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1 RESPONSE SYSTEMS TO ADULT SEXUAL
2 ASSAULT CRIMES PANEL
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6 PUBLIC SESSION
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11 Wednesday,
12 November 13, 2013
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18 Liberty One Center
19 875 North Randolph Street, Suite 150
20 Arlington, Virginia 22203
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PANEL MEMBERS PRESENT:

HONORABLE BARBARA JONES
HONORABLE ELIZABETH HOLTZMAN
VICE ADMIRAL (RET.) JAMES HOUCK, USN
PROFESSOR ELIZABETH HILLMAN
MAJOR GENERAL (RET.) JOHN D. ALTENBURG, JR., USA
GENERAL (RET.) CARTER F. HAM, USA
COLONEL LISA TURNER, USAF
PROFESSOR GEOFFREY CORN, USA
JOYE FROST
MARIA FRIED, Designated Federal Official to the Response Systems Panel
COLONEL PATRICIA HAM, USA, Staff Director
LIEUTENANT COLONEL KYLE GREEN, USAF, Staff Counsel
SHANNON GREEN, Legislative Analyst

ALSO PRESENT:
BRIGADIER GENERAL CHARLES PEDE, Chief Judge, Army Court of Criminal Appeals
HONORABLE CLAIRE MCCASKILL, U.S. Senator, State of Missouri

PROCEEDINGS
(9:40 a.m.)

COLONEL GREEN: All right. Good morning, everyone. I'll just provide some brief intro remarks just to make sure. Just a reminder that we are going to be recorded and transcribed, and the meeting will be posted to the Role of the Commander Subcommittee portion of the website.

This morning we have all members of the Subcommittee present for the meeting. Judge Jones, Representative Holtzman, General Ham, Ms. Frost, and General Altenburg are here in person. And then joining us by phone, Admiral Houck, Professor Hillman, Professor Corn, and Colonel Turner. So all are here.

We will have some intro remarks from Ms. Green to just sort of lay the legislative landscape for you to just make sure that we understand where we are with the legislative cycle and what's out there right now, and then turn it over to General Pede for some perspectives from the Army on some of the legislative initiatives that are under

consideration.

Just a note for those of you who are on the phone, we're still working with the Senators' staffs, but schedules change. And we've been informed that Senator Gillibrand is not going to be able to join us this morning, so we're trying to figure out with the sessions that will start at 11:00 what'll happen, whether someone from her staff will be here, and whether Senator McCaskill will be able to join us as well. So we'll get those worked out and let you know as we approach.

Are there any other questions? Can everybody on the phones hear okay? Are we good?

PROFESSOR HILLMAN: All good here. Thank you.

COLONEL GREEN: Okay. And did everybody -- I sent a lot of materials yesterday. Was everybody able to receive those materials?

SPEAKER: Yes.

COLONEL GREEN: Okay. If not, please let us know and we can send them -- copies to you this morning as well. So with that, I'll turn it over

to Judge Jones.

CONGRESSWOMAN HOLTZMAN: Could you put the name card -- her name card in front of us, please? Thank you.

MS. FRIED: Good morning, everyone. I'm Maria Fried. I just want to note for the record that the Designated Federal Official is present and that the meeting is open.

CHAIRWOMAN JONES: All right. Thank you, Maria. I think we'll hear from Ms. Green now with respect to, as Kyle put it, the landscape of the legislation.

MS. GREEN: Good morning. My name is Shannon Green. I just wanted to take a few minutes this morning, ladies and gentlemen, and just kind of talk about the 2013 legislative cycle, and how the Role of the Commander has become such an issue.

In the House of Representatives in March, Representative Jacky Spear introduced this STOP Act, which she has introduced the last -- every year since 2011, which would take sexual assault outside the chain of command, just sexual assault,

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Page 6

1 sex-related crimes. Her proposal did not make it
2 into the House NDAA -- the House-passed NDAA, but
3 as of this year she had 148 co-sponsors, so she's
4 generated quite a bit of support within the House
5 on that issue.
6 In the Senate, the sort of opposing
7 similar bill in the Senate is Senator Kirsten
8 Gillibrand and her proposal, S. 967, that was
9 introduced in May of this year. That proposal had
10 38 co-sponsors, but she's got an amendment that
11 she's floating around, and she claims to have 46
12 co-sponsors. And we expect -- she's indicated
13 she'll introduce that as soon as the Senate starts
14 debating the NDAA, which could be today, but most
15 certainly by tomorrow from what everyone has said.
16 There are a number of bipartisan and
17 bicameral provisions that have made it into both
18 the House and Senate versions of the NDAA related
19 to the Role of the Commander. The main one is
20 limiting the commander's discretion on findings of
21 a court martial. You're also aware probably
22 Senator Boxer introduced an Article 32 reform

Page 7

1 amendment, which has support on -- you know,
2 Republican and Democratic support. It has support
3 of Senator Gillibrand and Senator McCaskill. So
4 that's very likely to make it into the Senate's
5 NDAA once it's up for debate later this week. And
6 let's see.
7 So today, I guess, we're going to
8 basically dig down into Senator Gillibrand's bill.
9 Some of the provisions in her original bill made it
10 into the Senate-passed NDAA. There are some
11 parallels between her and Senator McCaskill's
12 proposals. But if you have any questions, feel
13 free to let me know. I have a brief analysis of
14 the Boxer Article 32. It's pretty straightforward.
15 CHAIRWOMAN JONES: Thanks.
16 VICE ADMIRAL (RET.) HOUCK: I would like
17 to raise, I guess, just as a placeholder issue, not
18 to discuss it now and not to derail the agenda for
19 this morning. But hearing the discussion about
20 Senator Boxer's Article 32 amendment, and I believe
21 it was distributed to us last week. We did hear a
22 lot of testimony from particularly the defense

Page 8

1 group last week about that, and at some point we
2 may want to have a more detailed discussion about
3 that. Thank you. This is Jim Houck. Thanks.
4 CHAIRWOMAN JONES: I think you're right,
5 Jim. Thanks for bringing that up and reminding us.
6 CONGRESSWOMAN HOLTZMAN: Before you
7 proceed, could you just be a little bit more
8 specific about what exactly the bill does with
9 regard to sentences? Is what you -- the
10 commander's role with regard to sentences?
11 MS. GREEN: You mean the provision that's
12 in the Senate and House version of the NDAA?
13 CONGRESSWOMAN HOLTZMAN: Yes.
14 MS. GREEN: It limits the commander's
15 discretion to alter the findings of a court martial
16 or to change it to a lesser included offense for
17 certain offenses. And if he or she does change the
18 findings, then a written statement of explanation
19 is required, which goes into the court martial
20 record.
21 CONGRESSWOMAN HOLTZMAN: Well, wait a
22 minute. You can't change the findings, but you can

Page 9

1 change the findings? What do you mean?
2 MS. GREEN: You can for certain offenses.
3 CONGRESSWOMAN HOLTZMAN: Oh, okay. So
4 where you are allowed to change the findings, you
5 have to explain it.
6 MS. GREEN: Yes, ma'am. And the provision
7 in the House and Senate are slightly nuanced, but
8 essentially that's what they both do.
9 CHAIRWOMAN JONES: Is this the Article 60
10 issue?
11 MS. GREEN: Right.
12 CHAIRWOMAN JONES: Okay. And at what
13 stage does the commander now have the right to
14 change the findings?
15 MS. GREEN: I think I've highlighted it on
16 there --
17 CHAIRWOMAN JONES: Okay.
18 MS. GREEN: -- on the second page the two
19 provisions.
20 CHAIRWOMAN JONES: I guess really I'm only
21 asking is it post-appeal, pre-appeal, or both?
22 MAJOR GENERAL (RET.) ALTENBURG: Post-

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1 trial.
2 MS. GREEN: Post-trial.
3 CHAIRWOMAN JONES: It's post-trial? And
4 then another -- and then again -- you can do it
5 again after appeal?
6 MS. GREEN: I don't think so, ma'am.
7 MAJOR GENERAL (RET.) ALTENBURG: What
8 happens is when the trial is complete, the record
9 of trial is prepared verbatim. It's reviewed by
10 the staff judge advocate, and all defense counsel
11 matters are submitted at that time and further
12 mitigation from what they submitted at the trial.
13 So that's the defense's opportunity to present to
14 the convening authority a basis for taking some
15 type of clement action, whether it's disapproving
16 the findings, or whether it's reducing the
17 sentence, or whatever.
18 All of those materials are then considered
19 by the convening authority. The convening
20 authority takes his or her action. In most cases,
21 the action is to approve the findings and sentence.
22 Subsequent to that, it goes to appeal before the

1 courts here in D.C.
2 CHAIRWOMAN JONES: And there's no further
3 clemency power after appeal, or is there?
4 MAJOR GENERAL (RET.) ALTENBURG: After
5 appeal, there is.
6 CHAIRWOMAN JONES: There is.
7 MAJOR GENERAL (RET.) ALTENBURG: There are
8 clemency ports in all of the services, yes. After
9 the person is imprisoned, yes.
10 GENERAL (RET.) HAM: But not by the
11 convening authority.
12 MAJOR GENERAL (RET.) ALTENBURG: Not by
13 the convening authority.
14 CHAIRWOMAN JONES: Okay.
15 MAJOR GENERAL (RET.) ALTENBURG: When a
16 convening authority signs the action after
17 considering all the defense matters and makes his
18 decision to approve or disapprove and finally
19 consents, the convening authority role is ended.
20 CONGRESSWOMAN HOLTZMAN: Now, what about
21 the role with regard to sentences? I see that the
22 commander is prohibited from interfering with

1 findings of fact. What about sentences? Can a
2 commander overturn sentences under both the House
3 -- in either one of those bills?
4 MS. GREEN: Sentences aren't addressed in
5 these provisions.
6 COLONEL HAM: Yes. That's how plea
7 bargaining works, ma'am. The convening authority
8 will act to enforce a plea bargain, and he will --
9 he may limit a sentence to have it conform to a
10 plea bargain.
11 CONGRESSWOMAN HOLTZMAN: Maybe I'm not
12 phrasing my question properly. I'm just trying to
13 understand. Somebody is convicted of murder and
14 sentenced to 100 years in prison. Can the
15 convening authority reduce that to 22 under this
16 bill, or does this bill take away the power of the
17 convening authority to affect the sentence --
18 MS. GREEN: Okay. So under the --
19 CONGRESSWOMAN HOLTZMAN: -- under either
20 one of the bills, the House and Senate bills.
21 MS. GREEN: It prohibits the convening
22 authority from modifying the finding or changing it

1 to a lesser offense --
2 CONGRESSWOMAN HOLTZMAN: Okay. Is a
3 finding --
4 MS. GREEN: -- except for qualified
5 offenses.
6 CONGRESSWOMAN HOLTZMAN: Okay. Is a
7 finding the same as a sentence?
8 COLONEL GREEN: No.
9 CONGRESSWOMAN HOLTZMAN: So does the
10 convening -- where does the sentence get imposed?
11 Who imposes the sentence? Is that the court
12 martial, the judge there?
13 MS. GREEN: Either a judge --
14 CONGRESSWOMAN HOLTZMAN: Well, suppose the
15 sentence -- can the convening authority after this
16 bill -- these bills are passed which do something
17 about the findings, can the convening authority
18 still reduce the sentence?
19 COLONEL GREEN: Yes.
20 MS. GREEN: Presumably, yes, because
21 that's not addressed in the bill.
22 GENERAL (RET.) HAM: Well, it seems that

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Page 14

1 it is, though, with some exceptions.
2 CONGRESSWOMAN HOLTZMAN: That's what I'm
3 trying to understand.
4 GENERAL (RET.) HAM: It says except for
5 qualifying offenses, which are in the House version
6 those offenses where the maximum sentence for the
7 offense does not exceed two years. And there's a
8 similar restriction in the Senate version.
9 MS. GREEN: In the Senate, it doesn't
10 state one year, yeah.
11 GENERAL (RET.) HAM: So it seems that
12 there is a constraint placed on the convening
13 authority's present authority to modify sentencing,
14 unless I misreading at that. That's what it seems
15 -- that's what it says to me is that, again, for
16 certain offenses, and given that the maximum
17 sentence is two years, that's most offenses that
18 would go to a general court martial, I believe.
19 The convening authority could not modify those
20 sentences, if I'm reading this correctly.
21 CONGRESSWOMAN HOLTZMAN: Okay.
22 MS. GREEN: Could not modify the findings

Page 15

1 and sentence.
2 GENERAL (RET.) HAM: Right.
3 MS. GREEN: Or change it to a lesser
4 offense.
5 GENERAL (RET.) HAM: So I guess the other
6 way to say that is that these two -- both the
7 Senate and House versions very significantly alter
8 the role of the convening authority post-trial. Is
9 that fair to say that?
10 MS. GREEN: Yes, sir.
11 CONGRESSWOMAN HOLTZMAN: I understand. I
12 was just trying to get a little bit more
13 specificity about that, but, okay. It's still not
14 clear to me.
15 CHAIRWOMAN JONES: And I think they're
16 consistent. They're just phrased differently.
17 Okay.
18 MS. GREEN: The qualifying offense
19 definition is slightly different.
20 GENERAL (RET.) HAM: Two years versus one
21 year.
22 CHAIRWOMAN JONES: Right.

Page 16

1 MS. GREEN: So they'll probably work out,
2 you know, the differences and have some version of
3 that in the final. I highlighted four provisions
4 in there that are in both bills that, you know,
5 like the role of the commander.
6 GENERAL (RET.) HAM: And again -- this is
7 General Ham. Just for a point of clarification,
8 both versions exclude offenses under Article 120.
9 So the convening -- for offenses -- for violations
10 of Article 120, the convening authority may not
11 adjust either finding or sentence.
12 MS. GREEN: Right.
13 CONGRESSWOMAN HOLTZMAN: Where are you
14 reading from, sir?
15 CHAIRWOMAN JONES: Right here.
16 GENERAL (RET.) HAM: In the House version
17 -- in the highlighted House version and Senate
18 version.
19 MS. GREEN: Yeah. In the Senate version,
20 qualified offenses do not include any offense under
21 Article 120.
22 GENERAL (RET.) HAM: And the same for the

Page 17

1 Senate version. So I think that's -- again, if I'm
2 reading that correctly, Article 120 violations, the
3 convening authority --
4 MS. GREEN: No discretion.
5 GENERAL (RET.) HAM: Basically all the
6 convening authority can do -- and, I guess, maybe
7 -- again, maybe I'm overstating this. But it seems
8 to me that the only option for the convening
9 authority for Article 120 violations is to approve
10 the finding and sentence. He has no -- the
11 convening authority, he or she has no other choice.
12 MS. GREEN: That's how I would read it.
13 CHAIRWOMAN JONES: I don't want to
14 complicate things, but what does that do for plea
15 bargaining, or is that a separate issue, or do we
16 know?
17 GENERAL (RET.) HAM: I think it
18 complicates it significantly.
19 CHAIRWOMAN JONES: Well, we're doing --
20 MAJOR GENERAL (RET.) ALTENBURG: This is
21 Altenburg. I agree that the bill as written would
22 complicate pretrial negotiations just in terms of

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Page 18

1 the mechanics of how you could do that and how you
2 could affect -- bring about a pre-trial agreement.
3 SPEAKER: How would it affect the --
4 PROFESSOR HILLMAN: Judge Jones?
5 CHAIRWOMAN JONES: Yes, Beth?
6 PROFESSOR HILLMAN: Sorry, Judge Jones.
7 This is Beth. I just had -- I think this is
8 actually a really important thing I don't fully
9 understand. And I'm not sure, do we have somebody
10 who -- I'm not sure who can explain this, if
11 Shannon could explain it to us. But there's two
12 parts that sort of arc through the system that I
13 don't fully understand with what this change would
14 do. One of them has to do with the pre-trial
15 agreement and how that would happen. The other has
16 to do with the accused's right under non-judicial
17 punishment, under Article 15, and how that
18 intersects with this. Could anybody speak to how
19 those two pieces would work as this would move
20 through the system?
21 CHAIRWOMAN JONES: When you say "move
22 through the system," are you talking about, for

Page 19

1 instance, the issue that if the commander offers
2 somebody non-judicial punishment that the person
3 refuses, or are you talking about something else?
4 PROFESSOR HILLMAN: That and the
5 negotiations prior to trial -- the pre-trial
6 agreement.
7 CHAIRWOMAN JONES: The plea bargaining.
8 The plea bargaining angle, right.
9 PROFESSOR HILLMAN: Correct.
10 CONGRESSWOMAN HOLTZMAN: Are you talking
11 about the Gillibrand bill?
12 PROFESSOR HILLMAN: Yes, although I'm not
13 -- I don't have the highlighted version, and I'm
14 not sure I understand totally the differences. I'm
15 looking primarily at the Gillibrand bill, so I'm
16 not looking at the House version.
17 CHAIRWOMAN JONES: I don't know if anybody
18 here understands how the House or Senate bill
19 provisions that we were just talking about, which
20 limits the authority of the commander under Article
21 60, how that would implicate plea bargaining or
22 complicate it. It's a big question, it seems to

Page 20

1 me, because it looks like they may not have plea
2 bargaining authority, if you read it literally.
3 MAJOR GENERAL (RET.) ALTENBURG: I think a
4 bigger problem is that the people that drafted it
5 don't know that either.
6 CHAIRWOMAN JONES: Yeah. Well, they
7 probably have no idea that it implicates plea
8 bargaining possibly. I don't -- is this Senate
9 version of this Senator Gillibrand's, or is this
10 just a piece of S. 1197?
11 MS. GREEN: That's the Senate version --
12 CHAIRWOMAN JONES: Right.
13 MS. GREEN: -- the SASC-passed NDAA.
14 CHAIRWOMAN JONES: Right.
15 MS. GREEN: The column to the right of
16 that has provisions from Senator Gillibrand's bill
17 that are also part of the SASC --
18 CHAIRWOMAN JONES: Oh, I see. There's
19 another column, right. Okay.
20 MS. GREEN: Professor Hillman, I should've
21 sent you the spreadsheet that we're looking at
22 because we were actually looking at a particular

Page 21

1 provision in the House and Senate bills relating to
2 the limitation of the convening authority to modify
3 findings from a court martial.
4 PROFESSOR HILLMAN: Understand.
5 GENERAL (RET.) HAM: Okay. Maybe it would
6 -- this is Carter Ham. Maybe it would make sense
7 for those that are in by phone simply to read --
8 would it make sense to just read the House and
9 Senate versions so they know what it is that we're
10 talking about?
11 MS. GREEN: Sure. Yes, sir.
12 CHAIRWOMAN JONES: Yeah. And I guess, so
13 we don't have answers to your questions, Professor
14 Hillman, about --
15 PROFESSOR HILLMAN: What?
16 (Laughter.)
17 CHAIRWOMAN JONES: I know. It's amazing.
18 But Shannon has highlighted four of these, and the
19 first one was the one that we were just talking
20 about. Shannon, do you want to go to the second
21 one?
22 MS. GREEN: Sure. And we don't

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1 necessarily -- there are others that we could point
2 to, but --
3 VICE ADMIRAL (RET.) HOUCK: Well, I will
4 interrupt -- this is Jim Houck -- to just ask one
5 question before we leave that topic. So we have
6 the Joint Service Committee on Military Justice,
7 which is the kind of cumulative wisdom of military
8 justice within the Department of Defense. Have
9 they done an analysis of these provisions? I mean,
10 we are struggling here with them to some extent,
11 and I'm just wondering if the Joint Service
12 Committee has already done an analysis of this
13 stuff.
14 COLONEL HAM: I don't know the answer to
15 that, sir. This is Colonel Ham.
16 VICE ADMIRAL (RET.) HOUCK: Yeah. It may
17 be worth asking because it's really kind of
18 alarming to, you know, the discussion in the sense
19 that they're drafting these bills. These bills are
20 going forward. They're getting serious
21 consideration, and they may not have even realized
22 what they may be doing to plea bargaining. And I

1 just -- that's the big question for me is have the
2 military justice people looked at this. So if it's
3 possible to find that out, that would be helpful, I
4 think.
5 CHAIRWOMAN JONES: This is the provision
6 where DoD submitted its own legislative proposal.
7 And as I look at the synopsis, it doesn't talk
8 about plea bargaining either. So we do need to ask
9 that.
10 MAJOR GENERAL (RET.) ALTENBURG: As I
11 understand it, the Joint Service Committee has done
12 that analysis. And if we ask for it, they would --
13 I assume they would provide it to us.
14 CHAIRWOMAN JONES: All right. Well,
15 that's something we'll do.
16 MS. GREEN: That makes sense in light of
17 the fact that DoD submitted a similar legislative
18 proposal to the Congress.
19 COLONEL TURNER: This is Colonel Turner.
20 In addition to asking about the pre-trial
21 agreements, the other factor would be their
22 thoughts on reducing a sentence to forfeitures, or

1 total forfeitures, or some portion of forfeitures
2 that can then be given back to the family. In
3 other words, if a spouse is raped by her husband,
4 he's convicted, he's punished to the reduction of
5 all his money. Is there any now authority left to
6 be able to reduce that sentence to total
7 forfeitures and give the family the money? Thank
8 you.
9 CHAIRWOMAN JONES: All right. I don't see
10 anything about that here, but it's another question
11 then that needs to be answered. All right,
12 Shannon, do you want to go the next provision?
13 MS. GREEN: Section 533 in the House bill
14 and 554 in the Senate both require a mandatory
15 discharge or dismissal for a conviction of sex-
16 related offenses. I highlighted on the next page
17 the top column, the provision related to the
18 authority or guidance to commanders regarding
19 reassignment of the accused just because that came
20 up in the public meeting last week. And I would
21 just point out that it's very discretionary. The
22 Senate version, each service Secretary may provide

1 guidance for commanders regarding their authority
2 to make a timely determination related to temporary
3 reassignment of an accused, not as a disciplinary
4 measure.
5 MAJOR GENERAL (RET.) ALTENBURG: And I
6 think the Secretary of Defense has already done
7 that.
8 MS. GREEN: Yeah, and I think so, too.
9 GENERAL (RET.) HAM: Well, I think what we
10 heard at the Panel last week was that the Secretary
11 had -- the Secretary of Defense has directed the
12 services to make recommendations with regard to
13 transfer of the accused.
14 MS. GREEN: Right, in the August memo.
15 PROFESSOR CORN: This is Professor Corn.
16 Are we talking about the transfer requirement or
17 the mandatory discharge requirement?
18 CHAIRWOMAN JONES: We sort of skipped from
19 the mandatory discharge to the transfer. Just to
20 go back for a minute to the mandatory discharge, we
21 really haven't discussed it. It is in both bills,
22 and it says we're supposed to assess it in one of

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Page 26

1 the bills. So it's something that we'll have to
2 get up to speed on. It's basically --
3 PROFESSOR CORN: Well, I certainly think
4 that --
5 CHAIRWOMAN JONES: It basically calls upon
6 us to assess the appropriateness of statutory
7 mandatory minimum sentencing provisions.
8 PROFESSOR CORN: Right. I think that it
9 is worth at least probing how comprehensive the
10 assessment was of the relationship between that
11 provision and other provisions of the Code and
12 Principles of Military Sentencing. You know, I
13 think one of the most admirable aspects of the
14 military criminal justice system is that it has
15 retained as a central purpose of criminal
16 punishment rehabilitation of the accused. And I
17 think those who have been involved in cases in
18 military courts know that it's not particularly
19 common, but there are cases where an accused might
20 actually ask the sentencing authority, the military
21 panel or the military judge, to substitute a more
22 -- a longer period of confinement in lieu of a

Page 27

1 certain level of discharge because of the permanent
2 stigma and consequence resulting from a discharge.
3 And I think that the mandatory discharge
4 provision in some ways -- I certainly understand
5 the logic of it, but I think in some ways it
6 undermines the sentencing flexibility that I think
7 is central to the military justice process to
8 enable the court to ensure that the punishment fits
9 the crime and the criminal and is not just
10 automatic based on the crime.
11 I just think that -- I question whether
12 it's been, just like the relationship to plea
13 bargaining, whether it's been kind of cross-
14 synchronized with all the other principles and
15 purposes of the military justice system.
16 CHAIRWOMAN JONES: Yeah, I think that's a
17 good question. I don't know the answer.
18 MS. FROST: And what are -- under the
19 House and Senate, what are the specific offenses
20 that relate to the mandatory?
21 CHAIRWOMAN JONES: Apparently the Senate's
22 are rape, sexual assault, forcible sodomy, or

Page 28

1 attempts to commit those offenses. Well, maybe. I
2 mean, it says that those are offenses that should
3 be disposed of by courts martial rather than non-
4 judicial punishment.
5 GENERAL (RET.) HAM: But that's a sense of
6 the Senate.
7 CHAIRWOMAN JONES: But that's a different
8 -- yeah. And that's a sense.
9 GENERAL (RET.) HAM: That's a sense of
10 Senate, not --
11 CHAIRWOMAN JONES: Exactly. So I don't
12 know what the certain sex-related offenses --
13 MAJOR GENERAL (RET.) ALTENBURG: Other
14 considerations, we might consider -- listen to me.
15 Other considerations for us in this regard are,
16 one, the response of the Federal judiciary to
17 mandatory sentencing and what they think of that
18 and what they think are the limitations of
19 mandatory sentencing, and how it restricts their
20 ability to sentence in what they would think is a
21 meaningful way.
22 PROFESSOR CORN: Well, and to jump on

Page 29

1 that, General, not just the Federal judiciary, but
2 I think the Federal Trial Litigation Bar, both
3 prosecutors and defense counsel. I think there's
4 been fairly widespread criticism of the mandatory
5 -- or of the sentencing guidelines by everybody
6 involved in the system because it deprives them of
7 the flexibility to periodically adjust the sentence
8 based on, you know, the actual evidence.
9 MAJOR GENERAL (RET.) ALTENBURG: And we're
10 creating the irony of a mandatory sentence for some
11 type of sexual assault, but not a mandatory
12 sentence for murder just to use one example.
13 CONGRESSWOMAN HOLTZMAN: Well, I think the
14 -- to give the argument on the -- for the mandatory
15 sentence here is that what you're dealing with, I
16 mean, is a crime that too often has been minimized
17 and trivialized because it's not been seen as a
18 crime. And generally murder is seen as a crime. I
19 don't think we had too many social stereotypes that
20 excuse it when it's not justified. But rape -- a
21 husband raping a wife, some think it's still legal.
22 So I think that's probably the reason for it,

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Page 30

1 although I'm not in any way suggesting that the
2 arguments about mandatory minimums don't apply
3 here. But I don't know what -- how should we
4 approach this if we have these concerns?
5 MS. FROST: Well, I would --
6 PROFESSOR CORN: Well, this is Professor
7 Corn --
8 MS. FROST: -- add that part of the
9 problem, too, is that the research shows that
10 rapists tend to be serial rapists. I don't know
11 that most people who murder are serial murderers,
12 and I think that's part of the issue here.
13 PROFESSOR CORN: This is Professor Corn.
14 I think that one of my concerns is I don't know
15 that there's any empirical support for the
16 conclusion that service members who are actually
17 tried and convicted at general court martial for
18 these very serious offenses are routinely not
19 punished with a punitive discharge.
20 So I think that suggesting that the
21 mandatory requirement for punitive discharge is a
22 response to the historic minimization of the

Page 31

1 offense itself mixes the problem of whether the
2 offense gets to trial with the history of what the
3 consequence of conviction is.
4 And I think most -- I would speculate that
5 you'd have to search far and wide to find a rape,
6 or a forcible sodomy, or an aggravated sexual
7 assault conviction by court martial that did not
8 result in a punitive discharge.
9 CONGRESSWOMAN HOLTZMAN: There was just a
10 sentence? Wasn't there somebody whose sentence was
11 overturned by a convening authority who was
12 convicted?
13 PROFESSOR CORN: I'm not talking about the
14 Article 60 clemency power. That sentence was
15 overturned because the convening authority
16 exercised his statutory authority to second guess
17 the judgment of the trial -- the trial court. The
18 trial court, to my knowledge, adjudged a punitive
19 discharge after they convicted the service member.
20 My point is -- go ahead, I'm sorry.
21 PROFESSOR HILLMAN: Sorry. Sorry, Geoff.
22 This is Beth. The sun is coming up in California.

Page 32

1 I've had a little more coffee. I'm a little more
2 awake.
3 (Laughter.)
4 PROFESSOR HILLMAN: I have just a sort of
5 general question here. Maybe this is for Judge
6 Jones. What should we be trying to do with respect
7 to this? It sounds like actually part of what we'd
8 like is some more information on not only what the
9 bills would do, but the scope of the problems
10 they're trying to address. For instance, Geoff
11 just said that there's really -- there aren't
12 convictions for -- you know, there aren't 120
13 violations for which service members are convicted,
14 and they're not subject to a punitive discharge.
15 Surely we could ask for that.
16 COLONEL HAM: We have asked for that, and
17 we either have it already and are going through it,
18 or to do it with the next two requests for
19 information batches that are due on November 21 and
20 December -- I'm forgetting the exact date. We've
21 asked for all of that information, and we either
22 have it or we'll be receiving it very shortly.

Page 33

1 PROFESSOR HILLMAN: That's great, Colonel
2 Ham.
3 CHAIRWOMAN JONES: You know, what I --
4 PROFESSOR HILLMAN: Go ahead.
5 CHAIRWOMAN JONES: What I was going to say
6 is I came today expecting to actually discuss the
7 Gillibrand proposal with respect to removing the
8 commander or removing the chain of command from the
9 military justice system. And so, I think that's
10 what our presenters are here to discuss. And the
11 first few minutes were really intended to be like a
12 menu of other issues that are going to be before
13 us. And I don't think we're really prepared to
14 talk about them right now, but they'll be on in
15 future Subcommittee meetings.
16 So maybe I could suggest that we go to
17 General Pede, who is sitting back patiently, and
18 ask him to do his presentation. And then I think
19 we'll be in good shape.
20 CONGRESSWOMAN HOLTZMAN: General?
21 PROFESSOR HILLMAN: Thanks, Judge Jones.
22 CHAIRWOMAN JONES: Thank you, Beth.

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Page 34

1 CHAIRWOMAN JONES: Good morning, General.
2 GENERAL PEDE: Ma'am, good morning. Good
3 morning, members of the Panel and for those on the
4 phone. My name is Chuck Pede, and it's a privilege
5 to be here to talk with you. Specifically, I was
6 asked to discuss the mechanics of what I'll refer
7 to as Senate Bill 1197, which I think has been
8 earlier referred to as 967. I think 1197, the
9 amendment, is the latest version that Senator
10 Gillibrand has offered. They're very similar, so
11 I'll reference it as Senate Bill 1197.
12 If I may just by way of introduction, let
13 you know that I'm currently assigned as the
14 Commander of the Legal Services Agency at Fort
15 Belvoir in the Chief of our Army Criminal Appeals
16 Court. However, today I appear before you as the
17 former Chief of the Criminal Law Division of the
18 Office of the Judge Advocate General, Army, a
19 position I left about five weeks ago to assume my
20 current duties. And so I had a good deal of
21 experience with the matters you've just discussed
22 and the matters I'm about to discuss, and feel

Page 35

1 privileged to be here today to talk with you about
2 those matters.
3 I should state at the outset that as I
4 present these materials, I don't pass judgment on
5 any of the legislation I'm here to discuss the
6 mechanics of. It's simply an outline of what my
7 counterparts in the other services and I have
8 concluded would be the mechanical application of
9 the statute as it's currently drafted. And so,
10 that is what I'll endeavor to do with you this
11 morning. I can obviously cover any other topic
12 that you wish to discuss and take back your
13 questions to either a particular service, of
14 course, or to the Joint Service Committee, if you
15 choose.
16 Before you -- I provided to the members of
17 the Panel a number of documents which are going to
18 be referred to as documents as I proceed and
19 exhibits. I did that simply because it is not an
20 easily understood set of materials, and so -- and
21 because some folks were remote, I wanted to make
22 sure you knew what I was referring to as we discuss

Page 36

1 them.
2 And so, you've got documents one through
3 five, Exhibits A through D. And I have on display
4 right now behind me, which we'll use a little bit
5 for those on the phone, Exhibit A and D. And I
6 know that all of you are probably very familiar
7 with a number of these things, so I won't spend a
8 lot of time on A and D, but I thought just by way
9 of reference, they will become useful as we go
10 through.
11 COLONEL HAM: Members, they're at Tab 11
12 of your materials, and for those by phone, they
13 were sent separately by Colonel Green as materials
14 for General Pede's presentation.
15 GENERAL PEDE: I would note, as well I'm
16 in the Army obviously, and so I'm going to use the
17 Army as an example for this discussion. However,
18 the implications and application of the legislation
19 that were talking about will essentially have the
20 same effect on all of the services. It is the
21 Uniform Code, so we're all doing the same thing.
22 We're built a little differently, but the impact of

Page 37

1 the legislation and how it will work will generally
2 be the same for the services.
3 Of the documents you have, you should have
4 the bill itself, the Amendment 1197. You should
5 have Article 22 and 23 of the Code as they are
6 currently written today. I'll make reference to
7 that. Document 4 is the maximum punishment chart,
8 which is a handy reference tool to see all of the
9 offenses under the Uniform Code that exist
10 currently. This will become important when we talk
11 about how 1197 bifurcates responsibility for those
12 offenses. And then finally, you have a set of
13 implementation questions, which were developed by
14 the Army Criminal Law Division to try to understand
15 the legislation.
16 So, first, if I could just refer to
17 Exhibit A, and leaving a few moments for the
18 members on the phone to find exhibit A. It's
19 simply a chart with blue, red, and green boxes that
20 show the process. And I won't bore you with the
21 details. Suffice it to say, first, this is not a
22 sexual assault specific process. There are

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Page 38

1 overlays to this process which I can discuss that
2 are specific to sexual assault offenses and
3 important differences. But in general, it's
4 important to understand that our court martial
5 process is very similar to any Federal criminal or
6 state criminal trial process with the report of a
7 crime in the upper left-hand corner, and an
8 investigation ensues. And then some responsible
9 authority in the blue boxes on the left side
10 initially disposes -- starts to dispose of the
11 allegation. At some point, that allegation moves
12 to the right into the red boxes.
13 And in the Army and in the services, we
14 have echelons of responsibility. And they're
15 indicated on this chart by rank. But, for example,
16 a battalion commander is referred to -- you see at
17 the bottom -- a summary court martial convening
18 authority, SCMCA. A special court martial
19 convening authority is a colonel, typically an O-6
20 in any of the services. And then, of course, a
21 GCM, or general courts, are what are generally, but
22 not always accurately, referred to as general or

Page 39

1 felony level courts because in the services we
2 don't break out between felony and misdemeanors.
3 General courts are courts that have the ability to
4 impose the maximum punishments authorized by law.
5 But you see those echelons, and each of those
6 echelons in general with garden variety offenses
7 can dispose of criminal allegations.
8 In general in the Army, courts are
9 convened by a general court martial convening
10 authority who has a staff judge advocate legal
11 advisor, and they can go in three levels of courts:
12 summary, special, and general. Typically, a GCM
13 authority will refer cases to special or general
14 court. That's where cases typically go. And then
15 everything else is pretty much the same in your
16 experience. There's an arraignment of an accused
17 who has to plead and what form he'd like. The
18 merits of the case itself, if they're found not
19 guilty, it ends. If they're found guilty, it goes
20 to sentencing. And then of course in the post-
21 trial process, which was referred to earlier, the
22 convening authority can take action, and then, of

Page 40

1 course, it goes up on appeal. So that's the
2 general process.
3 The sexual assault overlay on this is
4 quite significant in terms of who has
5 responsibility for what. And that's a function
6 over the developments over the last six to eight
7 years, and most especially, as you've probably
8 seen, just over the last 12 to 24 months, the
9 SECDEF's mandates on who does the 32, who does the
10 32 investigations.
11 The SECDEF recently mandated that judge
12 advocates will -- must -- conduct the Article 32
13 pre-trial investigation. The SECDEF has mandated
14 that a special victim counsel will be provided to
15 victims. The SECDEF has mandated that this O-6
16 special court martial convening authority is the
17 first person who can make decisions with regard to
18 allegations of sexual assault. So in terms of what
19 the institution has done recently, there's a lot of
20 overlay on that general process that's sexual
21 assault specific.
22 If there are no questions on Exhibit A,

Page 41

1 I'll refer then to Exhibit D, which is just a
2 general resourcing model for the Army. All the
3 other services have similar constructs, slightly
4 different. The reason this is important is because
5 of what it will mean with regard to the
6 implementation of 1197.
7 You probably all know that we have JAG
8 offices, legal offices, all over the world serving
9 commands. They're generally comprised of a lot of
10 lawyers, a lot of paralegals, performing multiple
11 types of legal services.
12 COLONEL HAM: Members on the phone, we're
13 looking at Exhibit D, Delta.
14 GENERAL PEDE: On the left side of the
15 chart of Exhibit D, you see those practice areas
16 that they provide legal services on. It can be
17 legal assistance. That's family law, divorce,
18 separation, financial issues. Administrative law
19 has a lot of questions regarding regulations and
20 the interpretation thereof, how to spend money.
21 Operational law is the law of war, claims. People
22 lose things, people have things damaged by

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Page 42

1 government movers, they file claims. Property is
2 damaged in a storm; they file a claim. Those are
3 all legal services delivered by a legal office.
4 And then, in the center there's a whole
5 other practice area we know as military justice,
6 criminal law. And I provide a breakout of who's
7 there in that office just so you have a sense of
8 how military justice is delivered at the
9 installation level where you're talking about
10 general and special courts, who's prosecuting those
11 cases, who's investigating them, and how they're
12 getting to trial.
13 So that's a staff judge advocate, usually
14 a lieutenant colonel or colonel with 15 to 24 years
15 of experience practicing law; a deputy staff judge
16 advocate, 14 to 18 to 20 years of experience. And
17 then specifically, the prosecution office, the
18 Chief of Criminal Law, usually a major who has a
19 number of trial counsel prosecutors working for
20 him, along with non-commissioned officers to
21 process the cases, to produce convening orders, to
22 find witnesses, to ensure witnesses are present for

Page 43

1 trial, to ensure bailiffs are present for trial to
2 support the military judge in the courtroom
3 process. And then we have court reporters and
4 other support personnel.
5 All of those people are very much tied to
6 company, battalion, and brigade leaders who deal
7 with allegations. And, of course, the staff judge
8 advocate is tied to corps and division level
9 commanders, who in the Army will typically convene
10 our courts martial. So that resource and construct
11 you see there in the center may become important.
12 In the Army, for example, we have roughly
13 70 general courts jurisdictions around the world.
14 There's roughly 50 that are active. We try roughly
15 1,200 to 1,500 courts a year. We actually have
16 over 2,000 to 2,400 cases preferred -- that means
17 charges sworn out -- in a given year. And that's
18 dispersed -- although there are 70 jurisdictions,
19 in the most active there's about 50 around the
20 world -- 50 jurisdictions. Although this says 70,
21 active jurisdictions, about 50. And among those,
22 they're dealing with those courts, but remember

Page 44

1 this office is also dealing with the allegations of
2 crimes that never get to court as well. There's
3 nobody else that does that. They do that. And on
4 a given year, we have roughly 30,000 to 45,000
5 allocations of crime throughout the Army, around
6 the world.
7 And so, when you think about the volume of
8 activity that this group of people are addressing
9 and sorting out, where does it go in the process
10 over here? When you divide that among the 50
11 jurisdictions, it's a fair amount of business.
12 COLONEL HAM: Sir, how many Article 15 or
13 non-judicial punishments does -- again, I know
14 you're from the Army -- does the Army generally do
15 an annual basis? Do you know that number?
16 GENERAL PEDE: The number ranges from
17 35,000 to 45,000 Article 15s a year. Those are all
18 being produced in these offices. It's roughly
19 5,000 a month around the world. Those are being
20 produced at all levels -- summary court, special
21 court, general court -- depending on the severity,
22 the gravity of the offense. If it's an officer who

Page 45

1 commits the misconduct, usually a general officer
2 administers the Article 15, a flag officer. If
3 they're senior NCOs, a brigade commander might do
4 that. A general officer might administer the non-
5 judicial punishment.
6 CONGRESSWOMAN HOLTZMAN: Could you just
7 explain what the Article 15 encompasses? What are
8 we talking about, non-traditional?
9 GENERAL PEDE: Yes, ma'am. Non-judicial
10 punishment is a --
11 CONGRESSWOMAN HOLTZMAN: Oh, non-judicial.
12 I didn't see your word. Okay.
13 GENERAL PEDE: I'm sorry, ma'am. Non-
14 judicial punishment is referred to as NJP.
15 CONGRESSWOMAN HOLTZMAN: Got it. Got it.
16 GENERAL PEDE: And a typically designed
17 commanders' tool to deal with lower-level --
18 CONGRESSWOMAN HOLTZMAN: Right, okay.
19 GENERAL PEDE: So that's just by
20 orientation. Any questions on Exhibit A or D?
21 CHAIRWOMAN JONES: So you say it's 35,000
22 to 45,000 allegations, charges that end up in the

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Page 46

1 non-judicial punishment?
2 GENERAL PEDE: No, it's general crime
3 allegations investigated throughout a year.
4 CHAIRWOMAN JONES: Total.
5 GENERAL PEDE: Yes, ma'am.
6 CHAIRWOMAN JONES: So it would be
7 everything.
8 GENERAL PEDE: Yes, ma'am.
9 CHAIRWOMAN JONES: Okay.
10 GENERAL PEDE: Okay. And out of that you
11 might have -- well, in our case we had roughly
12 anywhere from 1,500 to 2,000 charges preferred;
13 1,200 ultimately went to trial and went to court.
14 CHAIRWOMAN JONES: Okay.
15 GENERAL PEDE: But remembering that that
16 could be a larceny of someone's ID card to --
17 COLONEL HAM: So how many went to NJP?
18 GENERAL PEDE: Of that 45? Anywhere from
19 35,000 to 40,000 -- 45,000. Remember, some crimes
20 don't get reported through CID. They're low-level
21 -- disrespect, disobedience, somebody is late for
22 work. They go into the NJP process at a low level,

Page 47

1 but they don't come up on our statistical charts.
2 CHAIRWOMAN JONES: Okay.
3 GENERAL PEDE: So the 35,000 to 45,000
4 allegations are those offenses investigated by our
5 criminal agencies in the Army, typically CID. Of
6 the 35,000 -- again, it's an oddly similar number,
7 but of the 35,000 to 45,000 non-judicial
8 punishments, many of those are never investigated
9 formally by law enforcement. It's kind of a
10 separate category. It may consume some of those
11 allegations investigated by law enforcement, but a
12 lot of it is done by local commands. They identify
13 a soldier that has a problem. They discipline the
14 soldier.
15 CHAIRWOMAN JONES: So they're a little
16 overlapping, I guess is what we're saying.
17 GENERAL PEDE: Yes, ma'am.
18 CHAIRWOMAN JONES: Okay, great. Thank
19 you.
20 GENERAL PEDE: Any other questions on
21 Exhibit A and D from members on the phone?
22 (No response.)

Page 48

1 GENERAL PEDE: What I thought I would do
2 now for the Panel is look at Exhibit B. You may
3 also find useful pulling out of your folders
4 Document 1, which is the Senate Bill 1197, the
5 latest version of Senator Gillibrand's legislation
6 that we have. And Document 2 for ready reference
7 as I go through it, that's Article 22 of the
8 Uniform Code.
9 CONGRESSWOMAN HOLTZMAN: Where is that
10 Document 1?
11 GENERAL PEDE: It should be Tab 11.
12 CONGRESSWOMAN HOLTZMAN: Tab 11. I don't
13 have the bill.
14 COLONEL HAM: We didn't recopy 1197. It's
15 at Tab 4.
16 CONGRESSWOMAN HOLTZMAN: Okay, that's what
17 I'm asking. Okay.
18 GENERAL PEDE: So I have, again, Exhibit B
19 on display, and I'll use Document 1 and 2. And
20 again, there's a lot of, I just refer to them as,
21 rabbit holes throughout this legislative -- every
22 piece of legislation has rabbit holes. But I can

Page 49

1 go anywhere you'd like, where your interest
2 dictates. But I will try and follow the scheme as
3 outlined in the statute and raise some of the
4 questions on implementation we've identified.
5 COLONEL HAM: And for the record, the S.
6 1197 the members are referring to and General Pede
7 is referring to is the amendment intended --
8 entitled "The Amendment Intended to be Proposed by
9 Mrs. Gillibrand, An Amendment to the National
10 Defense Authorization Act," pending in the Senate.
11 GENERAL PEDE: I'm also going to put up
12 for display Exhibit C. That should be in your
13 folder as well. This just gives you a visual of
14 what the statute intends to do with the criminal
15 offenses. But I'll begin with Exhibit B, and this
16 will just be a general overview. It might prompt
17 some questions just simply as I go through it. I
18 would not want you to take from the fact that I've
19 got sequential boxes and some appearance of order
20 on this chart to suggest that -- and I don't mean
21 anything by this other than to say I've tried to
22 render order to that which to many who have

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Page 50

1 practiced in our system as currently configured,
2 it's difficult to create sequencing and order based
3 on our current system, which is to suggest that
4 there's a lot of the adjustments that we'll have to
5 make if this should pass.
6 In general, the amendment intends to
7 bifurcate our Criminal Code into two groups, and
8 each group is -- someone is responsible for that
9 group of offenses, what you see in Exhibit C. So
10 on Exhibit B, the amendment proposes to separate
11 out and make a certain person responsible for
12 Articles 118 through 132. That's murder through
13 fraudulent claims.
14 Article 78, 80, and 83 are things like
15 conspiracy attempts, solicitation to commit
16 offenses. These are specified in the statute. But
17 conjunctive with that is that only if those
18 offenses carry a maximum punishment in excess of a
19 year. So the theory is we're going to take away
20 from the commander, which is the intent, the
21 serious offenses, 118 through 132, and they're
22 attempts or conspiracy to commit them, so long as

Page 51

1 they carry more than a one-year sentence. And we
2 will give those offenses to this new disposition
3 authority, and I just refer to this person as the
4 DA for ease of reference. You'll see other terms
5 thrown about. There's no specific term listed in
6 the statute -- the DA.
7 By the statute you can see, and I'll walk
8 you through this, it has to be a judge advocate.
9 It has to be a commissioned officer. It must be an
10 O-6 at least, a colonel, in any of the services.
11 They have to be available for detail under Article
12 27. That's language from the statute. That simply
13 means they need to be able to be a trial counsel.
14 The theory is in here, this is a prosecutor who's
15 making these decisions over serious offenses.
16 They have to have significant experience
17 with general courts and special courts that is
18 trying these cases, although that's not defined in
19 the statute. And they have to be outside the chain
20 of command of the accused, which we'll talk about.
21 That can present some challenges.
22 Now, this new disposition authority over

Page 52

1 this category of offenses makes a couple of
2 determinations, and they are binding
3 determinations. They determine whether or not to
4 try the allegation, the charge itself, and what
5 level of court it will go to -- general court or
6 special court. So you have now a disposition
7 authority, a prosecutor, who has authority over
8 serious offenses, who will make binding decisions
9 on whether they -- those charges go to court.
10 That's the general construct that's outlined in the
11 statute.
12 Now, what you can see here on Exhibit C,
13 when you look at Exhibit C, this is just a visual
14 bifurcation of the offenses under the Uniform Code.
15 On the left side are those offenses that, assuming
16 they carry a maximum of a year or more -- more than
17 a year, I should say -- are the offenses that the
18 disposition authority, the super prosecutor, if you
19 will, would have authority over. The offenses
20 listed on the right remain with the command, would
21 remain with the structure as it currently exists.
22 Now, one thing to keep in mind, if you go

Page 53

1 all the way to the bottom on the right-hand side,
2 General Article 134, I'll talk about that in a
3 moment. But there's a whole other chart I could
4 fill up with 134 offenses under the Uniform Code,
5 and I'll do that. I can show you that in just a
6 moment. But this is the general notion of this
7 statute.
8 Now, on the right side are those offenses
9 left for the command from 83 -- actually I have a
10 typo here. It should actually be 82. On Exhibit B
11 on the left side, upper box, it says 80 to 83. It
12 should be 80 to 82, because under the statute, the
13 commander has Articles 83 to 117, 133 and 134, and
14 all offenses that carry a maximum punishment of a
15 year or less. The theory, again, as articulated by
16 the Senator and in some of her documents, that the
17 prosecutor will take serious offenses. The
18 commander will be left with what's generally been
19 referred to as the military offenses. Leave the
20 command with the military offenses. And so, what's
21 captured in this group is disrespect, disobedience,
22 malingerings, AWOLs, desertions. But as you'll --

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1 as I'll note for you, there are many serious
2 offenses in this category left with the command
3 that are not military. So, for example, drugs,
4 DUIs, kidnapping, embezzlement, a variety of
5 offenses that are very serious, carry maximums of
6 well in excess of a year, but are left with the
7 command.
8 The bill -- I'm now referring to Exhibit
9 A. When you come down on Exhibit B to the second
10 box, it says "Brigade BDE" is their abbreviation
11 for "brigade commander." When you come down to
12 this first box, the reason it says "brigade
13 commander" is because the statute eliminates the
14 general court martial convening authority concept
15 in the command world, so that division and corps
16 commanders under the statute are no longer general
17 court convening authorities. The brigade commander
18 is the only convening authority in the statute as
19 drafted that remains, and they're a special court
20 convening authority. So those are courts that can
21 mete out up to a one-year confinement. Now, a
22 brigade commander could also under the statute

1 administer summary court martial or non-judicial
2 punishment.
3 Now, the last thing I will highlight that
4 the statute does before I get into more questions
5 and discussion, is that it creates a new convening
6 authority office. And so, on the right side the
7 statute has deleted the authority -- if you look on
8 Exhibit A again of the general court martial
9 convening authorities, the general is a division
10 two-star and three-star general. It, however,
11 creates in the service chiefs -- the Chief of Naval
12 Operations, four-star generals in the Pentagon,
13 Chief of Staff of the Army, Chief of Staff of the
14 Air Force -- it creates in them the authority to
15 convene general courts. And they are in the
16 statute directed to appoint general court convening
17 authorities.
18 And those new convening authorities cannot
19 be in the chain of command of the victim or the
20 accused. They must be officers, and that's non-
21 commissioned officers at that point, but they must
22 be officers O-6 and above. And as a statutory

1 provision, there must be no cost to the services.
2 No additional authorizations are included in the
3 bill, so you have to use existing billets to create
4 this office and this office. That is the -- I'm
5 sorry -- for members on the phone, you cannot --
6 you must use existing billets to create the office
7 in the lower center box on Exhibit B, and you must
8 use existing billets -- people and money -- to
9 create the box on the left side that's entitled
10 "Disposition Authority." So no cost to build this
11 structure on the left to the services.
12 Now, that's Senate Bill 1197 in broad
13 brush. And I'm prepared to, if you have the
14 inclination, to go into to the details of the
15 statute with you now and to highlight some of the
16 questions that we have if we were to implement it.
17 CHAIRWOMAN JONES: We are inclined to do
18 that, yes.
19 GENERAL PEDE: If you'll pull out Document
20 1 then, that's the statute -- I refer to it as
21 Document 1 -- and Document 2, Article 22. We'll
22 proceed through the statute. And, in general, if I

1 may orient the members to the statute, it consists
2 of 10 pages. You should have 10 pages in front of
3 you so that we're all using the same document. I
4 won't go through every line, and so you don't need
5 to worry about that, but I will orient you to the
6 statute, and draw your attention to certain key
7 provisions. Is there anyone that does not have the
8 statute in front of them who wants me to pause?
9 (No response.)
10 GENERAL PEDE: The first page is merely an
11 introduction. It's the Military Justice
12 Improvement Act. If you'll proceed to page 2, in
13 general the first half of page 2 to page 6 modifies
14 the process of getting charges to trial. So it's a
15 series of provisions that create -- if you're
16 looking at Exhibit B again, it creates the
17 structure that you see roughly identified here,
18 with the exception of the box in the center bottom
19 of Exhibit B. So the first half of the bill simply
20 creates this new prosecutor and divides offenses.
21 The second half of the bill creates this central
22 office of convening authorities, and I'll talk

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Page 58

about that as we go through.

So if you look at page 2, and this, again, is difficult -- sometimes difficult statutory language, but I'll start by looking at -- ma'am, if it suits you, I'll go through just some select provisions.

CHAIRWOMAN JONES: Yeah, that'll be fine. And I'm sure there'll be questions.

GENERAL PEDE: Yes, ma'am. So Alpha 1 -- I'll refer to it as Alpha 1 -- Modification of Authority. This is where you get the beginning of the bifurcation of offenses. And toward the center of Alpha 1, it refers to those offenses for which a maximum punishment includes confinement for more than a year, and then it refers you later to Paragraph 3. So if you just hold that thought, "confinement for more than a year" and reference to Paragraph 3, and move then to Alpha 2, you then see language called "Excluded Offenses." And this is when it becomes a bit difficult because we now have things that are referred to as excluded offenses. And that, in essence, is the right side of Exhibit

Page 59

B.

Excluded offenses are 83 through 117, 133, 134, or anything that has a max of less than a year. So if you really wanted to be -- you know, if you get out of the weeds for just a moment, bear with me, and you looked at Article 121, which is larceny, larceny is the theft of property, but it's based on the gravity of the property. If you steal less than $50 -- you know, steal $50 from somebody, that doesn't carry a maximum punishment of a year. That means the commander gets it. If you steal $500, the DA gets it.

So it might be, I'll just refer to it as an included offense on the left side, but because of the gravity of the offense, it actually kicks over to the commander. We don't practice this way now, as you know. This is all -- it's all unitary now, if you will, if you'll allow me to use that word.

So Paragraph 2 is excluded offenses, and that's where you actually see identified what's excluded from this new prosecutor, and that is,

Page 60

again, 83 through 117. Just so you have a face to some of these, 83, fraudulent enlistment, and 117, provoking speech and gestures. And you may have heard of 133 and 134. 133 is conduct unbecoming an officer. 134 is referred to as the General Article. And again, the General Article could fill up with the number of offenses this entire chart. That is Exhibit C.

Okay. So that's what Paragraph 2 accomplishes. It creates this bifurcated category of excluded offenses, and it identifies them by number, and that's left with the commander. Now, I would point out to you that within that excluded number of offenses, there are some very serious crimes to include kidnapping, et cetera, under the excluded offenses which are left with the commander.

If we proceed then to Paragraph 3 on page 3 listed as requirements, this simply identifies who will take care of those offenses that are not excluded. Now, the offenses that are not excluded are those offenses on the left side of the chart,

Page 61

and now the statute tells you who's going to do it, who's responsible for them. And by paragraph, it says a commissioned officer in Paragraph A, O-6 or higher, at the bottom of that Paragraph A, available for detail under Article or Section 27. That's Sub (a)(i). That's again -- Article 27 of the Code is a licensed to practice judge advocate. Article 27 is the Article that creates a judge advocate and allows them to try courts martial, and only TJAGs, the judge advocates general, have authority to certify a judge advocate as qualified to practice before courts martial. So being available for detail under 27 means you can try criminal cases in Federal courts martial. So that person has to be a prosecutor -- or has to be a judge advocate.

Sub (2)(i) have to have significant experience in trials by general or special court. Now, there should be some pause to discuss how many of those we have in our inventory. And so, among the services, again, I will only speak for the Army, but one relevant question for all of us

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Page 62

1 within the services is, how many of those do we
2 have? We have approximately -- approximately --
3 135 to 145 colonel O-6s at any given time, bearing
4 in mind that each of them are currently assigned to
5 existing billets. And this may have -- this may
6 sound sarcastic, but it's not intended to. They
7 all occupy billets of some importance obviously,
8 otherwise they wouldn't have the billet. So
9 they're already engaged in the practice of law
10 somewhere.
11 And so, those O-6s are assigned, and then
12 we have to figure out among that group that's
13 already assigned, how many have significant trial
14 experience. I can't tell you today how many of
15 the, let's say, 135 -- would have significant trial
16 experience, although I would suggest to you that
17 it's far less than 135,000 that we have.
18 They have to be outside the chain of
19 command in Sub (3)(i). And then we move to page 4,
20 which creates the binding authority language. In
21 the top, it identifies that this person will make a
22 determination whether to try the charges by general

Page 63

1 or special court. That's in Sub (b). And then (c)
2 is the binding nature of that decision. Paragraph
3 C, the center of page 4, "This decision to
4 termination shall be binding on any applicable
5 convening authority."
6 In Sub (d), unlawful command influence,
7 which is something I'm sure you've heard people
8 testify about, is invoked in Sub (d) to ensure that
9 the person, this disposition authority at JAG O-6
10 is not subject to unlawful command influence. And
11 then Sub (e) that goes from the bottom of 4 to page
12 5 simply states that if this person makes a
13 decision -- if the disposition authority makes a
14 decision not to try a case, not to send it to
15 general or special, then this person on the right
16 side of the chart, the brigade commander, still has
17 authority to impose summary court or non-judicial
18 punishment. So they can still send a soldier to a
19 summary court martial for which the maximum
20 punishment is 30 days, or non-judicial punishment.
21 GENERAL (RET.) HAM: But not special.
22 GENERAL PEDE: That's correct, because

Page 64

1 under this construct, this disposition authority
2 has binding authority, and he's determined -- he or
3 she has determined it will not go to trial.
4 Now, one of the interesting questions that
5 you see reflected at one of your tabs -- it should
6 be Document 5, a number of implementing questions,
7 what happens as you probably remember, soldiers
8 have the authority -- sailors, airmen, marines have
9 the authority to refuse trial by summary court as
10 well as non-judicial punishment. So having made a
11 binding decision not to go to trial and kicking it,
12 for example, the DA declines a case -- this box in
13 the middle -- kicks it to the brigade commander.
14 The statute current doesn't address what to do in a
15 case where the soldier refuses, as is their right,
16 the summary court martial or non-judicial
17 punishment. Many of the brigade commanders try the
18 cases. According to the statute, that's not
19 authorized. He's disposed of it and declined.
20 Does it go back to the disposition authority, and
21 we would presume it does, but there's no answer for
22 that. Currently all of that is taken care of on

Page 65

1 the right side in the commander channels. Sir?
2 MAJOR GENERAL (RET.) ALTENBURG:
3 Technically, the accused's right when offered
4 punishment under non-judicial punishment or
5 proceeding under non-judicial punishment or
6 proceeding at a summary court martial to adjudge
7 guilt or innocence, his right is to demand trial at
8 a special court or higher, is that right?
9 GENERAL PEDE: The right is to demand
10 trial, yes, sir.
11 MAJOR GENERAL (RET.) ALTENBURG: Right.
12 GENERAL PEDE: It is always ultimately the
13 government's option to provide the trial. The
14 government has the option not to proceed to trial
15 upon the demand, but then no disposition is
16 essentially the windfall to the accused, who
17 decides to invoke that right.
18 MAJOR GENERAL (RET.) ALTENBURG: And one
19 might infer from the legislation that's drafted
20 that it creates a loophole, so to speak, because
21 it's hard to imagine an accused with the only
22 alternative for the command to do a non-judicial

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1 punishment or a summary court. It's hard to
2 envision an accused with advice of counsel, saying,
3 oh, sure, I accept that, because if he demands a
4 trial, it looks like there's no alternative. There
5 won't be a trial.
6 GENERAL PEDE: On first blush it does
7 appear that way and second blush. There's just no
8 answer currently in here. Presumably the
9 disposition authority would take it back and make a
10 decision, but we don't know that, and there's no
11 authority listed to be able to do that.
12 MS. FROST: But wouldn't that then be the
13 basis of an appeal if you initially said there
14 wasn't compelling evidence to move forward with
15 criminal prosecution, it gets kicked back, and you
16 changed your mind? I would -- that strikes me
17 as --
18 GENERAL PEDE: That's one basis, although
19 you can argue in some cases, prosecutors make
20 decisions for different reasons. Sometimes they
21 choose not to prosecute based on caseload, based on
22 availability of resources and money. The services

1 don't typically make decisions to prosecute or not
2 prosecute based on funding. We're not as
3 constrained perhaps as maybe a state office with
4 limited resources. But sometimes they do make
5 decisions -- prosecutors around the world make
6 decisions based on resources, so there are other
7 reasons. But there is no escape hatch or
8 explanation of how that's to be resolved.
9 CONGRESSWOMAN HOLTZMAN: And without more
10 -- let's just assume this legislation passed. How
11 would the military deal with that problem? What
12 would you do? I mean, could it be solved in any
13 way? I guess my specific question is, short of
14 some legislative correction, how would you deal
15 with this problem? Could you deal with this
16 problem?
17 GENERAL PEDE: That's the money question,
18 ma'am. Typically --
19 CONGRESSWOMAN HOLTZMAN: $64,000?
20 (Laughter.)
21 CHAIRWOMAN JONES: It's more today.
22 GENERAL PEDE: So your practitioners in

1 all of the services, ma'am, we make it work. We'll
2 find a way to make it work. The dilemma is, as
3 you've identified, is what type of errors will we
4 build in to the band-aid that we need to apply to
5 make it work? There could be just outright
6 impediments to making it work.
7 So, for example, we haven't gotten to it
8 yet, but what you'll see when you look at this is
9 there will be some courses of misconduct for which
10 both sides of this construct have authority. So I
11 may go AWOL, I may kidnap someone. That's all on
12 this side. And then I may rape them and then
13 murder them. That's on this side. By the statute,
14 both have authority over each category of those
15 offenses, certain of those offenses. Neither has
16 authority to do all of them.
17 Now, how do you determine who will take
18 jurisdiction? Do you have two trials wherein the
19 victims must testify in both, or do you have a
20 consolidated trial in which you now imbed potential
21 error, because as an accused I would argue, you
22 don't have authority to try -- legal authority to

1 try the kidnapping, which belongs to him or her, or
2 the AWOL. You only have authority over the murder
3 and rape. Again, legal error.
4 So back to my original example, yes,
5 ma'am, we will try and work it through, comity,
6 with a "T," between the commander -- and remember,
7 the commander system remains -- what you see on
8 Exhibit D, the staff judge advocate, senior legal
9 advisor, usually a colonel or an O-5, would work
10 with the commanding general and the brigade
11 commander to sort out what to we do with this if
12 this O-6 has declined to prosecute, or we have
13 shared jurisdiction, for lack of a better term.
14 And we would try and negotiate who's going to try
15 it, but we'll not know the answer until an
16 appellate court tells us if we're right or wrong.
17 We will not.
18 CHAIRWOMAN JONES: Go ahead.
19 GENERAL (RET.) HAM: This is Carter Ham.
20 On a practical level, General Pede, have you looked
21 at, again, if the legislation as proposed passes,
22 how you would implement in terms of manning with

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Page 70

1 the establishment of two new authorities,
2 disposition authority and chief of services, but
3 the staff judge advocate, less military justice
4 matters still is a necessary function for general
5 officers in command, though they no longer hold
6 military justice responsibilities. Do you have the
7 wherewithal within existing structure to execute
8 this?
9 GENERAL PEDE: Sir, I believe that the
10 judge advocates general have provided cost
11 estimates to build the structure you see on Exhibit
12 B, and I'll highlight some of those at least for
13 the Army.
14 So to build this structure just within the
15 disposition authority box, sir --
16 COLONEL HAM: And you have those at Tab 9,
17 sir.
18 GENERAL (RET.) HAM: Okay, all right.
19 GENERAL PEDE: And I refer you from, and I
20 apologize to members on the phone. I'm looking at
21 Exhibit B, the box that says "Disposition
22 Authority." To build that person, you must build

Page 71

1 an office around that person resourced to prosecute
2 cases. And in the Army, as I mentioned, we have
3 roughly 15 jurisdictions. Just as an example, all
4 the services have multiple prosecution centers
5 around the world. For the Army, we've got about 50
6 of these doing it now. They're called staff judge
7 advocates. And, sir, just to clarify, this staff
8 judge advocate, and this chief of the criminal law
9 on Exhibit B still have full responsibility for
10 over half of the offenses under the Uniform Code.
11 So I believe that TJAGs would tell you
12 that this structure must remain in large part in
13 order to continue to advise corps, division,
14 brigade, battalion commanders, and to dispose of
15 all of the offenses on the right side of this
16 chart, Exhibit C. They still have to prosecute the
17 kidnappings and the AWOLs, desertions, the
18 malingerings, the drunks, the DUIs, the drug cases.
19 All of that still needs to be prosecuted, and these
20 people will still do those. The courts martial
21 that are conducted on this side still need to be
22 taking verbatim transcripts. We still need court

Page 72

1 reporters. We still need NCOs to run the courts,
2 and to find witnesses, and to interview, and to do
3 all of the administrative preparations of records
4 of trial. All of that still needs to exist within
5 the staff judge advocate to continue to advise
6 these commanders.
7 So to do that, it requires all of this in
8 the center of Exhibit D, I think the judge
9 advocates general in the Army, for example, said to
10 do that here on Exhibit B, the disposition
11 authority, you need to do roughly -- to be able to
12 try cases with the same measure of speed that we do
13 now, you'd need -- we would need in the Army
14 roughly anywhere from 35 to 50 of these people. So
15 I need 35 to 50 senior judge advocates with
16 significant criminal law experience. And then I
17 need that pyramid under them to do the same thing
18 for all those other offenses, unless I cut this in
19 half and turned it over to them. And by doing
20 that, I would argue, having done this for about 24
21 years -- that is, prosecuted or defended cases --
22 this slows down and is decremented in some

Page 73

1 significant, meaningful way, as it deals with all
2 of the misconduct that is left with commanders.
3 So it's -- in a way, you're cutting the
4 Gordian knot, and you've got -- using now in some
5 way to a criminal to the capability on either side.
6 But both must be resourced. This O-6 can't
7 investigate 15,000 allegations. You need to spread
8 it out across the world so it's manageable. Then
9 he also needs other judge advocates to get cases
10 ready for trial, to identify if they should go to
11 trial, to prepare for trial. He needs paralegals
12 to help him do that. He needs court reporters and
13 judges. So there's a whole structure here.
14 The judges can probably be shared. Court
15 reporters can probably be shared to some degree.
16 But who do they work for? Right now they work for
17 the staff judge advocate. Those are questions
18 that, again, are unanswered. We would figure it
19 out. We would figure it out, but it would be very
20 difficult for the first probably 12 to 24 months.
21 CONGRESSWOMAN HOLTZMAN: How would plea
22 bargaining take place? If you had a case -- the

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1 example you gave where you have a kidnapping, a
2 rape, whatever -- offenses on both the left and the
3 right side.
4 GENERAL PEDE: It's impossible to say
5 today, ma'am, because it's not clear. I would
6 point out that Article 22 of the Uniform Code -- it
7 was Document 2 in your folder -- useful to look at
8 that because while this person has GCM authority,
9 general court authority, as we understand it, it
10 doesn't exist on the right side anymore. So these
11 commanders who traditionally have held that
12 authority with this legal advisor don't -- can't
13 convene general courts.
14 COLONEL HAM: It can't convene special
15 courts either, can they?
16 GENERAL PEDE: And they cannot -- thank
17 you -- under Article 23, these people can't convene
18 special courts either. So general officers don't
19 have authority to convene this lower level court.
20 This person does, the brigade commander, but
21 historically, at least in the Army, they don't do
22 this. So these brigade commanders have no

1 experience convening courts. So for a period of
2 time, we'd be left guessing until we sort it out.
3 Now this new office of convening authority
4 -- referring for members on the phone to Exhibit B
5 -- the Chiefs of Services have authority to create
6 new convening authorities. So presumably, the
7 Chief of Staff of the Army, General Odierno, would
8 identify at least one convening authority who could
9 convene general courts for all offenses worldwide.
10 Now again, currently we have roughly 70 in the
11 Army. There's an efficiency obviously that that
12 generates for you. It's close to where the offense
13 was committed. There's a legal advisor physically
14 present, can advise the convening authority and
15 move cases quickly. If you have --
16 PROFESSOR CORN: General Pede?
17 GENERAL PEDE: Yes?
18 PROFESSOR CORN: I'm sorry. I didn't mean
19 to interrupt. I thought you were done.
20 GENERAL PEDE: We would presume that the
21 Chief of Staff of any of the services would create
22 multiple convening authorities to spread them

1 around the world for efficiency. He has the
2 authority to do that. We don't know what his
3 constraints are. Having taken away these authority
4 from these individuals, three- and two-stars, is
5 the Chief of Staff of any of the services
6 comfortable reappointing them given that the
7 authority was, at least congressionally, seems to
8 indicate that they should not have it. Who is the
9 Chief of Staff to appoint at that point?
10 Assuming the Chief of Staff does that then
11 with regard to pre-trial negotiations, ma'am, we
12 would have to assume that that GCM would have the
13 authority to negotiate.
14 CONGRESSWOMAN HOLTZMAN: Over what crimes,
15 or what offenses?
16 GENERAL PEDE: Well, it would depend on
17 which offenses came to hand from which side of the
18 chart, if you will. Under the statute as currently
19 drafted, there is no way as I read it, ma'am, for
20 the offenses left with commanders -- even if you
21 reappointed them, there's no way for those offenses
22 to get to the new convening authorities because

1 it's generally constructed that the disposition
2 authority feed the new convening authorities.
3 It's not clear how that would happen under
4 the current language. It doesn't mean it can't be
5 fixed, ma'am, but just under the current language
6 it's not clear how military -- I won't say military
7 offenses because the carve-out, the excluded
8 offenses, are far more than just military. So,
9 those offenses left with the commander, they need
10 an outlet to the general court environment. But
11 right now it doesn't exist in the statute as
12 drafted.
13 CONGRESSWOMAN HOLTZMAN: But my
14 question --
15 PROFESSOR HILLMAN: General Pede, this
16 Beth Hillman. May I ask a question?
17 GENERAL PEDE: Yes, ma'am.
18 PROFESSOR HILLMAN: I wonder if you have
19 looked at what happened in the UK when they
20 undertook comparable changes, which really have
21 happened over a long period of time, but especially
22 in the Armed Forces Act of 2006 and then the

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Page 78

1 changes that were sort of fully implemented by
2 2009. Because what they did was actually
3 centralize more than what you're contemplating here
4 or what the bill specifies. It centralizes this
5 authority that deals with serious charges, and left
6 the authority to deal with lesser offenses reside
7 in command. Did you look at what they did?
8 GENERAL PEDE: Yes, ma'am, but I would
9 tell you that I haven't looked at it in greater
10 detail than what you described. I think I've read
11 -- well, I've certainly read articles about it.
12 I've talked with British judge advocates about its
13 effect and implementation. I think our judge
14 advocates general have also commented on it, and it
15 is, in our assessment, a question principally of
16 scale. But there's also a philosophical
17 underpinning I believe our judge advocate general
18 have highlighted.
19 So on the scale issue, we are a worldwide
20 deployed force. The British army is not. And on
21 the philosophical -- and what that means is we have
22 to have the ability to prosecute crime where we

Page 79

1 find our soldiers, wherever they may be. And
2 again, that's a question --
3 PROFESSOR HILLMAN: General, I
4 understand --
5 GENERAL PEDE: Yes, ma'am, go ahead.
6 PROFESSOR HILLMAN: I'm sorry to
7 interrupt. I understand the objections to the
8 scale, and I understand that many on this Panel
9 just reject the relevance of the foreign
10 experiences. But in terms of the process and the
11 -- what looks an incredibly redundant and
12 excessive, you know, sort of -- is that what they
13 experienced? Did they end up with sort of
14 redundancy and a complete lack of efficiency as a
15 result of making that change?
16 GENERAL PEDE: I can't answer that, ma'am,
17 because I don't know that they left court martial
18 authority for purely military offensives with
19 commanders. The dilemma here, if there is such a
20 dilemma, is that both commander and the new
21 disposition authority have authority over -- well,
22 let's just use normal terms -- felony level and

Page 80

1 misdemeanor level misconduct.
2 And so, I don't believe that's what they
3 did in the British system. However, here the
4 Senator has generally described the offenses left
5 with the commander as military offenses, suggesting
6 that they're lower in gravity perhaps, or at least
7 not general court martial material. And so,
8 therefore, you don't need to worry about gravity as
9 much. However, the reality when you look at the
10 bifurcation is, that's just not the case. And
11 so --
12 PROFESSOR HILLMAN: You know, General
13 Pede, I think you hit on a critical point there,
14 and that's that the bill as currently drafted
15 doesn't take the most serious offenses and shift
16 them to a non-chain of command authority, but
17 actually takes civilian style offenses of a serious
18 nature and shifts them to a civilian or, sorry, a
19 non-chain of command authority, the military
20 prosecutor, removing that from the chain of
21 command, but leave minor offenses and military
22 offenses within the chain of command. I think

Page 81

1 that's the big -- that's the --
2 COLONEL HAM: It also leaves offenses like
3 child pornography, ma'am, all the child pornography
4 offenses, which are in Article 134, it leaves all
5 offenses that can be assimilated by Federal law,
6 for example, Internet enticement of a minor under
7 18 U.S.C. 2422.
8 GENERAL PEDE: If you think about the
9 offenses for which Bradley Manning was tried, those
10 were offenses against the Espionage Act and one
11 other Federal statute. Those were assimilated
12 crimes under 134. So I agree with what you
13 described, ma'am, with that one addition, that
14 commanders are also left with very serious common
15 law crimes and serious codified crimes.
16 So the intent in the bifurcation may not
17 have been well executed; however, it may be
18 perfectly aligned with the intent of the drafter.
19 It's just too -- it's impossible for us to know,
20 ma'am.
21 PROFESSOR HILLMAN: Thank you, General.
22 PROFESSOR CORN: General Pede, this is

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1 Professor Corn. I have three questions for you.
2 First off, has the Army Judge Advocate General
3 contemplated the percentage of O-6 judge advocates
4 who might not meet the qualification under the
5 statute because of a lack of significant criminal
6 prosecution experience? In other words, are we
7 assuming that if you're an O-6, you need the
8 qualification, or do you think that the pool of
9 qualified officers would be substantially less than
10 the total number of O-6s in the force? That's my
11 first question, and how that might affect
12 implementation.
13 My second question is, are you looking at
14 the potential impact of creating these disposition
15 authorities on judge advocate officers'
16 professional development, so to speak, in other
17 words, their career development. And is there any
18 concern that by essentially tailoring career paths
19 to facilitate competence in this function, we might
20 be undermining the ability of these same officers
21 to perform the more kind of global function that
22 judge advocates routinely perform today, as you

1 outlined at the beginning of your presentation?
2 And then the third question is on the
3 efficiency issue, I thought that was interesting
4 because I recall at one of the earlier hearings
5 where I testified, that Professor Fidell actually
6 made the exact opposite argument. He argued that
7 he believed that having a centralized chief
8 prosecutor of the Army would actually be more
9 efficient. And all potential, what we might say,
10 serious or felony type offenses would go through
11 that centralized office ostensibly within the
12 office of a judge advocate general.
13 And I'm just interested in your opinion on
14 the feasibility of centralizing this function and
15 maybe having I'd have regional representatives,
16 kind of like the Regional Defense Council model
17 that we use in the Army, if you think that's
18 feasible, or if you and your colleagues are
19 convinced that the only way to effectively
20 implement this in our force would be to essentially
21 do what you're suggesting, which is to create 50 to
22 70 of these disposition authorities and disperse

1 them around the force.
2 GENERAL PEDE: Yes, sir. I would say out
3 of the gate, we don't have 50 to 70 O-6s with
4 significant experience doing trial work that could
5 immediately be fielded, even if you pulled out the
6 sitting staff judge advocates from these important
7 jobs around the world. They simply don't currently
8 exist in the inventory. I can't speak to the other
9 services, but I would believe we're all fairly
10 hard-pressed even now, given 12 years of war,
11 wherein certain skill sets can atrophy if you've
12 been focused on advising commanders in the field.
13 Your capabilities and skill sets with regard to
14 criminal law and the delivery of those services can
15 atrophy.
16 So in general, I think all of the services
17 would be hard pressed to field sufficient numbers
18 of disposition authorities to maintain the current
19 speed of prosecutions and the quality of
20 prosecutions. But specifically to your questions,
21 I've been -- and again, I'm speaking as the former
22 Chief of Criminal Law, not in my current capacity,

1 to be clear. I served as the Chief of Criminal Law
2 for about four and a half years. I was deployed as
3 a staff judge advocate in Iraq for a year -- over
4 the last five years, and I was recently the
5 Executive Officer for the Army Judge Advocate
6 General.
7 With that lens, my assessment would be
8 we'd have 20 to 25, perhaps more, judge advocates
9 with the level of experience that's expected for
10 these disposition authorities. I would like to say
11 there's more, and there could be. I haven't done a
12 critical analysis of the Army's inventory and the
13 skill sets. But I think at the lower grades they
14 exist, but at the higher grades with the work we've
15 been doing over the last 12 years, that's a
16 challenge. There are very few --
17 COLONEL TURNER: General Pede?
18 GENERAL PEDE: Yes, ma'am?
19 COLONEL TURNER: Lisa Turner here. To
20 pursue that question before you turn to the rest of
21 Professor Corn's questions, and just for the sake
22 of the record, we can't just hire an experienced

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Page 86

1 prosecutor on the street to be an O-6. So how long
2 does it take to grow an experienced O-6, and how
3 many people in the pyramid -- captain, you know,
4 major, et cetera -- level do you need to bring unit
5 accession levels to grow that force structure?
6 GENERAL PEDE: It takes approximately 18
7 to 24 years to build the kind of O-6 colonel that
8 we presume is identified in the statute.
9 COLONEL HAM: Members, for time purposes,
10 we've been notified Senator McCaskill still desires
11 to attend, and she's supposed to be here in about
12 10 minutes.
13 GENERAL PEDE: If that answers your
14 question, ma'am, it takes many years to build an O-
15 6 that you would -- that we presume would be
16 qualified under these criteria, although there's
17 not a lot of detail in the criteria. It's a
18 significant experience with criminal trials at the
19 general and special court martial levels.
20 COLONEL HAM: General Pede, can I ask a
21 question?
22 GENERAL PEDE: Please.

Page 87

1 COLONEL HAM: What happens to lesser
2 included offenses that fall from one side to the
3 other? Have you considered that?
4 GENERAL PEDE: Well, we have, and it's not
5 identified in the statute what happens. But
6 presumably if it's a lesser offense, it can get to
7 the other side, if you will, the commander side in
8 a couple of different ways. The DA can choose not
9 to prosecute it or -- I'm not sure what example
10 you're thinking of.
11 COLONEL HAM: What if the panel wants to
12 convict of a -- I mean, it may be an obvious
13 answer. What if the panel wants to convict of a
14 lesser included offense? I would think they still
15 could. The DA doesn't have jurisdiction over that
16 offense, but I would think it still remains a
17 lesser included offense for the panel or judge to
18 convict.
19 GENERAL PEDE: I presume once the court
20 has convened, those offenses remain available to
21 the panel to convict on. And then I'll just move
22 quickly through the remainder here, but to answer

Page 88

1 Professor Corn's last two questions, there's no
2 discussion in the statute obviously about
3 professional development. But to be able to create
4 this cadre in the disposition authority arena,
5 you've essentially got to track them over the
6 course of their career. That, again, nixes down
7 the amount of people available to do that.
8 It also deprives -- you know, when you
9 talk about an Army prepared for war, many of us
10 have spent a lot of time in deployed settings or in
11 garrison settings preparing for war. And a lot of
12 our time is spent on the left side of Exhibit D;
13 that is, in legal assistance at law, operational
14 law, in particular, and claims. You have to
15 develop that proficiency to be able to go to war
16 effectively and advise senior commanders. It's not
17 just military justice. So in order to maintain the
18 broadness of our skill set, we have to be able to
19 do all of it to be able to serve our Army and our
20 organizations, all of the services.
21 Efficiency of the centralized prosecutor,
22 to me it speaks for itself. The notion of having a

Page 89

1 single or a single office maybe with multiple
2 prosecutors in it responsible for worldwide
3 prosecution would bring us to a grinding halt. And
4 I can say that with some measure of confidence.
5 PROFESSOR CORN: Thank you.
6 CONGRESSWOMAN HOLTZMAN: General, maybe I
7 didn't ask my question clearly. But let's just say
8 -- going back to the question I asked about plea
9 bargaining. If the DA, the disposition authority,
10 does not want to plea bargain with regard to
11 certain offenses, or thinks that the sentence
12 should be X, and on the right side, that commander
13 doesn't want to plea bargain at all. How does this
14 get resolved when you have the same series of
15 offenses involved in a single incident? What do
16 you do? Is there authority? Who takes precedence?
17 Who has control?
18 GENERAL PEDE: There's no explanation. I
19 can't provide you an explanation, ma'am.
20 CONGRESSWOMAN HOLTZMAN: Okay. So the
21 statute doesn't solve that problem.
22 GENERAL PEDE: No.

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1 CONGRESSWOMAN HOLTZMAN: So it's possible
2 to have a complete breakdown in terms of how to
3 prosecute this case.
4 GENERAL PEDE: Yes, ma'am.
5 CONGRESSWOMAN HOLTZMAN: Okay.
6 GENERAL PEDE: And as you've identified,
7 much of the conduct we face in our daily lives is a
8 combination of misconduct. It's not a single
9 offense. It's a course of conduct. It's a course
10 of conduct that streams from left to right and back
11 again on Exhibit B. And that's what this center
12 box, this center phrase, cases with both excluded
13 and included offenses, what do we do with them,
14 which is your point, ma'am.
15 In addition, who has authority? How do
16 you negotiate pre-trial agreements? It's not
17 clear. It doesn't mean it can't be made clear, but
18 it's not currently in the statute as drafted. Sir?
19 MAJOR GENERAL (RET.) ALTENBURG: When you
20 were talking about the comparison to other
21 countries' military justice systems, you used two
22 concepts of distinction. One was scale. What was

1 the other?
2 GENERAL PEDE: Philosophical
3 underpinnings, sir.
4 MAJOR GENERAL (RET.) ALTENBURG: Right,
5 okay. Going back to scale, I would suggest that
6 when you talk about scale and worldwide deployment
7 of the U.S. forces compared to the relative lower
8 level of deployment of the forces from the European
9 countries especially, that when you address that,
10 you might also include the size of the country
11 because for their domestic military crimes, you
12 know, England is the size of -- you know, smaller
13 than many states. And when you take the U.S.
14 forces and spread them across CONUS in Alaska, and
15 not talking about deployment, just talking about
16 garrison crimes, there is a huge geographic area
17 that makes what they've done in those other
18 countries much more difficult for us to accomplish.
19 GENERAL PEDE: I would observe that in
20 practice in a number of CONUS stateside
21 jurisdictions that in general, and we see this
22 reflected still routinely, local state prosecutors

1 who have jurisdiction over the offenses our
2 soldiers commit -- sailors, airmen -- are not
3 interested in asserting jurisdiction in general, in
4 the main, simply because their loads are already --
5 their caseloads are already full, their courts are
6 already full, and it costs them money. And we have
7 the capability resident, and we're interested in
8 doing it, and we do it.
9 And our philosophy has always typically
10 been to maximize jurisdiction over soldier offenses
11 to maintain good order and discipline. I think
12 generally the services all abide with that
13 philosophy. And so, therefore, I don't believe
14 even in CONUS in the United States, we would be
15 able to jettison our crimes to either state courts
16 or particularly to Federal court. The thresholds
17 to get into Federal court are very high; that is,
18 District Court.
19 I used to try drug cases, and the Federal
20 prosecutor -- the U.S. attorney in my jurisdiction
21 would be very civil with me, but I would have to
22 have pounds of cocaine involved in order to

1 prosecute an aircraft mechanic working on our
2 aircraft on our installation. All I needed to
3 prosecute for distribution or use was an ounce or
4 less, and I was interested; he or she was not. So
5 there's no outlet -- civil outlet -- that has, in
6 my experience, the capacity or interest to deal
7 with our caseload.
8 And I know my time is very limited, so if
9 I may just quickly jump back to the statute very
10 quickly, at the bottom of page 6, I would simply
11 highlight that from 6 onward, the statute -- page 6
12 onward -- the statute creates the convening
13 authority construct to replace all of those that
14 were deleted from Article 22. And if you pull
15 Article 22 again, important to note that Article
16 22, which was Document 2, is amended by this
17 statute to delete -- if you have Article 22 in
18 front of you, it deletes Subparagraphs (a)(5)
19 through (8). So this statute beginning on page 6
20 deletes those who can convene general courts, which
21 include Army groups, typically three-star and four-
22 star commanders, to division commanders, to

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Page 94

1 admirals of the fleet, et cetera, to air commanders
2 at the general court martial level.
3 It also interestingly deletes the
4 Secretaries' authority -- the Secretaries of the
5 Services' authority -- to appoint general court --
6 convening authorities, and interestingly, vests
7 that new authority with the Chief of Staff of the
8 Army, which is interesting. The Secretaries no
9 longer have authority to create general courts.
10 The Chief of Staff of the Army does.
11 COLONEL HAM: General Pede, could I ask
12 you again -- can you explain using Article 23 why
13 current general court martial convening authorities
14 have no authority at all anymore?
15 GENERAL PEDE: If you look at Article 23,
16 which is Document 3, general court convening
17 authorities have their authority in two fashions.
18 A division commander, a fleet admiral or an admiral
19 of the fleet has authority based on Article 22
20 because of their position. It's statutory. It's
21 just because of who they are and the billet they
22 occupy. They can automatically convene general

Page 95

1 courts, or the Secretary has given them special
2 authority. They've just said in an order you're a
3 general court convening authority. That's it.
4 If that doesn't exist, they don't have it
5 because it doesn't reside in Article 23. Article
6 23 is special court authority. Article 23 lists
7 those who have special court authority. Division
8 commanders, fleet admirals, air commanders at a
9 certain grade are not listed. Article 23 is
10 designed for lower level, lower echelon commanders.
11 And, therefore, who used to convene courts may no
12 longer convene courts unless the Chief -- in the
13 Army's case, the Chief of Staff of the Army so
14 designates them after congressional intent,
15 presuming the statute is passed, has said they
16 should not have it.
17 It's just an interesting conundrum that
18 would have to be wrestled with by the Chief of
19 Staff of the Services. Who do I appoint now?
20 COLONEL HAM: I think I'm asking -- maybe
21 I'm interpreting it incorrectly. Article 23 also
22 says any person who can convene a general court

Page 96

1 martial can also convene a special court martial.
2 So the stuff that's deleted from 22, division
3 commanders, et cetera, no longer have general court
4 martial convening authority.
5 GENERAL PEDE: Right, they cannot --
6 COLONEL HAM: Then they are no longer a
7 person who can convene general courts martial.
8 They no longer have special court martial convening
9 authority. Is that the right logic?
10 GENERAL PEDE: Right, but remember -- I
11 believe that's correct. That's the way I read it.
12 But remember that this person has it; that is, the
13 brigade commander in the Army, O-6 commander. But
14 remember, in the Army this person has never
15 heretofore convened courts. They have the
16 authority under the law. We just don't do it that
17 way as a matter of practice. The marines tend to a
18 little bit. But in our practice, historically
19 they've not had that.
20 MAJOR GENERAL (RET.) ALTENBURG: For
21 what's it worth, since the early '80s --
22 GENERAL PEDE: Sir?

Page 97

1 MAJOR GENERAL (RET.) ALTENBURG: -- in the
2 '70s, brigade commanders routinely referred what we
3 call regular special courts martial.
4 GENERAL PEDE: Yes, sir.
5 MAJOR GENERAL (RET.) ALTENBURG: That's
6 when the caseload was three times what it was
7 later.
8 GENERAL PEDE: Right. And they would
9 handle the lower level cases that needed to go to
10 trial.
11 MAJOR GENERAL (RET.) ALTENBURG: Right.
12 And that was all in the wake of the '68 amendments.
13 I mean, there were huge numbers of special courts.
14 GENERAL PEDE: And the maximum punishment
15 was up to six months of confinement. Now it's a
16 year, so it's different historically.
17 MAJOR GENERAL (RET.) ALTENBURG: Right.
18 GENERAL PEDE: And I would note as well,
19 unless there are other questions, Document 4 in
20 your packet is the maximum punishment chart, which
21 is a handy tool all prosecutors and defense counsel
22 use. It's just a massive listing of every punitive

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Page 98

1 provision in the Code, and it has the corresponding
2 maximum punishment.
3 And I just wanted to simply highlight for
4 you, if you flip to the very last two pages, all of
5 those offenses you see you on the last two pages
6 are Article 134 offenses that fall under what we
7 refer to as the General Article, and that allows a
8 commander to try those specified offenses.
9 And as you can see as you read that list
10 and the maximum punishments of confinement to the
11 right, many of those offenses are in excess of a
12 year. Now, those offenses are all left with the
13 commander. None of them by the statute, as
14 currently drafted, can be disposed of by the
15 disposition authority. They've been carved out.
16 I would also note that the General Article
17 allows us to, what we say, assimilate state and
18 Federal crime that's not articulate. Again,
19 Bradley Manning, as just an example, was tried for
20 certain espionage offenses under the Espionage Act.
21 That was assimilated and pulled in from the Federal
22 law under 134.

Page 99

1 SENATOR MCCASKILL: Hi.
2 COLONEL GREEN: Good morning.
3 SENATOR MCCASKILL: I didn't want to
4 interrupt.
5 CHAIRWOMAN JONES: Hello, Senator.
6 Senator McCaskill has arrived. And I think what we
7 -- General Pede, do you want to just finish if you
8 have not?
9 GENERAL PEDE: Ma'am, thank you. I simply
10 wanted to call your attention to that. It is a
11 handy reference for the members of the Panel to get
12 scope and to understand the bifurcation that's
13 affected by the Senate -- current Senate Amendment
14 1197.
15 CHAIRWOMAN JONES: Senator, I have one
16 more question I'd like to ask the General, and
17 then --
18 SENATOR MCCASKILL: Sure, not a problem.
19 I'm a little early. Not a problem.
20 CHAIRWOMAN JONES: Okay. I'm looking at
21 your Exhibit B, General, and so the left is the
22 disposition authority, and then our new convening

Page 100

1 authority is the middle box at the bottom?
2 GENERAL PEDE: At the bottom center, yes,
3 ma'am.
4 CHAIRWOMAN JONES: Okay. And this new
5 convening or these new convening authorities are
6 the ones now who would pick the judge, detail the
7 panel or the jury, choose the prosecutors, and
8 choose the defense counsel?
9 GENERAL PEDE: According to the statute as
10 drafted, that office -- this new office would have
11 the authority to detail what you've just described,
12 the military judge, apparently both sides of the
13 bar, the counsel, trial and defense, and pick
14 selected members of the panel.
15 Now, as you've -- and some of these are
16 highlighted in some of the questions in the
17 document. All of this is now done by separate
18 authority within the military services to ensure
19 not only the appearance of fairness, but the
20 reality of fairness in who's controlling the
21 detail.
22 Ages ago, defense counsel were detailed by

Page 101

1 a staff judge advocate. They worked for the staff
2 judge advocate. They decided in great wisdom to
3 separate that function because it didn't look
4 right, and there could be a conflict of interest.
5 So that's all done separately now. This statute
6 would sort of take us back in time and have one
7 person detail all of those individuals.
8 CHAIRWOMAN JONES: Has there been any
9 discussion about how to -- assuming people think
10 that that's bad either in appearance or in
11 actuality, has there been any discussion about how
12 to amend that or fix that?
13 GENERAL PEDE: Like other provisions,
14 ma'am, not further than what we've discussed here.
15 And amongst the practitioners, the senior
16 practitioners in our services, we've raised this as
17 a concern obviously. But currently there's no
18 amendment to that portion.
19 CHAIRWOMAN JONES: Nothing in the bill.
20 GENERAL (RET.) HAM: I'm sorry, just one
21 more beat of the drum on resourcing. Because the
22 legislation as currently drafted proposed -- does

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Page 102

1 not allow any increase in end strength. The growth
2 in the various boxes that you've depicted, General
3 Pede, those are all now billets to the services.
4 The services would have to find those additional
5 billets and the fiscal resources within their
6 existing authority at a time when both budgets and
7 manpower are decreasing. Is that a correct
8 assumption?
9 GENERAL PEDE: That's an accurate
10 statement, sir. They have to be harvested
11 somewhere within the current inventory, and
12 buildings and offices would have to be found for
13 these people who, remember, who are not part of the
14 unit for which they're now responsible.
15 GENERAL (RET.) HAM: Thank you.
16 GENERAL PEDE: So they would be tenants in
17 some fashion. But they'd have to be pulled from
18 that existing structure.
19 CHAIRWOMAN JONES: Yes?
20 MAJOR GENERAL (RET.) ALTENBURG: Just one
21 more. Do you think it's fair to characterize
22 things like one person detailing all of these

Page 103

1 entities where before they were, you know,
2 different entities. Is it fair to characterize
3 that as one of many probably unintended
4 consequences of the drafting in fairness to the
5 drafters and maybe bending over backwards to be
6 generous to them, that that's an unintended
7 consequence?
8 GENERAL PEDE: I think that's a fair
9 description, sir. I don't think there's many
10 provisions in here -- I think our estimate is
11 roughly 30 to 40, 45 provisions of the Rules for
12 Court Martial at a minimum that would have to be
13 amended to accommodate this structure. Those are
14 consequences that I don't think are necessarily
15 intended, perhaps simply not appreciated, but I
16 can't say, sir. I don't know. But I think it's
17 fair to say.
18 MAJOR GENERAL (RET.) ALTENBURG: Just as
19 the 120 redo in 2006 had the unintended consequence
20 of being partially unconstitutional?
21 CHAIRWOMAN JONES: Yes, Liz?
22 CONGRESSWOMAN HOLTZMAN: Has your office

Page 104

1 or has anybody discussed these issues or concerns
2 with Senator Gillibrand or her staff to see what
3 their response is and how they would address these
4 issues?
5 GENERAL PEDE: Ma'am, I'm privy to early
6 conversations with various members and their
7 offices on the Hill. Recently I believe -- I can't
8 speak to recent conversations, engagements with the
9 office and to what extent they have addressed some
10 of the issues.
11 CONGRESSWOMAN HOLTZMAN: Thank you.
12 CHAIRWOMAN JONES: Thank you very much,
13 General Pede. For those of you on the phone, we
14 are going to take about a five-minute break now,
15 and then when we return, Senator McCaskill is going
16 to speak with us. Thank you.
17 (Whereupon, a recess was taken.)
18 CHAIRWOMAN JONES: Do we have everyone
19 back who's attending by telephone? Beth, are you
20 here?
21 PROFESSOR HILLMAN: Yes.
22 CHAIRWOMAN JONES: Jim?

Page 105

1 VICE ADMIRAL (RET.) HOUCK: I'm here.
2 CHAIRWOMAN JONES: Okay, great. Professor
3 Corn?
4 PROFESSOR CORN: Yes, ma'am, I'm here.
5 CHAIRWOMAN JONES: Okay, great. Have I
6 forgotten someone?
7 COLONEL GREEN: Colonel Turner.
8 CHAIRWOMAN JONES: Oh, Colonel Turner.
9 COLONEL TURNER: I'm here also, yes,
10 ma'am.
11 CHAIRWOMAN JONES: Great. Okay. As you
12 know, Senator McCaskill is here, and we'd like to
13 hear from you, Senator. Our concentration this
14 morning is to look at the Senate proposal sponsored
15 by Senator Gillibrand, and specifically with the
16 structure that is proposed, which removes
17 commanding officers from the convening authority
18 positions.
19 SENATOR MCCASKILL: Well, thank you, and
20 I'm pleased to be here. It is -- frankly, my staff
21 was laughing at me because I looked forward to this
22 because my frustration is so high in dealing with

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1 this issue on a superficial political level. This
2 has been personally very painful for me. I've
3 spent my life working on behalf of victims of
4 sexual assault. I would never advocate any
5 position that I believed was not going to do the
6 very best job the law would allow in terms of their
7 protection, their empowerment, and the ability to
8 put perpetrators in prison.
9 I have been on the front row, I think,
10 doing reforms in every part of the military. One
11 of the things that some of my colleagues laugh at
12 is the characterization that some victims'
13 organizations have made of me that I'm coddling the
14 military. I think if you check with the military
15 leadership and my record on the Armed Services
16 Committee, I don't think they would characterize as
17 coddling. I've been very tough on our military on
18 a number of different subjects, and I think this is
19 one where I have been consistently tough on them.
20 I think we do victims a terrible
21 disservice by simplifying this to victims versus
22 commanders. It is much more complex than that.

1 When arguments have been made about this change in
2 the UCMJ, they have shifted over time when we have
3 met them. The initial argument that was made in
4 front of the Armed Services Committee was our
5 allies have all done this and reporting went up.
6 In fact, Senator Gillibrand said in the Committee
7 that reporting had gone up 80 percent in Israel.
8 Well, the truth is that is not correct.
9 Reporting has not gone up in many of our allies
10 that have done this. And, in fact, even in Israel
11 reporting went up the year after they made a
12 change, but it only matched the same number that
13 they'd had two years previously. So it was a
14 statistical aberration. It was not a trend. It
15 was not an indication that the change had resulted
16 in additional reporting.
17 So if the reason for doing this is our
18 allies have done it and it has worked, and if the
19 whole premise of this change is that we've got to
20 bring victims forward out of the shadows, then
21 certainly we have data, and the prosecutor in me
22 wants the data. And the data would say that's not

1 true.
2 Well, then the next argument was, well, if
3 we don't change it, they will not come forward
4 because they don't have confidence. And I am
5 pleased with the changes that have been made over
6 the last two to three years that we are seeing,
7 unlike our allies, an increase in reporting.
8 Reporting is not just up 50 percent this year. It
9 has been up every year over the last several years.
10 I am by no means excusing the military
11 from doing better, and I am by no means saying we
12 have this under control. But I think the reforms
13 that we have put in the bill are historic, and when
14 enacted, and I believe they will be enacted and
15 signed into law, we will have the most victim
16 friendly military -- most victim friendly sexual
17 assault regimen in the world. There is no system
18 where a victim has their own lawyer. There is no
19 system where the victim is going to be given as
20 many opportunities to weigh in in a formal way as
21 to the way the case should go forward. So I really
22 believe the changes we are embracing are important

1 and needed, and in some ways the value of them have
2 been diminished by this very contentious argument
3 over how we decide command authority on these
4 cases.
5 I am not going to -- I know you just had
6 an expert that went through a lot of the details.
7 I am happy to go through the details. One of my
8 frustrations is that my -- the other side of this
9 argument has not been as willing as I would like to
10 debate the details, not willing to take the
11 questions about the practical impact. And I can
12 assure you the question was asked of the drafters
13 of this legislation, do they know the problems. I
14 think they need to note the problems. I mean,
15 let's just look at the shift that is evidently
16 occurring right now. I believe because of the
17 advice of Professor Fidell, and to some extent, I
18 think this is the position of Professor Hillman
19 that she stated in writing, that it's important to
20 shift a lot of these offenses over to a disposition
21 authority outside of the chain of command.
22 Now evidently, Senator Gillibrand is

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1 telling our colleagues she's going to limit it just
2 to 120 offenses. And now that means we have some
3 other practical considerations if, in fact, that
4 occurs. If it is just a sexual assault, then you
5 not only have the two track problem -- the
6 constitutional problems, the practical problems,
7 the pragmatic problems -- you have a real problem
8 as to the kinds of cases that I wish weren't common
9 in this area, but are.
10 And I am handcuffed by my review of all of
11 these issues by my experience. Until you have
12 handled hundreds of sexual assault cases and the
13 problems they present from a practical viewpoint,
14 it is very difficult to understand why this
15 amendment is so unworkable. I can give you
16 specific examples of cases I've handled. Let me
17 give you a couple of scenarios that will
18 demonstrate my point.
19 A woman comes forward and believes that
20 she has been fondled and inappropriately touched in
21 a sexual way. That would be a 120 offense. It
22 would go over to the disposition authority. One of

1 two things happens. The victim comes to the
2 prosecutor and says, or in this instance comes
3 through their advocate, which they would have, and
4 says, you know, I'm done. I will not go forward.
5 It is too personally painful in my life. My
6 counselor says that what I'm going to gain out of
7 this is not as much as what I'm going to lose in
8 terms of my mental health. I'm done.
9 Now, in that instance, if I were the
10 prosecutor, I'd want to get something. I'd want to
11 mark that guy. And in this instance, we want him
12 out of the military. That disposition authority,
13 now what do they do? Do they decline the case and
14 then does it seamlessly go back to the commander
15 for maybe a simple assault charge? Can they
16 legally do that? Not clear. Their authority is
17 binding.
18 And obviously -- I'm sure that the General
19 discussed NJP. What I would've given as a
20 prosecutor in the cases that I had to dismiss
21 either because factually they fell apart or because
22 the victim would go forward, what would I have

1 given to have NJP. What would I have given to have
2 a way to remove this person from the environment
3 where the victim wanted to serve.
4 And now, if you do what Senator Gillibrand
5 is advocating, that commander cannot do NJP because
6 all the perpetrator has to say is, sorry, I'm not
7 interested. The entire leverage of the trial is
8 removed from the ability to get that defendant to
9 take some kind of punishment, and, most
10 importantly, get them the hell out of our great
11 military.
12 Those are the kinds of practical and
13 pragmatic considerations that are not being
14 considered. Right now we are surfing a very
15 emotional wave as either you're on one or two sides
16 -- you're on the victim side or you're on those
17 dirty rotten commanders' side. And it's terribly
18 unfair to Senator Levin and half of the Democrats
19 on the Armed Services Committee. It's terribly
20 unfair to the women, and there are several of us
21 that did not give up our credentials as women, that
22 believe this is wrong for victims, to say that we

1 are anti-victim. Nothing could be further from the
2 truth.
3 And for the life of me, I cannot
4 understand. If you believe this new architecture
5 system is going to make a difference, why in the
6 world would you include language to say you can't
7 fund it unless this is a political exercise? Why
8 would you ever include that in your amendment? I
9 can't figure that out for the life of me.
10 I'm told it's what she had to do to get
11 some of the Tea Party support that she's gotten. I
12 don't know if that's true or not. There's a lot of
13 things being said that aren't true on both sides of
14 this equation, and I don't want to be irresponsible
15 about this. But I know the language of the
16 amendment, and it's included. And I think it's
17 really a problem, much less to say where or are we
18 going to get all of these experienced colonels?
19 Where are they going to come from?
20 And, you know, with all due respect to the
21 people in the room that have had that rank or have
22 that rank, I'm not sure colonels are necessarily

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Page 114

1 the right ones to try these cases. And obviously,
2 I think the General went over the problems that we
3 have in terms of the concentration of power, which
4 is clearly problematic. We've got speedy trial
5 issues. We've got one entity picking everybody
6 that plays in this system.
7 Now, I think if we only do 120, then we've
8 got to look at the global question. If we can't
9 trust the commanders on sexual assault, can we
10 trust them on murder? How do you reconcile that?
11 How do you reconcile it on anything?
12 So I think there are two competing
13 interests that are swirling around this. There are
14 those -- some academicians, and some I respect
15 greatly about their knowledge of military law,
16 including one member of your committee, that
17 believe we should have more civil involvement in
18 the criminal justice system within the military.
19 And some advocate that there should not be a
20 criminal justice system within the military, that
21 it should all be civilian. I can have that
22 argument. But this weird stew mix in this kind of

Page 115

1 setting, I think, will set back the meaningful
2 progress we're making.
3 And I know from the hundreds of victims I
4 have dealt with on a personal basis, the moment of
5 truth for them as to whether or not they will come
6 forward out of the shadows has everything to do
7 with how they are treated when they report, and the
8 support and information they get in the days
9 following their report. And we're fixing that.
10 We're fixing that.
11 And finally, let me close with this. We
12 are fixing a problem that cannot be documented. I
13 have asked over and over again, bring me a case
14 where the JAG has said go and the commander says
15 stop. If this remedy is needed, wouldn't those
16 cases be out there? They're not there. In fact,
17 just the opposite is there. We found 93 cases in
18 the last two years where the prosecutor said no,
19 and the commander said yes. So under the
20 Gillibrand proposal, when those prosecutors said
21 no, it's over. There's nothing else. So that's 93
22 cases just in the last two years where those

Page 116

1 victims would not have had their day.
2 So we're fixing a problem that can't be
3 found. More importantly, let's assume this problem
4 is one we can identify in the data. Let's assume
5 that the commanders are exerting such an influence
6 on their JAGs, which I fundamentally reject. But
7 let's assume for purposes of this argument that
8 they are putting such influence on their JAGs that
9 the JAGs are giving them the recommendations they
10 want. If the commander says no, we've now got
11 checks and balances on him like the UCMJ has never
12 seen in terms of the appeals that must go up, all
13 the way to the Secretary of the Services,
14 civilians, not military.
15 This will not accomplish what some of the
16 academicians want because we're not moving anything
17 to the civilian system. We are going to give
18 victims -- in the side-by-side I'll be offering we
19 are going to give victims choices to weigh in on
20 whether they prefer, if they're off base, if
21 they're not on the base, if they would prefer the
22 civilian system handling it. And I think the

Page 117

1 military will respect those preferences.
2 So I'll stop there, and I'm happy to take
3 any questions. I hope you bear with my frustration
4 and my ability to get in the weeds a little bit.
5 This has been probably the most challenging issue I
6 have faced in 30 years of public service because of
7 the nature of it, the emotion of it, and the fact
8 that I have to lay my head on my pillow every night
9 knowing there will be people that will never
10 understand that my advocacy on this issue has to do
11 with caring about victims, not because I don't.
12 CHAIRWOMAN JONES: Thank you, Senator, for
13 coming in and giving us that presentation. Are
14 there any questions for Senator McCaskill?
15 PROFESSOR HILLMAN: Judge Jones, this
16 is --
17 CHAIRWOMAN JONES: Yes, Professor?
18 PROFESSOR HILLMAN: I'm sorry to interrupt
19 you there. Senator McCaskill this is Beth Hillman,
20 and I regret that I'm not there in person, and I
21 very much appreciate you coming to talk to us. I
22 just wanted to -- first, I want to thank you for

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Page 118

1 your leadership on this issue. I've been there
2 when SWAN presented an award to you, and you made
3 remarks that clearly demonstrating then as they do
4 now how committed you are to finding the right
5 answers here. And that's what I personally am
6 committed to, too, as well as the rest of the
7 members of this Subcommittee and the Panel here.
8 Just one question for you on this. I'm
9 less concerned about the academicians, of whom I am
10 one, than I am about the victims, just like you.
11 And many of the -- you know, the victims' advocacy
12 organizations have lined up behind this change.
13 And yet, we have heard also from other victims, in
14 fact, last week in hearings of the full Panel. We
15 heard from persons with a wide range of views,
16 including at least one who was strongly supportive
17 of keeping this within the chain of command and not
18 making the kind of change that the proposal sets
19 out.
20 But to what do you attribute so many of
21 those advocacy organizations and individuals
22 putting the emphasis on this particular reform?

Page 119

1 SENATOR MCCASKILL: Well, it's very
2 difficult for me to characterize them. I have a
3 great deal of respect for SWAN and many of the
4 victims that have become very vocal advocates. I
5 appreciate their courage. I think there are a
6 couple of things I would comment on.
7 There are many victims that I have -- I've
8 talked to a lot of victims that have gone through
9 the process in the military, and I will tell you
10 there is some line of demarcation between people
11 who have encountered the system recently and those
12 victims who were struggling a decade ago. And many
13 of the most vocal victims who have been active in
14 this debate truly suffered through some horrific
15 situations a decade ago. I'm not saying the
16 military has gone as quickly as I would've liked,
17 and I'm not saying that they have not gone without
18 some pushing.
19 But there's no question that there is a
20 significant difference in the leadership of the
21 military and their attention to this issue, the
22 oxygen that it's consuming within the military

Page 120

1 leadership right now. I think they are
2 embarrassed, and they know they have a crisis, and
3 I think that if there's anything I can tell you is
4 the more recent victims have a different
5 characterization of the problem than those that
6 were victimized a decade or even longer ago.
7 The other thing is that I think it's very
8 easy to -- and for many of the victims, they don't
9 want to come forward that disagree with the victims
10 organizations. And I won't go into details here,
11 but there has been some inappropriate pressuring on
12 some of the victims that wanted to come forward and
13 be public, even a victim that was in The Invisible
14 War, who feels very strongly that we are correct,
15 that you cannot remove the accountability of
16 commanders by removing them from this process
17 entirely. And she received a great deal of
18 pressure, and she was receiving so much pressure
19 that I said, forget it, you don't need to be
20 victimized all over again around this.
21 So, you know, I think that the victim
22 community is not monolithic and just as women are

Page 121

1 not monolithic. And I think that, you know, the
2 victim advocates are doing what they think is best.
3 I just fundamentally disagree with them that it is
4 going to be better for victims.
5 I had one of the JAG prosecutors -- I've
6 spent an awful lot of time -- in fact, I feel
7 guilty about the time I've taken from JAGs over the
8 last 18 months, sitting with them, many of them in
9 all services experienced, new, women, men. And
10 it's been pointed out to me over and over again
11 that the JAGs believe that if a victim is raped and
12 comes back in a unit, the environment in that unit
13 is going to be significantly different if everyone
14 knows that lawyers a half a continent away are
15 looking at it and they'll get back to us, versus
16 the commander signing off on a 34 or a 32. That's
17 a different kettle of fish. And, of course, we've
18 addressed that even further in our reforms by
19 making retaliation a crime.
20 So part of is, I think, some of the
21 victims just don't believe the military could ever
22 do better, and I get that. I would not ever -- I

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Page 122

1 understand that their personal pain trumps every
2 attempt I'm making to try to get this right. But I
3 think that is the best explanation I can give you
4 as to the fact that the two organizations that have
5 been formed around this are both advocating this
6 change.
7 PROFESSOR HILLMAN: Thank you, Senator.
8 CHAIRWOMAN JONES: Senator, did I hear you
9 correctly that the bill may shift yet again, so
10 what we're looking at now may not be what's
11 actually presented?
12 SENATOR MCCASKILL: She has made
13 indications -- she is trying to get 60 votes, and
14 she is willing to change the legislation again to
15 try to do that. And I believe what she's going to
16 do is -- this is what senators have been told. She
17 has not told me this. But senators have been told
18 that she is contemplating narrowing the
19 classification of cases that would go to this new
20 lawyer somewhere else, also in the chain of
21 command, I might add. I mean, it's not going to
22 civilian. It's going to be people in uniform that

Page 123

1 ultimately are under the chain of command of the
2 commander in chief, just like the generals are
3 anywhere else. But that she's going to limit it to
4 120, which is all the sexual offenses.
5 CONGRESSWOMAN HOLTZMAN: Thank you very
6 much. Senator, I just wanted to say that in a way
7 you're being a little too modest about the role
8 you've played here. I would say that, yes, the
9 military understands that there's a serious
10 problem, and it's embarrassing, and it's shameful.
11 But without the extraordinary work that you have
12 done, and the other women on the Senate Armed
13 Services Committee and in the House, I don't
14 believe we would be where we are today. So I just
15 want to say personally thank you for standing up.
16 We've been focused on, as you can tell
17 from our conversation earlier, on the details of
18 Senator Gillibrand's proposal in terms of its
19 workability. We kind of address the philosophy
20 issues. We've tried to look at them, and they're
21 not easy. But we've been trying to focus on how
22 this bill would work practically, as you said. I

Page 124

1 mean, and there do seem to be some quite
2 substantial practical issues.
3 Assuming for a moment that the bill were
4 to be passed, how with these issues be resolved, or
5 are there going to be amendments, or are these just
6 insoluble problems that the military is going to be
7 confronted with which could lead to cases lost
8 because of constitutional challenges, or because of
9 administrative hassles, or because it can't be
10 staffed up properly? I mean, what's your take on
11 this, because these could be very --
12 I mean, and I have no doubt that Senator
13 Gillibrand is extremely well-intentioned in what
14 her objective is here and the people who support
15 it. I think everybody has the same objective,
16 which is to try to do something about this terrible
17 phenomenon. But I think the practical issues, you
18 know, could be overwhelming the good intentions.
19 And I just wanted to get your sense of how, if this
20 bill were to pass -- her amendment were to pass,
21 how these could be resolved if they could be. I
22 don't know the answer to that.

Page 125

1 SENATOR MCCASKILL: Well, I'm not sure
2 that some of them could be because they are
3 significant. And this is one of the dangers of
4 legislating, you know. I don't need to explain to
5 you, Liz, that it is a sausage making enterprise,
6 and you have policy intersecting with politics, and
7 sometimes it doesn't turn out well. I think this
8 is an instance where if it passes, which I think is
9 a big if, there is a real immediate problem in
10 terms of the system grinding to a halt. And there
11 are real speedy trial issues that I think will
12 arise because I think the military is really going
13 to be greatly circumscribed in terms of what they
14 can actually do.
15 Now, if it doesn't pass -- one of the
16 reasons I moved heaven and earth to be here this
17 morning is I think you all have a very solemn
18 responsibility. I think this Subcommittee and the
19 overall larger committee can play a vital role in
20 this because I don't believe that Senator
21 Gillibrand's proposal will become law this year,
22 which will give you an opportunity to weigh in.

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Page 126

1 And I think it's important that you do so. It's
2 kind of gotten away from me in terms of being able
3 to slow this thing down. But the House I do not
4 believe will accept it, and I do not believe she
5 will get 60 votes. Now, if she gets 60 votes,
6 that's another issue, and I can't predict what will
7 happen then.
8 But I think she's -- if she tries to
9 significantly change it now, I think she -- I'm
10 guessing. Some of this I'm speculating on, but I
11 think from a legislative -- if I was her -- I'm
12 trying to put myself in her shoes. If I were her,
13 and I made significant changes now, I think it
14 would undermine her credibility with many of the
15 senators she's talked into supporting it. That
16 might not be the case, but it does not appear to
17 have been drafted in a way that fully understands
18 the complexities of the UCMJ and the reality of the
19 practical application of the UCMJ in day-to-day
20 order and discipline of the United States military.
21 CONGRESSWOMAN HOLTZMAN: Thank you very
22 much.

Page 127

1 CHAIRWOMAN JONES: General Ham?
2 GENERAL (RET.) HAM: Senator, again,
3 thanks. As one who has appeared before the Senate
4 Armed Services Committee and Subcommittees a number
5 of times, I don't recall anybody treating me with
6 kid gloves in any of those sessions.
7 (Laughter.)
8 GENERAL (RET.) HAM: Two specific
9 questions, ma'am. First, are there elements of the
10 legislation that's currently pending that you do
11 support? And secondly, in the creation of the
12 envisioned new convening authority, not the
13 disposition authority that we're talking about, but
14 the new kind of global, general courts martial
15 convening authority that would be appointed by the
16 Chief of Service as opposed to the Secretary of the
17 Service, do you see any problems removing the
18 service Secretaries from that traditional role of
19 civilian leadership?
20 SENATOR MCCASKILL: Well, I'm a big
21 believer that our military -- and not that we
22 haven't had issues with it in history, but that our

Page 128

1 military is well served by being commanded by
2 civilians. And the role of the civilians within
3 our military, I think, is vital. And I think they
4 need to be involved.
5 I support the underlying provisions in the
6 underlying bill because I helped draft most of
7 them. The reforms that are there are ones that
8 were brought to me by victims, were brought to me
9 by practitioners, were ones that we spent a great
10 deal of time looking at, whether it is making
11 retaliation of crime or dramatically changing
12 Article 60.
13 I will tell you there will be more reforms
14 that I will be advancing in the debate, the
15 specifics of which have not been made public, but
16 they will include Article 32. I do not get Article
17 32. I do not get this weird combination of
18 preliminary hearing, grand jury hearing, and
19 deposition all at once. Those things should not be
20 done at one setting. It is totally inappropriate,
21 in my view, and we are going to change that in an
22 amendment that I will be offering, and particularly

Page 129

1 when the military victim is treated differently
2 than the civilian victim under the current system.
3 Right now, if you're a civilian victim and
4 the alleged perpetrator is in the military, it is a
5 grand jury in that you can sign a statement, and
6 that suffices as evidence that would support the
7 underlying charge. But if you're a member of the
8 military, because of the ability to compel
9 attendance, you've got to show up and be subjected
10 to deposition-like questioning in a setting that,
11 frankly, I can't imagine very many victims that
12 would ever feel good about the way they were being
13 treated in terms of fairness based on some of the
14 questioning that is allowed to occur. And by the
15 way, this is a shift -- are any of you currently
16 JAGs? Anybody in the audience? Okay, so you know,
17 Lieutenant Colonel, that this is a shift that these
18 32s were not being used this way, except the last
19 five or six years they've kind of shifted to this
20 deposition type, we've got another shot at the
21 apple in terms of, you know, trying to tear apart
22 the victim's statement. That wasn't the way that

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1 32s used to go on.
2 And so, we're going to try to address that
3 and see if we can't make that something that is not
4 such a mine field in an unfair way for a victim,
5 not removing their right to confront the witness.
6 Of course we must do that. It's constitutionally
7 required, and I don't want to remove that. But, I
8 mean, it would have been prosecutorial malpractice
9 for me to put my sexual assault victims through a
10 preliminary hearing when I had a grand jury. You
11 just wouldn't do it, and you didn't have to do it,
12 and I wouldn't do it. I mean, it was a grand jury.
13 PROFESSOR CORN: Senator McCaskill, this
14 is Professor Corn. Please forgive me for
15 interrupting, but I believe there are about 15 or
16 17 states in the union that don't use indictment by
17 grand jury, and some states that use grand juries
18 will allow an alternate process of presenting a
19 charged defendant before a preliminary hearing.
20 Wouldn't the same type of confrontation occur with
21 a victim in a civilian process that bound a
22 defendant over for trial to prepare for a hearing?

1 SENATOR MCCASKILL: It certainly would in
2 a preliminary hearing. And if I were in those
3 states, I would be busy in the state legislature
4 getting a grand jury system that was available in
5 these cases. Now, keep in mind that most states
6 where they don't require a preliminary hearing, it
7 doesn't take away the defendant's right to depose
8 the victim. It's not as if we are saying -- and
9 our reforms will not do that either. We are not
10 removing the right of confrontation.
11 The question is must you require that that
12 victim go through that in a setting that is also a
13 binding judicial setting as it relates to probable
14 cause divined over? And I come down on the side
15 of, you might not be surprised to know, of the
16 victims in this instance, that I think that often
17 the more times someone is allowed to do that, the
18 more likely it is that they find small, little
19 inconsistencies that they blow up for the jury and
20 try to undermine the credibility of the victim.
21 And as a prosecutor who believes the perpetrator is
22 guilty, I always was interested in making sure her

1 credibility stayed strong.
2 CHAIRWOMAN JONES: Senator, there are a
3 number of provisions, and the bill, such as
4 providing counsel for each sexual assault victim.
5 Does the bill provide any funding for any of these
6 programs? I know you've told us Senator Gillibrand
7 says no funding for hers.
8 SENATOR MCCASKILL: Well, this is an
9 authorization bill, so what this bill does, and
10 this is an age old fight that I'm sure Liz can
11 illuminate you on about the difference between
12 authorizing and appropriating. There's only one
13 way we spend money, and that's appropriating. But
14 what she has done is she has proactively limited
15 the ability to appropriate money for the reforms
16 she wants to enact. We did not do that in the
17 underlying bill, so it will ultimately be up to the
18 appropriators.
19 But I will tell you, I believe that the
20 leadership of the military is full bore on
21 requesting funding and making this a priority to
22 fund these counsel. I do not think we're going to

1 get pushback from either the military or the
2 appropriators even in this sequestration
3 environment when they are going to have to make
4 some amazingly difficult decisions as to how we
5 continue to be ready, and have the military
6 strength that all of us take for granted in America
7 in light of the sequestration that, if I had to
8 guess or die right now, if it gets a -- there might
9 be some alleviation, but probably not as much.
10 So that's what's really interesting is
11 that she is proactively limiting funding here in a
12 sequestration environment, and imagine how
13 difficult that's going to be.
14 CHAIRWOMAN JONES: Well, thank you. I
15 didn't understand the distinction.
16 MS. FROST: I just wanted to --
17 COLONEL GREEN: Senator, you made time in
18 your schedule until 12:00. We're past that by a
19 few minutes. I know from your talking to your
20 staff that you -- =
21 SENATOR MCCASKILL: There's nothing more
22 important than this --

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Page 134

1 COLONEL GREEN: -- that you have to go,
2 so --
3 SENATOR MCCASKILL: I'll stay as long as I
4 need to stay.
5 COLONEL GREEN: Okay. Yes, ma'am.
6 MS. FROST: I want to thank you for your
7 support and I think actual understanding of the
8 issues around sexual assault and victim support.
9 And we talked a little bit earlier about the
10 Special Counsel Program. That's a model that my
11 agency has been trying to push since 2002 that
12 every crime victim deserves their own -- we call
13 them victims' rights enforcement because we
14 actually have codified victims' rights that can be
15 enforced at the Federal and state level.
16 I personally think the Special Counsel
17 Program is going to be the game changer in victims'
18 willingness to report, and I base that on their
19 willingness to report. Victims want to feel safe.
20 They want to be believed. They want information.
21 And they want to be supported. And I truly think
22 that trying to simplify, as you said, this issue to

Page 135

1 the victim versus the commander could be a real
2 problem for victims, thinking that if you take the
3 commander, you're going to see a great increase in
4 reporting rates.
5 But my concern does relate to the
6 resources. I think as you get more and more
7 victims willing to come forward, we're talking a
8 lot of -- about a lot of special counsel resources
9 for these victims. Have you given that --
10 SENATOR MCCASKILL: Well, I want to be
11 very fair here. Her amendment does not limit that
12 because that reform is in -- our reform is in the
13 underlying bill. The Chairman's mark contains that
14 reform, and we have not limited the resources. Her
15 limitation is on finding all these experienced O-6s
16 that are going to quickly move around the world and
17 set up a duplicate system. And it's going to be
18 even more duplicate now because you're going to
19 have serious crimes investigated by both, you're
20 going to have serious cases tried by both, and
21 you're going to have a weird inability to reconcile
22 those two systems. That's where she's saying we

Page 136

1 can't spend any money.
2 COLONEL HAM: Anybody else?
3 CHAIRWOMAN JONES: Anyone else? Well,
4 thanks again --
5 VICE ADMIRAL (RET.) HOUCK: This is Jim
6 Houck. May I ask one question?
7 CHAIRWOMAN JONES: Hi, Jim. Yes, go
8 ahead.
9 VICE ADMIRAL (RET.) HOUCK: Senator, thank
10 you so much for your time and your attention to
11 this issue. I'm the most recently retired Navy --
12 Judge Advocate General of the Navy.
13 On the Article 32, issue, and I know it's
14 not the centerpiece of the discussion today. But
15 you've shown great patience and great diligence in
16 looking into the details of the commander issue.
17 And we -- on the Article 32 front we heard a panel
18 last week of defense attorneys, and not always the
19 prosecutors' best friend, but defense attorneys,
20 all people who are really conscientiously trying to
21 do their job in the military under the
22 Constitution, who talked about their concerns with

Page 137

1 changing the Article 32 in a way that it's woven
2 into the fabric of other advantages that the
3 defense does not have in the military.
4 And I just wanted to just put down a small
5 marker now, if I might, too, as you proceed with
6 your Article 32 review that you might consider that
7 perspective as well. And I just wanted to offer
8 that. Thank you.
9 SENATOR MCCASKILL: Well, I'm glad you
10 did, and you should know that we -- before for
11 embracing these reforms, I spent a significant
12 amount of time with both prosecutors and defense
13 lawyers within the JAG from a variety of different
14 services. And I think what we've done is measured.
15 I think it protects the right of confrontation, and
16 I believe it would pass muster in terms of being
17 fair.
18 But I would certainly welcome the
19 opportunity to share the specifics of it with you,
20 this Panel, anyone else. I am always willing to
21 understand more of the details and the complexities
22 of this. It is my touchstone right now. When it

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Page 138

1 is emotionally a little difficult for me, I find
2 comfort that I have, you know, kind of gotten into
3 the weeds and really tried to understand this. And
4 I'm confident of my knowledge of the subject matter
5 because we've worked very hard at it. And I
6 certainly don't want Article 32 to be any
7 different.
8 VICE ADMIRAL (RET.) HOUCK: Well, thank
9 you. And we are -- and I as a Panel member am very
10 grateful for your willingness to get into the weeds
11 on this. And it's important that people do so. We
12 appreciate that. And I just wanted to make that
13 observation. Thank you.
14 SENATOR MCCASKILL: Thank you.
15 CHAIRWOMAN JONES: Thank you again,
16 Senator. And we would be delighted if you could
17 share the details of the proposed legislation on
18 Article 32.
19 SENATOR MCCASKILL: Absolutely.
20 CHAIRWOMAN JONES: I remember hearing
21 about Article 32 and thinking that's terrible, and
22 then I listened to some Panel presenters talk about

Page 139

1 the discovery needs that it fulfills within the
2 military. So then I arrived at the posture in my
3 head without any real research, well then,
4 obviously maybe we can something with Article 32,
5 but we have to build something else in. So it's a
6 subject of great interest to us.
7 SENATOR MCCASKILL: And I'd be happy to
8 share it. And obviously I will -- it's going in in
9 the Senate. It wasn't in in the House. We can
10 always exceed the differences if there are
11 adjustments that need to be made on it in terms of
12 any input. We have tried -- you know, I accused
13 some of my staff that I'm going to turn the corner
14 and some of them are going to be in uniform they've
15 spent so much time with uniforms over the last 18
16 months.
17 And I will say this. I think it was very
18 unfortunate because I do think that Senator
19 Gillibrand took a public position telling senators
20 not to talk to the military, quoted in a newspaper
21 article you should not talk to -- were telling
22 senators in their offices not to talk to the

Page 140

1 military because they're just going to protect what
2 they have. And I think that did a huge disservice
3 to hundreds of lawyers in the military that want
4 nothing more than to get this right for victims.
5 So I do think it's important that we
6 continue to stay in touch and work with the
7 military because you know who's going to fix this?
8 The military.
9 CHAIRWOMAN JONES: Thank you so much.
10 SENATOR MCCASKILL: Thank you.
11 COLONEL GREEN: Members on the phone,
12 we're -- if you have a minute, I'm talking to Judge
13 Jones about if she wants to convene everybody back.
14 If you need to leave, I understand. We're past the
15 time. But if you're able to stick around, we'll
16 come back.
17 CHAIRWOMAN JONES: Why don't you ask who
18 can stay on?
19 COLONEL GREEN: The Judge asked of the
20 four of you on the phone, can each of you stay? Do
21 any of you need to leave?
22 PROFESSOR CORN: This is Professor Corn,

Page 141

1 Judge. I have a call with the Red Cross in Geneva
2 in about 10 minutes, so I'm going to have to sign
3 off.
4 CHAIRWOMAN JONES: Yeah, understood. I
5 don't think we've built in the time, and I know
6 you've all committed to the time that we did
7 suggest. We're actually --
8 PROFESSOR CORN: But I do want to say I
9 thought that the witnesses today were just
10 phenomenal. Thank you very much.
11 VICE ADMIRAL (RET.) HOUCK: This is Jim.
12 I'm sorry -- this is Jim. I've got an appointment
13 at 12:30.
14 CHAIRWOMAN JONES: Understood.
15 MS. FROST: I'm sorry, I've got an
16 appointment.
17 CHAIRWOMAN JONES: All right. I think --
18 PROFESSOR HILLMAN: I have a 12 --
19 CHAIRWOMAN JONES: Yeah. I think there
20 will come a point where we can discuss a lot of
21 this, and I'm sorry it can't be this morning. But
22 I think we specifically knew this morning --

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1 (Whereupon, at 12:17 p.m., the meeting was
2 concluded.)
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A
$50 59:9,9
$500 59:12
$64,000 67:19
a.m 3:2
abbreviation 54:10
aberration 107:14
abide 92:12
ability 28:20 39:3 78:22 82:20 106:7 112:8 117:4 129:8 132:15
able 4:6,10,18 24:6 51:13 66:11 72:11 88:3,15,18,19 92:15 126:2 140:15
Absolutely 138:19
academicians 114:14 116:16 118:9
accept 66:3 126:4
accession 86:5
accommodate 103:13
accomplish 91:18 116:15
accomplishes 60:10
accountability 120:15
accurate 102:9
accurately 38:22
accused 24:19 25:3 25:13 26:16,19 39:16 51:20 55:20 65:16,21 66:2 68:21 139:12
accused's 18:16 65:3
act 5:20 12:8 49:10 57:12 77:22 81:10 98:20
action 10:15,20,21 11:16 39:22
active 43:14,19,21 119:13
activity 44:8
actual 29:8 134:7
actuality 101:11
add 30:8 122:21
addition 23:20 81:13 90:15
additional 56:2 102:4 107:16
address 32:10 64:14 91:9 104:3 123:19 130:2
addressed 12:4 13:21 104:9 121:18
addressing 44:8
adjudge 65:6
adjudged 31:18
adjust 16:11 29:7
adjustments 50:4 139:11
administer 45:4 55:1
administers 45:2
administrative 41:18 72:3 124:9
admirable 26:13
admiral 2:5 3:13 7:16 22:3,16 94:18,18 105:1 136:5,9 138:8 141:11
admirals 94:1 95:8
ADULT 1:1
advancing 128:14
advantages 137:2
advice 66:2 109:17
advise 71:13 72:5 75:14 88:16
advising 84:12
advisor 39:11 69:9 74:12 75:13
advocacy 117:10 118:11,21
advocate 10:10 34:18 39:10 42:13 42:16 43:8 51:8 61:7,9,11,16 69:8 70:3 71:8 72:5 73:17 78:17 82:2 82:15 83:12 85:3 85:5 101:1,2 106:4 111:3 114:19 136:12
advocates 40:12 61:10 70:10 71:7 72:9,15 73:9 78:12,14 82:3,22 84:6 85:8 119:4 121:2
advocating 112:5 122:5
affect 12:17 18:2,3 82:11
age 132:10
agencies 47:5
agency 34:14 134:11
agenda 7:18
Ages 100:22
aggravated 31:6
ago 34:19 100:22 119:12,15 120:6
agree 17:21 81:12
agreement 18:2,15 19:6
agreements 23:21 90:16
ahead 31:20 33:4 69:18 79:5 136:8
air 55:14 94:1 95:8
aircraft 93:1,2
airmen 64:8 92:2
alarming 22:18
Alaska 91:14
aligned 81:18
allegation 38:11,11 52:4
allegations 39:7 40:18 43:7 44:1 45:22 46:3 47:4 47:11 73:7
alleged 129:4
alleviation 133:9
allies 107:5,9,18 108:7
allocations 44:5
allow 59:18 102:1 106:6 130:18
allowed 9:4 129:14 131:17
allows 61:9 98:7,17
Alpha 58:9,10,13 58:18
Altenburg 2:7 3:12 9:22 10:7 11:4,7 11:12,15 17:20,21 20:3 23:10 25:5 28:13 29:9 65:2 65:11,18 90:19 91:4 96:20 97:1,5 97:11,17 102:20 103:18
alter 8:15 15:7
alternate 130:18
alternative 65:22 66:4
amazing 21:17
amazingly 133:4
amend 101:12
amended 93:16 103:13
amendment 6:10 7:1,20 34:9 37:4 49:7,8,9 50:6,10 99:13 101:18 110:15 113:8,16 124:20 128:22 135:11
amendments 97:12 124:5
America 133:6
amount 44:11 88:7 137:12
analysis 7:13 22:9 22:12 23:12 85:12
Analyst 2:16
angle 19:8
annual 44:15
answer 22:14 27:17 64:21 66:8 69:15 79:16 87:13,22 124:22
answered 24:11
answers 21:13 86:13 118:5
anti-victim 113:1
anybody 18:18 19:17 104:1 127:5 129:16 136:2
anymore 74:10 94:14
apart 111:21 129:21
apologize 70:20
apparently 27:21 100:12
appeal 10:5,22 11:3 11:5 40:1 66:13
appeals 2:20 34:15 116:12
appear 34:16 66:7 126:16
appearance 49:19 100:19 101:10
appeared 127:3
appellate 69:16
apple 129:21
applicable 63:4
application 35:8 36:18 126:19
apply 30:2 68:4
appoint 55:16 76:9 94:5 95:19
appointed 127:15

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appointment 141:12,16
appreciate 117:21 119:5 138:12
appreciated 103:15
approach 4:11 30:4
appropriate 132:15
appropriateness 26:6
appropriating 132:12,13
appropriators 132:18 133:2
approve 10:21 11:18 17:9
approximately 62:2,2 86:6
arc 18:12
architecture 113:4
area 42:5 91:16 110:9
areas 41:15
arena 88:4
argue 66:19 68:21 72:20
argued 83:6
argument 29:14 83:6 107:3 108:2 109:2,9 114:22 116:7
arguments 30:2 107:1
Arlington 1:20
Armed 77:22 106:15 107:4 112:19 123:12 127:4
army 2:19 3:21 34:15,18 36:16,17 37:14 38:13 39:8 41:2 43:9,12 44:5 44:14,14 47:5 55:13 61:22 70:13 71:2,5 72:9,13 74:21 75:7,11 78:20 82:2 83:8 83:17 85:5 88:9 88:19 93:21 94:8 94:10 95:13 96:13 96:14
Army's 85:12 95:13
arraignment 39:16
arrived 99:6 139:2
article 6:22 7:14,20 9:9 16:8,10,21 17:2,9 18:17 19:20 31:14 37:5 40:12 44:12,17 45:2,7 48:7 50:14 51:11 53:2 56:21 59:6 60:6,6 61:5,6 61:8,8 74:6,17 81:4 93:14,15,15 93:17 94:12,15,19 95:5,5,6,9,21 98:6 98:7,16 128:12,16 128:16 136:13,17 137:1,6 138:6,18 138:21 139:4,21
articles 50:12 53:13 78:11
articulate 98:18
articulated 53:15
asked 32:16,21 34:6 89:8 109:12 115:13 140:19
asking 9:21 22:17 23:20 48:17 95:20
aspects 26:13
assault 1:2 5:21,22 27:22 29:11 31:7 37:22 38:2 40:3 40:18,21 106:4 108:17 110:4,12 111:15 114:9 130:9 132:4 134:8
asserting 92:3
assess 25:22 26:6
assessment 26:10 78:15 85:7
assigned 34:13 62:4 62:11,13
assimilate 98:17
assimilated 81:5,11 98:21
assistance 41:17 88:13
assume 23:13 34:19 67:10 76:12 116:3 116:4,7
assuming 52:15 76:10 82:7 101:9 124:3
assumption 102:8
assure 109:12
atrophy 84:11,15
attempt 122:2
attempts 28:1 50:15,22
attend 86:11
attendance 129:9
attending 104:19
attention 57:6 99:10 119:21 136:10
attorney 92:20
attorneys 136:18 136:19
attribute 118:20
audience 129:16
August 25:14
authorities 54:17 55:9,17,18 57:22 70:1 75:6,22 76:22 77:2 82:15 83:22 84:18 85:10 94:6,13,17 100:5
authority 10:14,19 10:20 11:11,13,16 11:19 12:7,15,17 12:22 13:15,17 14:13,19 15:8 16:10 17:3,6,9,11 19:20 20:2 21:2 24:5,18 25:1 26:20 31:11,15,16 38:9,18,19 39:10 39:13,22 40:16 51:3,22 52:7,7,18 52:19 54:14,18,20 55:6,7,14 56:10 58:11 61:11 62:20 63:5,9,13,17 64:1 64:2,8,9,20 66:9 66:11 68:10,14,16 68:22,22 69:2 70:2,15,22 72:11 74:8,9,12,19 75:3 75:5,8,14 76:2,3,7 76:13 77:2 78:5,6 79:18,21,21 80:16 80:19 88:4 89:9 89:16 90:15 93:13 94:4,5,7,9,14,17 94:19 95:2,3,6,7 96:4,9,16 98:15 99:22 100:1,11,18 102:6 105:17 109:3,21 110:22 111:12,16 127:12 127:13,15
authority's 14:13
authorization 49:10 132:9
authorizations 56:2
authorized 39:4 64:19
authorizing 132:12
automatic 27:10
automatically 94:22
availability 66:22
available 51:11 61:5,13 87:20 88:7 131:4
awake 32:2
award 118:2
aware 6:21
awful 121:6
AWOL 68:11 69:2
AWOLs 53:22 71:17

B

b 48:2,18 49:15 50:10 53:10 54:9 56:7 57:16,19 59:1 63:1 70:12 70:21 71:9 72:10 75:4 90:11 99:21
back 24:2 25:20 33:17 35:12 64:20 66:9,15 69:4 89:8 90:10 91:5 93:9 101:6 104:19 111:14 115:1 121:12,15 140:13 140:16
backwards 103:5
bad 101:10
bailiffs 43:1
balances 116:11
band-aid 68:4
bar 29:2 100:13
BARBARA 2:3
bargain 12:8,10 89:10,13
bargaining 12:7 17:15 19:7,8,21 20:2,8 22:22 23:8 27:13 73:22 89:9
base 116:20,21 134:18
based 27:10 29:8 50:2 59:8 66:21 66:21 67:2,6 94:19 129:13
basically 7:8 17:5

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26:2,5
basis 10:14 44:15 66:13,18 115:4
batches 32:19
battalion 38:16 43:6 71:14
BDE 54:10
bear 59:5 117:3
bearing 62:3
beat 101:21
beginning 58:11 83:1 93:19
behalf 106:3
believe 7:20 14:18 70:9 71:11 78:17 80:2 84:9 92:13 96:11 104:7 108:14,22 109:16 112:22 113:4 114:17 121:11,21 122:15 123:14 125:20 126:4,4 130:15 132:19 137:16
believed 83:7 106:5 134:20
believer 127:21
believes 110:19 131:21
belongs 69:1
Belvoir 34:15
bending 103:5
best 106:6 121:2 122:3 136:19
Beth 18:5,7 31:22 33:22 77:16 104:19 117:19
better 69:13 108:11 121:4,22
bicameral 6:17
bifurcate 50:7
bifurcated 60:10
bifurcates 37:11
bifurcation 52:14 58:12 80:10 81:16 99:12
big 19:22 23:1 81:1 125:9 127:20
bigger 20:4
bill 6:7 7:8,9 8:8 12:16,16 13:16,21 17:21 19:11,15,18 20:16 24:13 34:7 34:11 37:4 48:4 48:13 54:8 56:3 56:12 57:19,21 78:4 80:14 101:19 108:13 122:9 123:22 124:3,20 128:6 132:3,5,9,9 132:17 135:13
billet 62:8 94:21
billets 56:3,6,8 62:5 62:7 102:3,5
bills 12:3,20,20 13:16 16:4 21:1 22:19,19 25:21 26:1 32:9
binding 52:2,8 62:20 63:2,4 64:2 64:11 111:17 131:13
bipartisan 6:16
bit 6:4 8:7 15:12 36:4 58:20 96:18 117:4 134:9
blow 131:19
blue 37:19 38:9
blush 66:6,7
bore 37:20 132:20
bottom 38:17 53:1 57:18 61:4 63:11 93:10 100:1,2
bound 130:21
box 53:11 54:10,12 56:7,9 57:18 64:12 70:15,21 90:12 100:1
Boxer 6:22 7:14
Boxer's 7:20
boxes 37:19 38:9 38:12 49:19 102:2
Bradley 81:9 98:19
break 39:2 104:14
breakdown 90:2
breakout 42:6
brief 3:4 7:13
brigade 43:6 45:3 54:10,11,12,17,22 63:16 64:13,17 69:10 71:14 74:20 74:22 96:13 97:2
BRIGADIER 2:19
bring 18:2 86:4 89:3 107:20 115:13
bringing 8:5
British 78:12,20 80:3
broad 56:12
broadness 88:18
brought 128:8,8
brush 56:13
budgets 102:6
build 56:10 68:4 70:11,14,22,22 86:7,14 139:5
buildings 102:12
built 36:22 141:5
business 44:11
busy 131:3

C

c 3:1 49:12 50:9 52:12,13 60:8 63:1,3 71:16
cadre 88:4
California 31:22
call 97:3 99:10 134:12 141:1
called 58:19 71:6
calls 26:5
capabilities 84:13
capability 73:5 92:7
capacity 84:22 93:6
captain 86:3
captured 53:21
card 5:3,3 46:16
care 60:20 64:22
career 82:17,18 88:6
caring 117:11
carry 50:18 51:1 52:16 53:14 54:5 59:10
Carter 2:8 21:6 69:19
carve-out 77:7
carved 98:15
case 39:18 46:11 63:14 64:12,15 73:22 80:10 90:3 95:13 108:21 111:13 115:13 126:16
caseload 66:21 93:7 97:6
caseloads 92:5
cases 10:20 26:17 26:19 39:13,14 42:11,21 43:16 51:18 61:14 64:18 66:19 71:2,18 72:12,21 73:9 75:15 90:12 92:19 97:9 109:4 110:8 110:12,16 111:20 114:1 115:16,17 115:22 122:19 124:7 131:5 135:20
category 47:10 52:1 54:2 60:10 68:14
cause 131:14
center 1:18 42:4 43:11 56:7 57:18 58:12 63:3 72:8 90:11,12 100:2
centerpiece 136:14
centers 71:4
central 26:15 27:7 57:21
centralize 78:3
centralized 83:7,11 88:21
centralizes 78:4
centralizing 83:14
certain 8:17 9:2 14:16 27:1 28:12 50:11 57:6 68:15 84:11 89:11 95:9 98:20
certainly 6:15 26:3 27:4 78:11 107:21 131:1 137:18 138:6
certify 61:11
cetera 60:15 86:4 94:1 96:3
chain 5:22 33:8 51:19 55:19 62:18 80:20,22 109:21 118:17 122:20 123:1
Chairman's 135:13
CHAIRWOMAN 5:9 7:15 8:4 9:9 9:12,17,20 10:3 11:2,6,14 15:15 15:22 16:15 17:13 17:19 18:5,21 19:7,17 20:6,12 20:14,18 21:12,17 23:5,14 24:9 25:18 26:5 27:16 27:21 28:7,11 33:3,5,22 34:1 45:21 46:4,6,9,14

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47:2,15,18 56:17 58:7 67:21 69:18 99:5,15,20 100:4 101:8,19 102:19 103:21 104:12,18 104:22 105:2,5,8 105:11 117:12,17 122:8 127:1 132:2 133:14 136:3,7 138:15,20 140:9 140:17 141:4,14 141:17,19
challenge 85:16
challenges 51:21 124:8
challenging 117:5
change 4:4 8:16,17 8:22 9:1,4,14 15:3 18:13 79:15 107:1 107:12,15,19 108:3 118:12,18 122:6,14 126:9 128:21
changed 66:16
changer 134:17
changes 77:20 78:1 108:5,22 126:13
changing 12:22 128:11 137:1
channels 65:1
characterization 106:12 120:5
characterize 102:21 103:2 106:16 119:2
charge 52:4 111:15 129:7
charged 130:19
charges 43:17 45:22 46:12 52:9 57:14 62:22 78:5
CHARLES 2:19
chart 37:7,19 38:15 41:15 49:20 53:3 60:7,22 63:16 71:16 76:18 97:20
charts 47:1
check 106:14
checks 116:11
chief 2:19 34:15,17 42:18 55:11,13,13 70:2 71:8 75:7,21 76:5,9,10 83:7 84:22 85:1 94:7 94:10 95:12,13,18 123:2 127:16
chiefs 55:11 75:5
child 81:3,3
choice 17:11
choices 116:19
choose 35:15 66:21 87:8 100:7,8
Chuck 34:4
CID 46:20 47:5
circumscribed 125:13
civil 92:21 93:5 114:17
civilian 80:17,18 114:21 116:17,22 122:22 127:19 129:2,3 130:21
civilians 116:14 128:2,2
claim 42:2
claims 6:11 41:21 42:1 50:13 88:14
CLAIRE 2:21
clarification 16:7
clarify 71:7
classification 122:19
clear 15:14 74:5 77:3,6 85:1 90:17 90:17 111:16
clearly 89:7 114:4 118:3
clemency 11:3,8 31:14
clement 10:15
close 75:12 115:11
co-sponsors 6:3,10 6:12
cocaine 92:22
coddling 106:13,17
Code 26:11 36:21 37:5,9 48:8 50:7 52:14 53:4 61:7 71:10 74:6 98:1
codified 81:15 134:14
coffee 32:1
colleagues 83:18 106:11 110:1
colonel 2:9,14,15 3:3,14 4:16,20 12:6 13:8,19 22:14,15 23:19,19 32:16 33:1 36:11 36:13 38:19 41:12 42:14,14 44:12 46:17 48:14 49:5 51:10 62:3 69:9 70:16 74:14 81:2 85:17,19 86:7,9 86:20 87:1,11 94:11 95:20 96:6 99:2 105:7,7,8,9 129:17 133:17 134:1,5 136:2 140:11,19
colonels 113:18,22
column 20:15,19 24:17
combination 90:8 128:17
come 47:1 54:9,11 108:3 113:19 115:5 120:9,12 131:14 135:7 140:16 141:20
comes 110:19 111:1 111:2 121:12
comfort 138:2
comfortable 76:6
coming 31:22 117:13,21
comity 69:5
command 5:22 33:8 51:20 52:20 53:9,20 54:2,7,15 55:19 62:19 63:6 63:10 65:22 70:5 78:7 80:16,19,21 80:22 109:3,21 118:17 122:21 123:1
commanded 128:1
commander 3:7 5:17 6:19 9:13 11:22 12:2 16:5 19:1,20 33:8 34:14 38:16 45:3 50:20 53:13,18 54:11,13,17,22 59:11,16 60:12,17 63:16 64:13 65:1 69:6,7,11 74:20 77:9 79:20 80:5 87:7 89:12 94:18 96:13,13 98:8,13 111:14 112:5 115:14,19 116:10 121:16 123:2 135:1,3 136:16
commander's 6:20 8:10,14
commanders 24:18 25:1 43:9 45:17 54:16 64:17 71:14 72:6 73:2 74:11 74:22 76:20 79:19 81:14 84:12 88:16 93:22,22 94:1 95:8,8,10 96:3 97:2 106:22 112:17 114:9 116:5 120:16
commanding 69:10 105:17
commands 41:9 47:12
comment 119:6
commented 78:14
commissioned 51:9 55:21 61:3
commit 28:1 50:15 50:22 92:2
commits 45:1
committed 75:13 118:4,6 141:6
committee 22:6,12 23:11 35:14 106:16 107:4,6 112:19 114:16 123:13 125:19 127:4
common 26:19 81:14 110:8
community 120:22
company 43:6
comparable 77:20
compared 91:7
comparison 90:20
compel 129:8
compelling 66:14
competence 82:19
competing 114:12
complete 10:8 79:14 90:2
complex 106:22
complexities 126:18 137:21
complicate 17:14 17:22 19:22
complicates 17:18
comprehensive 26:9
comprised 41:9
concentration

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105:13 114:3
concept 54:14
concepts 90:22
concern 82:18 101:17 135:5
concerned 118:9
concerns 30:4,14 104:1 136:22
concluded 35:8 142:2
conclusion 30:16
conduct 40:12 60:4 90:7,9,10
conducted 71:21
confidence 89:4 108:4
confident 138:4
configured 50:1
confinement 26:22 54:21 58:14,17 97:15 98:10
conflict 101:4
conform 12:9
confront 130:5
confrontation 130:20 131:10 137:15
confronted 124:7
Congress 23:18
congressional 95:14
congressionally 76:7
CONGRESSWO... 5:2 8:6,13,21 9:3 11:20 12:11,19 13:2,6,9,14 14:2 14:21 15:11 16:13 19:10 29:13 31:9 33:20 45:6,11,15 45:18 48:9,12,16 67:9,19 73:21 76:14 77:13 89:6 89:20 90:1,5 103:22 104:11 123:5 126:21
conjunctive 50:17
conscientiously 136:20
consents 11:19
consequence 27:2 31:3 103:7,19
consequences 103:4,14
consider 28:14 137:6
consideration 4:1 22:21
considerations 28:14,15 110:3 112:13
considered 10:18 87:3 112:14
considering 11:17
consistent 15:16
consistently 106:19
consists 57:1
consolidated 68:20
conspiracy 50:15 50:22
Constitution 136:22
constitutional 110:6 124:8
constitutionally 130:6
constrained 67:3
constraint 14:12
constraints 76:3
construct 43:10 52:10 64:1 68:10 93:13
constructed 77:1
constructs 41:3
consume 47:10
consuming 119:22
contains 135:13
contemplated 82:3
contemplating 78:3 122:18
contentious 109:2
continent 121:14
continue 71:13 72:5 133:5 140:6
control 89:17 108:12
controlling 100:20
conundrum 95:17
CONUS 91:14,20 92:14
convene 43:9 55:15 74:13,14,17,19 75:9 93:20 94:22 95:11,12,22 96:1 96:7 140:13
convened 39:9 87:20 96:15
convening 10:14,19 10:19 11:11,13,16 11:19 12:7,15,17 12:21 13:10,15,17 14:12,19 15:8 16:9,10 17:3,6,8 17:11 21:2 31:11 31:15 38:17,19 39:9,22 40:16 42:21 54:14,17,18 54:20 55:5,9,16 55:18 57:22 63:5 75:1,3,6,8,14,22 76:22 77:2 93:12 94:6,13,16 95:3 96:4,8 99:22 100:5,5 105:17 127:12,15
conversation 123:17
conversations 104:6,8
convict 87:12,13,18 87:21
convicted 12:13 24:4 30:17 31:12 31:19 32:13
conviction 24:15 31:3,7
convictions 32:12
convinced 83:19
copies 4:21
Corn 2:10 3:14 25:15,15 26:3,8 28:22 30:6,7,13 30:13 31:13 75:16 75:18 81:22 82:1 89:5 105:3,4 130:13,14 140:22 140:22 141:8
Corn's 85:21 88:1
corner 38:7 139:13
corps 43:8 54:15 71:13
correct 19:9 63:22 96:11 102:7 107:8 120:14
correction 67:14
correctly 14:20 17:2 122:9
corresponding 98:1
cost 56:1,10 70:10
costs 92:6
Council 83:16
counsel 2:15 10:10 29:3 40:14 42:19 51:13 66:2 97:21 100:8,13,22 132:4 132:22 134:10,16 135:8
counselor 111:6
counterparts 35:7
countries 90:21 91:9,18
country 91:10
couple 52:1 87:8 110:17 119:6
courage 119:5
course 35:14 38:20 39:20 40:1 43:7 88:6 90:9,9 121:17 130:6
courses 68:9
court 2:20 6:21 8:15,19 13:11 14:18 21:3 27:8 30:17 31:7,17,18 34:16 38:4,17,18 39:9,14 40:16 43:3 44:2,20,21 44:21 46:13 52:5 52:5,6,9 54:14,17 54:19 55:1,8,16 61:18 63:1,17,19 64:9,16 65:6,8 66:1 69:16 71:22 73:12,14 74:9,19 77:10 79:17 80:7 86:19 87:19 92:16 92:17,18 94:2,5 94:13,16 95:3,6,7 95:22 96:1,3,8 103:12
courtroom 43:2
courts 11:1 26:18 28:3 38:21 39:1,3 39:3,8,11 42:10 43:10,13,15,22 51:17,17 54:20 55:15 61:9,12,14 71:20 72:1 74:13 74:15,18 75:1,9 92:5,15 93:20 94:9 95:1,11,12 96:7,15 97:3,13 127:14
cover 35:11
create 50:2 56:3,6,9 57:15 75:5,21 83:21 88:3 94:9
creates 55:5,11,14 57:16,20,21 60:10

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61:8 62:20 65:20 93:12
creating 29:10 82:14
creation 127:11
credentials 112:21
credibility 126:14 131:20 132:1
crime 27:9,10 29:16,18,18 38:7 44:5 46:2 78:22 98:18 121:19 128:11 134:12
crimes 1:2 6:1 44:2 46:19 60:15 76:14 81:12,15,15 91:11 91:16 92:15 135:19
criminal 2:20 26:14 26:15 27:9 34:15 34:17 37:14 38:5 38:6 39:7 42:6,18 47:5 49:14 50:7 61:14 66:15 71:8 72:16 73:5 82:5 84:14,22 85:1 86:18 114:18,20
crisis 120:2
criteria 86:16,17
critical 80:13 85:12
criticism 29:4
cross 27:13 141:1
cumulative 22:7
current 34:20 50:3 64:14 77:4,5 84:18,22 94:13 99:13 102:11 129:2
currently 34:13 35:9 37:6,10 50:1 52:21 62:4 64:22 66:8 75:10 76:18 80:14 84:7 90:18 98:14 101:17,22 127:10 129:15
cut 72:18
cutting 73:3
cycle 3:19 5:16

D

d 2:7 3:1 36:3,5,8 41:1,13,15 45:20 47:21 63:6,8 69:8 72:8 88:12
D.C 11:1
DA 51:4,6 59:12 64:12 87:8,15 89:9
daily 90:7
damaged 41:22 42:2
dangers 125:3
data 107:21,22,22 116:4
date 32:20
day 116:1
day-to-day 126:19
days 63:20 115:8
deal 34:20 43:6 45:17 67:11,14,15 78:6 93:6 119:3 120:17 128:10
dealing 29:15 43:22 44:1 105:22
deals 73:1 78:5
dealt 115:4
debate 7:5 109:10 119:14 128:14
debating 6:14
decade 119:12,15 120:6
December 32:20
decide 109:3
decided 101:2
decides 65:17
decision 11:18 63:2 63:3,13,14 64:11 66:10
decisions 40:17 51:15 52:8 66:20 67:1,5,6 133:4
decline 111:13
declined 64:19 69:12
declines 64:12
decreasing 102:7
decremented 72:22
defendant 112:8 130:19,22
defendant's 131:7
defended 72:21
defense 7:22 10:10 11:17 22:8 25:6 25:11 29:3 49:10 83:16 97:21 100:8 100:13,22 136:18 136:19 137:3,12
defense's 10:13
defined 51:18
definition 15:19
degree 73:15
delete 93:17
deleted 55:7 93:14 96:2
deletes 93:18,20 94:3
delighted 138:16
delivered 42:3,8
delivery 84:14
Delta 41:13
demand 65:7,9,15
demands 66:3
demarcation 119:10
Democratic 7:2
Democrats 112:18
demonstrate 110:18
demonstrating 118:3
Department 22:8
depend 76:16
depending 44:21
depicted 102:2
deployed 78:20 85:2 88:10
deployment 91:6,8 91:15
depose 131:7
deposition 128:19 129:20
deposition-like 129:10
deprives 29:6 88:8
deputy 42:15
derail 7:18
described 78:10 80:4 81:13 100:11
description 103:9
desertions 53:22 71:17
deserves 134:12
Designated 2:12 5:7
designates 95:14
designed 45:16 95:10
desires 86:10
detail 51:11 61:5 61:13 78:10 86:17 100:6,11,21 101:7
detailed 8:2 100:22
detailing 102:22
details 37:21 56:14 109:6,7,10 120:10 123:17 136:16 137:21 138:17
determination 25:2 62:22
determinations 52:2,3
determine 52:3 68:17
determined 64:2,3
develop 88:15
developed 37:13
development 82:16 82:17 88:3
developments 40:6
dictates 49:2
didn't 75:18
die 133:8
difference 113:5 119:20 132:11
differences 16:2 19:14 38:3 139:10
different 15:19 28:7 41:4 66:20 87:8 97:16 103:2 106:18 120:4 121:13,17 137:13 138:7
differently 15:16 36:22 129:1
difficult 50:2 58:3 58:3,20 73:20 91:18 110:14 119:2 133:4,13 138:1
dig 7:8
dilemma 68:2 79:19,20
diligence 136:15
diminished 109:2
directed 25:11 55:16
Director 2:14
dirty 112:17
disagree 120:9 121:3
disapprove 11:18
disapproving 10:15
discharge 24:15 25:17,19,20 27:1 27:2,3 30:19,21 31:8,19 32:14
disciplinary 25:3
discipline 47:13 92:11 126:20
discovery 139:1

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discretion 6:20 8:15 17:4
discretionary 24:21
discuss 7:18 33:6 33:10 34:6,22 35:5,12,22 38:1 61:19 141:20
discussed 25:21 34:21 101:14 104:1 111:19
discussion 7:19 8:2 22:18 36:17 55:5 88:2 101:9,11 136:14
dismiss 111:20
dismissal 24:15
disobedience 46:21 53:21
disperse 83:22
dispersed 43:18
display 36:3 48:19 49:12
dispose 38:10 39:7 71:14
disposed 28:3 64:19 98:14
disposes 38:10
disposition 51:2,22 52:6,18 56:10 63:9,13 64:1,20 65:15 66:9 70:2 70:15,21 72:10 77:1 79:21 82:14 83:22 84:18 85:10 88:4 89:9 98:15 99:22 109:20 110:22 111:12 127:13
disrespect 46:21 53:21
disservice 106:21 140:2
distinction 90:22 133:15
distributed 7:21
distribution 93:3
District 92:18
divide 44:10
divides 57:20
divined 131:14
division 34:17 37:14 43:8 54:15 55:9 71:13 93:22 94:18 95:7 96:2
divorce 41:17
document 37:7 48:4,6,10,19 56:19,21,21 57:3 64:6 74:7 93:16 94:16 97:19 100:17
documented 115:12
documents 35:17 35:18 36:2 37:3 53:16
DoD 23:6,17
doing 17:19 22:22 36:21 71:6 72:19 84:4 85:15 92:8 106:10 107:17 108:11 121:2
domestic 91:11
don't 96:16 106:16 121:21 141:5
doubt 124:12
draft 128:6
drafted 20:4 35:9 54:19 65:19 76:19 77:12 80:14 90:18 98:14 100:10 101:22 126:17
drafter 81:18
drafters 103:5 109:12
drafting 22:19 103:4
dramatically 128:11
draw 57:6
drug 71:18 92:19
drugs 54:3
drum 101:21
drunks 71:18
due 32:19 113:20
DUIs 54:4 71:18
duplicate 135:17 135:18
duties 34:20

E

e 3:1,1 63:11
earlier 34:8 39:21 83:4 123:17 134:9
early 96:21 99:19 104:5
earth 125:16
ease 51:4
easily 35:20
easy 120:8 123:21
echelon 95:10
echelons 38:14 39:5 39:6
effect 36:20 78:13
effectively 83:19 88:16
efficiency 75:11 76:1 79:14 83:3 88:21
efficient 83:9
eight 40:6
either 12:3,19 13:13 16:11 20:5 23:8 32:17,21 35:13 73:5 74:15 74:18 92:15 101:10 111:21 112:15 131:9 133:1
elements 127:9
eliminates 54:13
ELIZABETH 2:4,6
embarrassed 120:2
embarrassing 123:10
embezzlement 54:4
embracing 108:22 137:11
emotion 117:7
emotional 112:15
emotionally 138:1
emphasis 118:22
empirical 30:15
empowerment 106:7
enable 27:8
enact 132:16
enacted 108:14,14
encompasses 45:7
encountered 119:11
endeavor 35:10
ended 11:19
ends 39:19
enforce 12:8
enforced 134:15
enforcement 47:9 47:11 134:13
engaged 62:9
engagements 104:8
England 91:12
enlistment 60:2
ensues 38:8
ensure 27:8 42:22 43:1 63:8 100:18
enterprise 125:5
enticement 81:6
entire 60:7 112:7
entirely 120:17
entities 103:1,2
entitled 49:8 56:9
entity 114:5
environment 77:10 112:2 121:12 133:3,12
envision 66:2
envisioned 127:12
equation 113:14
error 68:21 69:3
errors 68:3
escape 67:7
especially 40:7 77:21 91:9
espionage 81:10 98:20,20
essence 58:22
essentially 9:8 36:19 65:16 82:18 83:20 88:5
establishment 70:1
estimate 103:10
estimates 70:11
et 60:15 86:4 94:1 96:3
European 91:8
everybody 4:13,16 4:18 29:5 114:5 124:15 140:13
evidence 29:8 66:14 129:6
evidently 109:15,22
exact 32:20 83:6
exactly 8:8 28:11
example 29:12 36:17 38:15 43:12 54:3 64:12 68:7 69:4 71:3 72:9 74:1 81:6 87:9 98:19
examples 110:16
exceed 14:7 139:10
exception 57:18
exceptions 14:1
excess 50:18 54:6 98:11
excessive 79:12
exclude 16:8
excluded 58:19,21 59:2,20,22 60:11

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60:13,16,21,21 77:7 90:12
excuse 29:20
excusing 108:10
execute 70:7
executed 81:17
Executive 85:5
exercise 113:7
exercised 31:16
exerting 116:5
exhibit 36:5 37:17 37:18 40:22 41:1 41:13,15 45:20 47:21 48:2,18 49:12,15 50:9,10 52:12,13 53:10 54:8,9 55:8 56:7 57:16,19 58:22 60:8 69:8 70:11 70:21 71:9,16 72:8,10 75:4 88:12 90:11 99:21
exhibits 35:19 36:3
exist 37:9 72:4 74:10 77:11 84:8 85:14 95:4
existing 56:3,6,8 62:5 70:7 102:6 102:18
exists 52:21
expect 6:12
expected 85:9
expecting 33:6
experience 34:21 39:16 42:15,16 51:16 61:18 62:14 62:16 72:16 75:1 82:6 84:4 85:9 86:18 93:6 110:11
experienced 79:13 85:22 86:2 113:18 121:9 135:15
experiences 79:10
expert 109:6
explain 9:5 18:10 18:11 45:7 94:12 125:4
explanation 8:18 67:8 89:18,19 122:3
extent 22:10 104:9 109:17
extraordinary 123:11
extremely 124:13

F

F 2:8
fabric 137:2
face 60:1 90:7
faced 117:6
facilitate 82:19
fact 12:1 23:17 49:18 107:6,10 110:3 115:16 117:7 118:14 121:6 122:4
factor 23:21
factually 111:21
fair 15:9 44:11 102:21 103:2,8,17 135:11 137:17
fairly 29:4 84:9
fairness 100:19,20 103:4 129:13
fall 87:2 98:6
familiar 36:6
family 24:2,7 41:17
far 31:5 62:17 77:8
fashion 102:17
fashions 94:17
feasibility 83:14
feasible 83:18
Federal 2:12 5:7 28:16 29:1,2 38:5 61:14 81:5,11 92:16,17,19 98:18 98:21 134:15
feed 77:2
feel 7:12 34:22 121:6 129:12 134:19
feels 120:14
fell 111:21
felony 39:1,2 79:22 83:10
Fidell 83:5 109:17
field 84:12,17 130:4
fielded 84:5
fight 132:10
figure 4:7 62:12 73:18,19 113:9
file 42:1,2
fill 53:4 60:6
final 16:3
finally 11:18 37:12 115:11
financial 41:18
find 23:3 31:5 37:18 42:22 48:3 68:2 72:2 79:1 102:4 131:18 138:1
finding 12:22 13:3 13:7 16:11 17:10 118:4 135:15
findings 6:20 8:15 8:18,22 9:1,4,14 10:16,21 12:1 13:17 14:22 21:3
fine 58:7
finish 99:7
first 21:19 33:11 37:16,21 40:17 54:12 57:10,13,19 66:6 73:20 82:2 82:11 117:22 127:9
fiscal 102:5
fish 121:17
fits 27:8
five 34:19 36:3 85:4 129:19
five-minute 104:14
fix 101:12 140:7
fixed 77:5
fixing 115:9,10,12 116:2
flag 45:2
fleet 94:1,18,19 95:8
flexibility 27:6 29:7
flip 98:4
floating 6:11
focus 123:21
focused 84:12 123:16
folder 49:13 74:7
folders 48:3
folks 35:21
follow 49:2
following 115:9
fondled 110:20
force 55:14 78:20 82:10 83:20 84:1 86:5
forces 77:22 91:7,8 91:14
forcible 27:22 31:6
foreign 79:9
forfeitures 23:22 24:1,1,7
forget 120:19
forgetting 32:20
forgive 130:14
forgotten 105:6
form 39:17
formal 108:20
formally 47:9
formed 122:5
former 34:17 84:21
Fort 34:14
forward 22:20 66:14 105:21 107:20 108:3,21 110:19 111:4,22 115:6 120:9,12 135:7
found 39:18,19 102:12 115:17 116:3
four 16:3 21:18 85:2 93:21 140:20
four-star 55:12
frankly 105:20 129:11
fraudulent 50:13 60:2
free 7:13
Fried 2:12 5:5,6
friend 136:19
friendly 108:16,16
front 5:3 57:2,8 93:18 106:9 107:4 136:17
Frost 2:11 3:11 27:18 30:5,8 66:12 133:16 134:6 141:15
frustration 105:22 117:3
frustrations 109:8
fulfills 139:1
full 71:9 92:5,6 118:14 132:20
fully 18:8,13 78:1 126:17
function 40:5 70:4 82:19,21 83:14 101:3
fund 113:7 132:22
fundamentally 116:6 121:3
funding 67:2 132:5 132:7,21 133:11
further 10:11 11:2 101:14 113:1 121:18
future 33:15

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G

G 3:1
gain 111:6
game 134:17
garden 39:6
garrison 88:11 91:16
gate 84:3
GCM 38:21 39:12 74:8 76:12
general 2:7,8,19 3:11,12,20 9:22 10:7 11:4,7,10,12 11:15 13:22 14:4 14:11,18 15:2,5 15:20 16:6,7,16 16:22 17:5,17,20 20:3 21:5 23:10 25:5,9 28:5,9,13 29:1,9 30:17 32:5 33:17,20 34:1,2 34:18 36:14,15 38:3,21,22 39:3,6 39:8,9,12,13 40:2 40:20 41:2,14 42:10 43:13 44:16 44:21 45:1,4,9,13 45:16,19 46:2,2,5 46:8,10,15,18 47:3,17,20 48:1 48:11,18 49:6,11 49:16 50:6 51:17 52:5,10 53:2,6 54:14,16 55:8,9 55:10,15,16 56:19 56:22 57:10,13 58:9 60:5,6 61:10 61:18 62:22 63:15 63:21,22 65:2,9 65:11,12,18 66:6 66:18 67:17,22 69:10,19,20 70:4 70:9,10,18,19 72:9 74:4,9,13,16 74:18 75:7,9,16 75:17,20 76:16 77:10,15,17 78:8 78:14,17 79:3,5 79:16 80:7,12 81:8,21,22 82:2 83:12 84:2,16 85:6,17,18 86:6 86:13,19,20,22 87:4,19 89:6,18 89:22 90:4,6,19 91:2,4,19,21 92:3 93:20 94:2,5,9,11 94:13,15,16,22 95:3,22 96:3,5,7 96:10,20,22 97:1 97:4,5,8,11,14,17 97:18 98:7,16 99:7,9,16,21 100:2,9 101:13,20 102:2,9,15,16,20 103:8,18 104:5,13 111:18 114:2 127:1,2,8,14 136:12
generally 29:18 37:1 38:21 41:9 44:14 53:18 77:1 80:4 92:12
generals 55:12 123:2
generated 6:4
generates 75:12
generous 103:6
Geneva 141:1
gentlemen 5:15
Geoff 31:21 32:10
GEOFFREY 2:10
geographic 91:16
gestures 60:3
getting 22:20 42:12 57:14 131:4
Gillibrand 4:5 6:8 7:3 19:11,15 33:7 34:10 49:9 104:2 105:15 107:6 109:22 112:4 115:20 124:13 132:6 139:19
Gillibrand's 7:8 20:9,16 48:5 123:18 125:21
give 24:7 29:14 51:2 110:15,17 112:21 116:17,19 122:3 125:22
given 14:16 24:2 43:17 44:4 62:3 76:6 84:10 95:1 108:19 111:19 112:1,1 135:9
gives 49:13
giving 116:9 117:13
glad 137:9
global 82:21 114:8 127:14
gloves 127:6
go 14:18 21:20 24:12 25:20 31:20 33:4,16 36:9 39:11,14 44:9 46:22 48:7 49:1 49:17 52:5,9,22 56:14 57:4 58:1,5 64:3,11,20 68:11 69:18 73:10 79:5 83:10 88:15 97:9 108:21 109:7 110:22 111:4,14 111:22 115:14 116:12 120:10 122:19 130:1 131:12 134:1 136:7
goes 8:19 10:22 39:19 40:1 63:11
going 3:6 4:5 7:7 22:20 32:17 33:5 33:12 35:17 36:16 49:11 50:19 61:1 69:14 89:8 91:5 104:14,15 106:5 108:19 109:5 110:1 111:6,7 113:5,18,19 116:17,19 121:4 121:13 122:15,21 122:22 123:3 124:5,6 125:12 128:21 130:2 132:22 133:3,13 134:17 135:3,16 135:17,18,20,21 139:8,13,14 140:1 140:7 141:2
good 3:3 4:13,14 5:5,13 27:17 33:19 34:1,2,2,20 92:11 99:2 124:18 129:12
Gordian 73:4
gotten 68:7 113:11 126:2 138:2
government 42:1 65:14
government's 65:13
grade 95:9
grades 85:13,14
grand 128:18 129:5 130:10,12,17,17 131:4
granted 133:6
grateful 138:10
gravity 44:22 59:8 59:15 80:6,8
great 33:1 47:18 101:2 105:2,5,11 112:10 119:3 120:17 128:9 135:3 136:15,15 139:6
greater 78:9
greatly 114:15 125:13
green 2:15,16 3:3 3:17 4:16,20 5:10 5:13,14 8:11,14 9:2,6,11,15,18 10:2,6 12:4,18,21 13:4,8,13,19,20 14:9,22 15:3,10 15:18 16:1,12,19 17:4,12 20:11,13 20:15,20 21:11,22 23:16 24:13 25:8 25:14 36:13 37:19 99:2 105:7 133:17 134:1,5 140:11,19
grinding 89:3 125:10
group 8:1 44:8 50:8 50:9 53:21 62:12
groups 50:7 93:21
grow 86:2,5
growth 102:1
guess 7:7,17 9:20 15:5 17:6 21:12 31:16 47:16 67:13 133:8
guessing 75:2 126:10
guidance 24:18 25:1
guidelines 29:5
guilt 65:7
guilty 39:19,19 121:7 131:22
guy 111:11

H

half 57:13,19,21 71:10 72:19 85:2 112:18 121:14
halt 89:3 125:10
Ham 2:8,14 3:11

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11:10 12:6 13:22 14:4,11 15:2,5,20 16:6,7,16,22 17:5 17:17 21:5,6 22:14,15 25:9 28:5,9 32:16 33:2 36:11 41:12 44:12 46:17 48:14 49:5 63:21 69:19,19 70:16,18 74:14 81:2 86:9,20 87:1 87:11 94:11 95:20 96:6 101:20 102:15 127:1,2,8 136:2
hand 76:17
handcuffed 110:10
handle 97:9
handled 110:12,16
handling 116:22
handy 37:8 97:21 99:11
happen 4:8 18:15 77:3 126:7
happened 77:19,21
happens 10:8 64:7 87:1,5 111:1
happy 109:7 117:2 139:7
hard 65:21 66:1 84:17 138:5
hard-pressed 84:10
harvested 102:10
hassles 124:9
hatch 67:7
head 117:8 139:3
health 111:8
hear 4:13 5:10 7:21 105:13 122:8
heard 25:10 60:4 63:7 118:13,15 136:17
hearing 7:19 128:18,18 130:10 130:19,22 131:2,6 138:20
hearings 83:4 118:14
heaven 125:16
held 74:11
hell 112:10
Hello 99:5
help 73:12
helped 128:6
helpful 23:3
heretofore 96:15
Hi 99:1 136:7
high 92:17 105:22
higher 61:4 65:8 85:14
highlight 55:3 56:15 70:12 93:11 98:3
highlighted 9:15 16:3,17 19:13 21:18 24:16 78:18 100:16
Hill 104:7
Hillman 2:6 3:14 4:14 18:4,6 19:4,9 19:12 20:20 21:4 21:14,15 31:21 32:4 33:1,4,21 77:15,16,18 79:3 79:6 80:12 81:21 104:21 109:18 117:15,18,19 122:7 141:18
hire 85:22
historic 30:22 108:13
historically 74:21 96:18 97:16
history 31:2 127:22
hit 80:13
hold 58:16 70:5
holes 48:21,22
Holtzman 2:4 3:11 5:2 8:6,13,21 9:3 11:20 12:11,19 13:2,6,9,14 14:2 14:21 15:11 16:13 19:10 29:13 31:9 33:20 45:6,11,15 45:18 48:9,12,16 67:9,19 73:21 76:14 77:13 89:6 89:20 90:1,5 103:22 104:11 123:5 126:21
HONORABLE 2:3 2:4,21
hope 117:3
horrific 119:14
Houck 2:5 3:13 7:16 8:3 22:3,4,16 105:1 136:5,6,9 138:8 141:11
House 5:18 6:2,4 6:18 8:12 9:7 12:2,20 14:5 15:7 16:16,17 19:16,18 21:1,8 24:13 27:19 123:13 126:3 139:9
House-passed 6:2
huge 91:16 97:13 140:2
hundreds 110:12 115:3 140:3
husband 24:3 29:21

I

ID 46:16
idea 20:7
identified 49:4 57:17 59:21 68:3 86:8 87:5 90:6
identifies 60:11,19 62:21
identify 47:12 73:10 75:8 116:4
illuminate 132:11
imagine 65:21 129:11 133:12
imbed 68:20
immediate 125:9
immediately 84:5
impact 36:22 82:14 109:11
impediments 68:6
implement 56:16 69:22 83:20
implementation 37:13 41:6 49:4 78:13 82:12
implemented 78:1
implementing 64:6
implicate 19:21
implicates 20:7
implications 36:18
importance 62:7
important 18:8 37:10 38:3,4 41:4 43:11 84:6 93:15 108:22 109:19 126:1 133:22 138:11 140:5
importantly 112:10 116:3
impose 39:4 63:17
imposed 13:10
imposes 13:11
impossible 74:4 81:19
imprisoned 11:9
Improvement 57:12
inability 135:21
inappropriate 120:11 128:20
inappropriately 110:20
incident 89:15
inclination 56:14
inclined 56:17
include 16:20 60:15 91:10 93:21 113:6 113:8 128:16
included 8:16 56:2 59:14 87:2,14,17 90:13 113:16
includes 58:14
including 114:16 118:16
inconsistencies 131:19
incorrectly 95:21
increase 102:1 108:7 135:3
incredibly 79:11
indicate 76:8
indicated 6:12 38:15
indication 107:15
indications 122:13
indictment 130:16
individuals 76:4 101:7 118:21
infer 65:19
influence 63:6,10 116:5,8
information 32:8 32:19,21 115:8 134:20
informed 4:5
initial 107:3
initially 38:10 66:13
initiatives 3:22
innocence 65:7
input 139:12
insoluble 124:6
installation 42:9 93:2
instance 19:1 32:10 111:2,9,11 125:8 131:16
institution 40:19

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intended 33:11 49:7,8 62:6 103:15
intends 49:14 50:6
intent 50:20 81:16 81:18 95:14
intentions 124:18
interest 49:1 93:6 101:4 139:6
interested 83:13 92:3,7 93:4 112:7 131:22
interesting 64:4 83:3 94:8 95:17 133:10
interestingly 94:3,6
interests 114:13
interfering 11:22
Internet 81:6
interpretation 41:20
interpreting 95:21
interrupt 22:4 75:19 79:7 99:4 117:18
interrupting 130:15
intersecting 125:6
intersects 18:18
interview 72:2
intro 3:4,16
introduce 6:13
introduced 5:19,20 6:9,22
introduction 34:12 57:11
inventory 61:20 84:8 85:12 102:11
investigate 73:7
investigated 46:3 47:4,8,11 135:19
investigating 42:11
investigation 38:8 40:13
investigations 40:10
Invisible 120:13
invoke 65:17
invoked 63:8
involved 26:17 29:6 89:15 92:22 128:4
involvement 114:17
Iraq 85:3
irony 29:10
irresponsible 113:14
Israel 107:7,10
issue 5:17 6:5 7:17 9:10 17:15 19:1 30:12 78:19 83:3 106:1 117:5,10 118:1 119:21 126:6 134:22 136:11,13,16
issues 33:12 41:18 104:1,4,10 110:11 114:5 123:20 124:2,4,17 125:11 127:22 134:8

J

Jacky 5:19
JAG 41:7 63:9 115:14 121:5 137:13
JAGs 116:6,8,9 121:7,11 129:16
JAMES 2:5
jettison 92:15
Jim 8:3,5 22:4 104:22 136:5,7 141:11,12
job 106:6 136:21
jobs 84:7
JOHN 2:7
join 4:6,10
joining 3:13
Joint 22:6,11 23:11 35:14
Jones 2:3 3:10 5:1 5:9 7:15 8:4 9:9 9:12,17,20 10:3 11:2,6,14 15:15 15:22 16:15 17:13 17:19 18:4,5,6,21 19:7,17 20:6,12 20:14,18 21:12,17 23:5,14 24:9 25:18 26:5 27:16 27:21 28:7,11 32:6 33:3,5,21,22 34:1 45:21 46:4,6 46:9,14 47:2,15 47:18 56:17 58:7 67:21 69:18 99:5 99:15,20 100:4 101:8,19 102:19 103:21 104:12,18 104:22 105:2,5,8 105:11 117:12,15 117:17 122:8 127:1 132:2 133:14 136:3,7 138:15,20 140:9 140:13,17 141:4 141:14,17,19
JOYE 2:11
JR 2:7
judge 2:19 3:10 5:1 10:10 13:12,13 18:4,6 26:21 32:5 33:21 34:18 39:10 40:11 42:13,15 43:2,7 51:8 61:7,8 61:10,11,16 69:8 70:3,10 71:6,8 72:5,8,15 73:9,17 78:12,13,17 82:2 82:3,15,22 83:12 84:6 85:3,5,8 87:17 100:6,12 101:1,2 117:15 136:12 140:12,19 141:1
judges 73:13,14
judgment 31:17 35:4
judicial 28:4 45:5 45:14 131:13
judiciary 28:16 29:1
jump 28:22 93:9
juries 130:17
jurisdiction 68:18 69:13 87:15 92:1 92:3,10,20
jurisdictions 43:13 43:18,20,21 44:11 71:3 91:21
jury 100:7 128:18 129:5 130:10,12 130:17 131:4,19
justice 22:6,8 23:2 26:14 27:7,15 33:9 42:5,8 57:11 70:3,6 88:17 90:21 114:18,20
justified 29:20

K

keep 52:22 131:5
keeping 118:17
kettle 121:17
key 57:6
kicked 66:15
kicking 64:11
kicks 59:15 64:13
kid 127:6
kidnap 68:11
kidnapping 54:4 60:15 69:1 74:1
kidnappings 71:17
kind 5:15 22:7,17 27:13 47:9 82:21 83:16 86:7 112:9 114:22 118:18 123:19 126:2 127:14 129:19 138:2
kinds 110:8 112:12
Kirsten 6:7
knew 35:22 141:22
knot 73:4
know 4:11,21 7:1 7:13 16:2,4 17:16 19:17 20:5 21:9 21:17 22:14,18 26:12,18 27:17 28:12 29:8 30:3 30:10,14 32:12 33:3 34:13 36:6 41:7 42:5 44:13 44:15 59:4,9,17 66:10 69:15 76:2 79:12,17 80:12 81:19 86:3 88:8 91:12,12 93:8 103:1,16 105:12 109:5,13 111:4 113:12,15,20 115:3 118:11 120:2,21 121:1 124:18,22 125:4 129:16,21 131:15 132:6 133:19 136:13 137:10 138:2 139:12 140:7 141:5
knowing 117:9
knowledge 31:18 114:15 138:4
knows 121:14
Kyle 2:15 5:11

L

lack 69:13 79:14 82:5
ladies 5:15
landscape 3:17

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This meeting was not subject to the notice and open meeting requirements of the Federal Advisory Committee Act.

5:11
language 51:12 58:4,19 62:20 77:4,5 113:6,15
larceny 46:16 59:7 59:7
large 71:12
larger 125:19
late 46:21
latest 34:9 48:5
laugh 106:11
laughing 105:21
Laughter 21:16 32:3 67:20 127:7
law 34:17 37:14 39:4 41:17,18,21 41:21 42:6,15,18 47:9,11 62:9 71:8 72:16 81:5,15 84:14,22 85:1 88:13,14 96:16 98:22 106:6 108:15 114:15 125:21
lawyer 108:18 122:20
lawyers 41:10 121:14 137:13 140:3
lay 3:17 117:8
lead 124:7
leaders 43:6
leadership 106:15 118:1 119:20 120:1 127:19 132:20
leave 22:5 53:19 80:21 140:14,21
leaves 81:2,4
leaving 37:17
left 24:5 34:19 38:9 41:14 52:15 53:9 53:11,18 54:2,6 56:9,11 59:14 60:12,16,22 73:2 74:2 75:2 76:20 77:9 78:5 79:17 80:4 81:14 88:12 90:10 98:12 99:21
left-hand 38:7
legal 29:21 34:14 39:10 41:8,11,16 41:17 42:3,3 68:22 69:3,8 74:12 75:13 88:13
legally 111:16
legislating 125:4
legislation 5:12 35:5 36:18 37:1 37:15 48:5,22 65:19 67:10 69:21 101:22 109:13 122:14 127:10 138:17
legislative 2:16 3:17,19,22 5:16 23:6,17 48:21 67:14 126:11
legislature 131:3
lens 85:7
lesser 8:16 13:1 15:3 78:6 87:1,6 87:14,17
let's 7:6 62:15 67:10 79:22 89:7 109:15 116:3,4,7
level 27:1 39:1 42:9 43:8 46:22 52:5 69:20 74:19 79:22 80:1 85:9 86:4 91:8 94:2 95:10 97:9 106:1 134:15
levels 39:11 44:20 86:5,19
leverage 112:7
Levin 112:18
Liberty 1:18
licensed 61:7
lieu 26:22
lieutenant 2:15 42:14 129:17
life 106:3 111:5 113:3,9
light 23:16 133:7
liked 119:16
limit 12:9 110:1 123:3 135:11
limitation 21:2 135:15
limitations 28:18
limited 67:4 93:8 132:14 135:14
limiting 6:20 133:11
limits 8:14 19:20
line 57:4 119:10
lined 118:12
Lisa 2:9 85:19
list 98:9
listed 51:5 52:20 60:19 66:11 95:9
listen 28:14
listened 138:22
listing 97:22
lists 95:6
literally 20:2
Litigation 29:2
little 8:7 15:12 32:1 32:1 36:4,22 47:15 96:18 99:19 117:4 123:7 131:18 134:9 138:1
lives 90:7
Liz 103:21 125:5 132:10
loads 92:4
local 47:12 91:22
logic 27:5 96:9
long 50:22 77:21 86:1 134:3
longer 26:22 54:16 70:5 94:9 95:12 96:3,6,8 120:6
look 23:7 48:2 52:13 55:7 58:2 68:8 74:7 78:7 80:9 94:15 101:3 105:14 109:15 114:8 123:20
looked 23:2 59:6 69:20 77:19 78:9 105:21
looking 19:15,16 20:21,22 41:13 57:16 58:4 70:20 82:13 99:20 121:15 122:10 128:10 136:16
looks 20:1 66:4 79:11
loophole 65:20
lose 41:22 111:7
lost 124:7
lot 4:17 7:22 36:8 40:19 41:9,10,19 47:12 48:20 50:4 86:17 88:10,11 109:6,20 113:12 119:8 121:6 135:8 135:8 141:20
low 46:22
low-level 46:20
lower 56:7 74:19 80:6 85:13 91:7 95:10,10 97:9
lower-level 45:17

M

ma'am 9:6 10:6 12:7 34:2 45:9,13 46:5,8 47:17 58:4 58:9 67:18 68:1 69:5 74:5 76:11 76:19 77:5,17 78:8 79:5,16 81:3 81:13,20 85:18 86:14 89:19 90:4 90:14 99:9 100:3 101:14 104:5 105:4,10 127:9 134:5
main 6:19 92:4
maintain 84:18 88:17 92:11
major 2:7 9:22 10:7 11:4,7,12,15 17:20 20:3 23:10 25:5 28:13 29:9 42:18 65:2,11,18 86:4 90:19 91:4 96:20 97:1,5,11 97:17 102:20 103:18
making 51:15 68:6 79:15 115:2 118:18 121:19 122:2 125:5 128:10 131:22 132:21
malingerings 53:22 71:18
malpractice 130:8
manageable 73:8
mandated 40:11,13 40:15
mandates 40:9
mandatory 24:14 25:17,19,20 26:7 27:3,20 28:17,19 29:4,10,11,14 30:2,21
manning 69:22 81:9 98:19
manpower 102:7
March 5:18
Maria 2:12 5:6,10
marines 64:8 96:17
mark 111:11 135:13

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marker 137:5
martial 6:21 8:15 8:19 13:12 14:18 21:3 28:3 30:17 31:7 38:4,17,18 39:9 40:16 43:10 54:14 55:1,8 61:9 61:12,14 63:19 64:16 65:6 71:20 79:17 80:7 86:19 94:2,13 96:1,1,4,7 96:8 97:3 103:12 127:14
massive 97:22
matched 107:12
material 80:7
materials 4:17,18 10:18 35:4,20 36:12,13
matter 96:17 138:4
matters 10:11 11:17 34:21,22 35:2 70:4
max 59:3
maximize 92:10
maximum 14:6,16 37:7 39:4 50:18 52:16 53:14 58:14 59:10 63:19 97:14 97:20 98:2,10
maximums 54:5
McCaskill 2:21 4:9 7:3 86:10 99:1,3,6 99:18 104:15 105:12,19 117:14 117:19 119:1 122:12 125:1 127:20 130:13 131:1 132:8 133:21 134:3 135:10 137:9 138:14,19 139:7 140:10
McCaskill's 7:11
mean 8:11 9:1 22:9 28:2 29:16 41:5 49:20 67:12 75:18 77:4 87:12 90:17 97:13 109:14 122:21 124:1,10 124:12 130:8,12
meaningful 28:21 73:1 115:1
means 43:16 51:13 59:11 61:13 78:21 108:10,11 110:2
measure 25:4 72:12 89:4
measured 137:14
mechanic 93:1
mechanical 35:8
mechanics 18:1 34:6 35:6
meet 82:4
meeting 3:7,10 5:8 24:20 142:1
meetings 33:15
member 31:19 114:16 129:7 138:9
members 2:1 3:9 30:16 32:13 34:3 35:16 36:11 37:18 41:12 47:21 49:6 56:5 57:1 70:20 75:4 86:9 99:11 100:14 104:6 118:7 140:11
memo 25:14
men 121:9
mental 111:8
mentioned 71:2
menu 33:12
merely 57:10
merits 39:18
met 107:3
mete 54:21
middle 64:13 100:1
military 22:6,7 23:2 26:12,14,18 26:20,21 27:7,15 33:9 42:5,8 43:2 53:19,20 54:3 57:11 67:11 70:3 70:6 77:6,6,8 79:18 80:5,19,21 88:17 90:21 91:11 100:12,18 106:10 106:14,14,17 108:10,16 111:12 112:11 114:15,18 114:20 116:14 117:1 119:9,16,21 119:22 121:21 123:9 124:6 125:12 126:20 127:21 128:1,3 129:1,4,8 132:20 133:1,5 136:21 137:3 139:2,20 140:1,3,7,8
mind 52:22 62:4 66:16 131:5
mine 130:4
minimization 30:22
minimized 29:16
minimum 26:7 103:12
minimums 30:2
minor 80:21 81:6
minute 8:22 25:20 140:12
minutes 5:14 33:11 86:12 133:19 141:2
misconduct 45:1 68:9 73:2 80:1 90:8
misdemeanor 80:1
misdemeanors 39:2
misreading 14:14
Missouri 2:22
mitigation 10:12
mix 114:22
mixes 31:1
model 41:2 83:16 134:10
modest 123:7
Modification 58:10
modifies 57:13
modify 14:13,19,22 21:2
modifying 12:22
moment 53:3,6 59:5 115:4 124:3
moments 37:17
money 24:5,7 41:20 56:8 66:22 67:17 92:6 132:13,15 136:1
monolithic 120:22 121:1
month 44:19
months 40:8 73:20 97:15 121:8 139:16
morning 3:3,9 4:6 4:22 5:5,13,15 7:19 34:1,2,3 35:11 99:2 105:14 125:17 141:21,22
move 18:19,21 58:18 62:19 66:14 75:15 87:21 135:16
moved 125:16
movers 42:1
moves 38:11
moving 116:16
multiple 41:10 71:4 75:22 89:1
murder 12:13 29:12,18 30:11 50:12 68:13 69:2 114:10
murderers 30:11
muster 137:16

N

N 3:1
name 5:3,3,13 34:4
narrowing 122:18
National 49:9
nature 63:2 80:18 117:7
Naval 55:11
Navy 136:11,12
NCOs 45:3 72:1
NDAA 6:2,2,14,18 7:5,10 8:12 20:13
necessarily 22:1 103:14 113:22
necessary 70:4
need 23:8 51:13 57:4 68:4 71:21 71:22 72:1,11,13 72:13,15,17 73:7 77:9 80:8 82:7 86:4 109:14 120:19 125:4 128:4 134:4 139:11 140:14,21
needed 93:2 97:9 109:1 115:15
needs 24:11 71:19 72:4 73:9,11,12 139:1
negotiate 69:14 76:13 90:16
negotiations 17:22 19:5 76:11
Neither 68:15
never 44:2 47:8 96:14 106:4 116:11 117:9
new 51:2,22 55:5 55:18 57:20 59:22 70:1 75:3,6 76:22 77:2 79:20 94:7 99:22 100:4,5,10

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113:4 121:9 122:19 127:12,14
newspaper 139:20
night 117:8
nixes 88:6
NJP 45:14 46:17,22 111:19 112:1,5
non 28:3 45:4,13 55:20
non-chain 80:16,19
non-commissioned 42:20
non-judicial 18:16 19:2 44:13 45:9 45:11 46:1 47:7 55:1 63:17,20 64:10,16 65:4,5 65:22
non-traditional 45:8
normal 79:22
North 1:19
note 4:2 5:6 36:15 54:1 93:15 97:18 98:16 109:14
notified 86:10
notion 53:6 88:22
November 1:12 32:19
nuanced 9:7
number 6:16 35:17 36:7 42:19 44:15 44:16 47:6 60:7 60:12,14 64:6 82:10 91:20 106:18 107:12 127:4 132:3
numbers 84:17 97:13

O

O 3:1 86:14
O-5 69:9
O-6 38:19 40:15 51:10 55:22 61:3 63:9 69:12 73:6 82:3,7 86:1,2,7 96:13
O-6s 62:3,11 82:10 84:3 135:15
objections 79:7
objective 124:14,15
observation 138:13
observe 91:19
obvious 87:12
obviously 35:11 36:16 62:7 75:11 88:2 101:17 111:18 114:1 139:4,8
occupy 62:7 94:22
occur 129:14 130:20
occurring 109:16
occurs 110:4
oddly 47:6
Odierno 75:7
offense 8:16 13:1 14:7 15:4,18 16:20 31:1,2 44:22 59:14,15 75:12 87:6,14,16 87:17 90:9 110:21
offenses 8:17 9:2 13:5 14:5,6,16,17 16:8,9,20 24:16 27:19 28:1,2,12 30:18 37:9,12 38:2 39:6 47:4 49:15 50:9,16,18 50:21 51:2,15 52:1,8,14,15,17 52:19 53:4,8,14 53:17,19,20 54:2 54:5 57:20 58:12 58:13,19,21 59:2 59:20 60:7,11,14 60:16,20,21,22 68:15,15 71:10,15 72:18 74:2 75:9 76:15,17,20,21 77:7,8,9 78:6 80:4 80:5,15,17,21,22 81:2,4,5,9,10 83:10 87:2,20 89:11,15 90:13 92:1,10 98:5,6,8 98:11,12,20 109:20 110:2 123:4
offensives 79:18
offer 137:7
offered 34:10 65:3
offering 116:18 128:22
offers 19:1
office 34:18 42:3,7 42:17 44:1 55:6 56:4,4,6 57:22 67:3 71:1 75:3 83:11,12 89:1 100:10,10 103:22 104:9
officer 44:22 45:1,2 45:4 51:9 60:5 61:3 85:5
officers 42:20 55:20,21,22 70:5 74:18 82:9,15,20 105:17
offices 41:8,8 44:18 102:12 104:7 139:22
Official 2:12 5:7
oh 9:3 20:18 45:11 66:3 105:8
okay 4:13,16,20 9:3 9:12,17 11:14 12:18 13:2,6 14:21 15:13,17 20:19 21:5 45:12 45:18 46:9,10,14 47:2,18 48:16,17 60:9 70:18 89:20 90:5 91:5 99:20 100:4 105:2,5,11 129:16 134:5
old 132:10
once 7:5 87:19 128:19
one-year 51:1 54:21
ones 100:6 114:1 128:7,9
onward 93:11,12
open 5:8
operational 41:21 88:13
Operations 55:12
opinion 83:13
opportunities 108:20
opportunity 10:13 125:22 137:19
opposed 127:16
opposing 6:6
opposite 83:6 115:17
option 17:8 65:13 65:14
order 49:19,22 50:2 71:13 88:17 92:11,22 95:2 126:20
orders 42:21
organizations 88:20 106:13 118:12,21 120:10 122:4
orient 57:1,5
orientation 45:20
original 7:9 69:4
ostensibly 83:11
ounce 93:3
outlet 77:10 93:5,5
outline 35:6
outlined 49:3 52:10 83:1
outright 68:5
outset 35:3
outside 5:22 51:19 62:18 109:21
overall 125:19
overlapping 47:16
overlay 40:3,20
overlays 38:1
overstating 17:7
overturn 12:2
overturned 31:11 31:15
overview 49:16
overwhelming 124:18
oxygen 119:22

P

P 3:1
p.m 142:1
packet 97:20
page 9:18 24:16 57:10,12,13,13 58:2 60:18 62:19 63:3,11 93:10,11 93:19
pages 57:2,2 98:4,5
pain 122:1
painful 106:2 111:5
panel 1:2 2:1,13 25:10 26:21 34:3 35:17 48:2 79:8 87:11,13,17,21 99:11 100:7,14 118:7,14 136:17 137:20 138:9,22
paragraph 58:16 58:18 59:20 60:9 60:18 61:2,3,4 63:2
paralegals 41:10 73:11

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parallels 7:11
part 20:17 30:8,12 32:7 71:12 102:13 106:10 121:20
partially 103:20
particular 20:22 35:13 88:14 118:22
particularly 7:22 26:18 92:16 128:22
parts 18:12
Party 113:11
pass 35:4 50:5 124:20,20 125:15 137:16
passed 13:16 67:10 95:15 124:4
passes 69:21 125:8
paths 82:18
patience 136:15
patiently 33:17
PATRICIA 2:14
pause 57:8 61:19
Pede 2:19 3:21 33:17 34:2,4 36:15 41:14 44:16 45:9,13,16,19 46:2,5,8,10,15,18 47:3,17,20 48:1 48:11,18 49:6,11 56:19 57:10 58:9 63:22 65:9,12 66:6,18 67:17,22 69:20 70:9,19 74:4,16 75:16,17 75:20 76:16 77:15 77:17 78:8 79:5 79:16 80:13 81:8 81:22 84:2 85:17 85:18 86:6,13,20 86:22 87:4,19 89:18,22 90:4,6 91:2,19 94:11,15 96:5,10,22 97:4,8 97:14,18 99:7,9 100:2,9 101:13 102:3,9,16 103:8 104:5,13
Pede's 36:14
pending 49:10 127:10
Pentagon 55:12
people 20:4 23:2 30:11 41:21,22 43:5 44:8 56:8 63:7 71:20 72:14 74:17 86:3 88:7 101:9 102:13 113:21 117:9 119:10 122:22 124:14 136:20 138:11
percent 107:7 108:8
percentage 82:3
perfectly 81:18
perform 82:21,22
performing 41:10
period 26:22 75:1 77:21
periodically 29:7
permanent 27:1
perpetrator 112:6 129:4 131:21
perpetrators 106:8
person 3:12 11:9 19:2 40:17 50:11 51:3 61:15 62:21 63:9,12,15 70:22 71:1 74:8,20 95:22 96:7,12,14 101:7 102:22 112:2 117:20
personal 115:4 122:1
personally 106:2 111:5 118:5 123:15 134:16
personnel 43:4
persons 118:15
perspective 137:7
perspectives 3:21
phenomenal 141:10
phenomenon 124:17
philosophical 78:16,21 91:2
philosophy 92:9,13 123:19
phone 3:13 4:3 21:7 34:4 36:5,12 37:18 41:12 47:21 56:5 70:20 75:4 104:13 140:11,20
phones 4:13
phrase 90:12
phrased 15:16
phrasing 12:12
physically 75:13
pick 100:6,13
picking 114:5
piece 20:10 48:22
pieces 18:19
pillow 117:8
place 73:22
placed 14:12
placeholder 7:17
play 125:19
played 123:8
plays 114:6
plea 12:6,8,10 17:14 19:7,8,21 20:1,7 22:22 23:8 27:12 73:21 89:8 89:10,13
plead 39:17
please 4:20 5:3 86:22 130:14
pleased 105:20 108:5
point 8:1 16:7 22:1 24:21 31:20 38:11 55:21 60:13 74:6 76:9 80:13 90:14 110:18 141:20
pointed 121:10
policy 125:6
political 106:1 113:7
politics 125:6
pool 82:8
pornography 81:3 81:3
portion 3:8 24:1 101:18
ports 11:8
position 34:19 94:20 106:5 109:18 139:19
positions 105:18
possible 23:3 90:1
possibly 20:8
post 9:22 39:20
post-appeal 9:21
post-trial 10:2,3 15:8
posted 3:7
posture 139:2
potential 68:20 82:14 83:9
pounds 92:22
power 11:3 12:16 31:14 114:3
practical 69:20 109:11 110:3,6,13 112:12 124:2,17 126:19
practically 123:22
practice 41:15 42:5 59:16 61:7,12 62:9 91:20 96:17 96:18
practiced 50:1
practicing 42:15
practitioners 67:22 101:15,16 128:9
pragmatic 110:7 112:13
pre-appeal 9:21
pre-trial 18:2,14 19:5 23:20 40:13 76:11 90:16
precedence 89:16
predict 126:6
prefer 116:20,21
preferences 117:1
preferred 43:16 46:12
preliminary 128:18 130:10,19 131:2,6
premise 107:19
preparations 72:3
prepare 73:11 130:22
prepared 10:9 33:13 56:13 88:9
preparing 88:11
present 2:1,18 3:10 5:7 10:13 14:13 35:4 42:22 43:1 51:21 75:14 110:13
presentation 33:18 36:14 83:1 117:13
presented 118:2 122:11
presenters 33:10 138:22
presenting 130:18
pressed 84:17
pressure 120:18,18
pressuring 120:11
presumably 13:20 66:8 75:6 87:6
presume 64:21 75:20 86:8,15 87:19
presuming 95:15

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pretrial 17:22
pretty 7:14 39:15
previously 107:13
primarily 19:15
principally 78:15
principles 26:12 27:14
prior 19:5
priority 132:21
prison 12:14 106:8
privilege 34:4
privileged 35:1
privy 104:5
proactively 132:14 133:11
probable 131:13
probably 6:21 16:1 20:7 29:22 36:6 40:7 41:7 64:7 73:14,15,20 103:3 117:5 133:9
probing 26:9
problem 20:4 30:9 31:1 47:13 67:11 67:15,16 89:21 99:18,19 110:5,7 113:17 115:12 116:2,3 120:5 123:10 125:9 135:2
problematic 114:4
problems 32:9 109:13,14 110:6,6 110:7,13 114:2 124:6 127:17
proceed 8:7 35:18 56:22 57:12 60:18 65:14 137:5
proceeding 65:5,6
process 27:7 37:20 37:22 38:1,5,6 39:21 40:2,20 42:21 43:3 44:9 46:22 57:14 79:10 119:9 120:16 130:18,21
produce 42:21
produced 44:18,20
professional 82:16 88:3
Professor 2:6,10 3:13,14 4:14 18:4 18:6 19:4,9,12 20:20 21:4,13,15 25:15,15 26:3,8 28:22 30:6,6,13 30:13 31:13,21 32:4 33:1,4,21 75:16,18 77:15,18 79:3,6 80:12 81:21,22 82:1 83:5 85:21 88:1 89:5 104:21 105:2 105:4 109:17,18 117:15,17,18 122:7 130:13,14 140:22,22 141:8 141:18
proficiency 88:15
Program 134:10,17
programs 132:6
progress 115:2
prohibited 11:22
prohibits 12:21
prompt 49:16
properly 12:12 124:10
property 42:1 59:7 59:8
proposal 6:1,8,9 23:6,18 33:7 105:14 115:20 118:18 123:18 125:21
proposals 7:12
proposed 49:8 69:21 101:22 105:16 138:17
proposes 50:10
prosecute 66:21 67:1,2 69:12 71:1 71:16 78:22 87:9 90:3 93:1,3
prosecuted 71:19 72:21
prosecuting 42:10
prosecution 42:17 66:15 71:4 82:6 89:3
prosecutions 84:19 84:20
prosecutor 51:14 52:7,18 53:17 57:20 59:22 61:15 80:20 83:8 86:1 88:21 92:20 107:21 111:2,10 111:20 115:18 131:21
prosecutorial 130:8
prosecutors 29:3 42:19 66:19 67:5 89:2 91:22 97:21 100:7 115:20 121:5 136:19 137:12
protect 140:1
protection 106:7
protects 137:15
provide 3:4 23:13 24:22 41:16 42:6 65:13 89:19 132:5
provided 35:16 40:14 70:10
providing 132:4
provision 8:11 9:6 21:1 23:5 24:12 24:17 26:11 27:4 56:1 98:1
provisions 6:17 7:9 9:19 12:5 16:3 19:19 20:16 22:9 26:7,11 57:7,15 58:6 101:13 103:10,11 128:5 132:3
provoking 60:3
public 1:6 24:20 117:6 120:13 128:15 139:19
pull 56:19 93:14
pulled 84:5 98:21 102:17
pulling 48:3
punished 24:4 30:19
punishment 18:17 19:2 26:16 27:8 28:4 37:7 45:5,10 45:14 46:1 50:18 53:14 55:2 58:14 59:10 63:18,20,20 64:10,17 65:4,4,5 66:1 97:14,20 98:2 112:9
punishments 39:4 44:13 47:8 98:10
punitive 30:19,21 31:8,18 32:14 97:22
purely 79:18
purpose 26:15
purposes 27:15 86:9 116:7
pursue 85:20
push 134:11
pushback 133:1
pushing 119:18
put 5:2,11 49:11 106:8 108:13 126:12 130:9 137:4
putting 116:8 118:22
pyramid 72:17 86:3

Q

qualification 82:4 82:8
qualified 13:4 16:20 61:11 82:9 86:16
qualifying 14:5 15:18
quality 84:19
question 12:12 19:22 22:5 23:1 24:10 27:11,17 32:5 61:22 67:13 67:17 77:14,16 78:15 79:2 82:11 82:13 83:2 85:20 86:14,21 89:7,8 99:16 109:12 114:8 118:8 119:19 131:11 136:6
questioning 129:10 129:14
questions 4:12 7:12 21:13 35:13 37:13 40:22 41:19 45:20 47:20 49:4,17 55:4 56:16 58:8 64:4,6 73:17 82:1 84:20 85:21 88:1 97:19 100:16 109:11 117:3,14 127:9
quickly 75:15 87:22 93:9,10 119:16 135:16
quite 6:4 40:4 124:1
quoted 139:20

R

R 3:1

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rabbit 48:21,22
raise 7:17 49:3
raised 101:16
Randolph 1:19
range 118:15
ranges 44:16
rank 38:15 113:21 113:22
rape 27:22 29:20 31:5 68:12 69:3 74:2
raped 24:3 121:11
raping 29:21
rapists 30:10,10
rates 135:4
read 17:12 20:2 21:7,8 76:19 78:10,11 96:11 98:9
reading 14:20 16:14 17:2
ready 48:6 73:10 133:5
real 110:7 125:9,11 135:1 139:3
reality 80:9 100:20 126:18
realized 22:21
really 9:20 18:8 22:17 25:21 32:11 33:11,13 59:4 77:20 108:21 113:17 125:12 133:10 136:20 138:3
reappointed 76:21
reappointing 76:6
reason 29:22 41:4 54:12 107:17
reasons 66:20 67:7 125:16
reassignment 24:19 25:3
recall 83:4 127:5
receive 4:18
received 120:17
receiving 32:22 120:18
recess 104:17
recommendations 25:12 116:9
reconcile 114:10,11 135:21
recopy 48:14
record 5:6 8:20 10:8 49:5 85:22 106:15
recorded 3:6
records 72:3
red 37:19 38:12 141:1
redo 103:19
reduce 12:15 13:18 24:6
reducing 10:16 23:22
reduction 24:4
redundancy 79:14
redundant 79:11
refer 34:6 37:16 39:13 41:1 48:20 51:3 56:20 58:10 59:13 70:19 98:7
reference 34:11 36:9 37:6,8 48:6 51:4 58:17 99:11
referred 34:8 35:18 38:16,22 39:21 45:14 53:19 58:21 60:5 97:2
referring 35:22 49:6,7 54:8 75:4
refers 58:13,15
reflected 64:5 91:22
reform 6:22 118:22 135:12,12,14
reforms 106:10 108:12 121:18 128:7,13 131:9 132:15 137:11
refuse 64:9
refuses 19:3 64:15
regard 8:9,10 11:21 25:12 28:15 40:17 41:5 76:11 84:13 89:10
regarding 24:18 25:1 41:19
regimen 108:17
regional 83:15,16
regret 117:20
regular 97:3
regulations 41:19
rehabilitation 26:16
reject 79:9 116:6
relate 27:20 135:5
related 6:18 24:16 24:17 25:2
relates 131:13
relating 21:1
relationship 26:10 27:12
relative 91:7
relevance 79:9
relevant 61:22
remain 52:20,21 71:12 87:20
remainder 87:22
remains 54:19 69:7 87:16
remarks 3:5,16 118:3
remedy 115:15
remember 43:22 46:19 64:7 69:6 96:10,12,14 102:13 138:20
remembering 46:15
reminder 3:5
reminding 8:5
remote 35:21
remove 112:2 120:15 130:7
removed 112:8
removes 105:16
removing 33:7,8 80:20 120:16 127:17 130:5 131:10
render 49:22
replace 93:13
report 38:6 115:7,9 134:18,19
reported 46:20
reporters 43:3 72:1 73:12,15
reporting 107:5,7,9 107:11,16 108:7,8 135:4
Representative 3:11 5:19
representatives 5:18 83:15
Republican 7:2
requesting 132:21
requests 32:18
require 24:14 131:6,11
required 8:19 130:7
requirement 25:16 25:17 30:21
requirements 60:19
requires 72:7
research 30:9 139:3
reside 78:6 95:5
resident 92:7
resolved 67:8 89:14 124:4,21
resource 43:10
resourced 71:1 73:6
resources 66:22 67:4,6 102:5 135:6,8,14
resourcing 41:2 101:21
respect 5:11 32:6 33:7 113:20 114:14 117:1 119:3
response 1:1 2:13 28:16 30:22 47:22 57:9 104:3
responsibilities 70:6
responsibility 37:11 38:14 40:5 71:9 125:18
responsible 38:8 50:8,11 61:2 89:2 102:14
rest 85:20 118:6
restriction 14:8
restricts 28:19
result 31:8 79:15
resulted 107:15
resulting 27:2
RET 2:5,7,8 7:16 9:22 10:7 11:4,7 11:10,12,15 13:22 14:4,11 15:2,5,20 16:6,16,22 17:5 17:17,20 20:3 21:5 22:3,16 23:10 25:5,9 28:5 28:9,13 29:9 63:21 65:2,11,18 69:19 70:18 90:19 91:4 96:20 97:1,5 97:11,17 101:20 102:15,20 103:18 105:1 127:2,8 136:5,9 138:8 141:11

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retained 26:15
retaliation 121:19 128:11
retired 136:11
return 104:15
review 110:10 137:6
reviewed 10:9
right 3:3,20 5:9 8:4 9:11,13 15:2,22 16:12,15 18:16 19:8 20:12,14,15 20:19 23:14 24:9 24:11 25:14 26:8 33:14 36:4 38:12 45:18 52:20 53:8 55:6 58:22 63:15 64:15 65:1,3,7,8,9 65:11,17 69:16 70:18 71:15 73:16 74:3,10 77:11 89:12 90:10 91:4 96:5,9,10 97:8,11 97:17 98:11 101:4 109:16 112:14 114:1 118:4 120:1 122:2 129:3 130:5 131:7,10 133:8 137:15,22 140:4 141:17
right-hand 53:1
rights 134:13,14
role 3:7 5:17 6:19 8:10 11:19,21 15:8 16:5 123:7 125:19 127:18 128:2
room 113:21
rotten 112:17
roughly 43:12,14 43:14 44:4,18 46:11 57:17 71:3 72:11,14 75:10 103:11
routinely 30:18 82:22 91:22 97:2
row 106:9
Rules 103:11
run 72:1

S

S 3:1 6:8 20:10 49:5
safe 134:19
sailors 64:8 92:2
sake 85:21
sarcastic 62:6
SASC 20:17
SASC-passed 20:13
sausage 125:5
saying 47:16 66:2 108:11 119:15,17 131:8 135:22
says 14:4,15 25:22 28:2 43:20 53:11 54:10,12 61:3 70:21 95:22 111:2 111:4,6 115:14 116:10 132:7
scale 78:16,19 79:8 90:22 91:5,6
scenarios 110:17
schedule 133:18
schedules 4:4
scheme 49:2
SCMCA 38:18
scope 32:9 99:12
seamlessly 111:14
search 31:5
SECDEF 40:11,13 40:15
SECDEF's 40:9
second 9:18 21:20 31:16 54:9 57:21 66:7 82:13
secondly 127:11
Secretaries 94:4,4 94:8 127:18
Secretary 24:22 25:6,10,11 95:1 116:13 127:16
Section 24:13 61:5
see 7:6 11:21 20:18 24:9 37:8 38:16 39:5 41:15 43:11 45:12 50:9 51:4,7 52:12 57:17 58:18 59:21 64:5 68:8 69:7 70:11 91:21 98:5,9 104:2 127:17 130:3 135:3
seeing 108:6
seen 29:17,18 40:8 116:12
select 58:5
selected 100:14
Senate 6:6,7,13,18 8:12 9:7 12:20 14:8,9 15:7 16:17 16:19 17:1 19:18 20:8,11 21:1,9 24:14,22 27:19 28:6,10 34:7,11 48:4 49:10 56:12 99:13,13 105:14 123:12 127:3 139:9
Senate's 7:4 27:21
Senate-passed 7:10
Senator 2:21 4:5,9 6:7,22 7:3,3,8,11 7:20 20:9,16 34:9 48:5 53:16 80:4 86:10 99:1,3,5,6 99:15,18 104:2,15 105:12,13,15,19 107:6 109:22 112:4,18 117:12 117:14,19 119:1 122:7,8,12 123:6 123:18 124:12 125:1,20 127:2,20 130:13 131:1 132:2,6,8 133:17 133:21 134:3 135:10 136:9 137:9 138:14,16 138:19 139:7,18 140:10
senators 4:3 122:16 122:17 126:15 139:19,22
send 4:21 63:14,18
senior 45:3 69:8 72:15 88:16 101:15
sense 21:6,8 22:18 23:16 28:5,8,9 42:7 124:19
sent 4:17 20:21 36:13
sentence 10:17,21 12:9,17 13:7,10 13:11,15,18 14:6 14:17 15:1 16:11 17:10 23:22 24:6 28:20 29:7,10,12 29:15 31:10,10,14 51:1 89:11
sentenced 12:14
sentences 8:9,10 11:21 12:1,2,4 14:20
sentencing 14:13 26:7,12,20 27:6 28:17,19 29:5 39:20
separate 17:15 47:10 50:10 100:17 101:3
separately 36:13 101:5
separation 41:18
sequencing 50:2
sequential 49:19
sequestration 133:2,7,12
serial 30:10,11
series 57:15 89:14
serious 22:20 30:18 50:21 51:15 52:8 53:17 54:1,5 60:14 78:5 80:15 80:17 81:14,15 83:10 123:9 135:19,20
serve 88:19 112:3
served 85:1 128:1
service 22:6,11 23:11 24:22 30:16 31:19 32:13 35:13 35:14 55:11 117:6 127:16,17,18
services 11:8 25:12 34:14 35:7 36:20 37:2 38:13,20 39:1 41:3,11,16 42:3 51:10 56:1 56:11 61:21 62:1 66:22 68:1 70:2 71:4 75:5,21 76:5 84:9,14,16 88:20 92:12 94:5 95:19 100:18 101:16 102:3,4 106:15 107:4 112:19 116:13 121:9 123:13 127:4 137:14
serving 41:8
SESSION 1:6
sessions 4:7 127:6
set 35:20 37:12 88:18 115:1 135:17
sets 84:11,13 85:13 118:18
setting 115:1 128:20 129:10

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131:12,13
settings 88:10,11
severity 44:21
sex 24:15
sex-related 6:1 28:12
sexual 1:1 5:21,22 27:22 29:11 31:6 37:22 38:2 40:3 40:18,20 106:4 108:16 110:4,12 110:21 114:9 123:4 130:9 132:4 134:8
shadows 107:20 115:6
shameful 123:10
Shannon 2:16 5:14 18:11 21:18,20 24:12
shape 33:19
share 137:19 138:17 139:8
shared 69:13 73:14 73:15
she'll 6:13
shift 80:15 109:15 109:20 122:9 129:15,17
shifted 107:2 129:19
shifts 80:18
shoes 126:12
short 67:13
shortly 32:22
shot 129:20
should've 20:20
show 37:20 53:5 129:9
shown 136:15
shows 30:9
side 38:9 41:14 52:15 53:1,8,11 55:6 56:9 58:22 59:14 60:22 63:16 65:1 68:12,13 71:15,21 73:5 74:3,10 76:17 87:2,7,7 88:12 89:12 109:8 112:16,17 131:14
side-by-side 116:18
sides 68:10 100:12 112:15 113:13
sign 129:5 141:2
signed 108:15
significant 40:4 51:16 61:17 62:13 62:15 72:16 73:1 82:5 84:4 86:18 119:20 125:3 126:13 137:11
significantly 15:7 17:18 121:13 126:9
signing 121:16
signs 11:16
similar 6:7 14:8 23:17 34:10 38:5 41:3 47:6
simple 111:15
simplify 134:22
simplifying 106:21
simply 21:7 35:6,19 37:19 49:17 51:12 57:19 60:19 63:12 84:7 92:4 93:10 98:3 99:9 103:15
single 89:1,1,15 90:8
sir 15:10 16:14 21:11 22:15 44:12 65:1,10 70:9,15 70:17 71:7 84:2 90:18 91:3 96:22 97:4 102:10 103:9 103:16
sitting 33:17 84:6 121:8
situations 119:15
six 40:6 97:15 129:19
size 91:10,12
skill 84:11,13 85:13 88:18
skipped 25:18
slightly 9:7 15:19 41:3
slow 126:3
slows 72:22
small 131:18 137:4
smaller 91:12
social 29:19
sodomy 27:22 31:6
soldier 47:13,14 63:18 64:15 92:10
soldiers 64:7 79:1 92:2
solemn 125:17
solicitation 50:15
solve 89:21
solved 67:12
somebody 12:13 18:9 19:2 31:10 46:21 59:9
someone's 46:16
soon 6:13
sorry 18:6 31:20,21 31:21 45:13 56:5 75:18 79:6 80:18 101:20 112:6 117:18 141:12,15 141:21
sort 3:17 6:6 18:12 25:18 32:4 69:11 75:2 78:1 79:12 79:13 101:6
sorting 44:9
sound 62:6
sounds 32:7
speak 18:18 61:21 65:20 82:16 84:8 104:8,16
SPEAKER 4:19 18:3
speaking 84:21
speaks 88:22
Spear 5:19
special 38:18 39:12 39:13 40:14,16 42:10 44:20 51:17 52:6 54:19 61:18 63:1,15,21 65:8 74:14,18 86:19 95:1,6,7 96:1,8 97:3,13 134:10,16 135:8
specific 8:8 27:19 37:22 38:2 40:21 51:5 67:13 110:16 127:8
specifically 34:5 42:17 84:20 105:15 141:22
specificity 15:13
specifics 128:15 137:19
specified 50:16 98:8
specifies 78:4
speculate 31:4
speculating 126:10
speech 60:3
speed 26:2 72:12 84:19
speedy 114:4 125:11
spend 36:7 41:20 132:13 136:1
spent 88:10,12 106:3 121:6 128:9 137:11 139:15
sponsored 105:14
spouse 24:3
spread 73:7 75:22 91:14
spreadsheet 20:21
staff 2:14,15 4:9 10:10 39:10 42:13 42:15 43:7 55:13 55:13 69:8 70:3 71:6,7 72:5 73:17 75:7,21 76:5,9,10 84:6 85:3 94:7,10 95:13,19 101:1,1 104:2 105:20 133:20 139:13
staffed 124:10
staffs 4:4
stage 9:13
standing 123:15
star 93:22
start 4:7 58:4
starts 6:13 38:10
state 2:21 14:10 35:3 38:6 67:3 91:22 92:15 98:17 131:3 134:15
stated 109:19
statement 8:18 102:10 129:5,22
states 63:12 91:13 92:14 126:20 130:16,17 131:3,5
stateside 91:20
statistical 47:1 107:14
statute 35:9 49:3 49:14 50:16 51:6 51:7,12,19 52:11 53:7,12 54:13,16 54:18,22 55:4,7 55:16 56:15,20,22 57:1,6,8 61:1 64:14,18 68:13 76:18 77:11 81:11 82:5 86:8 87:5 88:2 89:21 90:18 93:9,11,12,17,19 95:15 98:13 100:9

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101:5
statutory 26:6 31:16 55:22 58:3 94:20
stay 134:3,4 140:6 140:18,20
stayed 132:1
steal 59:8,9,11
stereotypes 29:19
stew 114:22
stick 140:15
stigma 27:2
stop 5:19 115:15 117:2
storm 42:2
straightforward 7:14
streams 90:10
street 1:19 86:1
strength 102:1 133:6
strikes 66:16
strong 132:1
strongly 118:16 120:14
structure 52:21 56:11 57:17 70:7 70:11,14 71:12 73:13 86:5 102:18 103:13 105:16
struggling 22:10 119:12
stuff 22:13 96:2
style 80:17
Sub 61:6,17 62:19 63:1,6,8,11
Subcommittee 3:8 3:10 33:15 118:7 125:18
Subcommittees 127:4
subject 32:14 63:10 138:4 139:6
subjected 129:9
subjects 106:18
submitted 10:11,12 23:6,17
Subparagraphs 93:18
Subsequent 10:22
substantial 124:2
substantially 82:9
substitute 26:21
suffered 119:14
Suffice 37:21
suffices 129:6
sufficient 84:17
suggest 33:16 49:20 50:3 62:16 91:5 141:7
suggesting 30:1,20 80:5 83:21
Suite 1:19
suits 58:5
summary 38:17 39:12 44:20 55:1 63:17,19 64:9,16 65:6 66:1
sun 31:22
super 52:18
superficial 106:1
support 6:4 7:1,2,2 30:15 43:2,4 113:11 115:8 124:14 127:11 128:5 129:6 134:7 134:8
supported 134:21
supporting 126:15
supportive 118:16
suppose 13:14
supposed 25:22 86:11
sure 3:5,18 18:9,10 19:14 21:11,22 35:22 58:8 63:7 66:3 87:9 99:18 111:18 113:22 125:1 131:22 132:10
Surely 32:15
surfing 112:14
surprised 131:15
SWAN 118:2 119:3
swirling 114:13
sworn 43:17
synchronized 27:14
synopsis 23:7
system 18:12,20,22 26:14 27:15 29:6 33:9 50:1,3 69:7 80:3 108:17,19 113:5 114:6,18,20 116:17,22 119:11 125:10 129:2 131:4 135:17
systems 1:1 2:13 90:21 135:22

T

T 69:6
Tab 36:11 48:11,12 48:15 70:16
tabs 64:5
tailoring 82:18
take 5:14,21 12:16 35:12 39:22 49:18 50:19 53:17 60:20 66:9 68:17 73:22 80:15 86:2 91:13 101:6 104:14 109:10 112:9 117:2 124:10 131:7 133:6 135:2
taken 64:22 76:3 104:17 121:7
takes 10:20 80:17 86:6,14 89:16
talk 5:16 23:7 33:14 34:5 35:1 37:10 51:20 53:2 57:22 88:9 91:6 117:21 138:22 139:20,21,22
talked 78:12 119:8 126:15 134:9 136:22
talking 18:22 19:3 19:10,19 21:10,19 25:16 31:13 36:19 42:9 45:8 90:20 91:15,15 127:13 133:19 135:7 140:12
Tea 113:11
tear 129:21
Technically 65:3
telephone 104:19
tell 62:14 71:11 78:9 119:9 120:3 123:16 128:13 132:19
telling 110:1 139:19,21
tells 61:1 69:16
temporary 25:2
tenants 102:16
tend 30:10 96:17
term 51:5 69:13
termination 63:4
terms 17:22 40:4 40:18 51:4 69:22 79:10,22 90:2 106:6 111:8 114:3 116:12 123:18 125:10,13 126:2 129:13,21 137:16 139:11
terrible 106:20 124:16 138:21
terribly 112:17,19
testified 83:5
testify 63:8 68:19
testimony 7:22
thank 4:14 5:4,9 8:3 24:7 33:22 47:18 74:16 81:21 89:5 99:9 102:15 104:11,12,16 105:19 117:12,22 122:7 123:5,15 126:21 133:14 134:6 136:9 137:8 138:8,13,14,15 140:9,10 141:10
thanks 7:15 8:3,5 33:21 127:3 136:4
theft 59:7
theory 50:19 51:14 53:15
thereof 41:20
they'd 102:17 107:13
thing 18:8 36:21 52:22 55:3 72:17 120:7 126:3
things 17:14 36:7 41:22,22 50:14 58:21 102:22 106:11 111:1 113:13 119:6 128:19
think 5:10 8:4 9:15 10:6 15:15 17:1 17:17 18:7 20:3 23:4 25:6,8,9 26:3 26:8,13,17 27:3,5 27:6,11,16 28:17 28:18,20 29:2,3 29:13,19,21,22 30:12,14,20 31:4 33:9,13,18 34:7,8 44:7 72:8 78:10 78:13 80:13,22 81:8 82:8 83:17 84:16 85:13 87:14 87:16 92:11 95:20 99:6 101:9 102:21 103:8,9,10,14,16

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106:9,14,16,18,20 108:12 109:14,18 113:16 114:2,7,12 115:1 116:22 119:5 120:1,3,7 120:21 121:1,2,20 122:3 124:15,17 125:7,8,11,12,17 125:18 126:1,8,9 126:11,13 128:3,3 131:16 132:22 134:7,16,21 135:6 137:14,15 139:17 139:18 140:2,5 141:5,17,19,22
thinking 87:10 135:2 138:21
thinks 89:11
third 83:2
thought 36:8 48:1 58:16 75:19 83:3 141:9
thoughts 23:22
three 39:11 76:4 82:1 97:6 108:6
three-star 55:10 93:21
thresholds 92:16
thrown 51:5
tied 43:5,8
time 10:11 36:8 62:3 75:2 77:21 86:9 88:10,12 93:8 101:6 102:6 107:2 121:6,7 128:10 133:17 136:10 137:12 139:15 140:15 141:5,6
timely 25:2
times 97:6 127:5 131:17
TJAGs 61:10 71:11
today 6:14 7:7 33:6 34:16 35:1 37:6 62:14 67:21 74:5 82:22 123:14 136:14 141:9
told 113:10 122:16 122:17,17 132:6
tomorrow 6:15
tool 37:8 45:17 97:21
top 24:17 62:21
topic 22:5 35:11
total 24:1,6 46:4 82:10
totally 19:14 128:20
touch 140:6
touched 110:20
touchstone 137:22
tough 106:17,19
track 88:5 110:5
traditional 127:18
traditionally 74:11
transcribed 3:6
transcripts 71:22
transfer 25:13,16 25:19
treated 115:7 129:1 129:13
treating 127:5
trend 107:14
trial 10:1,8,9,12 19:5 29:2 31:2,17 31:17,18 38:6 39:21 42:12,19 43:1,1 46:13 51:13 57:14 62:13 62:15 64:3,9,11 65:7,10,13,14 66:4,5 68:20 72:4 73:10,11,11 84:4 97:10 100:13 112:7 114:4 125:11 130:22
trials 61:18 68:18 86:18
tried 30:17 49:21 81:9 98:19 123:20 135:20 138:3 139:12
tries 126:8
trivialized 29:17
true 108:1 113:12 113:13
truly 119:14 134:21
trumps 122:1
trust 114:9,10
truth 107:8 113:2 115:5
try 37:14 43:14 49:2 52:4 61:9,13 62:22 63:14 64:17 68:22 69:1,5,14 69:14 72:12 92:19 98:8 114:1 122:2 122:15 124:16 130:2 131:20
trying 4:6 12:12 14:3 15:12 32:6 32:10 51:18 122:13 123:21 126:12 129:21 134:11,22 136:20
turn 3:20 4:22 85:20 125:7 139:13
turned 72:19
Turner 2:9 3:14 23:19,19 85:17,19 85:19 105:7,8,9
two 9:18 14:7,17 15:6,20 18:11,19 32:18 50:7 68:18 70:1 88:1 90:21 94:17 98:4,5 107:13 108:6 110:5 111:1 112:15 114:12 115:18,22 122:4 127:8 135:22
two-star 55:10
two-stars 76:4
type 10:15 29:11 68:3 83:10 129:20 130:20
types 41:11
typically 38:19 39:12,14 43:9 45:16 47:5 67:1 67:18 92:9 93:21
typo 53:10

U

U.S 2:21 91:7,13 92:20
U.S.C 81:7
UCMJ 107:2 116:11 126:18,19
UK 77:19
ultimately 46:13 65:12 123:1 132:17
unanswered 73:18
unbecoming 60:4
unconstitutional 103:20
underlying 128:5,6 129:7 132:17 135:13
undermine 126:14 131:20
undermines 27:6
undermining 82:20
underpinning 78:17
underpinnings 91:3
understand 3:18 12:13 14:3 15:11 18:9,13 19:14 21:4 23:11 27:4 37:14 38:4 74:9 79:4,7,8 99:12 110:14 113:4 117:10 122:1 133:15 137:21 138:3 140:14
understanding 134:7
understands 19:18 123:9 126:17
understood 35:20 141:4,14
undertook 77:20
unfair 112:18,20 130:4
unfortunate 139:18
uniform 36:21 37:9 48:8 52:14 53:4 71:10 74:6 122:22 139:14
uniforms 139:15
unintended 103:3,6 103:19
union 130:16
unit 86:4 102:14 121:12,12
unitary 59:17
United 92:14 126:20
unlawful 63:6,10
unworkable 110:15
upper 38:7 53:11
USA 2:7,8,10,14
USAF 2:9,15
use 29:12 36:4,16 48:19 56:3,6,8 59:18 79:22 83:17 93:3 97:22 130:16 130:17
useful 36:9 48:3 74:7
USN 2:5
usually 42:13,18 45:1 69:9

V

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value 109:1
variety 39:6 54:4 137:13
various 102:2 104:6
verbatim 10:9 71:22
version 8:12 14:5,8 16:2,16,17,18,19 17:1 19:13,16 20:9,11 24:22 34:9 48:5
versions 6:18 15:7 16:8 21:9
versus 15:20 106:21 121:15 135:1
vests 94:6
VICE 2:5 7:16 22:3 22:16 105:1 136:5 136:9 138:8 141:11
victim 40:14 55:19 108:15,16,18,19 111:1,22 112:3,16 120:13,21 121:2 121:11 129:1,2,3 130:4,21 131:8,12 131:20 132:4 134:8,12 135:1
victim's 129:22
victimized 120:6,20
victims 40:15 68:19 106:3,12,20,21 107:20 112:22 115:3 116:1,18,19 117:11 118:10,11 118:13 119:4,7,8 119:12,13 120:4,8 120:9,12 121:4,21 128:8 129:11 130:9 131:16 134:13,14,17,19 135:2,7,9 140:4
view 128:21
viewpoint 110:13
views 118:15
violations 16:9 17:2 17:9 32:13
Virginia 1:20
visual 49:13 52:13
vital 125:19 128:3
vocal 119:4,13
volume 44:7
votes 122:13 126:5 126:5

W

wait 8:21
wake 97:12
walk 51:7
want 5:6 8:2 17:13 21:20 24:12 49:18 89:10,13 99:3,7 111:10,10,11 113:14 116:10,16 117:22 120:9 123:15 130:7 134:6,19,20,20,21 135:10 138:6 140:3 141:8
wanted 5:14 35:21 59:4 98:3 99:10 112:3 117:22 120:12 123:6 124:19 133:16 137:4,7 138:12
wants 57:8 87:11 87:13 107:22 132:16 140:13
war 41:21 84:10 88:9,11,15 120:14
wasn't 31:10 66:14 129:22 139:9
wave 112:15
way 15:6 28:21 30:1 34:12 36:8 53:1 59:16 66:7 67:13 68:2 73:1,3 73:5 76:19,21 83:19 96:11,17 108:20,21 110:21 112:2 116:13 123:6 126:17 129:12,15,18,22 130:4 132:13 137:1
ways 27:4,5 87:8 109:1
we'll 4:10 5:10 23:15 26:1 32:22 33:19 36:4 50:4 51:20 56:21 68:1 69:15 140:15
we're 4:3,6 7:7 17:19 20:21 21:9 25:22 29:9 33:13 36:21,22 41:12 47:16 50:19 57:3 67:2 69:16 84:9 92:7 115:2,9,10 116:2,16 122:10 127:13 130:2 132:22 133:18 135:7 140:12,14 141:7
we've 4:4 32:20 49:4 71:5 85:14 86:10 101:14,16 107:19 114:4,5,7 116:10 121:17 123:16,20,21 129:20 137:14 138:5 141:5
website 3:8
Wednesday 1:11
weeds 59:5 117:4 138:3,10
week 7:5,21 8:1 24:20 25:10 118:14 136:18
weeks 34:19
weigh 108:20 116:19 125:22
weird 114:22 128:17 135:21
welcome 137:18
well-intentioned 124:13
went 46:13,13,17 107:5,11 109:6 114:2
weren't 110:8
wherewithal 70:7
wide 31:5 118:15
widespread 29:4
wife 29:21
willing 109:9,10 122:14 135:7 137:20
willingness 134:18 134:19 138:10
windfall 65:16
wisdom 22:7 101:2
wish 35:12 110:8
witness 130:5
witnesses 42:22,22 72:2 141:9
woman 110:19
women 112:20,21 120:22 121:9 123:12
wonder 77:18
wondering 22:11
word 45:12 59:19
words 24:3 82:6,17
work 16:1 18:19 37:1 46:22 68:1,2 68:5,6 69:5,9 73:16,16 84:4 85:14 123:11,22 140:6
workability 123:19
worked 4:11 101:1 107:18 138:5
working 4:3 42:19 93:1 106:3
works 12:7
world 41:8 43:13 43:20 44:6,19 54:15 67:5 71:5 73:8 76:1 84:7 108:17 113:6 135:16
worldwide 75:9 78:19 89:2 91:6
worry 57:5 80:8
worth 22:17 26:9 96:21
would've 111:19 119:16
wouldn't 62:8 66:12 115:15 130:11,12,20
woven 137:1
wrestled 95:18
writing 109:19
written 8:18 17:21 37:6
wrong 69:16 112:22

X

X 89:12

Y

yeah 14:10 16:19 20:6 21:12 22:16 25:8 27:16 28:8 58:7 141:4,19
year 5:21 6:3,9 14:10 15:21 43:15 43:17 44:4,17 46:3 50:19 52:16 52:17 53:15 54:6 58:15,17 59:4,10 85:3 97:16 98:12 107:11 108:8,9 125:21
years 12:14 14:7,17

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15:20 40:7 42:14 42:16 72:21 84:10 85:2,4,15 86:7,14 107:13 108:6,9 115:18,22 117:6 129:19
yesterday 4:17

Z

0

1

1 48:4,10,19 56:20 56:21 58:9,10,13
1,200 43:15 46:13
1,500 43:15 46:12
10 57:2,2 86:12 141:2
100 12:14
11 36:11 48:11,12
11:00 4:8
117 53:13 59:2 60:1 60:2
118 50:12,21
1197 20:10 34:7,8 34:11 37:4,11 41:6 48:4,14 49:6 56:12 99:14
12 40:8 73:20 84:10 85:15 141:18
12:00 133:18
12:17 142:1
12:30 141:13
120 16:8,10,21 17:2 17:9 32:12 103:19 110:2,21 114:7 123:4
121 59:6
13 1:12
132 50:12,21
133 53:13 59:2 60:4 60:4
134 53:2,4,13 59:3 60:4,5 81:4,12 98:6,22
135 62:3,15
135,000 62:17
14 42:16
145 62:3
148 6:3
15 18:17 42:14 44:12 45:2,7 71:3 130:15
15,000 73:7
150 1:19
15s 44:17
17 130:16
18 42:16 81:7 86:6 121:8 139:15

2

2 48:6,19 56:21 57:12,13 58:2,18 59:20 60:9 61:17 74:7 93:16
2,000 43:16 46:12
2,400 43:16
20 42:16 85:8
2002 134:11
2006 77:22 103:19
2009 78:2
2011 5:21
2013 1:12 5:16
21 32:19
22 12:15 37:5 48:7 56:21 74:6 93:14 93:15,16,17 94:19 96:2
22203 1:20
23 37:5 74:17 94:12 94:15 95:5,6,6,9 95:21
24 40:8 42:14 72:20 73:20 86:7
2422 81:7
25 85:8
27 51:12 61:5,6,8 61:13

3

3 58:16,18 60:18,19 62:19 94:16
30 63:20 103:11 117:6
30,000 44:4
32 6:22 7:14,20 40:9,10,12 121:16 128:16,17 136:13 136:17 137:1,6 138:6,18,21 139:4
32s 129:18 130:1
34 121:16
35 72:14,15
35,000 44:17 45:21 46:19 47:3,6,7
38 6:10

4

4 37:7 48:15 62:19 63:3,11 97:19
40 103:11
40,000 46:19
45 46:18 103:11
45,000 44:4,17 45:22 46:19 47:3 47:7
46 6:11

5

5 63:12 64:6 93:18
5,000 44:19
50 43:14,19,20,21 44:10 71:5 72:14 72:15 83:21 84:3 108:8
533 24:13
554 24:14

6

6 57:13 86:15 93:10 93:11,11,19
60 9:9 19:21 31:14 122:13 126:5,5 128:12
68 97:12

7

70 43:13,18,20 75:10 83:22 84:3
70s 97:2
78 50:14

8

8 93:19
80 50:14 53:11,12 107:7
80s 96:21
82 53:10,12
83 50:14 53:9,11,13 59:2 60:1,2
875 1:19

9

9 70:16
9:40 3:2
93 115:17,21
967 6:8 34:8

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