3
 89:3 91:22 92:9 93:16
 95:2 167:4 232:11
reviewed 136:16
RFI 42:19
Rhode 165:12
rhythm 36:3
ribbon 112:7 131:10
rid 193:17
right 12:17 18:22 20:2
 20:10 27:12 30:9 32:1
 34:5 37:20 46:7 47:5
 47:15 59:7 74:14 77:4
 77:5 79:18 84:5 85:7
 86:19 93:19 100:7
 111:9 117:2 120:14
 123:18 129:8 135:14
 141:19 146:16 152:2
 154:22 158:22 159:7
 161:7 170:9,20,21
 171:4,18 174:13,17
 176:4,21 179:22
 180:12 182:3,20
 189:5,9 191:12,18
 192:14 196:11,15
 197:6 198:13 199:17
 206:14 208:3 211:12
 211:22 213:12 215:13
 215:20 220:12 225:22
 229:2 231:12
rights 74:11 75:15
 82:20 232:9 234:4
rigorous 180:15
robust 86:4
rocky 36:1
ROI 42:21 43:1,5,7
 44:15
ROIs 43:14,18
role 23:11 75:11 103:18
 108:20 110:3,4
 133:19,20 144:13
 146:8
roles 102:10
rolls 123:13
roof 186:8,11
room 25:17 28:8 66:4

68:20 69:1 96:22
180:7 213:4
roster 202:15,15,16
207:3
rosters 124:12 177:13
204:9,12
routine 58:20
routinely 30:18 59:6
Rozell 2:16
rule 82:13 170:5 171:1
215:5
rules 71:4 76:12 81:3
82:11 83:2,3 84:7
86:18 90:2 125:20
run 205:1,1
running 35:3
rush 150:18

S

SA 10:19 11:4 12:3
13:22 14:13,19 16:13
16:16 17:7,18 18:13
19:2 21:16 22:2,14
23:19 24:19,20 25:5
26:19 29:19 30:8 31:6
34:3 35:7,16 36:22
38:22 39:10,14 40:6
40:10,19 41:12,15,18
42:12 43:3,17 44:7
45:10,13 46:16 47:10
47:21 48:9 51:8
safe 12:8 14:15 15:5
22:15 37:22 54:14
222:7
safety 40:4,6,9,11,15
40:15,18,20 41:6 57:3
sailors 126:12
Salon 1:9
sample 138:13 152:16
San 49:12,15
sanctions 83:8,10
SANE 61:8,12,16 64:18
98:18,19
Santucci 2:20 224:14
224:17,19 232:4
234:2 235:13
SARC 22:21 23:22
SARCs 22:21
sat 149:18 180:21 184:5
233:2
satisfied 111:15 200:5
satisfying 112:20
Save 219:1,2
saw 104:8 202:12
saying 16:10 29:7
88:21 120:7 159:8
161:17 175:17 179:20
182:3 198:17 201:15

201:15 223:4,16,17
233:11
says 161:9 171:6
189:16 221:2
scale 224:10
scales 219:18 225:8,8
234:14
scar 226:10
scheduled 75:4
schedules 157:7
scheduling 54:20 74:1
74:19,21
school 115:9 165:12
Schwenk 1:17 104:11
118:12 122:1 131:3
144:12 170:7 185:9
189:13 195:7 234:17
science 127:7
scope 28:12 142:15
Scott 2:8 52:14 57:7
58:9 65:20 68:17
72:16 79:6 86:6 96:12
100:5
screened 205:17
scrubbed 177:18
scrutinize 150:19
se 160:21
sea 65:21 67:16 79:9
82:11
seal 65:12
sealed 15:3 67:14
search 54:18
seats 51:16
SECNAV 181:9
second 33:8 125:15
130:2,18 135:10
204:1 225:16
secondary 50:19 123:1
123:19 124:11
Secretary 4:22 5:4 8:5
8:9
section 5:18 6:6 99:16
117:8,19 119:21
121:10 130:14 140:16
140:17 141:18 147:13
sector 73:3 147:15
194:14 212:10
secure 23:8
security 25:20 102:14
123:1 129:15 136:3
see 19:11 38:4 40:4,6,8
40:16,19 43:6 46:11
51:4 80:11 88:1,3
104:18,20 108:10
115:12,17 125:5,6,12
125:13 144:3 149:17
154:11 171:2,9,19
172:2,6 174:1 182:9

182:10 192:8 202:6,7
204:14 209:10 215:13
217:7 221:7 226:9
seeing 29:2,5 45:20
97:20 100:7 171:5
223:1 228:6
seek 25:7,8 64:5 67:5
105:22 156:21
seemingly 108:13
seen 21:4,6 24:15 26:6
47:1 66:4 68:13 69:9
70:7 75:2 79:12 85:11
86:8 98:18 99:7 115:8
130:5 134:9 170:17
170:17 173:8 174:21
213:8 226:3,4
sees 197:16
segments 148:13
select 108:1 120:5
180:13 193:8 202:18
203:3,19
selected 107:9 108:18
123:13,17 137:12
150:21 155:15 156:17
177:10 205:18
selecting 106:13
129:16 131:16 180:19
203:16
selection 104:2,5 106:9
114:7,8,13 116:12,16
118:17 120:12,19
128:19 129:4 132:9
134:1 136:6 138:17
144:9 150:19 155:21
176:19 185:11 192:18
201:20 202:5 204:3
205:2
selects 169:9
Senate 8:10
Senators 220:21
send 4:21 154:19
156:14 209:20
sends 171:11 231:15
senior 2:16,16 3:8 6:1
111:18,20 116:19
162:9,18 163:6,11
166:4,12 167:6 168:8
168:15 182:9 198:8
seniority 174:5
sense 96:16 129:10
132:1 150:14 161:4
197:9
sensitive 13:20 25:12
62:22 217:4
sensitivity 15:11
sent 124:9 138:11
154:4,5 155:18 230:5
sentence 185:22 229:7

sentenced 227:18
sentences 234:2
sentencing 114:11
115:6 134:7,11
sentiments 72:17
separate 5:21 6:11
separating 204:12
separation 189:14
191:3,5
September 6:21 7:3
sergeant 128:21 163:2
163:3,8,11,18 164:1
164:11,13 166:18
168:8 170:11 175:16
182:13 216:4,6
220:12 222:20 223:21
series 6:19
serious 132:11 197:1,5
seriously 140:7
serve 5:9 76:13 82:15
83:17,19 104:3
132:22 133:2 135:3,3
142:16 143:18 175:19
served 82:20 84:4,16
85:7,14 86:19 102:9
113:10 121:12 164:8
166:21 167:3,6,10
176:8 179:15 199:5
199:22 216:17 217:14
218:11 222:4 224:11
service 5:10 10:1 12:21
18:15 23:5 44:21 54:6
76:1 101:7 102:11
110:19 111:3 112:16
118:3 131:22 137:14
137:16 147:17,18
163:22 166:2,6 174:8
174:13,15 176:21
178:1 183:6,10,21
185:6 188:20 202:9
207:1,6,8 208:17
211:1,2,3,15 217:13
219:16
service's 6:8
servicemen 221:13
services 5:8,11 6:10
8:10 9:21 23:3 43:1
56:9 58:19 65:22
67:17 72:20 78:16,19
79:9 82:11 84:22
149:6 163:8,9 166:9
166:20 168:1,4
173:22 190:7 192:20
serving 76:6 101:14
102:1,6 131:22 168:1
session 7:1 9:9 10:12
51:19,22 74:3
sessions 100:14

set 7:3 106:18 111:14
132:7 174:20 176:20
212:3
sets 40:14 213:22
setting 73:20 114:15
settings 32:16
seven 153:21 154:1
sex 102:22 113:16
188:8,16 226:7,11
233:9 235:18
sexual 1:1 4:6,14 5:6,6
13:14 15:20 46:2
55:21 118:15 143:16
143:17 192:2 225:3
226:17 229:11,18
233:1
sexually 224:8 225:12
227:14 230:16
SGEN 195:7
shake 149:4 197:9
209:11
shaken 228:11
shape 18:20 190:22
share 12:5,12 16:16
23:10 25:10 32:6,8
33:13 65:21 72:16
116:5 211:6
shared 14:16 26:1
32:13 36:13 52:15
62:21 68:3,4,6 105:14
131:7 195:19 226:13
sharing 5:17 10:7,9
27:11 28:13 32:2 36:7
51:19 52:2 66:17 86:4
99:19
shaving 213:10
sheet 14:17 15:10
73:20 180:16
shifting 103:17
shirt 226:9
shoe 186:12
shoes 184:5
short 5:20 109:4 162:13
229:5
shortest 104:12
shoulder 199:4
show 131:17 178:7
229:17
shown 160:20 181:14
side 103:10 116:11,12
116:14,14 121:5,5
132:7 139:7 166:1,13
194:7 200:18 209:14
217:6 220:21
sides 35:13 137:21
152:5 203:12 230:18
sign 71:15 233:11
signal 7:16

significant 24:4,7
102:15 127:10 148:7
149:11 151:10
silly 172:22
Silva 2:20 216:4,6,9,10
223:22 224:5
similar 55:4 56:8,8 66:2
68:17 77:1 84:22 86:6
116:13 182:18 234:20
similarly 78:4 99:17
118:6
simple 151:14
simply 94:20 101:10
105:22 106:20 217:2
217:19
sir 16:13 17:7 31:22
32:12 45:10 60:4,7
61:14 70:14 71:3,8
173:18 175:20 191:2
191:6 224:5
sister 56:8 78:16
sisters 223:9
sit 92:5 111:20 119:3
148:8 149:16 153:3
153:12 156:21 172:17
177:15 178:8 179:22
191:4 197:14 208:19
209:22
sits 171:13 228:10
sitting 113:5 133:5
184:20 199:12 200:18
210:20 228:4
situation 46:4 66:21
89:18 147:11 187:9
situations 68:20 147:14
six 101:1,11 158:10
207:7 232:18
size 152:4
SJ's 177:12
SJA 44:21 121:12 147:5
147:6 168:2
Skenk's 124:8
skill 212:3
skills 91:9
sleep 208:7 221:7
slip 27:15
slows 47:3
small 96:14 115:2
139:16 228:4
smaller 140:15 154:16
158:1 194:19
smart 120:22 123:4
Smith 1:11,13 4:9,10
8:1 9:11 10:13,20
11:5 20:12,20 51:4,8
52:22 63:7 88:5 100:6
100:19 158:15 160:4
160:6 162:3 174:10

183:19 188:18 201:18
215:13,17 224:13
234:16 236:7
smoothly 20:2
sneeze 190:6
social 41:1 138:4
179:16
society 148:13,18
151:10
socioeconomic 117:12
123:15
SOH 220:15
soldier 178:6,13 179:20
214:1,6
soldier's 179:3
soldiers 126:11 164:5
164:21 178:10 179:15
214:17,22
solicit 8:21
Solomon 120:6
solution 135:7
somebody 19:16 70:2
91:10 143:16 146:21
147:16 150:13 174:16
174:21 222:19
someone's 180:1,2
210:9,19
somewhat 113:5,11
122:10
son 225:16 227:17,21
229:6 232:12 234:6,8
son's 231:9,22 232:16
sons 209:18 234:9
soon 8:16 77:19
sooner 233:7
SOP 77:3
SOPs 54:10 55:17 56:5
90:14
sorry 9:15 13:5 31:2
42:4 76:4,20 144:4
157:9 171:21 174:12
206:12 223:11
sort 26:11 28:3 46:8
86:8 90:3 91:17
106:13 131:13 145:14
155:17 176:4 189:22
214:14 218:22
sorted 115:15
sought 64:19 65:2 84:2
soul 211:22
sounds 35:4 58:19
soup 106:14
south 1:10 105:19
138:15
Southern 101:16
110:13
space 127:19 134:1,16
speak 7:17 16:8 23:15

27:8 28:9 47:19 81:5
105:16,17 116:4
117:10 121:11 128:2
137:6 160:8 168:6
204:21 216:20 217:22
218:5 234:12 235:20
speakers 156:4
speaking 4:19 7:15
60:20 70:10 98:12
108:8 112:8 208:15
210:14 212:7
spearheaded 22:20
special 2:4,5,9 3:5 5:13
6:8,14 9:15,18,19,20
9:21 11:1 13:6 30:4
31:15 34:10,15 38:6
38:14 39:18 44:19
48:7,12,19 52:10,11
52:13 54:9 60:22 61:6
85:22 90:13 92:4,21
103:5 114:9 141:7
168:14 187:17
specialist 166:21
178:15,17
specialty 208:18
specific 5:10 12:4,15
23:14 28:17 38:3 43:6
43:9 71:17 88:1
176:18 185:18
specifically 32:2 82:13
84:6 188:2 195:3
227:8
specifications 73:21
specified 32:14
specifies 13:9
spectrum 126:12,22
127:19 161:13 192:5
speed 78:12 209:6
spend 49:3 104:20
233:16
spending 102:21
spent 168:13,17 227:20
spits 207:4
split 120:7 189:13
Spohn 1:17 62:18 136:5
spoke 217:3
spoken 155:7
sponte 54:17 74:17
75:3
spot 97:12
Sprance 2:12
sprint 199:15
squarely 75:14
stack 180:16
Stacy 2:16
staff 2:11,14,15,15 13:2
57:13 128:20 145:4
145:18 167:6

- stage** 43:15 59:11
91:11
- stages** 18:16 35:18
87:4
- stand** 172:17 225:11
- standard** 64:17 175:13
178:3 232:6
- standardized** 34:12
39:16
- Standards** 8:4
- standing** 75:9 78:1
- standpoint** 69:12
143:15 152:22
- stands** 54:9 81:19
179:7
- standup** 79:11
- start** 7:20 35:3 51:11
53:1 83:13 122:6,9
124:17 139:13 141:13
141:17 142:11 145:21
146:14 160:9 176:15
177:5 179:5 181:17
192:12 193:18 201:9
202:20 233:22 235:6
- started** 51:13,15 120:1
194:11 216:2 218:17
222:16
- starting** 115:10 154:15
- state** 47:16 64:21
100:21 101:12 102:16
102:20 103:10 105:18
108:5,12 112:1,3
114:8 116:6,9,11,13
117:22 123:10 129:16
200:12,12
- state's** 113:7
- stated** 113:13 165:8
180:21
- statement** 16:17 28:12
30:10 36:19 37:16
39:4,5 40:12,13,22
45:6,11 54:12 58:1
59:6,7,9,18 60:21
64:10 87:11,16,22
88:7,9 90:10 91:3,11
91:19 93:17 95:3,14
96:4,11,17 137:2
153:4 175:21 189:1
- statements** 10:16 12:4
17:22 25:16 30:19
37:14,15 53:6,10 55:6
55:11,11 57:1,10
61:15,21 62:2,12 63:3
87:20,21 88:10 89:1,3
89:4,9 90:10 92:1,7,9
92:11,16 95:18
234:21
- states** 101:16 102:12
102:19 103:1,7,15
110:13 131:1 133:3
160:4 163:4 165:18
165:21 166:22 192:20
232:7 233:21
- stating** 7:17 180:14
- station** 46:20 47:22
125:15 135:20
- stationed** 184:9
- statistically** 138:10,12
142:19
- statistics** 141:2 149:22
- status** 11:7 117:12
- statutory** 5:3 10:5
51:21 52:18
- stay** 46:20 48:13 92:15
124:1 171:17 181:13
208:4
- Stayce** 2:16
- stayed** 109:4
- STC** 70:17
- STCs** 68:22 96:20
187:16
- STDs** 227:7
- step** 80:4 95:6 139:9
145:11
- steps** 142:2 234:13
- stern** 83:14
- stick** 93:22
- stipulation** 54:16
- stock** 112:17
- stole** 65:4
- stood** 35:21
- stop** 222:15
- storage** 16:1
- stories** 222:12
- story** 92:13 96:22 109:4
217:6
- strain** 28:20
- strata** 106:20
- strategic** 192:19
- strategy** 26:3
- street** 90:14
- streets** 167:13
- strict** 67:11
- strictly** 124:19
- stripes** 173:17
- strong** 229:18
- strongest** 110:19
- strongly** 189:10
- structure** 140:11
199:21
- struggled** 108:19
- study** 5:15 6:2
- stuff** 88:22 125:13
178:2 198:9 224:2
- style** 158:14
- sua** 54:17 74:17 75:3
- subcommittee** 235:5
- subcommittees** 6:22
235:3
- subject** 49:8,16 53:22
89:7 138:5
- subjective** 159:6 160:2
160:9 181:1 182:8
- subjectivity** 160:13
161:3
- subjects** 50:13
- submission** 221:22
- submissions** 223:16
- submit** 7:9 59:19
110:18 137:19
- submitted** 8:13,19 9:1,6
27:1 71:13 219:3
- subordinate** 111:18,19
- subpoenas** 54:18
- subsection** 145:4
- subsequently** 77:1
- substance** 54:7
- substantive** 61:1,19
76:2 89:11 90:13 93:3
93:18 94:18 95:7
196:7
- substation** 167:11
- successful** 220:14
- sufficient** 112:11
121:10
- suggest** 126:8 127:15
- suggesting** 126:2,7
140:21
- suggestion** 131:18
173:4
- suggestions** 66:11
136:22 196:1
- suicide** 220:14
- Sullivan** 2:12 4:3,4,10
134:7 236:9
- summarize** 161:5
- summarized** 73:16
- summary** 16:2 28:19
- summons** 138:11
- superintendent** 168:14
168:18
- support** 55:8 85:20
163:21 164:7 165:2,2
168:2 186:10
- supporting** 204:13
- suppose** 30:20
- supposed** 74:6 75:9
186:7 194:9 214:13
- sure** 30:6 31:11,12,18
35:3,6,13,22 42:6
50:5 53:8 71:20 77:13
79:2,3 84:13,20 85:8
99:13 115:19 141:21
142:10 179:1 185:7
- 207:10 218:21 223:8
229:15,16 230:14
231:20 235:6,7 236:1
- Surely** 99:12
- surface** 197:21
- surgery** 147:17
- surprised** 146:5 209:9
- surrounds** 109:14
- survivor** 20:8
- suspect** 27:16 49:11
105:14 151:18,18
- Suzanne** 1:15 195:8
- SVC** 13:6 17:10 40:1
62:4 81:4 86:9
- SVCs** 19:22 38:7 79:14
81:6
- swab** 227:7,8
- switch** 51:11
- switched** 144:8
- switching** 100:15
- sworn** 101:15 133:2
146:17
- system** 23:8 49:5 75:21
77:19 79:11 80:3 85:2
85:3 103:20 106:2
107:21 108:16,19
125:4,7,11 126:6,22
127:10,20,21 128:4
132:3 133:9 135:14
135:14 136:1,2,4,7,18
136:20,21 138:2,3
140:1 144:9 148:21
151:11 156:11 158:17
159:13 180:5 181:10
182:1,22 183:6
193:21 198:18 201:13
203:2,15 205:1
206:12 207:16 219:10
233:19
- systemically** 127:8
- systems** 128:5 130:9
198:4
-
- T**
-
- T.L** 2:10 9:15
- tab** 10:3 101:1,11
162:14
- table** 117:14 160:11
189:8 206:13
- tag** 104:9 144:4
- Tagert** 2:15
- take** 17:8 31:11 41:9,19
45:20 49:13 51:10,16
67:19 88:10 100:9
111:17 130:6 142:2
156:20 157:1 161:3
179:21 180:3 184:7
188:8 197:6 205:14

207:18 209:18 215:4
226:8 230:22 233:9
234:13
taken 13:10 14:4 88:7
184:22 214:14 220:10
233:12,15 234:14
takes 209:5 211:17
talisman 90:3
talk 13:15,17 125:7
200:20 204:2 224:18
talked 32:19 118:18
119:17 133:14 134:2
137:1 193:19 220:16
229:12
talking 21:2 33:5 60:1
68:12 96:15 107:1
117:11 144:12 146:5
146:10 149:6 190:18
225:17 230:20
Tang 2:8 52:9 54:5
61:13 64:9 65:3 66:22
70:13 74:16 76:11,19
81:15 83:4 85:11 89:5
92:20 94:12 95:5
98:20 99:17
tap 206:4
task 10:5 51:21 52:19
146:22 198:20
taxing 205:4
Taylor 143:1
TC 70:17 75:3,12,18
79:22
TCs 96:20
TDS 105:7,8
team 177:11,12
teammates 199:19
206:13 213:5
teams 85:21
tears 214:16
technical 4:19
teleconference 2:21
4:21
tell 60:5 94:2,5 141:4
153:19 172:14 173:19
186:17 218:8 221:18
222:9 230:13 233:5
telling 16:8 69:13
tells 67:18 82:13 213:18
temperament 111:10
112:12 122:16 159:5
159:6,10 160:2,21
161:15 179:11,14,18
180:21 181:2 182:6
182:12 183:14,17,21
template 15:9
temporarily 58:15 69:2
ten 4:20 83:11 102:21
tend 25:11 96:20

138:19 174:2
tends 37:6
term 154:18 178:12
terms 21:14 26:17
28:16,22 63:9 124:1
129:8 139:15 159:21
199:8 202:4 204:5
213:14
Terry 100:16
testified 149:2 219:2
testify 95:15
testimony 73:17 119:13
180:22
testing 27:14
tests 206:1
tether 211:9
Texas 167:11
thank 4:10 7:19,21,22
9:10 10:12 17:11
20:10,22 24:12,14
26:8 31:1 45:14 47:17
51:3,6,8 53:1 55:2
56:7 57:7 58:4 66:1
73:8 80:13 81:14 97:7
100:7 104:7,7,13
108:1 118:12 131:3,5
144:10 162:4 163:19
163:21 166:16 169:1
169:3 170:6 176:12
176:13 188:17 215:14
215:16 222:6 224:12
224:13,17 234:15,16
235:12,13 236:3
thankful 116:3
thankfully 66:22 220:15
Thanks 62:17 168:6
themselves 39:13
theory 58:4,8
thereabouts 128:11
Theresa 2:14
They'd 156:14
thing 57:20 58:7 78:13
80:6 86:14 91:6
119:11 124:10 134:4
146:16 149:14 150:11
159:2 160:2 165:17
179:12 192:1 200:19
202:1 203:8,9 204:17
216:12 221:2 225:1
225:14 226:21 235:10
things 21:1 23:9 34:11
50:5 57:5 59:22 60:3
63:12 65:11 77:5,10
78:22 85:1 94:20 95:8
95:16 96:1,1 97:4
107:8 114:5 119:22
121:7,21 124:13
127:13 134:4 144:5

152:8 156:7 164:4,14
170:18 171:9 172:21
174:1 175:7 178:9
180:20 181:17 184:18
190:20 192:2 193:4
194:15 198:5 199:10
200:9,10,15 202:12
205:7 206:10 212:8
213:9 215:3,3
think 9:4 18:13,21
20:16 21:1 25:11
27:10 28:12 29:12,15
33:4 34:9 35:7,17
36:2,7 37:10 38:4
39:4 41:5 46:14 47:13
50:22 54:3 57:19
60:18 62:18 66:3,7,14
68:19 71:22 72:5 78:2
88:8,16 90:8,22 91:21
92:17 94:17 95:15
96:9,15 97:13 98:20
100:3 105:13 107:13
107:17 109:13 110:11
110:16 111:13,21,22
112:15,19 115:1,5,7
115:17 117:4,18,21
118:6,10 121:9 122:3
122:17 123:2,5,9,16
124:6,7,9,14 125:1,4
126:10,19 128:3,7,17
129:2,21 130:1 131:6
132:4,12,19 133:7,10
133:22 136:1 137:2,4
137:8,17 138:5,21
139:4,8 140:6,12,18
141:20 142:4,9,14
143:21 144:2,4
145:13 146:13 147:21
148:1,6,12 149:13
150:3,9,14,16,17
151:1,5 152:16,20,22
153:14,15 155:16
156:16 157:2,4,14
158:19 159:9,18
160:4,5,9,12,13,22
162:3,10 169:17
170:13 171:3 172:3,4
172:6,6,7,9 173:14,15
174:1,2,4,5,7 175:12
175:17,20,21 176:1
176:21 179:13 180:4
180:6,8,12 181:5,9,16
181:21 182:3,6,11,16
183:3,4,9,12,15,22
184:3,6,11,15,18,21
185:1,3 188:2,22
189:1,11,15 190:7,11
190:13,15,17 191:8

191:20 192:11,13,15
193:3,9,18,19,20
194:7,11,17 195:2
196:9 197:14,17
198:3,3,13,16 200:20
201:1,9,13 202:1
203:11 204:5 205:11
207:19,21 208:7,9,10
208:11,22 209:2,4,16
210:3,9 211:6,13,14
212:13,18 215:1
217:3,21 220:1 223:4
227:12 229:13 232:4
235:10,21 236:8
thinking 98:8 110:7
125:3 126:3 132:9
158:20 196:4
thinks 197:15
third 8:19 125:16 130:2
130:18 171:19 204:2
third-party 222:22
thoroughly 49:2
thought 104:10 110:3,4
123:3 134:18 147:12
225:16 227:13,13
thoughts 121:6 122:1
151:22 152:3 169:12
169:20,21 170:5
177:2 188:14,19
201:21 202:4
thousands 139:19
three 6:22 9:5 10:3 40:5
48:14 58:19 61:14
89:6,21 97:9,9 156:4
164:4 174:14 175:18
211:5 214:2 222:5
228:8 231:9
threshold 125:5 127:11
128:11,14
throw 71:10 190:10
198:9 207:3
thrown 189:18 190:14
thunder 65:4
Tiffany 2:5 163:5 165:8
tighter 161:6
TikTok 40:22
time 7:15 11:2,18,22
20:13 24:1 27:11
28:17 30:10 32:6 34:6
34:7 41:13 45:20 47:8
47:10,11,22 49:3,13
50:11 51:6 73:13 74:2
82:8 84:3,9,10,13,15
84:17 86:11 91:14
92:6,7 93:5,12 94:6,7
96:18 97:5 100:8
103:21 104:16 105:2
105:10,11 112:6,18

116:20 118:3 131:18
 139:11 156:5,6 157:2
 159:14 162:17 164:17
 165:4 167:15,22
 168:13,17 174:12
 178:14 179:4 183:10
 191:7 193:7 206:9,15
 206:17 209:20 210:7
 212:5 215:9,10,15
 217:3 218:8,14 222:2
 224:12 229:4,6
times 82:5 92:4 94:17
 95:19 105:6 150:21
 151:1 166:14 172:10
 184:4,12 194:7
 225:19 231:22
timing 34:10,13 35:5
 68:8 87:17 88:2
tipped 225:9
tissue 188:5
title 198:19
titled 8:2
TJAG 56:10 73:10
today 5:11 6:3 7:13,19
 100:8,19 104:10
 124:5 144:11 162:4
 163:20 165:20 166:10
 168:6 169:2 172:14
 181:1 190:18 197:18
 199:12 200:7 202:9
 202:13 208:5 213:12
 217:2 218:1 224:18
 229:13 236:3
Today's 4:16
Tokash 1:18 8:13,20
 20:15 40:3,3 41:7,14
 42:4 72:18,18 76:4,17
 76:20 80:13 81:10,14
 82:22 83:6 84:1,19
 176:8,12 208:14,15
 210:11,17 211:8
 235:15,16
told 94:7 119:12,12
 206:10,16 224:19
 226:20 232:1,3
 233:16
tomorrow 6:5 7:13
 72:19 73:7 80:14
 200:8
top 171:7
topic 195:1
topics 101:1 162:15
totality 11:16 184:21
totally 159:17 225:1,9
touch 133:15
tours 184:6
toxicology 56:1
traditional 73:3

TRADOC 157:16
train 85:5
trained 95:22 213:11
training 29:22 30:5
 45:18 111:5 112:10
 115:3,11 129:13
 156:2 159:22 160:15
 160:17 165:16 167:12
 183:5,11 199:6,10
 209:5 213:7
trains 103:3
traits 145:8
transcribed 7:6
transcript 7:6 73:17
transfer 49:1,18
transferred 12:18 49:15
 50:4,14
transformation 46:19
 46:20
transformed 113:21
transitioned 102:22
transparent 28:13
traumatic 186:22
treat 14:13 15:19 36:14
 39:1,19,22
treated 15:12 22:12,16
 110:1
treatment 21:4 22:5,7
 22:17,19 53:20 99:4
Tregle 2:9 52:9 53:8
 62:1 63:16 66:14,19
 69:18 70:10 73:9
 80:22 81:13 86:13
 88:19 91:20 99:6,14
tremendously 75:22
trends 66:4,15,20 68:14
 68:18
trial 6:14 10:21 12:14
 13:2 16:11,21 17:5,10
 18:1,4,10 19:16,22
 26:14 33:5 34:4 35:9
 41:9,16 42:20 44:5,21
 52:7,10,11,13 54:9
 57:13 59:11,12 60:8
 60:22 61:6 67:8 71:13
 74:3,17,20,22 76:6,15
 76:17 77:12 78:10
 79:7 80:19 81:1 82:11
 84:2 85:8,22 89:4
 90:12,13 91:3 92:4,13
 92:21 94:13 95:13
 96:6 98:2,7,7 103:3
 114:6 138:16 139:2,3
 144:19 157:7 167:3
 174:19 185:8 187:17
 191:11,15 225:18
trials 135:19,19
tricky 91:6

tried 125:8 169:22
trouble 42:5
true 23:17 46:6 93:18
 93:20 132:19 162:1
 206:21 230:10 233:7
truly 128:19 161:16
 179:1 181:2
trumps 150:15
trust 127:1,12 132:21
 133:12 199:16,18
trusted 127:5 199:17
trusting 208:16
trustworthiness 142:4
truth 69:13 94:6 209:13
try 71:22 83:11 150:3
 150:18 158:3 161:12
 178:3 194:19 200:11
 208:3,3 231:19
trying 18:4 34:17 91:5
 113:14 116:10 122:6
 122:9 123:19 130:6
 135:18 145:14 148:4
 164:19 170:1 180:10
 181:22 186:20 188:9
 227:20 234:5
TUESDAY 1:6
turn 10:10 16:10,14,20
 37:6 52:20 57:14
 58:19,21 59:1,6,9
 98:15 162:13 163:15
turned 60:16 64:4,7
 98:6 177:21 217:12
 230:3
turning 43:1
turns 57:17 59:2,3
 185:19 198:4
tweak 181:20,21
tweaks 193:20
two 6:6 9:1 25:18 33:2
 51:13 55:18 58:19
 59:22 60:3 84:11
 118:14 120:3 130:9
 144:5 153:20 161:17
 164:14 166:4 168:12
 169:4 170:6 174:14
 187:14 190:6,7,13
 211:4 215:18 216:5
 230:1 234:12,19
twofold 11:6
type 14:7,11 56:12
 108:10 113:17,17
 157:16 180:8
types 88:4
typical 107:14
typically 22:19 48:11,14
 50:9 70:14 75:15
 81:20,22 84:9 93:9,10

U

U.S. 2:13 9:20,22 52:9
 101:17,19 103:7
 105:11 114:10,21,22
 116:8 216:6 222:22
UCMJ 6:2 8:4 109:22
ultimate 122:17 124:2,6
 125:1 150:1 153:1,14
 185:12
ultimately 69:3 154:7
unanimous 152:1 155:9
unaware 67:1 68:18
unbelievably 84:12
uncomfortable 27:11
undercover 25:19
underlying 112:10
understand 12:15
 23:11 31:2,20 34:4
 46:12 66:14 76:5
 107:13 144:22 150:1
 172:7,20 177:9
 186:21 194:5 200:2
 204:8 221:4
understanding 16:9
 20:14 33:14 37:8
 38:10 52:1 136:19
 187:9 201:14
understands 143:19
 173:17
understood 33:16
 140:20
underway 78:18
undesigned 165:14
unevenness 32:21 33:4
unfair 197:4
unfairness 169:18
 181:11
unfortunate 153:4
unfortunately 30:18
 148:15,17 217:9
 225:21
unfounded 127:4 223:5
uniform 5:17 8:3 10:6
 17:13,16,19 19:6
 26:10 66:9,12 68:19
 110:19 179:21 199:2
 200:14 213:10 215:6
unique 65:13 116:7
 211:21
unison 193:19
unit 11:16 41:3 102:22
 113:16 119:22 191:13
 207:22
United 101:15 102:12
 102:18 103:1,7,15
 110:13 131:1 133:3
 160:4 163:4 165:18
 165:20 166:22 192:20

233:21
units 235:1
unlimited 153:22
unrepresented 55:19
 56:19
unusual 89:13
Unwilling 32:8
upbringing 117:13
update 6:20
updates 6:19,21
uphold 133:2 191:10
 194:2
upset 83:18 198:11,12
use 14:17 23:8 33:17
 48:4 56:14 59:16,20
 79:19 85:6 95:20
 136:10 203:2 206:2
 229:1
user 79:4,19
USMJ 218:20
usual 98:22
usually 16:7 22:20
 67:11 71:11,15 77:12
 84:11 86:15
utilize 57:16
utilizing 80:2

V

v 160:4 222:22
VA 220:6 222:19
valid 100:3
validity 223:2
valuable 172:20
value 126:19 134:10
 138:6
Van 2:18
vantage 109:9,11 110:6
 111:22
variety 72:10 124:3,13
 143:2 160:17
various 108:9 122:19
 132:4 146:2
vast 96:18
vector 106:12 107:12
vehicle 226:6
veneer 116:13
venire 141:17 142:3,9
 153:12 154:5 155:18
 159:16
verbalization 91:9
verdict 155:9
version 92:13
versus 80:6 175:13
vetting 132:11 144:22
 145:8 146:9
victim 5:17 12:6 14:9
 17:1 19:15 20:8 25:16
 27:7,12 28:21 30:4

31:4,9,17 32:9 35:20
 35:21 38:20 39:12,18
 39:18 40:15,21 42:21
 43:1,2,18 45:4,4,6,7
 48:8,19 49:10 50:17
 53:5,11,12,12,18,19
 54:13,14,15,19 55:9
 55:10,13,20 57:3,11
 57:15 58:13 59:7,8
 60:2,16,21 61:5,15,16
 61:17,21,22 62:2,4,8
 62:12,15,22 63:5,18
 63:21 64:10,14,14,15
 65:15 68:4,7,13 69:9
 69:16 71:11 72:19
 73:21 74:18 75:4,8,17
 75:19 76:9 77:13,13
 78:10,11,19 79:4,14
 81:3 82:17 83:19
 85:17 87:20 88:7,9,12
 89:3,17 90:11 91:1
 92:6 93:2,16,21 95:2
 95:13,22 97:10 98:16
 103:5 141:9 143:17
 182:17 186:15 219:21
 230:6,8,9
victim's 6:10 10:8,18
 11:1,10 12:6 16:15,17
 16:18 17:4 26:14 30:4
 30:9 32:4,16 33:9,12
 34:10,15 36:10,19
 37:16 38:19 39:7,12
 54:12 55:10 56:13
 59:9,17 60:17 73:17
 74:9,11,12,14,18
 75:15 76:9,13 78:7
 79:5 82:19 84:3 85:9
 85:13,21 87:11,15
 196:12
victim-centered 223:13
victims 6:8 10:7,16
 12:16 21:3,5 25:6
 28:3,6 39:22 44:1
 45:2 51:20 55:6 56:18
 72:14 73:12 77:4
 78:21 91:22 95:20
 114:4 119:13,17
 142:6 148:10 186:16
 196:19,21 208:6
 220:6 221:11 229:21
 231:16
victims' 3:5 44:19 51:20
 53:6 57:1 60:11 80:15
video 2:21 4:16,18
 25:22 28:18 29:5
 55:11
videos 24:21
view 1:9 63:12 186:5

viewed 188:19
viewing 198:5
views 33:8 176:17
violating 67:22
violation 232:8
violence 99:1
violent 102:16 103:16
Virgin 165:18
Virginia 1:10
virtue 108:17 111:3
 122:14
visit 45:17
visual 198:1
VLC 37:2 55:9,19 70:18
 71:14 81:21 82:2,6,8
 82:16 83:18 86:8
 93:10 94:15,16
voice 213:3 232:15,16
 236:4
voices 116:21 117:13
 117:17 236:1
voir 115:15 118:11
 120:16 121:3,4
 128:11,15 152:8,14
 154:20 171:10 178:8
 179:3
voluntary 138:3
voter 123:13
vulnerable 214:18
Vuono 2:15

W

wait 90:19,19
waiting 7:18
walk 37:16 141:4
 169:15
walking 105:20
Walton 1:18 17:12
 29:12 86:22 87:11
 147:20 156:9 157:10
 157:21 159:3 175:16
 207:12
want 4:11 14:9 17:4
 18:3,5 28:17 29:3,7,8
 29:8 35:3,5,14 36:16
 45:19,20 52:6 84:10
 84:13,19 90:2,5 93:8
 93:18 95:17 101:3
 114:16 132:7 145:8
 162:13,16 163:19,21
 169:1 173:19 176:20
 177:15,17 178:12
 179:22 199:16 204:17
 204:17 208:5 209:22
 215:19 216:10,15,22
 217:15,16 220:8
 222:3,9 223:8 224:3
 224:17,22 225:15

226:8,9 227:9 232:13
 232:15 235:8,11,20
wanted 31:3 128:12
 133:15 135:9 156:1
 165:17 190:1 216:20
wanting 25:12 165:20
wants 7:8 62:5 114:17
ward 28:3
warfighter 165:3
warm 50:15 153:3
warrants 54:18
Warriors 224:21
was 165:1,2 193:5
wasn't 91:15 119:20
 201:8,11 220:14
 221:19 224:20
waste 179:3
wasting 215:9
watch 92:11 95:3
watching 114:13
water 67:21
wave 233:3
way 15:2 18:19 21:8
 29:6 33:18 34:15,19
 46:8 79:15 88:3 91:21
 97:5 107:11,18
 116:17,18 121:7
 133:1 140:20 143:10
 143:21 151:3 153:16
 158:5 170:8 171:9
 177:8,9 182:21
 189:21 197:4 200:9
 202:18 205:13 209:3
 211:19 214:14 216:14
 218:2 227:10
ways 204:18
we'll 9:5 51:11,13 53:3
 90:19 93:4 132:8
 162:7 215:5,20,22
 216:2
we're 11:2 17:14 18:7
 21:2 27:10,19 29:9
 30:6 31:8 32:5 34:16
 35:13 39:16 46:21
 51:15 52:16 59:22
 61:20 68:11 72:19
 77:15 78:3 89:2 90:16
 90:18 100:8 106:10
 111:8 125:14 126:7
 127:9,20 130:20
 134:18 138:12 145:1
 145:9,14 152:15
 153:15 154:6,21
 157:6,6 161:8,12,14
 161:15 162:3,10
 170:13 171:22 178:17
 181:7 194:8 196:3,3,4
 198:17 199:20 205:20

207:20
we've 27:16 34:16
 37:21 69:9,15 108:19
 111:7 112:5,19
 119:13 123:13 126:3
 127:11 132:13 136:16
 142:21 143:3 144:21
 145:6 146:18 149:1
 169:5,14 176:22
 185:11 186:15,15
 195:13 206:13 213:17
 215:3 217:20 220:16
 220:19
weapon 199:14
wear 173:16 199:3,15
wearing 199:14
wears 215:6
web 77:18
website 7:7 8:18
weed 179:2
week 6:15 8:13 181:9
Wega 2:9 9:18 12:3
 14:19 16:16 19:2
 22:14 25:5 26:19 30:8
 36:22 39:10 40:6
 42:12 43:17 48:9
weigh 19:8 84:20
 109:17
weighted 138:10
 143:11
welcome 3:2 4:11 5:11
 66:11
went 26:22 100:11
 135:22 167:8 219:12
 221:1,5 236:12
weren't 88:12
whatsoever 14:16 82:6
 146:11 220:19
whew 139:14
Whichever 190:9
white 119:14,20 141:2
 148:21 186:15,18
 187:5 197:20 198:6
wholeheartedly 171:15
whs.pentagon.em.m...
 7:11
wide 142:8
widespread 25:5
widest 142:3
wife's 16:8
wiggle 68:20 69:1 96:22
William 1:14
Williams 2:10 9:16
 12:20 15:18 19:20
 23:14 26:5 28:6 29:12
 31:21 32:11 38:5
 39:21 40:8 41:21 42:6
 44:12 50:8

willing 23:10 135:3,6
 215:15
willingness 138:4
win 165:1 193:4
Wing 167:7
wisdom 120:6 122:3
 175:1 207:9
wise 31:17
wish 7:17
withheld 58:3,7,15
withhold 69:2 90:7
witness 19:15
witnessed 218:9
witnesses 2:1 63:1,5
 64:15 114:4 142:7
 148:11
woman 195:17 225:11
 225:12 228:12 230:11
 230:12
women 119:13,15
 141:6 217:13 225:5
 229:21 230:1,14,15
wonder 234:10
wondered 188:1
wonderful 120:6 161:21
wondering 33:7 147:13
 177:2
word 31:18 136:8
 177:17 192:11 206:2
words 73:1 178:2
 197:14 199:7 213:17
 214:17
work 3:5 6:18 12:10
 22:18 23:21 24:6,9
 25:19,19 40:13 48:10
 71:21 105:6,9 107:2,3
 107:3 111:19 114:1
 134:6 157:5 162:2
 165:15 192:9 209:14
worked 113:6 166:1
 168:20 230:12
working 19:21 37:5
 38:7 47:5,12 78:20
 121:12 181:18,19
works 47:6 79:15
 103:18 179:7 180:6
 180:12
world 46:6,7 61:2 70:8
 92:21 106:3,19
 129:12,13 140:14
 147:22 150:10 151:6
 151:6,12,17 154:12
 156:13 158:19 166:8
 176:5 210:22 231:12
worldwide 164:8
worry 178:13
worrying 221:15
worse 207:20

worst 215:11 229:8
worth 105:4 182:16
wouldn't 13:22 14:11
 17:20 31:4 40:2 41:17
 42:12 45:10 71:16
 174:15 190:16 214:9
 221:6,20 225:17
 227:9
wrap 7:2 224:3 234:1
written 7:6 28:19 37:14
 87:22 91:2,11 182:4
 208:5 224:1
wrong 93:19 129:7
 177:8 179:9 183:2
 212:15 219:12 221:5
 229:3 231:15
wrongful 219:9
wrongfully 218:15
 222:6,18 225:14
 232:13 234:11
wrote 180:5 232:17
www.dacipad.whs.mil
 7:8

X

Y

y'all 128:12
yards 199:15
yeah 20:15,20 22:14
 26:19 197:18 214:20
year 5:2,19 47:16
 109:10 113:15 118:6
 118:8 134:6 209:3
 229:7 233:2 235:7
years 48:1,14 50:9 70:8
 71:5 75:2 102:19,21
 104:21 108:4 109:2
 109:13 110:15,21
 113:8,22 114:21
 118:14 120:3 132:8
 132:10 143:1 148:1,4
 149:15 164:9 165:9
 166:20 168:22 170:1
 172:12 174:14,15,16
 175:18 176:21 185:13
 186:18 187:14 188:4
 207:6,7 209:9 211:5
 214:6 216:17 218:12
 219:21 221:1 222:4,5
 222:15 226:1 227:4
 227:18,20 229:7
 232:18 233:4,4,17
years' 105:4
yelled 109:11
yesterday 181:8 200:8
Yonah 2:17
young 116:18 169:15

207:1 208:17 210:6

Z

zeroed 59:22
Zoom 4:17

0

0506 169:16

1

1,700 218:2
1:00 220:17 223:6
10 174:16
10-1/2 229:7
100 3:5 93:4 175:4
100-percent 47:14
12 152:4 153:20 154:4
 154:16
12:45 1:10
12:58 4:2
13 1:7 221:1
130 48:2
14 104:21 154:7
1400 51:12
144 221:21 223:18
15 174:16
16 154:4
162 3:8
17 101:21 109:10
 218:12
18 109:13 114:21 118:1
 209:3,12
1811s 48:5
19 102:19 108:4 113:8
 113:15,22
1948 109:20 110:8,22
1950 110:8 118:20
1994 109:2
1997 166:21
19th 7:3

2

2,000 167:15
2.1 8:6 72:8
2.666 155:1
2:00 7:10
2:58 100:11
20 148:4 186:18 214:6
 216:17 227:18 229:7
 232:19 233:4,17
200 167:14
2003 125:12 165:11
2005 169:1
2007 167:13
2008 103:14
2010 167:14
2012 113:12 167:8
 232:19

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In the matter of: Open Meeting

Before: DAC-IPAD

Date: 06-13-23

Place: Arlington, VA

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