

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL  
ASSAULT CRIMES PANEL

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PUBLIC MEETING

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FRIDAY  
MAY 16, 2014

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The Panel met in the United States District Court for the District of Columbia, Ceremonial Courtroom 20, 6th Floor, 333 Constitution Avenue, N.W., Washington, D.C., at 9:00 a.m., The Honorable Barbara Jones, Chair, presiding.

PRESENT

THE HONORABLE BARBARA JONES, Chair  
THE HONORABLE ELIZABETH HOLTZMAN  
VICE ADMIRAL (RETIRED) JAMES HOUCK  
BRIGADIER GENERAL (RETIRED) COLLEEN MCGUIRE  
BRIGADIER GENERAL (RETIRED) MALINDA DUNN  
COLONEL (RETIRED) HOLLY COOK  
PROFESSOR ELIZABETH HILLMAN (by telephone)  
HARVEY BRYANT  
MAI FERNANDEZ (by telephone)

ALSO PRESENT

MARIA FRIED, Designated Federal Official  
THE HONORABLE CRISTEL MARQUARDT, Victim  
Services Subcommittee (by telephone)  
MEG GARVIN, Victim Services Subcommittee  
COLONEL PATRICIA HAM, Staff Director  
LIEUTENANT COLONEL KYLE GREEN, Supervising  
Attorney  
COMMANDER SHERRY KING, Supervising Attorney

TABLE OF CONTENTS

Comments From the Panel Chair 4

Subcommittee Report to Panel and Panel  
Deliberations 6

Public Comment

Adjourn

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
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P-R-O-C-E-E-D-I-N-G-S

9:35 a.m.

CHAIR JONES: First of all, good morning. And I want to explain that on May 5th and 6th, the Response Panel began to hear the reports from each of its three subcommittees, and to deliberate on and accept or modify or reject the various recommendations that came from those subcommittees.

This morning, we are going to finish the report out of the Role of the Commander Subcommittee and the recommendations made by that subcommittee to the full Panel which we were unable to complete on May 6th.

As I think you all know by now, we have three subcommittees, The Role of the Commander, Victim Services, and Comparative Systems. And many of the Panel members, all of the Panel members are on one or more of those subcommittees, plus we have a number of other members of subcommittees who are subject

1 matter experts.

2 This morning, you will see that we  
3 have Elizabeth Holtzman and Jim Houck who are  
4 both subcommittee members of the Role of the  
5 Commander Subcommittee as well as Panel  
6 members. And so we wear both hats.

7 Right now, I'm reporting out as  
8 the chair of the Subcommittee on the Role of  
9 the Commander.

10 We have already briefed the Panel  
11 on three major areas of study that we've done.  
12 Ms. Joye Frost, who is the Director of the  
13 Office for Victims of Crime at the Department  
14 of Justice, discussed the role of the  
15 commander in sexual assault prevention.

16 And Professor Geoffrey Corn, who  
17 is the Presidential Research Professor of Law  
18 at the South Texas College of Law was the  
19 subcommittee member who presented our report  
20 on climate assessment and command  
21 accountability.

22 We were able to discuss,

1 deliberate, and accept either in whole or with  
2 some modifications on May 6th, the  
3 subcommittee's recommendations in these areas  
4 which were 5 through 13 and 20 through 28.

5 We actually have three additional  
6 recommendations in the area of commander  
7 accountability which I would like to go  
8 through now.

9 The first recommendation I'd like  
10 to talk about is Recommendation 21. This  
11 recommendation is right in line with  
12 Recommendations 27 and 28, and it's meant to  
13 complement and strengthen both the Department  
14 of Defense and Congress' efforts to hold  
15 commanders accountable.

16 From the beginning of our  
17 discussions as a subcommittee, we quickly  
18 realized the importance of command  
19 accountability, commander accountability, if  
20 there was going to be success in implementing  
21 the Sexual Assault Prevention and Response  
22 Programs. And in fact, the Secretary of

1 Defense, as you will recall, just to do a  
2 little recap, directed the secretaries of the  
3 services to report on how they were going to  
4 implement SAPRO's 2013 Strategic Plan and as  
5 such, specifically directed them to develop  
6 metrics to enhance commander accountability,  
7 which they did.

8           The first action in the services  
9 was to modify performance evaluations so that  
10 they would now require specific consideration  
11 of SAPRO issues for officers and  
12 noncommissioned officers.

13           But 29, our recommendation there  
14 goes to the basic issue which is that before  
15 you, can hold the commander and anyone else  
16 accountable, they have to know what the goals  
17 are and what is expected of them. And so the  
18 services have made efforts in that direction.  
19 A particularly good example comes from the  
20 Navy. The Navy has provided tailored and  
21 specific guidance to commanders on the  
22 implementation of the Navy's Sexual Assault,

1 Prevention, and Response Program initiatives  
2 and have sent it to the entire fleet. These  
3 programs give guidance which is, as I said,  
4 specific on how to implement these  
5 initiatives. And they also explain and set  
6 out the standards and expectations so that a  
7 commander reading these will have a good idea  
8 of what's expected of him and then can be held  
9 accountable.

10 So our recommendation in 29 is in  
11 order to hold commanders accountable, DoD  
12 SAPRO and the service secretaries must ensure  
13 that Sexual Assault Prevention and Response  
14 Programs and initiatives are clearly defined  
15 and establish objective standards when  
16 possible. So that's basically our  
17 recommendation for 29.

18 Recommendation 30, which we'll go  
19 to now, is really just an extension of that.  
20 The service secretaries, it reads, should  
21 ensure sexual assault prevention, response,  
22 performance assessment requirements extend



1 below unit commanders to include subordinate  
2 leaders including officers, noncommissioned  
3 officers and civilian supervisors. This could  
4 not be more important and it's been touched on  
5 before during these proceedings.

6 We know that subordinate leaders  
7 in a unit play a significant role in the  
8 success or failure of sexual assault  
9 prevention and response efforts, and  
10 accountability has to extend beyond commanders  
11 to junior officers, noncommissioned officers,  
12 and civilian supervisors. So that is the  
13 basic backdrop for Recommendation 30.

14 The last recommendation which is  
15 31 is actually a much broader recommendation  
16 which goes beyond the topic of command  
17 accountability. And it reads that, the  
18 Secretary of Defense should ensure all  
19 officers preparing to assume senior command  
20 positions at the grade of O6 and above receive  
21 dedicated, legal training that fully prepares  
22 them to perform the quasi-judicial authority

1 and functions assigned to them under the UCMJ.

2 As we know from all of our  
3 interviews and all of our information and our  
4 study of the UCMJ, many of the decisions made  
5 by commanders are ones that do require  
6 assessing, making judgments about conduct, and  
7 then deciding what should be done about it,  
8 and it's a justice system. Obviously, all  
9 commanders need some training with respect to  
10 this and they receive it. But our  
11 recommendation is that it should be more  
12 intense and be dedicated legal training, not  
13 an ad hoc system.

14 I would just also add that  
15 obviously senior commanders have judge  
16 advocates on their staff who provide constant  
17 advice and training with respect to what we're  
18 calling these quasi-judicial issues. But we  
19 think our recommendation will promote, and we  
20 hope will promote, more dedicated and more  
21 training for commanders in an O6 and above  
22 range to help them with this kind of decision

1 making.

2 So those are the three  
3 recommendations that came from the commander  
4 accountability section which we didn't finish  
5 last week and I would open it up now to any  
6 comments, questions, or deliberation.

7 Colonel? I guess I'll be chair  
8 now. Go ahead, Colonel.

9 COL COOK: Judge Jones, on -- for  
10 the most part I agree with all three, just  
11 some clarifications or some nuances in the  
12 wordings. On Recommendation 29, I agree with  
13 the DoD and SAPRO making sure that everything  
14 is specific. I recommend to change that  
15 introductory language. The goal, I don't  
16 think, is to hold people accountable. The  
17 goal is to identify -- part of me wants to  
18 just say to ensure military leaders understand  
19 their duties and responsibilities, DoD and  
20 service secretaries. The goal is to get them  
21 to adhere to those duties and  
22 responsibilities. It's not to find

1     accountability after the fact. That may be a  
2     consequence if they don't do it, but I would  
3     just recommend stating it more positively.  
4     It's to make sure they know what they're  
5     supposed to do, make sure they do it. The  
6     system is written in a way that if they don't  
7     do it, they could be held accountable  
8     afterward as long as it was clearly defined.  
9     So that's a comment on 28.

10                 CHAIR JONES: And are you thinking  
11     along the lines of to ensure the commanders  
12     know what is expected of them, language along  
13     those lines?

14                 COL COOK: Since you in  
15     Recommendation 30 had extend below, just below  
16     commanders to supervisors, I would say to  
17     ensure military leaders, supervisors and  
18     leaders. Make it more generic to go in  
19     accordance with your recommendation at the  
20     next one. And I'd be okay with that.

21                         And then on Recommendation 31, I  
22     have no objection to the wording of the

1 recommendation. I would recommend a change to  
2 the finding that's in the report itself  
3 because it's not quite accurate.

4 I agree with giving mandatory  
5 training, but dedicated legal training could  
6 be at a capstone course, it could be any kind  
7 of leadership training, but the finding 31-1  
8 said that at the Army and the Navy JAG Schools  
9 they provide senior commanders with mandatory  
10 resident or on-site courses. The courses are  
11 available and they are encouraged to go  
12 resident or on-site, but there are occasions  
13 where military exigencies prevent them from  
14 going. It's not mandatory on site or  
15 residence. They have to get that training.  
16 If they can get to the JAG School that's the  
17 gold standard, but if they can't, there are  
18 SJAs in the field that provide them one-on-one  
19 training. So I would just take the word  
20 mandatory out of that finding.

21 CHAIR JONES: Are you saying that  
22 there is mandatory training, but it doesn't

1 necessarily have to be residential or on-site?

2 COL COOK: No, it's not  
3 necessarily resident of the JAG Schools which  
4 is what your point is in that finding. You  
5 say, for example, the Army and Navy JAG  
6 Schools provide senior commanders -- I would  
7 say with resident and on-site courses on legal  
8 issues. There are other places -- they're  
9 going to get resident training as part of  
10 their leadership courses. It's not always at  
11 the JAG Schools.

12 CHAIR JONES: Okay, then my only  
13 question is, is there any mandatory training?

14 COL COOK: I would say yes. I  
15 would say in the --

16 CHAIR JONES: I'm not taking  
17 mandatory -- there is mandatory training.

18 COL COOK: It's incorporated into  
19 courses of instruction.

20 CHAIR JONES: Okay, fine.  
21 Understood. Yes, General Dunn?

22 BG DUNN: I was just going to

1 clarify that the Army does have mandatory  
2 legal training incorporated into the mandatory  
3 commanders' training at Fort Leavenworth. And  
4 in addition has courses at the Judge Advocate  
5 Generals Legal Center and School which are  
6 focused specifically on commanders that  
7 provide additional training.

8 CHAIR JONES: Anything else? All  
9 right, well I think with those suggestions, we  
10 can make modifications acceptable to  
11 everybody. Based on our discussion, I believe  
12 Recommendations 29, 30, and 31 have been  
13 accepted with those modifications.

14 All right, the remaining session  
15 of our subcommittee report centers on the role  
16 of the commander as convening authority.

17 And on January 30th, this  
18 subcommittee presented its initial assessment  
19 that senior commanders should retain authority  
20 to refer cases of sexual assault to courts-  
21 martial. After deliberations on that initial  
22 assessment, the Panel adopted it with a

1 dissent from Professor Beth Hillman joined in  
2 by Mr. Bryant.

3 Today, the subcommittee reports  
4 out that it remains in agreement that senior  
5 commanders should retain convening authority  
6 and recommends against current legislation  
7 that would modify or remove that authority.  
8 In this regard, we have three recommendations  
9 and Professor Hillman, are you on the phone,  
10 Professor?

11 PROF. HILLMAN: Yes, Judge Jones.

12 CHAIR JONES: Okay, who is a  
13 member of our subcommittee who has presented  
14 -- is dissenting and has presented her written  
15 dissent in Section 10 of our subcommittee  
16 report. Let me begin by presenting some of  
17 our basic findings surrounding the issue of  
18 the convening authority which I think are  
19 important to understand and to our  
20 conclusions.

21 First of all is the fact that the  
22 term commander is not synonymous with the term



1 convening authority. Convening authority is  
2 a person authorized to convene courts-martial  
3 for serious violations of the Uniform Code of  
4 Military Justice. Most commanders are not  
5 convening authorities and only a very few  
6 senior commanders have convening authority.

7           We've also found that commanders  
8 with authority to refer sexual assault  
9 allegations for trial by court-martial are  
10 elevated in the chain of command to the point  
11 that they will not only be removed from any  
12 personal knowledge of an accused or the  
13 victim. And specifically, under the new  
14 legislation enacted by Congress in NDAA 2014  
15 and under current practice, only a general  
16 court-martial convening authority is  
17 authorized to make the decision whether or not  
18 to take the case to trial for the offenses of  
19 rape, sexual assault, and forcible sodomy, as  
20 well as the attempts to commit those crimes.

21           We've also found that the victim  
22 of a sexual assault does not have to report

1 that sexual assault to anyone in their  
2 military unit or any member of their chain of  
3 command. Victims have a number of channels  
4 outside of the chain of command to report  
5 incidents of sexual assault.

6 In addition, under current law and  
7 practice unrestricted reports of sexual  
8 assault must be referred to and investigated  
9 by military criminal investigative  
10 organizations that are independent of the  
11 chain of command and no commander or convening  
12 authority may refuse to forward an allegation  
13 or impede in an investigation.

14 In addition, any attempt to do so  
15 would constitute a dereliction of duty or  
16 obstruction of justice in violation of that  
17 Uniform Code of Military Justice.

18 This subcommittee, as well as the  
19 full Panel, has listened carefully to the very  
20 powerful testimony of victims' advocates and  
21 victims of sexual assaults and we have  
22 witnessed personally the pain and the damage

1 to the community, body, and spirit caused by  
2 those assaults. We are aware that this is not  
3 a new problem in the military and that there  
4 have been many previous efforts by the  
5 military to respond to this problem with not  
6 enough success.

7 We recognize that virtually all of  
8 the victims' advocate groups we heard from and  
9 most of the victims who have testified before  
10 us, earnestly believe that removing the  
11 commander as the convening authority will not  
12 increase victim confidence in military justice  
13 system and promote reporting.

14 We have also listened to a number  
15 of current and former commanders. While some  
16 agree with the position that the convening  
17 authority should be removed, most do not. The  
18 majority stressed the unique society that is  
19 the military, a society based upon discipline  
20 and the need for commanders to maintain good  
21 order and discipline if they are to remain  
22 mission-ready. They honestly believe that the

1 authority to order courts-martial in felony  
2 cases is necessary if commanders are to remain  
3 credible leaders and to enforce values, and  
4 they maintain that if they're to be held  
5 accountable in reducing sexual assaults, they  
6 should also remain responsible for  
7 administering justice.

8           After analyzing these positions,  
9 the subcommittee finds that it is not clear  
10 what impact removing convening authority from  
11 some of the commanders would have on the  
12 military justice process or what consequences  
13 would result to organization, discipline, or  
14 operational capability and effectiveness.  
15 Having said that, we also find that the  
16 evidence does not support a conclusion that  
17 removing authority to convene courts-martial  
18 from senior commanders will reduce the  
19 incidence of sexual assault, increase  
20 reporting of sexual assaults, improve the  
21 quality of investigations or prosecutions or  
22 increase the conviction rate in these cases.

1                   These findings are supported by a  
2 volume of analysis that this subcommittee did  
3 and the experience of the military justice  
4 systems employed by our allies. Although they  
5 have eliminated the role of the convening  
6 authority and have placed prosecution  
7 decisions with independent military or  
8 civilian entities, the evidence does not  
9 indicate that the removal of the commander  
10 from the decisionmaking process has affected  
11 the reporting of sexual assaults. In fact,  
12 despite this fundamental change to their  
13 military justice systems, our allies still  
14 face many of the same issues in preventing and  
15 responding to sexual assaults as the U.S.  
16 military does.

17                   In this regard, we also found that  
18 civilian jurisdictions face under-reporting  
19 challenges in sexual assault cases that are  
20 similar to the military and it is not clear  
21 that the criminal justice response in civilian  
22 jurisdictions where prosecutorial decisions

1 are supervised by elected or appointed lawyers  
2 is more effective.

3 It is also worth noting that we  
4 find that senior commanders vested with  
5 convening authority do not face an inherent  
6 conflict of interest when they convene courts-  
7 martial for sexual assault offenses allegedly  
8 committed by members of their command. First,  
9 if a convening authority has other than an  
10 official interest in a particular case, a  
11 convening authority is required to recuse  
12 himself or herself just as a prosecuting  
13 authority or judge in the civilian world would  
14 have to do.

15 Second, as with leaders of all  
16 organizations, commanders often must make  
17 decisions that will negatively impact  
18 individual members of the organization when  
19 those decisions are in the best interest of  
20 the organization.

21 Our mandate from Congress and so  
22 our focus with respect to the subcommittee on

1 the Role of the Commander is to analyze the  
2 problem of sexual assault and recommend  
3 measures that will be successful in preventing  
4 it and reducing it. The subcommittee does not  
5 believe that there is sufficient evidence to  
6 support that eliminating the convening  
7 authority from the Uniform Code of Military  
8 Justice will achieve either of those results.

9           If we could go to Recommendation -  
10 - well, you have. Recommendation 15 and I  
11 should say here that Recommendation 19 and 15  
12 are virtually identical, so I will go with 15.  
13 It simply reads that Congress should not  
14 further modify the authority under the UCMJ to  
15 refer charges for sexual assault crimes to  
16 trial by a court-martial beyond the recent  
17 amendments to the UCMJ and Department of  
18 Defense policy.

19           And if we could go to  
20 Recommendation 1 now. Recommendation 1  
21 follows from the findings and the  
22 recommendation that I just read which support

1 our recommendation which is that we recommend  
2 against any further modification to authority  
3 vested in commanders also designated as court-  
4 martial convening authorities. So we do not  
5 recommend Congress adopt the reforms in either  
6 the Sexual Assault Training Oversight and  
7 Prevent Act, the STOP Act, or the Military  
8 Justice Improvement Act, also known as the  
9 MJIA.

10 In this regard, we believe that  
11 Congress should not make any further changes  
12 to the convening authority until current  
13 important initiatives that have begun can be  
14 evaluated for their success or failure in  
15 responding to sexual assaults. Congress, over  
16 the last two years, has enacted significant  
17 amendments to the Code to enhance the response  
18 to sexual assault in the military and the  
19 Department of Defense has enumerated and  
20 implemented numerous changes to policies and  
21 programs for the same purpose.

22 Some changes have just been



1 implemented; other amendments to the UCMJ have  
2 not yet been implemented. The Department of  
3 Defense has yet to fully evaluate what impact  
4 these reforms will have on the incidence of  
5 reporting or prosecution of sexual assault in  
6 the military. And so for that reason, we  
7 believe that those changes and implementations  
8 should be given some time.

9 Now to go specifically to the MJIA  
10 and I just will make this distinction between  
11 the two acts, the STOP Act and the Military  
12 Justice Improvement Act both call for the  
13 removal of the commander as the convening  
14 authority, but in the STOP Act, it would be  
15 the creation of a prosecutorial judicial  
16 process which would not include commanders,  
17 but it would only cover sexual assault crimes.

18 In the Military Justice  
19 Improvement Act, it would call for a new set  
20 of military prosecutors and I'll get into that  
21 a little bit more in a moment, but all cases  
22 that one might consider, I guess the easiest

1 way to describe it is felony cases which would  
2 be all serious cases including sexual assault  
3 cases would no longer be in the jurisdiction  
4 of the convening authority, but would go to a  
5 separate group of military lawyers. And I  
6 should say in that regard with respect to  
7 serious felony cases, some have been exempted  
8 under the MJIA which were considered to be  
9 specifically military crimes such as desertion  
10 and other crimes of that type. But otherwise,  
11 all serious felonies are included in the MJIA.

12 In addition to the reasons that  
13 the subcommittee has already given with  
14 respect to this issue, there are a couple of  
15 things that we also find that are of concern  
16 with respect to the Military Justice  
17 Improvement Act. It seems to us that it would  
18 involve significant personnel and  
19 administrative costs. Essentially, it is a  
20 bill that calls for a separate military  
21 prosecution system outside the chain of  
22 command staffed by military lawyers who must

1 be senior judge advocates with prosecutor  
2 qualifications at the level of O6 or above.

3 We have found that the existing  
4 pool of O6 advocates is finite and to  
5 implement the MJIA, these qualified judge  
6 advocates would have to be reassigned from  
7 other assignments that are related to  
8 important aspects of military legal practice.  
9 The problem with this -- in regard to this  
10 specific issue is that this bill, although we  
11 believe that it would involve significant  
12 personnel and administrative costs includes  
13 the statutory restriction on the expenditure  
14 of additional resources or authorization of  
15 additional personnel. That's merely an  
16 additional specific comment with respect to  
17 the MJIA that went into our considerations.

18 Professor Hillman, did you want to  
19 make a statement or present your dissent at  
20 this point?

21 PROF. HILLMAN: Yes, Your Honor.  
22 Thank you for the opportunity to speak and I

1 apologize for not being able to attend in  
2 person.

3 I think these are very important  
4 recommendations and I appreciate the work that  
5 the subcommittee has put into this effort and  
6 also to the members of the Panel for convening  
7 to review these findings and recommendations.  
8 So I won't reiterate what I said before when  
9 I explained why I thought that prosecutorial  
10 discretion belongs with trained and  
11 experienced prosecutors, the same people that  
12 civilian systems and federal and state and  
13 also most well respected military systems rely  
14 on. But I'll just focus on what I view as a  
15 fundamental difference between the way I see  
16 the chain of command and the way the other  
17 subcommittee members see it.

18 Commanders are critical to  
19 military operational success and also to  
20 success in solving difficult problems like  
21 military sexual assault, but the hierarchy of  
22 the military and the impact of rank and of the

1 demographic balance of the military leaves us  
2 with a different problem with respect to  
3 sexual assault than in other circles. And the  
4 subcommittee report likens the sexual violence  
5 in the military precisely to what happens in  
6 the civil sector and I just don't think that  
7 that's a reasonable conclusion, nor do I think  
8 that commanders can be considered as the  
9 solution without some checks on the power that  
10 they have in the military justice system.

11           And really, our military justice  
12 system has already evolved significantly to  
13 reduce the authority of commanders in many  
14 ways that Judge Jones just recounted. This  
15 would be a step that would make the court-  
16 martial process and the entire, from beginning  
17 to end, response to sexual assault something  
18 the commander had a role in, but not something  
19 the commander controlled in a way that  
20 undermines the legitimacy of the entire system  
21 and rejects international norms and U.S. norms  
22 of procedural justice.

1                   So I'll just note that to me, the  
2 fact that commanders continue to run into  
3 trouble in the high profile ways here means  
4 that despite the training which we just  
5 recommended also that be increased for  
6 commanding officers, that putting excessive  
7 legal authority in the chain of command  
8 doesn't solve the problem of commanders erring  
9 in this really critical role. And the quasi-  
10 judicial role that Judge Jones just mentioned,  
11 the training that we're adding to help  
12 commanders manage that, puts them in a very  
13 difficult position.

14                   So the subcommittee report  
15 actually talks quite a bit about the training,  
16 grooming officers for command, and yet we've  
17 had officers groomed for command who have --  
18 who continue to make missteps in this area  
19 that redound to the detriment of victims of  
20 sexual violence in the military today just as  
21 has happened in the past. And I would  
22 privilege the comments of those survivors of

1 military sexual assault rather than those of  
2 commanding officers who I think should retain  
3 the authority to take all these steps that are  
4 so important in changing the climate and  
5 advancing the cultural changes that will  
6 reduce the incidence of sexual assault in the  
7 military, but I see no reason to leave this  
8 decision to prosecute in the chain of command.

9 Thank you, Judge Jones. That's  
10 all I have to say.

11 CHAIR JONES: Thank you, Professor  
12 Hillman.

13 Is there comment, deliberations,  
14 questions from the Panel?

15 MR. BRYANT: Yes, Judge Jones.

16 CHAIR JONES: Mr. Bryant.

17 MR. BRYANT: I had intended to  
18 save the majority of my remarks for  
19 Recommendation 19, but --

20 CHAIR JONES: You know, I think 19  
21 and 15 are so similar that -- feel free to go  
22 ahead now.

1                   MR. BRYANT: Okay, I thought I  
2 would wait until they got -- it was actually  
3 on the board. I disagree with Recommendation  
4 15, Recommendation 1, Recommendation 18, and  
5 I don't know at what point we're going to get  
6 to that, and Recommendation 19.

7                   And let me say that in terms of  
8 specifying sexual assault offenses, I agree  
9 with those who say that if we're going to  
10 limit or change the authority to prefer  
11 charges and initiate general courts-martial,  
12 it should be for all felony-level offenses,  
13 not just for sexual assault. To take that one  
14 crime and carve that out of the rest of the  
15 mix really is -- really will cause some  
16 problems. So when I speak of this, I'm  
17 talking about the general authority of  
18 commanders who have the rank and the position  
19 to initiate general courts-martial in any  
20 felony-level offense.

21                   My memory and my understanding of  
22 my notes from when we were in this very



1 courtroom at one point is that the generals  
2 and admirals who came before us, all well  
3 intentioned, all well experienced -- and I  
4 want to say before I go further that I  
5 certainly admire the work and the diligence  
6 that the Role of the Commander Subcommittee  
7 has put into this. I respect your work and  
8 your findings and your effort to come up with  
9 these recommendations. So it is with all of  
10 that respect for the work that you've put in  
11 that I respectfully disagree with these  
12 following recommendations.

13           When we were here at one point  
14 with several generals and admirals on this  
15 very topic, what came through to me and what  
16 my notes and memory seem to say is that the  
17 primary reason they did not want this  
18 authority taken away from them was they felt  
19 that it would somehow affect morale in the  
20 unit. Well, what are we going to say to the  
21 men and women who we send into battle? Are we  
22 going to suddenly say that Congress does not

1 trust us to make the decisions in courts-  
2 martial when they trust us to send the sons  
3 and daughters of this country into battle?

4           And the other thing was that some  
5 idea that I want the troops to know that if  
6 they have committed these crimes, I'm the  
7 person they're going to have to answer to, and  
8 I just don't see realistically that either one  
9 of those are true, are going to be true. I  
10 asked during other deliberations, do we have  
11 any idea that the average soldier, whether he  
12 be enlisted or even an officer, is going to  
13 have less respect for their commander and all  
14 the other war-fighting decisions that have to  
15 be made just because they're not now going to  
16 be the ones who will decide who is going to be  
17 court-martialed if we give that over to the  
18 professional prosecutors who exist in the  
19 military.

20           The reason that I just don't  
21 believe that is going to be true is that we  
22 have heard nothing publicly, nothing from

1 Congress, nothing before this committee that  
2 the changes that Congress has already made in  
3 restricting the authority of the convening  
4 authorities in a variety of ways in terms of  
5 what punishments and when they can do and  
6 initiate certain charges, we have heard  
7 nothing that suddenly there's a lack of  
8 respect or a lack of morale within the units  
9 because, gee whiz, Congress doesn't trust  
10 General Smith and I don't mean any General  
11 Smith in particular. I mean a hypothetical  
12 General Smith or an Admiral Jones. So we  
13 haven't seen any of that. And I just really  
14 doubt that we would see it if suddenly or  
15 through legislation the convening authority  
16 was taken away in general courts-martial and  
17 given to prosecutors as, much more eloquently,  
18 Dean Hillman has told us about today and  
19 earlier.

20 The other reason that I don't  
21 think it would have that effect is that I  
22 honestly don't believe that the majority of

1 the people in the military even know who the  
2 convening authority is for general courts-  
3 martial. I just don't believe it. And some  
4 proof of that, if you don't mind, is that  
5 obviously, unscientific, random survey that I  
6 have taken the liberty over the last several  
7 months of asking people, both active and  
8 retired, in my neighborhood, in my social  
9 circles, in airports, at Portsmouth Naval  
10 Hospital where for family reasons I've had to  
11 be several days recently, asking active duty  
12 and retired and in my neighborhood, like a lot  
13 of neighborhoods in the Norfolk-Virginia Beach  
14 area, we have -- this is just to my knowledge,  
15 there may be others, a retired commodore, five  
16 retired Navy captains, one active duty Navy  
17 captain and a retired Army O6 colonel.

18                   When I take these random surveys  
19 and just go up and say who's the convening  
20 authority in your unit for general courts-  
21 martial, often the enlisted people just give  
22 me a blank stare because they don't know what

1 I'm talking about. The officers know what I'm  
2 talking about and are generally unsure. When  
3 I say this is random, I'm talking 12 to 15  
4 people total, that's all, just walk up and say  
5 hi, I'm conducting a random anonymous survey,  
6 do you know who the convening authority of  
7 general courts-martial is?

8 Some of the officers will give me  
9 a name or a position. And I will say are you  
10 sure? And they'll say no, I'm not sure.

11 I remember a particular active  
12 duty field grade Army officer who was at a  
13 particular post in the United States, that's  
14 where he was stationed. And when I asked him  
15 he said I think it's the post commander. That  
16 would make sense because we're all within his  
17 purview. But, said this field grade Army  
18 officer, it might be the division commander  
19 because our division headquarters are at a  
20 different post. He wasn't sure. And I just  
21 don't think as we talk about that and look at  
22 that and use our common sense that this idea

1 that the average soldier needs to know that  
2 General So and So or Admiral So and So is the  
3 person they're going to have to answer to and  
4 who can potentially cause them to be charged  
5 with felony offenses, I don't think they know  
6 that any more than the average citizen can  
7 name their prosecutor, except when they see it  
8 on the ballot every four years or can name who  
9 their chief of police is because it's not  
10 something that's in the forefront of their  
11 mind.

12 I hope that our sailors and  
13 soldiers and airmen do not constantly have in  
14 the forefront of their mind with all the other  
15 things that we expect of them who is the  
16 convening authority if I commit a felony. If  
17 that were true in the civilian world, then  
18 maybe we wouldn't have as much crime if they  
19 had constantly in the forefront of their minds  
20 who is the prosecutor, who is the chief of  
21 police. I hope what they have in mind is how  
22 they're going to do their jobs and they have

1 no idea that at some point they may commit  
2 something that's going to cause them to come  
3 before a general court-martial.

4 So I don't think it's going to  
5 affect morale. I don't think that the idea  
6 that the average person in the military knows  
7 who the convening authority is true because I  
8 did not find that to be true in my informal  
9 survey of primarily O6s and below.

10 So the other aspect of that that  
11 comes in my mind is that on one of our site  
12 visits -- this was just the Comparative  
13 Systems Subcommittee, and we agreed that those  
14 comments would be off the record and not  
15 attributable to anyone in particular. But  
16 among the site visits at a major military  
17 facility, we found that the convening  
18 authority there had absorbed convening  
19 authority from other lower-level convening  
20 authorities and was the convening authority  
21 for about 100,000 troops.

22 We also heard that that convening

1 authority always followed the advice of his  
2 SJA. We also heard that that convening  
3 authority for approximately 100,000 troops,  
4 and a direct question was how long is spent on  
5 convening authority matters in a week or a  
6 month, and without hesitation, the answer was  
7 15 minutes a week.

8           Assuming that's all it needs and  
9 that's all it takes, and I have every belief  
10 that that is all it takes, if you're just  
11 doing what the SJA says every time it comes  
12 up. I don't know why it would be the end of  
13 good order and discipline as we know it if  
14 those decisions were being made by a  
15 professional military prosecutor.

16           Another example and I'm sorry that  
17 this answer is long, but since it's going to  
18 cover several recommendations, we all bring  
19 our own experiences and many of you have  
20 fantastic experience way beyond anything that  
21 I could imagine in terms of your military  
22 background. And I respect that and I



1 appreciate that from every one of you. But I  
2 recall when I was first enlisted before I went  
3 to Infantry OCS, guard duty. And for guard  
4 duty, you had to be able to name the, quote,  
5 chain of command. It was amazing how many  
6 people could not remember the chain of command  
7 beyond, say, the brigade commander, even  
8 though you know that when you went to guard  
9 duty, if you didn't know those things, you  
10 were going to be standing in front of a first  
11 sergeant the next morning and then over and  
12 over. So they drilled us. They had us  
13 memorize it before we ever went. And many,  
14 many people could not remember their chain of  
15 command, even as important we stressed that it  
16 was. So again, I have to wonder who is aware  
17 of, in the military today -- I don't even know  
18 if people stand guard duty anymore, but I can  
19 recall once I became an officer, being the  
20 officer of the guard and when I was the one  
21 asking the questions about chain of command,  
22 and again it was difficult for those who were

1 assigned guard duty, even though they had been  
2 drilled and knew from former guard duties that  
3 when they came there they better know the  
4 chain of command which did not frankly involve  
5 a question of who is the convening authority  
6 of a general court-martial. And I don't mean  
7 to be flip about it, but it involved the  
8 normal general chain of command, those who  
9 have their pictures on the wall.

10 And at Portsmouth Medical  
11 Hospital, by the way, the picture of the  
12 convening authority is not on the wall over  
13 there because that's not what affects the  
14 average person at that facility which is a  
15 major facility treating Army, Navy, Air Force,  
16 all sorts of people in our region.

17 But even as officer of the guard,  
18 I found that the ire of the lower commands  
19 came the most when a soldier couldn't name who  
20 the first sergeant was and I'll never forget  
21 the day I went back the next morning and said,  
22 "First Sergeant, So and So didn't know who is

1 his first sergeant." And of course, you could  
2 imagine the verbiage that came out of his  
3 mouth and said he will know who I am before  
4 this day is over.

5 So all those anecdotal stories  
6 just support how, in my mind, it's not really  
7 going to have a morale effect, nor the other  
8 effects in terms of good order and discipline  
9 or I want them to know they're going to be  
10 answering to me because I don't think the --  
11 I don't mean to repeat myself -- I don't think  
12 he average troop and my informal,  
13 unscientific, admittedly unscientific survey,  
14 I didn't find that field grade officers were  
15 sure who was the convening authority for  
16 general courts-martial were, was, is.

17 The other thing that we heard from  
18 the admirals and generals here that was, if we  
19 took this away from commanders, whether it's  
20 the convening authority or commanders, in  
21 general, and it was being handled somewhere  
22 else, that they really wouldn't be paying

1 attention to it. If I'm not responsible for  
2 charging, then I'm not really going to care  
3 about the other aspects of this which struck  
4 me as a very odd thing, if not a very  
5 dangerous thing to be saying. Because I can't  
6 believe that just because I'm not going to be  
7 convening authority, that suddenly sexual  
8 assault in their unit isn't going to be on  
9 their radar.

10 The third or fourth aspect was,  
11 well, just like -- and they gave us an  
12 example, when these offenses occur in town,  
13 they're, quote, off my radar, said one of the  
14 general officers. Off my radar when they  
15 occur in town. And frankly, again, at one of  
16 our site visits, at a major military facility  
17 there, you've got an awful lot of prosecutions  
18 were taking place in the surrounding cities,  
19 we heard just the opposite, no, I track those  
20 every minute. Those cases that are going to  
21 be prosecuted by civilians I track every  
22 minute. I believe our commanders, as

1 conscientious as they are in preparing their  
2 troops for war-fighting, are going to follow  
3 charges whether they are initiated by a  
4 military commander or whether initiated by a  
5 senior military prosecutor who does this as a  
6 profession.

7           The other thing that strikes me  
8 about the necessity to do that is, and this  
9 may get into other aspects, Judge Jones, of  
10 other recommendations is the recommendation  
11 against higher review. It would be higher  
12 review of these decisions by the secretaries  
13 of the services or the next highest general  
14 court-martial level. It would seem to me,  
15 with the presentation and attitude of, yes, we  
16 should do this, we should keep this, this  
17 should be within our purview, I'm confident  
18 that I'm doing the right thing. I'm confident  
19 that I'm getting good advice from my SJA, it  
20 just seems to me that the better tactic and  
21 the better strategy and I'm surprised that  
22 we're not hearing it from the military would

1 be, yes, review what I do. I'm not -- I have  
2 every confidence that what I do is right. Go  
3 ahead and review it. Secretary of the Army,  
4 he can send it to the President, because I  
5 know what I'm doing. And yet, we're hearing  
6 just sort of the opposite. We don't want to  
7 do that. It may cause undue pressure,  
8 unnecessary command influence.

9                   And so I don't understand,  
10 frankly, the military for whom I have a great  
11 deal of respect in their many, many functions  
12 that they have to do and do for us, I don't  
13 understand why they are resisting review of  
14 their decisions at a higher level if they're  
15 so confident that what they're doing is, in  
16 fact, the right thing.

17  
18                   The last -- I'm going to stop in  
19 just a minute. The last thing that occurs to  
20 me is that at least when you have prosecutors  
21 making these decisions, lawyers, licensed  
22 lawyers in whatever state, there is always the

1 possibility of a review of their decision  
2 making in terms of whether or not it's ethical  
3 by their state bar associations and I realize  
4 that there is a body of law that goes back and  
5 forth at the state bar associations can't  
6 dictate what a government lawyer can do and I  
7 experienced that when I was in the U.S.  
8 Attorney's Office. But that prospect is there  
9 that those decisions to prosecute without  
10 sufficient grounds are reviewable as an  
11 ethical violation. That doesn't exist in the  
12 military commanders. So again, I wonder why  
13 they would be critical of a review of their  
14 decision making process.

15 In short and to sum up, I  
16 respectfully disagree with the subcommittee's  
17 Recommendations 1, 15, and 19 and associated.

18 CHAIR JONES: Thank you, Mr.  
19 Bryant. I guess I should say we are now  
20 deliberating as the Panel, so I think I've  
21 made most of the remarks that I intended to  
22 make.

1                   Are there additional statements or  
2 remarks that anyone else would like to make?  
3 And I know, Professor Hillman, you're on  
4 there.                   Ms. Fernandez, are you on  
5 there?

6                   MS. FERNANDEZ: I am.

7                   CHAIR JONES: Thank you very much.  
8 Okay. Any other comments?

9                   Admiral?

10                  VADM HOUCK: As a member of the  
11 subcommittee who is supportive of the  
12 recommendations of the subcommittee, I want to  
13 make just a couple of very brief remarks.

14                  I think fundamentally the Uniform  
15 Code of Military Justice has played a  
16 fundamental role in the success of the U.S.  
17 armed forces over the past several decades and  
18 that the role of the commander in the UCMJ has  
19 also been fundamental to the success of the  
20 UCMJ and the role that the UCMJ has played.

21                  Throughout this nearly year-long  
22 process, at every turn, at every opportunity,



1 I and others have asked the question of  
2 proponents of change of removing the commander  
3 from the process for empirical evidence, for  
4 some evidence to suggest that this would make  
5 a difference, that the significant and  
6 arguably radical change, removing the  
7 commander from the process would be supported  
8 by some notion that it was going to make a  
9 difference. This question has been asked of  
10 the domestic proponents. It's been asked of  
11 proponents from foreign militaries. It's been  
12 asked of law enforcement and judicial officers  
13 from civilian jurisdictions, even in the  
14 United States.

15 There has been no evidence, none,  
16 zero evidence that this change would make a  
17 difference. Judge Jones made that point in  
18 her preliminary remarks, but I wanted to  
19 reinforce it. There has been speculation.  
20 There has been anecdote, but there has been no  
21 evidence that this would make a difference.

22 I think one of the things that has

1 gone a little but unnoticed in this process is  
2 that what I think is the interesting  
3 phenomenon that of the proposal for these  
4 changes, that the proposals are not to remove  
5 the military from the process, but to put the  
6 onus of the decision making on military  
7 prosecutors. I find it interesting and  
8 fascinating that not a single trained,  
9 licensed, military prosecutor that has  
10 appeared before this Panel throughout the  
11 course of the past year has supported the very  
12 change that is supposed to put military  
13 prosecutors in charge of this process.

14 I think some might argue that  
15 yeah, that's because many of them were on  
16 active duty and are beholden to the chain of  
17 command and are going to be unwilling to speak  
18 freely about that. I'm not. Having served  
19 for 27 years as a licensed attorney in the  
20 United States armed forces, I've seen it in a  
21 variety of vantage points.

22 I think it would be a significant

1 error to remove commanders from this decision-  
2 making process because I believe that the  
3 commanders play a constructive role which is  
4 not to say that commanders are always perfect.  
5 In a system as large as the United States  
6 armed forces and as many people who are  
7 involved in decisions, you will have people  
8 that make decisions that are questionable.  
9 You will have people who make decisions that  
10 are arguably wrong. But I think that by and  
11 large, and this admittedly is anecdotal on my  
12 own part, the dialogue that goes on between  
13 judge advocates and commanders who know their  
14 units is enormously productive and enormously  
15 beneficial and serves the interest of justice.

16 I think that there are many, many  
17 changes that this Panel is going to endorse,  
18 not only the Role of the Commander  
19 Subcommittee, but the other two subcommittees  
20 as well, significant changes that are going to  
21 make a difference in fighting the scourge and  
22 contemptible crime of sexual assault in the

1 military. I think those changes will make a  
2 difference. I do not think that removing the  
3 commander from the process is going to be  
4 productive, but that the other changes are the  
5 way to go. Thank you.

6 CHAIR JONES: Thank you, Admiral  
7 Houck.

8 Is there anyone else who would  
9 like to comment? Ms. Holtzman?

10 REP. HOLTZMAN: Thank you, Judge  
11 Jones. I made comments on this issue before,  
12 but since the dissenters are speaking out, I  
13 just thought that the public should not think  
14 that by our silence we are not responding to  
15 the dissent. So I just want to make a few  
16 points on which I made before. I'll try to be  
17 real brief.

18 First of all, the claim that we  
19 need to privilege victims, we have heard from  
20 no victims of crimes other than sexual assault  
21 and yet, this is a change over the fact the  
22 prosecution of every serious crime in the

1 military, aside from specifically military  
2 crimes, as you mentioned, Judge Jones, such as  
3 desertion. We have no evidence to support the  
4 need for such a change with regard to those  
5 crimes and yet that demand has been made to us  
6 without evidence.

7           Secondly, the idea that somehow  
8 putting the decision making into the hands of  
9 professional prosecutors is a panacea is  
10 wrong. I want to say first I have no military  
11 experience and I don't speak from that  
12 perspective. But I was a prosecutor in the  
13 fourth largest office in the United States for  
14 eight years. I have some familiarity with  
15 that system. I would say most of the people  
16 who worked for me were dedicated,  
17 conscientious, trained, caring people. But  
18 they made mistakes and right now, in Brooklyn,  
19 New York there is a special panel that has  
20 been convened to review cases of serious  
21 prosecutorial misconduct over the past 20 or  
22 25 years.

1                   So the idea that, oh, if we take  
2                   it away from a commander and give it to a  
3                   professional prosecutor we are going to have  
4                   justice. I mean that's just nonsense. And I  
5                   think sadly contemporary history shows the  
6                   contrary. People are human beings and they  
7                   can make mistakes. What you try to do is have  
8                   trained, competent people and actually this  
9                   system in the military justice has its checks  
10                  and balances which we don't really have in a  
11                  prosecutorial system. After all, the  
12                  convening authority must, M-U-S-T, has to,  
13                  discuss the decision of whether to prefer  
14                  charges with his or her SJA which means there  
15                  is already a discussion of a need to prove  
16                  your case. And the special judge advocate can  
17                  raise any disagreement that he or she has with  
18                  the convening authority to higher level. But  
19                  the idea that there's no review, I think, with  
20                  all due respect is not quite accurate. There  
21                  is a check and balance in this system.

22                                   And I think without spelling out

1     how the prosecutorial role is going to be  
2     played here, it would be irresponsible to  
3     change a system and say oh, we'll let the  
4     professional prosecutors handle it without  
5     describing how that's going to happen and  
6     without funding it.

7                     And finally, the idea that people  
8     don't know who the convening authority is and  
9     the anecdotal research that's been done, I  
10    think that that's -- my own sense is that that  
11    is the results of that endeavor reflect my own  
12    intuition which is that many people don't know  
13    who the convening authority is and the  
14    conclusion that can be drawn from that is not  
15    that you need to change the system, but that  
16    the absence of knowledge of who the convening  
17    authority is, is not affecting the decision  
18    one way or another of the person who is a  
19    victim of crime to come forward. That's the  
20    conclusion that I draw. I know everybody is  
21    very passionate about changing a system that  
22    has produced too much sexual assault and too

1 much pain and sorrow for the victims and too  
2 much disgrace for a great military and to this  
3 nation. But we should not be looking for a  
4 silver bullet that's going to solve this  
5 problem. It's an unrealistic effort. We owe  
6 the victims more than that.

7 I think there are serious and  
8 important and systematic changes that are  
9 being made, need to be made such as Special  
10 Victims' Counsel that will have an enormous  
11 and profound effect on how the military  
12 handles this system and how victims handle it.  
13 But I think this is an ill-advised, not  
14 thought through proposal, very well  
15 intentioned because people want to solve this  
16 problem, but the problem -- this is not the  
17 solution to the problem. Thank you.

18 CHAIR JONES: Thank you, Ms.  
19 Holtzman. Anyone else? Colonel Cook?

20 COL COOK: If I may? And I agree  
21 with the subcommittee on this and with the  
22 comments just offered by Representative



1 Holtzman and Admiral Houck. And one of the  
2 things I just wanted to take on from what  
3 Representative Holtzman had said and one of my  
4 biggest concerns is as you noted, the  
5 convening authority now must confer with the  
6 judge advocate. If we take this out and put  
7 it just in the judge advocate channels, that  
8 reciprocal requirement wouldn't be there and  
9 I will say that you would take away a fairness  
10 perspective that's there.

11           The military is not the civilian  
12 community where somebody may get into trouble.  
13 You go through a disciplinary action. They go  
14 to jail. They go home. They get probation.  
15 And the problem is solved. Within the  
16 military that command structure and that  
17 command unit continues to exist. The  
18 questions that are presented are not always  
19 just legal decisions. Good order and  
20 discipline is more than that. Things like bad  
21 checks; somebody not doing their job or  
22 they're late for work, dereliction of duty, if

1 you will; an improper relationship, for us,  
2 fraternization. They affect the way that  
3 command is going to operate. They affect the  
4 morale and welfare of everybody if they're not  
5 addressed and I do agree with that concept.

6 You don't pull the convening  
7 authority out of one offense, but not all. So  
8 assume you pull them out of all, you need that  
9 judge advocate and commander discussion. The  
10 lawyer is going to bring to the perspective,  
11 hey, this is what the requirements are. This  
12 is everything you need to be aware of. And  
13 the commander is going to bring to the  
14 discussion the holistic impact it has on that  
15 unit, what should be done.

16 The fact that somebody does  
17 something wrong doesn't automatically mean  
18 it's a court martial and there's a whole host  
19 of tools that are out there. So I'd say that  
20 the system the way it is now that forces a  
21 convening authority to confer with the judge  
22 advocate, especially if the general court

1 martial convening authority, it is a high-  
2 level officer who's got a lot of experience  
3 providing that advice, the benefit to the  
4 entire community that's affected, the unit,  
5 the accused, and the victims that are  
6 involved, it's not all crimes, have a person  
7 as a victim, some of them are victimless, but  
8 everybody's interests are considered as part  
9 of a holistic review with those two people  
10 being involved. And to take out one side or  
11 the other, the military is going to lose that  
12 synergy that, as Admiral Houck said, has  
13 proven effective and the perception of  
14 fairness over the years.

15 CHAIR JONES: Thank you, Colonel  
16 Cook.

17 Ms. Fernandez, General Dunn,  
18 General McGuire, any further comments?

19 MS. FERNANDEZ: This is Mai  
20 Fernandez. I don't have any at the time.

21 CHAIR JONES: All right, thank  
22 you. PROF. HILLMAN: Judge

1 Jones?

2 CHAIR JONES: Yes.

3 PROF. HILLMAN: This is Beth  
4 Hillman.

5 CHAIR JONES: I'm sorry,  
6 Professor.

7 PROF. HILLMAN: I'd just like to  
8 make a point briefly.

9 CHAIR JONES: Sure, go ahead.

10 PROF. HILLMAN: I just wanted to  
11 say that I appreciate the comments of  
12 everybody on these issues. I understand that  
13 we disagree. It's a perspective on where the  
14 system is headed and how we're negotiating  
15 around what I see as a central problem as  
16 opposed to whether this is -- that all the  
17 changes actually are able to support this sort  
18 of central premise.

19 I just wanted to mention in  
20 response to Admiral Houck's statement that  
21 there's no judge advocate for the record  
22 stating that we should make this change.

1                   I have heard from many judge  
2 advocates who think that we should, but  
3 they're not on the record for a reason,  
4 because they're in the line of duty, because  
5 it doesn't help their -- there are some who  
6 have written about this, but it's not in their  
7 interest and it's actually not in their job  
8 description to get out there and to make  
9 statements that are contrary to what their  
10 commands are saying on this very issue and  
11 testimony before us.

12                   The military is not monolithic.  
13 There are many brilliant lawyers throughout  
14 the services who have a range of different  
15 opinions on all the issues that we're trying  
16 to address. And I appreciate all of that  
17 experience that we hear from, but considering  
18 all of those judge advocates out there with  
19 all the different experiences they have as  
20 agreeing on any particular point is just a  
21 mistake in terms of understanding where  
22 they're coming from on this. That's all.

1 Thanks, Judge Jones.

2 CHAIR JONES: Thank you,  
3 Professor. All right, then with respect to --  
4 and let me just go back up to the podium for  
5 a minute. Will you put Recommendation 19 up  
6 there, the actual recommendation? Pardon me?  
7 I think we were showing 15 originally,  
8 correct? Oh, I'm sorry, okay.

9 The reason 19 is not even in the  
10 deck is it says the same thing as 15. So at  
11 this point, I believe that we have two  
12 dissents from the recommendations which are 15  
13 and 1 of the Role of the Commander  
14 Subcommittee, with the remaining members of  
15 the Panel in favor of those recommendations.  
16 Is that correct?

17 PROF. HILLMAN: Yes, that's  
18 correct.

19 CHAIR JONES: Then those two  
20 recommendations are accepted.

21 All right, I'd like to move on  
22 then to Recommendation 2 of the Role of the

1 Commander Subcommittee.

2 This is actually a recommendation  
3 that's also been made in substance by the  
4 Comparative Systems Committee. And it's our  
5 recommendation that Congress should not adopt  
6 Section 2 of the Victims Protection Act of  
7 2014. And we believe that the decision  
8 whether to refer a case to courts martial  
9 should continue to be a decision formed by the  
10 convening authority in consultation with his  
11 or her staff judge advocate.

12 The act that we're recommending  
13 against is actually legislation that would  
14 mandate secretarial review of cases involving  
15 sex-related offenses when the senior trial  
16 counsel on a case recommends that charges  
17 should be referred to trial and the convening  
18 authority  
19 upon the advice of her staff judge advocate  
20 decides not to refer charges. And I think you  
21 alluded to this, Mr. Bryant, a little bit.

22 MR. BRYANT: Yes, ma'am.

1                   CHAIR JONES:  Basically, our  
2                   subcommittee, as well as the Comparative  
3                   Systems Subcommittee, think it's just simply  
4                   inappropriate to elevate the assessments of a  
5                   trial counsel and trial counsel are generally  
6                   more junior and less experienced than the  
7                   staff judge advocate who is advising the  
8                   convening authority to elevating that  
9                   assessment to require review when it's in the  
10                  convening authority and a much more  
11                  experienced staff judge advocate.

12                  So we agree with Comparative  
13                  Systems, and although theirs has not been  
14                  deliberated or voted on yet, we would  
15                  recommend that you agree with our  
16                  Recommendation 2.  Is there any discussion  
17                  with respect to that?

18                  Mr. Bryant?

19                  MR. BRYANT:  Yes.  Judge Jones,  
20                  thank you.  Again, it goes without saying that  
21                  I have the great respect for the work that  
22                  this Role of the Commander Subcommittee has



1 done.

2 In terms of review at a secretary  
3 level, I would re-adopt my earlier statements.  
4 I guess in a courtroom, Judge Jones, you would  
5 hear one of the lawyers say "I have a  
6 continuing objection."

7 CHAIR JONES: You've got it, Mr.  
8 Bryant.

9 MR. BRYANT: Yes, to that. But I  
10 just want to point out that our commanders at  
11 almost every level, at every level are subject  
12 to review in almost everything else they do,  
13 especially when they are in their war-fighting  
14 capacity. The decision to launch an air  
15 strike, the decision to call in artillery, the  
16 decision even to where to place a particular  
17 outpost is going to be subject to review,  
18 especially when something goes wrong.

19 There have been numerous times in  
20 Afghanistan and one in particular stands out  
21 in my mind that I'm aware of and watched young  
22 Sergeant White receive the Congressional Medal

1 of Honor this week in the East Room of the  
2 White House and that particular unit, not that  
3 event that he was involved in, but another  
4 event by that unit was highly scrutinized at  
5 all levels, up through the United States  
6 Senate over the decision of where that unit  
7 was placed, what preparations were made to  
8 defend the perimeter, to supply water, all  
9 sorts of things was questioned and reviewed up  
10 through two- and three-star generals.

11 Who was being reviewed? A company  
12 commander, a battalion commander, and a  
13 brigade commander. It went on for over a  
14 year, maybe two. I may be short on how long  
15 it went on. But the point is -- and they were  
16 all eventually cleared of having -- of any  
17 wrongdoing or dereliction of duty or any of  
18 those things. But my point is our military  
19 commanders are subject to review in much, much  
20 more serious events when life and death is on  
21 the line for our young soldiers and sailors  
22 and airmen and why there wouldn't be the

1     tactic, the strategy, for the military to come  
2     in here and say yes, by golly, go ahead,  
3     review me, I ask that you review me because  
4     I'm confident that the things that I do are  
5     right. Or when I play prosecutor, when I play  
6     judge, I know I'm confident that I'm doing the  
7     right thing. So please, review my decisions.  
8     Thank you.

9                   CHAIR JONES: All right. I just  
10    have one comment which is to say that I think  
11    Recommendation 2 is not so much about kicking  
12    a decision to a higher up, it's about --  
13    because frankly, with respect to charging  
14    decisions by convening authorities, there are  
15    provisions for when there's a disagreement  
16    with the staff judge advocate for there to be  
17    higher review. Article 6 provides for it.  
18    Congress has now more legislation that will  
19    send it to as high as the secretary.

20                   This provision, I think, is really  
21    about having someone junior in the process  
22    being able to stop the train and ask for a

1 review to go forward. And it seems even -- I  
2 won't say even from, in my experience it would  
3 be unusual to have or to permit someone who is  
4 junior in the system to be able to not just  
5 challenge and debate, but also have the  
6 ability to engender a review above a more  
7 senior person. And I think that's the main  
8 reason behind that.

9 Did anyone else have a comment?

10 Mr. Bryant, I understand that you  
11 dissent. Does anyone else dissent from  
12 Recommendation 2? All right, then that's  
13 accepted. Thank you.

14 Recommendation 3.

15 COL COOK: I'm sorry, Judge Jones,  
16 just to qualify, Recommendation 2 that's  
17 accepted, but you're using the language that  
18 the Comparative Systems report had done or the  
19 language that you have --

20 CHAIR JONES: No, our --

21 COL COOK: Your language, okay.

22 CHAIR JONES: Our language.

1 Recognizing that we may have to reconcile them  
2 when we deliberate Comparative Systems.

3 COL COOK: I just wanted to  
4 clarify.

5 CHAIR JONES: Right, thank you,  
6 Colonel.

7 PROF. HILLMAN: Judge Jones, can  
8 you hear me? This is Beth Hillman.

9 CHAIR JONES: Oh, yes, Professor.

10 PROF. HILLMAN: I'm just in the  
11 continuing objection category of Mr. Bryant,  
12 just to be clear on that.

13 CHAIR JONES: Oh, all right.  
14 Thank you.

15 PROF. HILLMAN: Thank you.

16 CHAIR JONES: Do we have three?  
17 Let me start talking about it anyway. Section  
18 3(d) of the Victims Protection Act of 2014  
19 calls for a climate assessment following each  
20 report of a sexual offense. And frankly, our  
21 thinking in recommending that Congress not  
22 adopt this fairly straight-forward, it's just

1 not clear to us at least, the subcommittee,  
2 how that assessment would necessarily be  
3 effective. And also, we have a lot of concern  
4 that has been discussed by the subcommittees  
5 and panels before about more surveys causing  
6 more survey fatigue. And frankly, we think  
7 there are probably better ways to respond to  
8 each individual sexual assault incident.

9           And our recommendation is not only  
10 that Congress should not adopt 3(d) of the  
11 VPA, but also that the Secretary of Defense  
12 should direct the formulation of a review  
13 process to be applied following each reported  
14 instance of sexual assault to determine the  
15 noncriminal factors surrounding the event.  
16 And such reviews should address what measures  
17 ought to be taken to lessen the likelihood of  
18 recurrence and that could be physical  
19 security, lighting, access to alcohol offered  
20 at establishments, etcetera. I have very  
21 little doubt that those types of things are  
22 not being done now by military investigators,

1 but I think as with all things, having a  
2 formulation for such a review process could  
3 standardize it and would be very helpful.

4 And I know that some of commands  
5 have developed review processes and we think  
6 they should be evaluated in connection with  
7 this so that the DoD can formulate a review  
8 process. Are there any comments with respect  
9 to Recommendation 3?

10 COL COOK: Judge Jones, a  
11 question. You're not suggesting that they  
12 come up the review process, but the --

13 CHAIR JONES: I'm sorry, I'm just  
14 having a little trouble hearing you.

15 COL COOK: I'm sorry. In that  
16 recommendation, I don't have a problem with  
17 the review process. I guess my question is  
18 you're not suggesting that be pulled up at a  
19 higher level to review them more centrally.  
20 It can be a review process that's built in at  
21 the local command as they do it.

22 CHAIR JONES: Yes, I think that

1       only the local command can do it. I agree.

2       Thank you. Anything else?

3                   MR. BRYANT: Judge Jones --

4                   CHAIR JONES: Yes, Mr. Bryant.

5                   MR. BRYANT: -- I just want to

6       make it clear for the record that my

7       continuing objection does not apply to

8       Recommendation 3. I do agree with

9       Recommendation 3.

10                   CHAIR JONES: Okay, thank you. I

11       think we can move now to -- you can tell me

12       what's next on your slide deck. Fourteen,

13       okay.

14                   You know, in the course of the

15       subcommittee's review of reporting, generally,

16       by sexual assault victims or failure to report

17       for that matter, we learned that a number of

18       -- could you put the findings up, please?

19                   Particularly junior members of the

20       military scored lowest in understanding the

21       options for filing a restricted report and the

22       results of this survey that was done showed



1 that nearly one half of junior enlisted  
2 personnel surveyed thought that they could  
3 make a restricted report to someone in their  
4 chain of command.

5                   So for that reason, we have  
6 recommended 14 and let me read the text of it  
7 to you: "that the Secretary of Defense should  
8 direct DoD SAPRO to ensure sexual assault  
9 reporting options are clarified to ensure all  
10 members of the military, including the most  
11 junior personnel, understand their options for  
12 making a restricted or an unrestricted report  
13 and the channels through which they can make  
14 a report."

15                   It was pretty clear as we listened  
16 to witnesses and also did site visits, for  
17 instance, that there was some confusion about  
18 who you could report to and still have a  
19 restricted report. And so we think that this  
20 is a very important recommendation so that in  
21 this particular area which is so important to  
22 victims that there is a real effort to clarify

1 the rules.

2 Are there any comments with  
3 respect to 14?

4 MR. BRYANT: Just to say that my  
5 standing objection does not apply to  
6 Recommendation 14.

7 CHAIR JONES: All right, thank  
8 you, Mr. Bryant. Then the Panel will accept  
9 Recommendation 14. Thanks.

10 I think then we should have 16,  
11 17, or 18 next? Seventeen, okay.

12 All right, Recommendation 17, "the  
13 Secretary of Defense should direct the  
14 Military Justice Review Group or the Joint  
15 Service Committee to evaluate if there are  
16 circumstances when a general court martial  
17 convening authority should not have authority  
18 to override an Article 32 investigating  
19 officer's recommendation against referral of  
20 an investigative charge for trial by court  
21 martial."

22 Obviously, at this stage and never

1 has a convening authority been bound by the  
2 recommendation made by an investigating  
3 officer from an Article 32. And so obviously  
4 the question here is whether or not they  
5 should now under certain circumstances be  
6 bound by it. And our recommendation is simply  
7 that this is something that ought to be  
8 reviewed in either the Joint Service Committee  
9 or the Military Justice Review Group, or both  
10 of them review appropriate places to review  
11 it.

12 Obviously, Article 32 has changed  
13 with most recent legislation. And I think at  
14 this point it's fair to say that it's not  
15 entirely clear what the scope of Article 32s  
16 are going to be in the future. They appear to  
17 be trending more towards preliminary hearings  
18 and clearly the victim under the new  
19 legislation can no longer be ordered to appear  
20 for testimony.

21 Nonetheless, it appears that  
22 defense -- defendants will still be calling

1 witnesses and having testimony taken before  
2 their investigating officer and so the report  
3 of the investigating officer is still likely  
4 not just to have a finding of probable cause  
5 or no probable cause, but may still contain  
6 findings with respect to the facts and the  
7 strength of the proof in recommendations with  
8 respect to the case on those grounds.

9           So I think at this point that's  
10 one very good reason since everything is in a  
11 bit of a state of flux not to be making any  
12 recommendations ourselves and to be suggesting  
13 -- recommending it go to these two other  
14 potential reviewers.

15           Are there comments or  
16 considerations anyone would like to make with  
17 respect to that recommendation?

18           MR. BRYANT: Judge Jones, as a  
19 member of the Comparative Systems  
20 Subcommittee, I am in favor of our  
21 Recommendation 45(d) which is listed as being  
22 somewhat comparable, but it's not quite the

1 same as Recommendation 17, so I have some  
2 hesitancy in not opposing Recommendation 17.

3 CHAIR JONES: You know what, Mr.  
4 Bryant? You are completely right. There is  
5 a Comparative Systems recommendation and if I  
6 recall it correctly, it's that if the  
7 investigating officer finds no probable cause  
8 essentially, that that should be binding on  
9 the convening authority and we have not  
10 deliberated that because there's not yet a  
11 final report.

12 I would be happy to wait on taking  
13 a vote on this until we --

14 MR. BRYANT: Obviously, I defer to  
15 you as chairman of your subcommittee and  
16 chairman of this Panel as to whether or not we  
17 do that. I would point out that one  
18 difference in the Comparative Systems  
19 Subcommittee recommendation is that military  
20 judges would become the hearing officers in  
21 what the revised Article 32 is. So that would  
22 be a difference and a nuance that I don't see

1 as part of the recommendations or findings in  
2 17.

3 CHAIR JONES: Well, actually, you  
4 make a good point. I think I would be in  
5 favor of our recommendation now that I realize  
6 we're only talking about investigating  
7 officers who are judge advocates, but not  
8 judges, not military judges.

9 I will switch my position thanks  
10 to your help and go back to recommending our  
11 subcommittee's Recommendation 17. I don't see  
12 that it is in conflict now with Comparative  
13 Systems.

14 Any -- Colonel?

15 COL COOK: I would agree with the  
16 Role of the Commander's Recommendation 17 and  
17 I would object to the Comparative Systems'  
18 recommendation with all due respect.

19 CHAIR JONES: Well, we're actually  
20 not deliberating that now, but please feel  
21 free to --

22 COL COOK: One of the big

1 differences is that you're going to mandate  
2 that a military judge become the Article 32  
3 officer in all cases and if they make a  
4 determination in some regards it becomes  
5 binding. I don't think we've had sufficient  
6 evidence to jump to that. I don't think  
7 there's been a need and I don't think anyone  
8 has looked at the feasibility of requiring  
9 military judges to sit as that 32 officer in  
10 all cases.

11           And the testimony that we heard at  
12 our last proceeding said that the military  
13 judge that had been -- the former military  
14 judge and member of the subcommittee that had  
15 been presenting us information had advocated  
16 that it be that same judge at the Article 32  
17 and then later at the trial in most cases.

18           And again, not knowing what an  
19 Article 32 is going to develop into -- if the  
20 defense attorney presents their case there and  
21 they have the opportunity to see how the  
22 evidence lays out, do you have the same judge

1 sitting at the trial later on? So I strongly  
2 concur with the recommendation that's on the  
3 screen now, but I'm not sure I agree with the  
4 other one.

5 CHAIR JONES: All right, thank  
6 you.

7 PROF. HILLMAN: Judge Jones?

8 CHAIR JONES: Yes, Professor.

9 PROF. HILLMAN: Thank you, Judge  
10 Jones. I'm sorry -- I want to let our staff  
11 -- our staff is working really hard to get  
12 this report out and I regret that the Panel  
13 doesn't yet have the Comparative Systems  
14 Subcommittee's full report and discussion, but  
15 because of all the hard work and site visits  
16 and efforts of the subcommittee members and  
17 then the staff, I'd like to wait to talk about  
18 those until actually the Panel members have  
19 the benefit of that report.

20 CHAIR JONES: All right. Are you  
21 saying you don't want to take a position on  
22 the recommendation we're making now?



1                   PROF. HILLMAN: No, ma'am, I'm  
2 not. Seventeen was fine.

3                   CHAIR JONES: Okay, got you.  
4 You're fine with 17. Very good. Okay.

5                   Then Role of the Commander  
6 Recommendation 17 is accepted, despite my best  
7 efforts to confuse people.

8                   What's our next -- Recommendation  
9 18, "Congress should not adopt additional  
10 amendments to Article 60 of the Uniform Code  
11 of Military Justice beyond the significant  
12 limits on discretion already adopted and the  
13 President should not impose additional limits  
14 to the post-trial authority of convening  
15 authorities."

16                   I think we're all aware of the  
17 provisions in FY14 NDAA which modifies Article  
18 60. And really does significantly limit post-  
19 trial authority and discretion for convening  
20 authorities with respect to sexual offenses.  
21 They cannot disapprove findings and they can't  
22 -- and it reduces their discretion to reduce

1 the court martial sentence for sexual assault  
2 offenses.

3 I think I may ask Professor  
4 Hillman for some help here. You have a  
5 similar provision about Article 60, Professor,  
6 and I think it has to do with possibly  
7 amending it so that convening authorities  
8 would have the right to hold off on the  
9 forfeiture of the accused's assets so that  
10 their families might be able to keep those for  
11 their support. Am I right about that?

12 PROF. HILLMAN: Yes, Your Honor.

13  
14 CHAIR JONES: Am I right about  
15 that?

16 PROF. HILLMAN: Yes, Your Honor.

17 CHAIR JONES: That would be  
18 something we're recommending. I frankly don't  
19 know. Are there more or additional amendments  
20 that are floating around right now to Article  
21 60? I'll have to go to Colonel Green. Okay.

22 So it's basically then without

1 prejudice to the Comparative Systems  
2 recommendation which we'll talk about at an  
3 upcoming session. The Role of the Commander  
4 Subcommittee's recommendation is straight out  
5 that there shouldn't be any additional  
6 amendments to Article 60 that would  
7 significantly limit, further limit the  
8 convening authority's authority.

9 Are there any comments about that?

10 MR. BRYANT: I disagree.

11 CHAIR JONES: All right, then.

12 That recommendation is also accepted.

13 PROF. HILLMAN: Judge Jones, I  
14 disagree, too. I just wanted to clarify. My  
15 disagreements are actually on the record in  
16 the separate statement, so I'm not going to  
17 interrupt you from a long distance any more on  
18 that. Thank you.

19 CHAIR JONES: All right, thank  
20 you, Professor.

21 Next. This recommendation has to  
22 do with a topic that both the Role of the

1 Commander and the Comparative Systems  
2 Committees have looked at to some extent,  
3 Comparative Systems, I believe, more than the  
4 Role of the Commander Subcommittee. And it  
5 relates to modifying authority for specific  
6 quasi-judicial responsibilities. What we're  
7 talking about is discovery, selecting the  
8 court martial panel, authorizing searches,  
9 appointment and funding of experts and  
10 witnesses and consultants, the procurement of  
11 witnesses. And basically, there has been a  
12 lot of discussion about the feasibility of  
13 modifying the authority of the convening  
14 authorities in these areas and switching some  
15 of this authority to military judges.

16 It's the consensus of the Role of  
17 the Commander Subcommittee that the Secretary  
18 of Defense should direct the Military Justice  
19 Review Group or the Joint Service Committee to  
20 evaluate the feasibility and consequences of  
21 doing this, of modifying authority for  
22 specific quasi-judicial responsibilities that

1 are currently assigned to convening  
2 authorities.

3 And as I said earlier, including  
4 discovery oversight, court martial panel  
5 member selections, search authorization and  
6 other magistrate duties, appointment and  
7 funding of expert witnesses, and expert  
8 consultants and procurement of witnesses.

9 Our subcommittee just thinks that  
10 a lot of further study is necessary in order  
11 to fully assess what the positive and negative  
12 impacts would be from changing some of these  
13 pre-trial or trial responsibilities that  
14 convening authorities now have.

15 Comments?

16 PROF. HILLMAN: Your Honor, this  
17 is Beth Hillman. I just wondered where is  
18 that in the subcommittee report? Are you  
19 talking about a particular recommendation?  
20 I'm sorry if I got lost there.

21 CHAIR JONES: I'm talking about  
22 Recommendation 16.

1                   PROF. HILLMAN: Sixteen.

2                   CHAIR JONES: Sorry.

3                   PROF. HILLMAN: No, no. It's my  
4 fault. Fair enough, so I'm caught up. This  
5 is -- I was just reading in the report about  
6 it there.

7                   CHAIR JONES: And this would  
8 obviously be a recommendation that would  
9 differ from the one that I believe your  
10 subcommittee is planning to make. But I'd  
11 love to hear from you on that.

12                   PROF. HILLMAN: That's correct,  
13 Your Honor.

14                   CHAIR JONES: Okay.

15                   BG DUNN: May I speak for one  
16 moment?

17                   CHAIR JONES: Yes, General Dunn.

18                   BG DUNN: Professor Hillman, this  
19 is Malinda Dunn. If I speak in error, please  
20 correct me. But I think that the RSS  
21 Subcommittee vision is that you would insert  
22 the military judge in the process sooner, not

1 necessarily change the authority of the  
2 convening authority, but insert the military  
3 judge in the process sooner.

4           So in terms of this recommendation  
5 and what may be discussed when the RSS  
6 recommendations are discussed, I think if we  
7 approve both of them it would be a little  
8 inconsistent. At some point, we're going to  
9 have to square this recommendation with the  
10 RSS recommendation.

11           PROF. HILLMAN: Agreed, General  
12 Dunn.

13           CHAIR JONES: All right. I think  
14 that is exactly what my concern was. So why  
15 don't we discuss Recommendation 16 and the CSS  
16 recommendation together because they will be  
17 inconsistent.

18           And I think actually, General  
19 Dunn, it goes way beyond just having the  
20 military judge come in sooner, although I  
21 think that's your point that it probably would  
22 be completely opposite to what we're talking

1 about here.

2 We're not against any of these  
3 things. We're merely recommending study. But  
4 you're right, there would be a different  
5 position in the CSS recommendation.

6 BG DUNN: And these would be the  
7 bodies that would study the concept of putting  
8 the judge into the process earlier, so it may  
9 just be a matter of modifying that --

10 CHAIR JONES: I am happy to hold  
11 Recommendation 16 of our committee, the  
12 subcommittee, Role of the Commander, until we  
13 get to the relevant CSS recommendation.

14 All right. I think we're at the  
15 last of the Role of the Commander  
16 recommendations. And this recommendation is  
17 that "the Secretary of Defense should  
18 establish an advisory panel comprised of  
19 persons external to the Department of Defense  
20 to offer to the secretary and other senior  
21 leaders in DoD independent assessment and  
22 feedback on the effectiveness of DoD sexual



1 assault prevention and response programs and  
2 politics."

3 I think the Panel has heard this  
4 before, particularly from Joye Frost not so  
5 long ago that in order for the Department of  
6 Defense to have credibility, there need to be  
7 independent organizations and evaluations by  
8 independent entities conducted and that was  
9 the genesis for this final recommendation for  
10 the Role of the Commander Committee.

11 Are there any comments or  
12 questions with respect to that?

13 I'm looking at you, Colonel Cook.  
14 Any? Okay.

15 COL COOK: There's no problem.  
16 External will give validation to what's out  
17 there.

18 CHAIR JONES: All right, anyone  
19 else? All right, thank you.

20 Recommendation 4 is also accepted.

21

22 I think, unless I've overlooked

1 one, that that concludes the recommendations  
2 made by the Role of the Commander  
3 Subcommittee. And I think we'll take a ten-  
4 minute break at this point and come back and  
5 we'll begin to discuss some of the remaining  
6 Victim Services recommendations. Thanks.

7 (Whereupon, the above-entitled  
8 matter briefly went off the record.)

9 CHAIR JONES: We're going to  
10 resume the Response Panel meeting now. And we  
11 have Meg Garvin with us this afternoon.  
12 Welcome, Meg. And Ms. Garvin is a member of  
13 the Victims' Services Subcommittee. Mai,  
14 you're still on the phone, right?

15 MS. FERNANDEZ: I am.

16 CHAIR JONES: Great. And Mai  
17 Fernandez who couldn't be here with us in  
18 person is the Chair of that subcommittee and  
19 a Panel member. And I don't know if there are  
20 any subcommittee members for Victim Services  
21 on the line. Are there? Okay.

22 So what we're going to do this

1 afternoon is go through a few of the  
2 recommendations that we did not finish  
3 deliberating on. And, Ms. Garvin, you're  
4 going to make the presentations. And so if  
5 you will just direct us to each recommendation  
6 as you go along.

7 MS. GARVIN: Certainly. Thank  
8 you. Happy to be here and I'm sorry I missed  
9 the last meeting but glad I can participate in  
10 this one. We're going to start with -- I'm  
11 going to go through the pending Panel  
12 discussion recommendations.

13 That's how they are labeled on the  
14 PowerPoint. I'm going to go through just a  
15 handful of those. And then two additional  
16 ones that I had asked to comment on that are  
17 also on the slide deck, Recommendations 26 and  
18 33.

19 But I will start with  
20 Recommendation 5. Make sure everyone gets  
21 there. This is pending Panel discussion.  
22 There were some modifications made during the

1 last meeting. I'm going to start each time  
2 reiterating the findings, which are the  
3 context in which the subcommittee came to its  
4 recommendations.

5 And I think reiterating those  
6 while they're on the slide deck but framing  
7 the recommendation first with the findings  
8 helps to explain the context. So I'm going to  
9 start with the findings on 5.

10 And I will read some of them and  
11 also paraphrase some of them. So findings 5-1  
12 through 5-5. The subcommittee found that  
13 there's no current mechanism for a sexual  
14 assault victim to keep a report of sexual  
15 assault restricted and yet still request an  
16 expedited transfer.

17 DoD policy does not permit victims  
18 who file a restricted report of sexual assault  
19 to request temporary or permanent expedited  
20 transfer from their assigned command or  
21 installation to a different location within  
22 their assigned duty or living location.

1           If the commander knows or learns  
2           about the sexual assault and report it, it  
3           becomes unrestricted. We heard a great deal  
4           of testimony about this issue and how  
5           troubling it was for survivors.

6           We did also hear and received  
7           evidence that there may be inherent  
8           flexibility, inherent powers of the commander  
9           and flexibility to transfer members or place  
10          them on limited duty status due to medical  
11          conditions.

12          Based on those findings and the  
13          great deal of weight of evidence about why  
14          it's important that restricted reports still  
15          be allowed, individuals who file restricted  
16          reports still to be able to transfer without  
17          the report going unrestricted, which is a  
18          significant moment for survivors.

19          We have made a recommendation that  
20          you all looked at at the last meeting and made  
21          some modifications. You have both versions in  
22          front of you.

1           The original recommendation of the  
2           subcommittee was Service Secretary's should  
3           ensure that command orientation and training  
4           address the commander's authority to make duty  
5           or living assignment transfers based upon the  
6           recommendation of medical personnel even if  
7           the specific underlying reason for the request  
8           for transfer is protected and cannot be  
9           disclosed.

10           In the last meeting, there was  
11           discussion and proposed amendments to that  
12           recommendation that would read, Service  
13           Secretary should create a means by which  
14           sexual assault victims who file a restricted  
15           report may request an expedited transfer  
16           without having to make the report  
17           unrestricted.

18           In reviewing everything from the  
19           subcommittee's perspective the amended  
20           language aligns with the great deal of  
21           evidence we heard, the intent of the  
22           subcommittee with regard to Recommendation 5.

1                   But I was asked to re-present that  
2                   to you with the findings and indicate that it  
3                   aligns with the subcommittee. There was no  
4                   discussion at the last meeting with regard to  
5                   Recommendation 5A, however, which is that  
6                   there should be required training for medical  
7                   personnel, SARCs and VAs to include options  
8                   that a commander has available to make or  
9                   affect transfers based on recommendations from  
10                  medical personnel.

11                  This sub-recommendation, or  
12                  recommendation 5A, came out of evidence we  
13                  heard that individuals did not know that it  
14                  was possible for transfers to happen, that the  
15                  Commander had this authority inherent and that  
16                  therefore victims wouldn't know that they  
17                  could do it.

18                  And so the only answer out there  
19                  was to go unrestricted. So the subcommittee  
20                  had made Recommendations 5 and 5A to  
21                  accommodate the evidence that we heard and to  
22                  support victims' need to stay with restricted

1 reports but still be able to transfer. And  
2 that's all that we have on that one, so I  
3 submit it to you.

4 CHAIR JONES: So, Ms. Garvin, are  
5 you asking us to reconsider the -- I'm just a  
6 little --

7 MS. GARVIN: I'm sorry, Judge, I  
8 read both versions just to provide the  
9 context. I'm not asking, on behalf of  
10 subcommittee, I'm not asking you to go back to  
11 the original language. I am indicating to you  
12 that your amended language of Recommendation  
13 5 is in alignment with the subcommittee's  
14 assessment of things.

15 CHAIR JONES: Okay.

16 MS. GARVIN: So I'm asking you to  
17 stick with your amended language but then to  
18 please consider Recommendation 5A --

19 CHAIR JONES: Okay.

20 MS. GARVIN: -- of the  
21 subcommittee.

22 CHAIR JONES: Well, I guess my



1 question would be, I mean, it assumes that the  
2 recommendation from medical personnel, which  
3 is -- we may not be in a position where there  
4 is any training yet on that.

5 I mean, isn't that the point if we  
6 -- you're not talking about a specific means  
7 by which the secretaries both might come up  
8 with could be a medical transfer.

9 So I don't know that a specific  
10 recommendation that they be trained based on  
11 recommendations from medical personnel. I  
12 don't know. Maybe it's broad enough but do  
13 you see my concern?

14 MS. GARVIN: Certainly, Your  
15 Honor. 5A, I believe, based on the  
16 subcommittee's evidence received would still  
17 stand in that Commanders do have this inherent  
18 authority now under the medical provision to  
19 make a transfer and that is not well known  
20 based on the evidenced we've received.

21 CHAIR JONES: Oh, so --

22 MS. GARVIN: So regardless of the

1 additional mechanisms that the Service  
2 Secretaries may put into place, individuals  
3 that we heard from and as we understood do not  
4 know about the existing opportunity for  
5 transfers.

6 And it seems that recommendation  
7 could move forward even though the Panel is  
8 making a larger recommendation now to create  
9 additional means.

10 COL COOK: Judge Jones, if I can  
11 offer --

12 CHAIR JONES: Yes, Colonel.

13 COL COOK: You might be able to --  
14 I think if you leave it with the language  
15 that's in there now for 5A, it becomes a  
16 little bit unclear with Recommendation 5.

17 But I think we can modify it  
18 slightly leaving the training for medical  
19 personnel, SARCs and VAs should include the  
20 options to leave this to the Commander that a  
21 Commander has available to make or effect  
22 transfers when an unrestricted report is made.

1                   Take out the portion about whether  
2                   it's the recommendation of the medical  
3                   personnel, which is whatever. And it would  
4                   have to be an unrestricted report because we  
5                   just said that in modifying Part A, that Part  
6                   A is they can come up with the means to effect  
7                   transfers.

8                   And one of the discussions when  
9                   you weren't here the last time was outside of  
10                  the command channels so that once it's in the  
11                  hands of a Commander it's unrestricted. But  
12                  you can keep it outside the hands of the  
13                  Commander keep it restricted and go up another  
14                  channel through personnel or SAPRO, whatever.

15                  Let them look at what that process  
16                  should be. So if you just put available or to  
17                  make or affect transfers cross out based on  
18                  the recommendation from medical personnel and  
19                  add the language when an unrestricted report  
20                  is made.

21                  CHAIR JONES: I think that sounds  
22                  right.

1 MS. GARVIN: That would certainly  
2 align with where the subcommittee was going,  
3 which is --

4 CHAIR JONES: Right.

5 MS. GARVIN: -- ensuring that  
6 there is training on available means for  
7 staying restricted yet still securing a  
8 transfer.

9 COL COOK: And it still allows the  
10 Secretary to determine how best to effect  
11 that.

12 MS. GARVIN: Right.

13 CHAIR JONES: All right then. Is  
14 there any other comment or hearing none, then  
15 we are going to now, if we didn't already. I  
16 guess we did not, obviously. Recommendation  
17 5A is accepted. Thank you.

18 CDR KING: Your Honor, So I don't  
19 think that the Panel deliberated or completely  
20 deliberated and either accepted or rejected 5  
21 either. I think it was delayed because of  
22 some of the members not being present at the

1 last meeting.

2 CHAIR JONES: All right. I think  
3 you're right. And we were still talking about  
4 it. And does anybody need a little bit more  
5 time to consider it? Any objections to 5,  
6 which basically asks the Service Secretaries  
7 to figure this out and find a means for  
8 someone who's filed a restricted report to get  
9 an expedited transfer without having to make  
10 their report unrestricted.

11 I don't know whether they'll be  
12 able to figure it out but we're asking them to  
13 figure it out. Any problems with that? All  
14 right. 5 is accepted. Thank you, Sherry.

15 MS. GARVIN: So I'd like to turn  
16 the Panel to Recommendation 31, which -- the  
17 slide deck 2 --

18 CHAIR JONES: On Page 2? Yes.

19 MS. GARVIN: It refers to is the  
20 right to confer. I'm going to start again  
21 with the findings to provide the context for  
22 this. There was, and I have reviewed the

1 transcript from the last hearing and there was  
2 substantial conversation about this but then  
3 it was delayed until today.

4           So the findings on Recommendation  
5 31, which are findings 31-1 through 31-4. The  
6 right to confer with the prosecutor under the  
7 Federal Crime Victims Rights Act, which is 18  
8 USC 3771, which was passed in 2004 is not  
9 directly analogous to the right to confer with  
10 trial counsel, which is currently afforded to  
11 military victims.

12           The CVRA grants the victims the  
13 right to confer with a prosecutor in the case.  
14 The DoD policy and service policies as well as  
15 NDAA do grant victims the right to confer with  
16 the attorney for the government or trial  
17 counsel in criminal cases.

18           However, that is and the evidence  
19 received during the subcommittee meetings,  
20 those are not analogous rights in large part  
21 because the decision making moment with regard  
22 to proceedings is not in trial counsel's hands

1 but instead is with the convening authority.

2 So while the victim may confer  
3 with trial counsel on a variety of matters,  
4 whether those are to pursue court marshal,  
5 non-judicial punishment or administrative  
6 action in the case.

7 And if pursuing court-martial, the  
8 level of court-martial the right is afforded  
9 to victims because the Commander serving as  
10 the convening authority actually makes the  
11 decision with regard to how to dispose of  
12 cases, the victim's right to confer as  
13 currently afforded in military rights is not  
14 in aligned with the Federal Crime Victims'  
15 Rights Act, which was one of the specific  
16 responsibilities of the subcommittee to  
17 analyze is whether the military systems and  
18 proceedings provide the rights afforded by 18  
19 USC 3771.

20 And I'm noting that right out of  
21 the objectives by which we were guided. So  
22 with those findings in place, the

1 recommendation of the subcommittee in order to  
2 align the rights that military victims have is  
3 that the Secretary of Defense direct the  
4 creation and implementation of mechanisms  
5 where not currently in place requiring trial  
6 counsel to convey the victim's specific  
7 concerns and preferences regarding case  
8 disposition to the convening authority so that  
9 the convening authority may consider the  
10 victim's concerns and preferences prior to  
11 making a decision on case disposition.

12           The procedures will account for  
13 the convening authority's role in the  
14 disposition of cases under military justice  
15 system and create a process more analogous to  
16 the victim conferring with the prosecutor  
17 under the CVRA.

18           The import of this is that under  
19 the CVRA and in the civilian system, victims  
20 have the right to confer all along with the  
21 prosecuting attorney from the get go of the  
22 case.



1                   In fact, we heard evidence along  
2                   the way that it actually can happen  
3                   precharging in the civilian system all the way  
4                   through the moment of charging or not and then  
5                   what charges.

6                   And in order to align military  
7                   victims' rights with that, which was our  
8                   directive in large part, we tried to find a  
9                   mechanism by which that would happen.

10                  And so our recommendation is in  
11                  fact that the Secretary of Defense grant and  
12                  implement those mechanisms but to make sure  
13                  that it's meaningful and actually does align  
14                  with the Federal Crime Victims' Right Act that  
15                  it should be communication to the convening  
16                  authority.

17                  BG DUNN: I would just make one  
18                  comment. I don't have any problem with the  
19                  recommendation but in my 28 years and 5 months  
20                  on active duty in the United States Army,  
21                  Judge Advocate General's Corps would have  
22                  fired any prosecutor who did not convey the

1 victims' sensibilities on the trial in a  
2 sexual assault case to me, as the Staff Judge  
3 Advocate to carry to the convening authority.

4 So I think that this is a process  
5 that is certainly in place in any well-run  
6 criminal jurisdiction in any of the United  
7 States military services, but.

8 MS. GARVIN: And we certainly  
9 heard evidence that practice is allowing this  
10 to happen right now and we took testimony that  
11 many trial counsel are doing this.

12 The question is making sure there  
13 is a process in place to ensure that it  
14 happens so that victims know that their  
15 interests are being conveyed and whether it be  
16 being done right now by practice, it's not  
17 mandated under the current process. And that  
18 is what the gap we were trying to fill based  
19 on aligning the rights.

20 CHAIR JONES: Any other comment on  
21 this?

22 COL COOK: I have one comment.

1 And it's not subject to the wording of what's  
2 on there. But during our discussion the last  
3 time I think we had talked about the  
4 possibility of combining Recommendation 31 and  
5 32.

6 31 deals with being heard. You  
7 have the right to convey information regarding  
8 case disposition. And 32 has to do with the  
9 pretrial agreement.

10 And one of the comments that I had  
11 made on the record last time was you could  
12 change the wording on 31 to leave most of the  
13 first two lines but add the acceptance of a  
14 plea here so that the wording would say, the  
15 Secretary of Defense direct the creation and  
16 implementation of mechanisms where not  
17 currently in place requiring trial counsel to  
18 convey the victim's specific concerns and  
19 preferences -- delete the next three lines  
20 regarding case disposition because we're going  
21 to add it later -- to the convening authority  
22 so the convening authority may consider the

1 victim's concerns and preferences prior to  
2 making a decision on case disposition and/or  
3 accepting a plea.

4           So you'd be adding the words  
5 and/or accepting a plea at the end and having  
6 the case disposition. And you'd be combining,  
7 trial counsel you must convey what the victim  
8 preferences on those two actions are during  
9 the course of the proceedings. And that  
10 should get rid of having to put out the next  
11 recommendation.

12           CHAIR JONES: Because the  
13 Secretary of Defense might decide to do it by  
14 changing the venue for courts martial. Is  
15 that your point?

16           COL COOK: I'm sorry?

17           CHAIR JONES: We don't need 32  
18 because that could be one way the Secretary of  
19 Defense would --

20           COL COOK: In the Manual for  
21 Courts-Martial, there is something called the  
22 pretrial advice.

1 CHAIR JONES: Right.

2 COL COOK: And you have all the  
3 information that you have to put into there.  
4 So that would go into it and it would just  
5 become another factor that trial counsel's got  
6 to put together and SJA would have to bring to  
7 discuss with the convening authority.

8 But it would be two parts though.  
9 Before the trial, so the case disposition. It  
10 would also be if a plea is put in later you'd  
11 also have to convey it at that same time.

12 MS. GARVIN: So, if I may?

13 CHAIR JONES: Sure.

14 MS. GARVIN: Is the subcommittee's  
15 intent was to ensure that both those moments  
16 happened. Obviously 31 and 32 address those  
17 two moments.

18 But the difference in them in part  
19 is that, in addition to the amendment that you  
20 are recommending is that one is a specific  
21 recommendation that the Manual for Court-  
22 Martial -- we specified in 32 the device by

1       which this should happen whereas in 31 we left  
2       it open.

3                       And part of why 32 we went with a  
4       direct recommendation and I will defer to the  
5       military experts on this but part of why in  
6       our deliberations why we went with doing it  
7       right in the court-martial as well.

8                       Congress can do it and others can  
9       do it. The current actual process in the  
10      court-martial right now does not allow for  
11      this. It doesn't specify specifically the  
12      victim input during the plea part.

13                      And so if you -- when I reviewed  
14      it last night and went through the actual  
15      processes in the court-martial manual about  
16      plea, it didn't specifically say where the  
17      victim input for that piece came in.

18                      So it seemed like the specificity  
19      that the subcommittee came up with with regard  
20      to directing it be in the courts martial  
21      manual with regard to 32 seemed important.

22                      So I just want to raise that. I

1 could be misreading the manual for courts  
2 martial.

3 COL COOK: Then I would need you  
4 to clarify, where are you -- in Number 32  
5 then, tell me where you are advocating that a  
6 victim has the right to be heard regarding a  
7 plea?

8 Is that in the court itself in  
9 front of the military judge or is it prior to  
10 a convening authority deciding whether to  
11 accept that plea.

12 MS. GARVIN: It's prior to the  
13 convening authority.

14 COL COOK: Then if you're leaving  
15 it the way it is right now, it's in the court-  
16 martial. The plea agreement's already been  
17 accepted. They've lost their opportunity.

18 If you move it to the other where  
19 you're saying the trial counsel has to convey  
20 it before the plea agreement is accepted,  
21 before the case is referred for some kind of  
22 disposition.

1                   But whether it's in the manual or  
2 not, I will tell you if you put if that is  
3 becomes a process, whether it's in a  
4 regulation or whether it's in manual, the  
5 trial counsel's are going to abide by it.

6                   MS. GARVIN: So, and again, I will  
7 defer -- oh, I'm sorry.

8                   REP. HOLTZMAN: Judge.

9                   CHAIR JONES: Yes.

10                  REP. HOLTZMAN: Maybe I'm wrong  
11 here, Colonel Cook, and so I'm going to defer  
12 to you but VSS Recommendation 32B says the  
13 recommendators recommended changes include the  
14 right to be heard before the convening  
15 authority decides to accept, reject or propose  
16 a counter offer to a plea agreement offer  
17 submitted the accused. So that would --

18                  COL COOK: That's what 32B says  
19 but then the 32 says it's the right to be  
20 heard regarding pretrial agreement.

21                                It doesn't say where  
22 Recommendation 32 is so the trying counsel has



1 to convey those concerns to the convening  
2 authority, which means it's before as part of  
3 the decision by the convening authority.

4 What will happen is when the case  
5 goes to the convening authority to refer the  
6 case wherever it's going to go, there may be  
7 a plea agreement with it at that time.

8 Maybe not. I mean, it could be  
9 two separate actions that could be combined.  
10 But what Number 31, if it's changed as  
11 recommended, you're done.

12 It requires that if the plea  
13 agreement comes in after the fact, trial  
14 counsel, you still have to go to the victim,  
15 get what their input or their preference would  
16 be and you have to submit that to the  
17 convening authority as part of their  
18 deliberations on whether or not to accept that  
19 plea.

20 REP. HOLTZMAN: Are you saying  
21 that's under 31?

22 COL COOK: I'm saying that if you

1 put, right now what you're saying  
2 Recommendation 31 is trial counsel has to  
3 convey the victim's concerns.

4 I'm saying add it to 31 and you'll  
5 achieve both of the goals of they get the  
6 right to get their information put forward to  
7 the convening authority before they dispose of  
8 the case and they get the right to put it in  
9 front of the convening authority before they  
10 accept a plea.

11 And it doesn't need necessarily to  
12 be in the Manual for Courts-Martial. You'll  
13 still achieve the same thing. I agree with  
14 having victims' rights be heard.

15 I agree with General Dunn. In my  
16 23 years being a combat division SJA or an SJA  
17 at different levels, I agree, it's always been  
18 done. Making it part of the process regards  
19 with whether it's in the manual or in a  
20 regulation, then it will be done.

21 Victims get that same  
22 satisfaction. But you do want it before the

1 convening authority sees it, not necessarily  
2 the way Number 32 reads where it's -- is that  
3 in the court when the Judge is listening to  
4 it? MS. GARVIN: Again, you  
5 know process far better than I and members in  
6 the subcommittee certainly knew the process  
7 better than I as a civilian. Your point's  
8 well-taken though.

9 The intent of the subcommittee was  
10 to ensure that victims had their information  
11 heard and received so that it could have  
12 impact along the way through the confer all  
13 about what to do with the case as well as with  
14 regard to plea.

15 The subcommittee also did want it  
16 to happen in front of the court. So it was a  
17 both/and. It was input before anything so  
18 that there was no moment of finality that  
19 occurred before the input was taken, which  
20 would essentially eviscerate their rights  
21 because they're meaningless then.

22 And if there is a proceeding in

1 front of the Court, also then. It was a  
2 both/and. And we may have drafted poorly.

3 But your iteration of it to ensure  
4 that it was before decisions were made  
5 certainly achieves a significant part of what  
6 the subcommittee was recommending. The second  
7 part was then there is a proceeding in court  
8 they also have it.

9 COL COOK: The challenge with  
10 putting it before the -- a plea agreement is  
11 what's considered during the findings portion  
12 of the court-martial.

13 The challenge with allowing a  
14 victim the opportunity, you know, maybe the  
15 convening authority does hear it because it's  
16 conveyed by trial counsel which is what it is  
17 now and what you'd be making more formal.

18 Maybe the convening authority  
19 disregards or makes another decision for  
20 whatever purpose? Now you're in the court-  
21 martial, the plea agreement in the military is  
22 the accused stands up and says everything

1 they're guilty of.

2           They can't just say, you know, I  
3 just plead guilty I'll get a better deal.  
4 They have to explain everything they did  
5 wrong. If the victim is allowed a say at that  
6 point before the judge hears it, the  
7 difference in the military system is the judge  
8 or the Panel depending on who the trial fact  
9 is, well, plea agreement so it's a judge, does  
10 not get to see the quantum portion.

11           So having a victim stand up in a  
12 court-martial at that point and make comments  
13 on the recommence about the quantum portion  
14 would deny the defense counsel or the accused  
15 the opportunity to persuade the judge to come  
16 up with a different result that maybe the  
17 convening authority had agreed to up front,  
18 so.

19           CHAIR JONES: So are you saying  
20 there isn't a public in court moment where the  
21 convening authority is saying --

22           COL COOK: I think there would be

1 for the victim during the sentence.

2 CHAIR JONES: -- I am now making  
3 my decision on the plea bargain obviously.

4 COL COOK: That's kept in court.

5 CHAIR JONES: Because they're kept  
6 secret.

7 COL COOK: Right. It's kept  
8 secret.

9 CHAIR JONES: Right. Okay.

10 COL COOK: The victim can go in  
11 during the sentencing portion, you know, once  
12 the plea agreement is resolved with the Judge,  
13 you can go to the sentencing portion and have  
14 the impact statement.

15 But that's not the place for a  
16 victim to go in and discuss whether they agree  
17 with the plea agreement or not. Not under the  
18 current system. It would take away from the  
19 right of the defense of an accused.

20 MS. GARVIN: So, and I think --

21 PROF. HILLMAN: Judge Jones.

22 CHAIR JONES: Where are you, Beth?

1                   PROF. HILLMAN:  Sorry.  Judge  
2                   Jones?

3                   CHAIR JONES:  Yes.

4                   PROF. HILLMAN:  This is Beth.

5                   CHAIR JONES:  Okay, Beth.  Go  
6                   ahead.

7                   PROF. HILLMAN:  I'm sorry to  
8                   interrupt everybody there.

9                   CHAIR JONES:  No, please.

10                  PROF. HILLMAN:  I just wanted to  
11                  say that the Comparative System Subcommittee  
12                  is making some recommendations with respect to  
13                  the sentencing process and has an extensive  
14                  discussion of the different pretrial  
15                  agreements, plea bargaining process in the  
16                  military as compared to civilian  
17                  jurisdictions.

18                  So while this is a useful  
19                  discussion, I do wonder if we should bracket  
20                  the precise way that this happens, whether  
21                  it's on the record and at what point the  
22                  military system would embrace this that we

1 want, the Victims' Services Subcommittee wants  
2 us to do in terms of making sure the process  
3 that General Dunn and Colonel Cook both said  
4 is routine already.

5 But just making clear that every  
6 victim has that chance to do it and the  
7 complicating piece here is the convening  
8 authority and the trial counsel aren't the  
9 single sort of prosecutor in the way it is in  
10 the civilian system.

11 So the precise way we do this is a  
12 little bit tricky. But I recommend we wait  
13 until we get the sentencing part of the CSS  
14 recommendations before the Panel to resolve  
15 this particular piece.

16 CHAIR JONES: Any objection to  
17 that? All right. Then on this, Meg, we'll  
18 wait on 32.

19 MS. GARVIN: Judge. Judge, may I  
20 just add one note --

21 CHAIR JONES: Yes, of course.

22 MS. GARVIN: -- for your



1 consideration when you get there and that is  
2 one of the specific things that we were tasked  
3 with looking at was the alignment of the CVRA  
4 with military accommodating the differences  
5 and specifically looking at how to integrate  
6 the right to be heard on plea.

7 That is one of the specific pieces  
8 of what we were supposed to do. And we tried  
9 to accommodate the differences in what we were  
10 recommending, acknowledging the difference of  
11 the kind of bifurcated aspect of the plea, the  
12 factual piece of a plea and the quantum piece  
13 of a plea.

14 And we didn't use the word  
15 quantum. You'll not find that in any parts of  
16 our discussion during the subcommittee  
17 meetings in part because there were a lot of  
18 civilians on our subcommittee.

19 But we did talk about the reality  
20 of what happens in civilian plea situations  
21 and what they are allowed to say in front of  
22 a court, what they know and what they aren't

1 allowed to know.

2 And we did try to factor that and  
3 so I just ask that when you get there that  
4 someone from the Victim Services Subcommittee  
5 also be allowed to talk about it because we  
6 did attempt to factor this and ensure it was  
7 a meaningful input but was a direct input, so.

8 CHAIR JONES: Well, let me just  
9 ask this is Recommendation 31 as amended by  
10 Colonel Cook acceptable to everybody of does  
11 that conflict, Professor Hillman?

12 PROF. HILLMAN: Judge Jones, can  
13 you tell me what the --

14 CHAIR JONES: I'm sorry. It's  
15 direct the creation and implementation of  
16 mechanisms where they are currently in place  
17 requiring trial counsel to convey the victim's  
18 specific concerns and preferences to the  
19 convening authority.

20 Now what it does is then says, so  
21 the convening authority may consider the  
22 victim's concerns and preferences prior to

1 making a decision on case disposition or  
2 accepting a plea bargain or entering into a  
3 plea bargain.

4 I'm just wondering if that's  
5 something we can deliberate and accept or not  
6 without getting into the notion of appearing  
7 in court.

8 PROF. HILLMAN: Yes, Your Honor.  
9 That's fine with me. Does Professor Garvin  
10 agree with that one?

11 MS. GARVIN: Yes. I believe that  
12 that aligns with a significant portion of what  
13 the subcommittee was recommending.

14 REP. HOLTZMAN: My only concern  
15 about this is whether by dropping the  
16 reference to the Manual for Courts-Martial we  
17 are dropping some specific requirement that we  
18 need to have. That's all.

19 MS. GARVIN: And as I noted  
20 before, the subcommittee did spend time on 31  
21 talking about -- I'm sorry, 32 talking about  
22 a specific recommendation with regard to

1 quickly getting it into the Manual for Courts-  
2 Martial.

3 COL COOK: And I have no, I mean,  
4 I don't have an objection of saying it goes  
5 into the Manual for Courts-Martial so that  
6 became the recommendation as well.

7 I'm just saying that whether it's  
8 in that form or something else, trial counsel  
9 may say you have to do this. You're going to  
10 do it.

11 But I've got no objection to  
12 actually putting it in the manuals part of the  
13 pretrial advice or coming up with another  
14 portion that requires the affirmative passing  
15 of the victims as part of a pre-agreement  
16 packet when that goes forward.

17 I just don't think there's  
18 anything about that plea agreement piece in  
19 the manual right now so you'd be adding a new  
20 provision. But I'm not positive of that.  
21 You'd have to check with somebody who knows  
22 the current draft.

1 COL. HAM: Actually, I think it  
2 might be. This is Colonel Ham. It might  
3 require a change to Article 34 of what would  
4 be included in the pretrial advice and the  
5 corresponding rule for court-martial. But, so  
6 it may require actually statutory change but  
7 I'm not saying it has to but it might.

8 COL COOK: Right. That might take  
9 longer so you might want to put it in the  
10 rules up front with the intent that it later,  
11 you know, be considered by the joint service  
12 panel to put it as a permanent one later on.  
13 But the goal is affecting it to make sure it's  
14 mandated now. How, is not as important as  
15 getting it done.

16 MS. GARVIN: And mandating the  
17 last part of your statement, the now was part  
18 of the discussion, quickly getting it in.

19 CHAIR JONES: So where are we?  
20 Are we accepting 31 and holding on to  
21 discussions about 32A and 32C?

22 COL COOK: I think we're accepting

1 31 as changed --

2 CHAIR JONES: Right.

3 COL COOK: -- saying you have to  
4 convey it and the only part of 32 that's being  
5 delayed is whether or not the victim's got the  
6 opportunity to be heard during the court-  
7 martial process itself.

8 CHAIR JONES: Okay.

9 MS. GARVIN: And if I may?

10 CHAIR JONES: Sure.

11 MS. GARVIN: The specificity of  
12 the Manual for Courts-Martial where that fits.

13 CHAIR JONES: Right. All right.  
14 So we're going to accept 31 as changed, as  
15 amended, and hold up on our discussion of  
16 Recommendation 32 until we've had the  
17 opportunity to review the CSS recommendation  
18 and findings.

19 REP. HOLTZMAN: Well, I'm still  
20 not sure that's quite correct, Your Honor,  
21 because I think what she's saying and I think  
22 that Colonel Cook was agreeing to was that

1 there would be a reference to the manual for  
2 courts martial now that we would include that  
3 as part of the amended 31. We would take that  
4 to 32.

5 CHAIR JONES: I'm sorry. I missed  
6 that.

7 MS. GARVIN: That's my  
8 understanding.

9 CHAIR JONES: Is that what --

10 MS. GARVIN: There had not been  
11 proposed language of exactly where to put that  
12 in this conversation but the idea was the  
13 subcommittee had strongly landed on making  
14 sure it was in the manual for courts martial,  
15 well, 32 was.

16 But the idea was to expedite that  
17 process. But in this discussion there wasn't  
18 a location of it. So I don't know if that's  
19 something that the Panel needs to consider  
20 where to put it. I don't believe I can  
21 recommend where to put that in this amendment.

22 JUDGE MARQUARDT: May I ask a

1 question?

2 CHAIR JONES: Yes. Sure.

3 JUDGE MARQUARDT: Was the second  
4 sentence of 31 deleted?

5 CHAIR JONES: I'm sorry. I didn't  
6 quite hear that.

7 JUDGE MARQUARDT: Was the second  
8 sentence of 31 deleted?

9 CHAIR JONES: Oh, the text of 31?

10 MS. GARVIN: No. The second  
11 sentence.

12 JUDGE MARQUARDT: Yes.

13 COL COOK: I think the second  
14 sentence of 31 was more explanatory more than  
15 it created anything else. It just said that  
16 they were trying -- so it's not necessary but  
17 it's not harmful to leave it in there.

18 MS. GARVIN: Correct.

19 CHAIR JONES: It's still there.  
20 It was not deleted.

21 JUDGE MARQUARDT: Thank you.

22 CHAIR JONES: All right. I



1 confess. I'm confused.

2 MS. GARVIN: Judge, perhaps if I  
3 may make a suggestion in light of the  
4 recommendation and you all obviously have  
5 authority to correct me, if there's agreement  
6 on the Panel with regards to the amendment to  
7 31 then maybe what is pending with regard to  
8 the amendment which is and/or accepting a  
9 plea, if what is still pending is there to  
10 articulate that the change should include a  
11 change to the Manual for Court-Martial, maybe  
12 that specific piece is continued with regard  
13 to the discussion of 32 and may or may not  
14 then reference back to integrating it in 31  
15 when you have the next conversation unless you  
16 want to wordsmith and figure out where to put  
17 it now.

18 CHAIR JONES: Well, maybe what we  
19 should just say is that the text of 31 right  
20 now, I gather is acceptable to everybody. We  
21 won't formally accept the full recommendation  
22 until we see if we're going to be adding

1 something from 32.

2 REP. HOLTZMAN: We agree that we  
3 want to add the reference to the -- maybe I'm  
4 wrong. I don't mean to --

5 CHAIR JONES: You could be right.  
6 I'm not --

7 REP. HOLTZMAN: I think we agreed  
8 that we wanted to add the reference to the  
9 inclusion of the change in the military in the  
10 Manual for Courts-Martial. Where that should  
11 go, maybe we could just let staff propose the  
12 language for us and that would be --

13 PROF. HILLMAN: Judge Jones, this  
14 is Beth.

15 CHAIR JONES: Yes, Beth.

16 PROF. HILLMAN: I agree with  
17 Representative Holtzman. I think it's fine  
18 for us to accept 32, that first, not  
19 necessarily the details or, I actually agree  
20 with A and B. They're fine with me. But I  
21 don't think we have to say exactly where it  
22 goes. But we can say that it should happen.

1                   CHAIR JONES: All right. Let me  
2 just -- so are you saying that you think it  
3 should go in the Manual for Courts-Martial or  
4 not? That's where my confusion is.

5                   COL COOK: Can we, in  
6 Recommendation 31, can we add the word, you  
7 know, in the first line can we add the word  
8 immediate in front of the word creation.

9                   So that would say, the Secretary  
10 of Defense direct the immediate creation and  
11 implementation of mechanisms were not  
12 currently in place requiring trial counsel to  
13 convey the victim's specific concerns and  
14 preferences to the convening authority so the  
15 convening authority may consider the victim's  
16 concerns and preferences prior to making a  
17 decision on case disposition or entering into  
18 a plea agreement.

19                   That becomes one of them. And the  
20 second sentence unchanged. But Number 32  
21 becomes, the Secretary of Defense recommends  
22 to the President changes to the Manual for

1 Courts-Martial that incorporate the right to  
2 recommend in Recommendation 3 above.

3 Because that will allow you to get  
4 the immediate process changed and allow the  
5 longer process of getting it put into the  
6 manual and having it solidified there.

7 CHAIR JONES: All right. I  
8 understand what you're talking about. Thank  
9 you, Liz. And you, Colonel. Any disagreement  
10 with that?

11 PROF. HILLMAN: Judge Jones?

12 CHAIR JONES: Yes, Beth.

13 PROF. HILLMAN: I'm just -- if we  
14 put a time element in one of these and not in  
15 all kinds of other ones where we're  
16 recommending things, I'm not sure where that  
17 leaves all the rest of the recommendations  
18 like go ahead and take your time with them.

19 REP. HOLTZMAN: I agree with that,  
20 Judge Jones, from just a drafting point of  
21 view.

22 CHAIR JONES: Right. I think that

1 makes perfect sense actually. So I would also  
2 say we should not put immediate in there. We  
3 haven't done it anywhere else, nor should we.

4 But are we in agreement then that  
5 31 should read as Colonel Cook has described  
6 it which would include 32 in there as she's  
7 amended it? Is everybody in agreement with  
8 that? Okay.

9 Then we'll accept Recommendation  
10 31 as amended. And as I just said, that will  
11 include the first -- Recommendation 32 will  
12 become part of 31 as amended, as 32 is  
13 amended. All right.

14 COL COOK: And I'm sorry. Just to  
15 clarify, Judge Jones, then for Recommendation  
16 32A and 32B, I don't think that those are  
17 necessary right now.

18 CHAIR JONES: No, I'm not --  
19 right.

20 COL COOK: Okay.

21 CHAIR JONES: 32A and B are not  
22 going to be any part of Recommendation 31.

1 MS. GARVIN: May I ask for one  
2 clarifying point? When the other subcommittee  
3 reports out that has a similar recommendation  
4 with regard to the structural analysis, some  
5 parts of 32A and B will be with regards to the  
6 victim being heard in court --

7 CHAIR JONES: Yes.

8 MS. GARVIN: -- on plea will be  
9 brought up at that juncture. Okay.

10 CHAIR JONES: That's my  
11 understanding from Professor Hillman. Then we  
12 can discuss it at that point.

13 REP. HOLTZMAN: Judge Jones.

14 CHAIR JONES: Yes.

15 REP. HOLTZMAN: Just to raise  
16 another issue about this. I don't mean to do  
17 this in a piece meal fashion but I'm just  
18 reading the last sentence of Recommendation  
19 32B, which says that the convening authority  
20 should retain discretion to determine the best  
21 means to comply with this right and consider  
22 the victim's opinion, e.g. submission in

1 writing or in person.

2 Is that something that should be  
3 there? I mean it does give the Commander in  
4 the event he or she wants to the right to hear  
5 from the victim directly as opposed to through  
6 pretrial counsel.

7 I don't know. You probably know  
8 whether this was ever done or whether this is  
9 a meaningless suggestion. But I want to raise  
10 it just because I want to throw this -- if  
11 this is a baby in the bath water, I don't want  
12 to throw that out.

13 BG DUNN: Right. And the  
14 convening authorities certainly have the  
15 discretion now to meet with the victim and get  
16 his or her input should the convening  
17 authority make that decision.

18 I think, and I'm not on this  
19 particular subcommittee but I have an idea  
20 that that language is in there just to make  
21 sure Congress doesn't require a meeting with  
22 the convening authority, which would become

1 unattainable in most cases.

2 CHAIR JONES: I'm sorry. Who's on  
3 the line?

4 MS. FERNANDEZ: This is Mai  
5 Fernandez.

6 CHAIR JONES: Hi, Mai. Go ahead.  
7 What did you have to say?

8 MS. FERNANDEZ: I was saying that  
9 I have a plane that's about to take off so  
10 I've got to get off the phone.

11 CHAIR JONES: Oh. Well, that's  
12 clear and unambiguous. Okay.

13 MS. FERNANDEZ: Okay.

14 CHAIR JONES: Thanks very much.

15 MS. FERNANDEZ: Good luck,  
16 everybody. Take care.

17 CHAIR JONES: Thank you.

18 COL COOK: Judge Jones? I would  
19 agree. Put that language in there just to  
20 make it clear so the discretion's not taken  
21 away.

22 I mean, if we're talking about



1 having a victim who's been transferred out of  
2 the area, if you've got a Commander who's  
3 deployed and not in the same place, you want  
4 to make sure that those preferences are  
5 conveyed and not strap the command in how  
6 that's done.

7 If the opportunity to see somebody  
8 is there, great. But if it's not you still  
9 want to make sure that the written submission  
10 is what's considered.

11 CHAIR JONES: All right.

12 MS. GARVIN: And that was -- the  
13 subcommittee did talk specifically about this  
14 piece and intending to leave discretion with  
15 the method of delivery of the victim  
16 information.

17 Albeit, in part this piece was  
18 about the victim being heard directly rather  
19 than via trial counsel also. So that's hence  
20 the in-person in writing to align with what  
21 happens in Federal courts when plea is  
22 happening.

1                   So, again, this should be, I  
2 believe, based on the conversation thus far  
3 this morning or this afternoon in part should  
4 be carried over to when you discuss the next  
5 one. But the discretionary piece that was  
6 intended to allow that to happen.

7                   REP. HOLTZMAN: My view is that we  
8 should retain it right now as part of 31. And  
9 I think that's what Colonel Cook was  
10 suggesting.

11                   COL COOK: Yes.

12                   MS. GARVIN: My apologies.

13                   COL COOK: Yes.

14                   CHAIR JONES: And it's not you,  
15 Meg. It's me. I now have to go back to  
16 Professor Hillman. Professor, and I confess,  
17 I do not recall exactly what your  
18 recommendations from the CSS subcommittee are.  
19 Is there a reason for us to wait or just  
20 immediately adopt Recommendation 32B?

21                   PROF. HILLMAN: No reason to wait,  
22 Your Honor. I was flagging it only because we

1 addressed potential changes in the sentencing  
2 process that do implicate the way that  
3 pretrial agreements and other, you know, they  
4 would roll out.

5 But it would not -- I'm happy to  
6 defer to Victim's Services Subcommittee on the  
7 importance of the victim being heard. And I  
8 just, in terms of the process of that, we may  
9 run this down the road. But there's nothing  
10 that conflicts with this and I recommend going  
11 ahead there. Sorry if I derailed things  
12 there.

13 CHAIR JONES: No. Not at all.  
14 Okay. With respect to 32B, any other issues?  
15 It sounds like everyone's in agreement?  
16 Colonel Cook?

17 COL COOK: One clarification. As  
18 Rep. Holtzman just said, it'd be that last  
19 sentence that we're retaining but put it up at  
20 the end of 31 because it's going to apply to  
21 case disposition as much as it does to the  
22 plea. And then leave 32 as the portion to

1 ultimately incorporate it into the manual  
2 somehow.

3 BG DUNN: I am not sure. You  
4 know, I think that maybe the reason these  
5 recommendations were separated out at the very  
6 beginning is because in terms of case  
7 disposition it's the victim's concerns  
8 conveyed through the trial counsel up through  
9 the system.

10 And in the second one, based on  
11 what Meg just said, it is the victim's right  
12 to be heard. So either to submit a statement  
13 or to appear in person.

14 And that is different than  
15 conveyed through the trial counsel, you know,  
16 verbally or, you know, based on my discussion,  
17 et cetera. I mean that appears to be two  
18 different --

19 MS. GARVIN: That is accurate.

20 BG DUNN: -- processes.

21 MS. GARVIN: They were separated  
22 in large part in our discussion because they

1 are two distinct rights legally. The right to  
2 confer exists under the CVRA and under the  
3 NDAA.

4 And that is conferral with the  
5 decision maker, meaning you get to talk with  
6 them and have some level of discussion with  
7 them. That's 31. 32 is actually a right to  
8 be heard, which is an individual held right  
9 where you actually get to have the input.

10 The method by which that input  
11 happens may not be in person, it may be in  
12 writing. And the intent of both of those is  
13 to have an impactful moment before decisions  
14 are made, whether that be with regard to  
15 whether to go forward or what plea to accept.

16 So I think what has been done with  
17 regard to amending 31 including this last  
18 sentence on 32B achieves a portion of what the  
19 subcommittee talked about. But not the second  
20 portion of what the subcommittee heard  
21 evidence on, which is the importance of  
22 individuals being personally heard rather than

1 having it conveyed.

2 COL COOK: But where? To the  
3 convening authority or in court?

4 MS. GARVIN: We discussed both.  
5 We discussed both. And 31 we ended up leaving  
6 it for -- I don't have -- I just flipped my  
7 page. The implementation of mechanisms --  
8 that's where that language came from because  
9 we heard evidence that defense doesn't go  
10 directly to the convening authority, generally  
11 speaking.

12 Most things go through trial  
13 counsel to the convening authority and through  
14 the SJA. That's how the convening authority  
15 hears things with regard to whether to move  
16 forward or not.

17 So we were trying to leave in  
18 place and not override all of that but figure  
19 out the mechanisms by which the victim  
20 actually gets heard by the convening authority  
21 and the conferral process pre-decision about  
22 whether to move forward with a case but with

1 regard to plea to make it align we wanted it  
2 to be meaningful, heard by the convening  
3 authority in both/and moments, both by the  
4 convening authority and the court to align  
5 with the Federal Crime Victims' Rights Act and  
6 the right to be heard.

7 BG DUNN: See, I think that  
8 regardless of where we come down on the heard  
9 on the pretrial agreement, that we should keep  
10 the two provisions separate or we're going to  
11 get ourselves in a position here of having  
12 the, you know, victim write a statement to the  
13 convening authority before he refers the case,  
14 which is not the recommendation of the  
15 subcommittee.

16 I mean, for all the discussion  
17 we've had about trying to combine 31 and 32,  
18 I think because we're talking about two  
19 different levels of input that we should  
20 separate those recommendations back out.

21 Leave 31 the way it is and then  
22 deal with 32 and the pretrial agreement. And

1 if they go together, Holly, then, you know,  
2 however we sort out the victim's right to be  
3 heard on pretrial agreement could just go  
4 along with the pretrial advice.

5 MS. GARVIN: And if I may also the  
6 subcommittee intentionally kept them as the  
7 confer with the regard to whether to move  
8 forward with the case be heard with regard to  
9 plea and then sentencing is taken care of  
10 somewhere else.

11 There's a separate and discrete  
12 right to be heard at sentencing under federal  
13 law and that's different.

14 BG DUNN: That's right.

15 MS. GARVIN: And I think just  
16 making sure that that doesn't get conflated,  
17 the right to be heard about a plea agreement  
18 with regard to a plea agreement, which is the  
19 right, needs to be a separate right and  
20 acknowledged.

21 BG DUNN: And I think it's good to  
22 keep them separate because of the difficulty



1 of sorting through the quantum portion of the  
2 plea agreement.

3 I mean that's got to be a  
4 completely separate process because if the  
5 military plea agreement process remains the  
6 same whether or not the victim is going to  
7 know what quantum portion is is going to be a  
8 difficult process to work through.

9 COL COOK: And I'd be okay with  
10 keeping the right to convey their interests in  
11 the case disposition and the plea separate.  
12 I'd be fine with that.

13 But if what you're building in is  
14 the right to be heard in person in either one  
15 of those, then I think that logistically  
16 that's not always going to be feasible.

17 So I would like to keep them  
18 separate if you want to say that there's two  
19 separate rights, or two separate portions of  
20 the trial, and leave it as the opportunity to  
21 convey their thoughts, and a requirement to  
22 convey their thoughts, to the convening

1 authority so the convening authority considers  
2 it both for case disposition and for a plea  
3 agreement, that's fine.

4 But if it's a right to be heard,  
5 you're going to go get to talk to the person  
6 in person, that may not be feasible in every  
7 situation. I don't think that we ought to  
8 make a recommendation to that affect.

9 MS. GARVIN: I may have confused  
10 the situation. The parenthetical in 32 with  
11 regard to "e.g., submission in writing or in  
12 person" was to accommodate that reality. When  
13 I said personally held and can personally  
14 convey, it was so that it wouldn't be  
15 translated through trial counsel.

16 It'd actually be, whether it's in  
17 writing or in person, at some juncture it's  
18 me. I write it. I say it. My counsel says  
19 it. Whatever it is. I get to do it. It's a  
20 personally held right, not one where I just  
21 get to informally tell trial counsel and then  
22 trial counsel gets to change it.

1                   So with regard to the plea, that's  
2 what we meant by that. So it wouldn't always  
3 have to be physically in person. But the  
4 Subcommittee did not go there.

5                   COL COOK: Is the victim going to  
6 understand that nuance?

7                   MS. GARVIN: I'm sorry?

8                   COL COOK: Is the victim who's  
9 personally involved in the case going to  
10 understand that nuance, do you think, based on  
11 everything you heard talking with the victims  
12 and the victims' advocates? Will they  
13 understand that nuance that -- to write a  
14 letter and get their input?

15                   MS. GARVIN: If they have Special  
16 Victims' Counsel, which they all have the  
17 right to.

18                   That's how this works in the  
19 civilian world, too, is counsel explains their  
20 rights to them and then they would then  
21 advocate for -- I should step back. We did  
22 not specifically address that as the

1 Subcommittee and I just put on my hat as a  
2 subject matter expert, which I'm happy to  
3 continue with, but I don't think that's my  
4 role unless you specifically ask it of me, so.

5  
6 We did not hear evidence  
7 specifically about that. What we heard  
8 evidence on is that Special Victims' Counsel  
9 spends a lot of time explaining rights and  
10 what they mean and how you can execute them in  
11 court. So I would anticipate that would be  
12 true here.

13 COL COOK: And it's the last part  
14 of what you just said that probably concerns  
15 me the most, about how they can enforce or how  
16 they can execute those rights in court.

17 MS. GARVIN: Or in proceedings or  
18 before adjudicators or the decision makers.  
19 Special Victims' Counsel, the evidence we  
20 heard and the directives they've been given,  
21 they explain rights and how you can exercise  
22 your rights regardless of what that avenue of

1 that exercise is.

2 COL COOK: I have no objection to  
3 leaving, in Recommendation 31, the input on  
4 case disposition to separating out the input  
5 on a plea agreement for the victim and  
6 requiring it be part of the process. That I  
7 have no objection to. Keeping it flexible  
8 enough that it accommodates, at the convening  
9 authority's discretion, how that will happen,  
10 that's fine.

11 CHAIR JONES: So are we taking  
12 accepting a plea bargain out of 31 now?

13 COL COOK: I think that's what  
14 General Dunn was recommending and I don't have  
15 an objection to that.

16 REP. HOLTZMAN: We are keeping 31  
17 and 32 the same. Am I wrong?

18 CHAIR JONES: Well, everybody  
19 knows that confer doesn't mean you have a  
20 right to appear in court, whereas the right to  
21 be heard, Ms. Garvin, and correct me, implies  
22 that you might have the right to be heard in

1 court? Or does it mean, you know, in the  
2 civilian Victims' Rights Act, that you have a  
3 right to be heard in court?

4 MS. GARVIN: It depends on where  
5 the decision is being made. If the decision  
6 is being made in a court proceeding you would  
7 have and you have the right to be heard about  
8 whatever is being decided. You would have the  
9 right to be heard in that court proceeding.  
10 If the decision is being made somewhere else,  
11 you have the right to be heard about that.  
12 That's where you have the right to be heard.

13 You execute your right to be heard  
14 where the decision-making moment is. The  
15 proceeding in which, or the opportunity in  
16 which that decision is being made.

17 COL COOK: In the military court,  
18 though, there are two parts to that. The  
19 convening authority makes the initial decision  
20 about whether to accept a plea on what might  
21 be a potential cap on that plea.

22 The accused has then got to go

1 into the first part of a court-martial and say  
2 what they are pleading to, why they think they  
3 are guilty and then it's up to the military  
4 judge to accept that plea.

5 If the victim, to the extent that  
6 this right, you know, to convey your opinions  
7 is saying that it's before the convening  
8 authority, I have no objection.

9 If you're saying it's going to go  
10 into part one of the court-martial, the  
11 findings proceedings, then I would object to  
12 that based on the system that we have and the  
13 way the process is set up.

14 MS. GARVIN: And our  
15 recommendation was for both.

16 CHAIR JONES: Well, I personally  
17 couldn't agree to both because I don't know  
18 how it could be done.

19 MS. GARVIN: Well, with regards to  
20 the rights being heard -- I'm sorry. I'm  
21 sorry, Judge.

22 CHAIR JONES: No, because of the

1 way, you know, the plea bargain works. I  
2 don't know how it could be an in-court  
3 presentation by a victim.

4 MS. GARVIN: Well, the victim  
5 already has, and it's already operationalized,  
6 the right to be heard at sentencing.

7 COL COOK: At the sentencing.

8 MS. GARVIN: Right. This is a  
9 recommendation to be heard with regard to the  
10 plea. That is what the Subcommittee is  
11 recommending.

12 CHAIR JONES: When and where?

13 MS. GARVIN: We are recommending  
14 both because there are two decision points  
15 that happen. There is the first one, which is  
16 the plea that includes the cap, that has the  
17 quantum element. And then there is the second  
18 piece, which is in court. And we were  
19 recommending both in order to align it with  
20 the federal CVRA.

21 My understanding from the  
22 conversation is there doesn't seem to be a



1       dispute about the former of those, the  
2       convening authority. And perhaps the second  
3       of those might be the piece that is held until  
4       the conversation with the Subcommittee.

5                   BG DUNN: Well, in the military,  
6       in the first part of a military court-martial  
7       where there is a plea agreement, there's a  
8       conversation between the judge and the accused  
9       about, you know, did you do this, did you do  
10      this, did you do this, tell me how you did  
11      that.

12                   What the judge is determining is  
13      whether or not that accused, you know,  
14      understands the plea, understands the  
15      consequences of the plea and actually  
16      committed the misconduct.

17                   It's very different than it is in  
18      the civilian. Much more detailed and much  
19      lengthier process of making sure that the  
20      accused, you know, actually is in fact  
21      pleading guilty to all the elements of each  
22      offense on that charge sheet.

1                   And then the military judge makes  
2                   a decision purely whether to accept the  
3                   accused's plea of guilty in that first part of  
4                   the court-martial. And I do not see how the  
5                   victim comes into that to be heard in any  
6                   manner. I don't see where the victim belongs  
7                   in that process or what or how that would  
8                   work.

9                   The second part, if the judge  
10                  accepts the plea -- the judge can reject the  
11                  plea, which means that we don't go any  
12                  further. It doesn't mean the case is over.  
13                  It means the government has to now try the  
14                  case. But assuming the judge accepts the  
15                  plea, then we move to the sentencing phase,  
16                  you know, where clearly the victim has the  
17                  opportunity to be heard on the sentence in the  
18                  case.

19                  MS. GARVIN: So our directive was  
20                  to try to align the right, or see where the  
21                  rights are different between the military and  
22                  the civilian.

1                   And with regard to the civilian,  
2                   the victim actually is heard in that first  
3                   moment, with regard to the plea. Under the  
4                   federal Crime Victims' Rights Act, the victim  
5                   can be heard on the pure plea moment, meaning,  
6                   do you accept this plea or do you not,  
7                   regardless of the latter terms of the plea  
8                   that go to sentencing.

9                   So the victim, they're not a  
10                  decision maker in the civilian system under  
11                  the federal Crime Victims' Rights Act. They  
12                  are heard at the proceeding and can say,  
13                  right, in the federal system the test of  
14                  whether to accept a plea or not to accept a  
15                  plea is, is it in the interest of justice?

16                 The victim can be heard to say, in  
17                 federal court, acceptance of this plea is not  
18                 in the interest of justice. Or the term of  
19                 this plea isn't in the interest of justice.  
20                 That is what is not currently aligned. And  
21                 then they also have the right to be heard at  
22                 sentence. But they can be heard purely on

1       whether or not to accept plea.

2                   BG DUNN: Right. But that is tied  
3 to the term of the plea. It's not tied to  
4 what the military judge is doing, which is  
5 just merely determining if this accused in  
6 fact committed those crimes, understands what  
7 his or her plea means, et cetera.

8                   I mean, I think that first part is  
9 not comparable. And you have the whole  
10 quantum portion issue because the military  
11 judge goes through the whole process without  
12 ever knowing what the cap is, and so the  
13 victim cannot address that.

14                   MS. GARVIN: The Subcommittee  
15 certainly did understand the difference --  
16 again, we did not speak about the quantum  
17 piece in those terms. What we were talking  
18 about is making sure it was meaningful and if  
19 the plea is going to be accepted in that  
20 moment.

21                   The victim's right to be heard  
22 about anything is essentially gone after that

1 because you start to put in the cap in the  
2 military terms and so you start to not have a  
3 meaningful being heard about whether the plea  
4 is in the interest of justice or not.

5 So we were trying to ensure, early  
6 in the process, separate and apart from the  
7 punishment that might be imposed, which is the  
8 right to be heard at sentencing, or the  
9 rehabilitative terms that come into play at  
10 sentencing.

11 The victim has a separate and  
12 discrete right. We were trying to find the  
13 avenue by which that gets a play in the  
14 military system. We may not have found the  
15 right device.

16 But that's what the Subcommittee  
17 was grappling with, is how do you ensure that  
18 the victim has a separate and discrete right  
19 to be heard about the acceptance of a plea  
20 regardless of the terms of sentence? Which is  
21 what the right is in the federal system.  
22 That's what we were trying to achieve.

1 COL COOK: May I ask a question  
2 about the federal practice? I'm sorry.  
3 Because I don't know that practice much. When  
4 they do that in the federal -- when the victim  
5 comes in and has their right to be heard in  
6 the federal system -- federal pleas, when an  
7 accused stands there and says I plead guilty,  
8 do they have to go into a lot of detail? Or  
9 can they just plead to whatever the agreed  
10 upon charge was and saying I'm pleading  
11 guilty, not to rape but to sexual assault?

12 MS. GARVIN: They have to argue to  
13 the facts that result in --

14 CHAIR JONES: They have to  
15 allocate to sufficient conduct to satisfy each  
16 and every element in their defense.

17 MS. GARVIN: There we go.

18 COL COOK: Okay.

19 CHAIR JONES: And I have to say,  
20 in 17 years, I never saw a victim come in and  
21 make a statement at a plea. I understand that  
22 it's in the --

1 MS. GARVIN: And it was only  
2 passed in 2004 and the first case interpreting  
3 the federal Crime Victims' Rights Act did not  
4 issue from an appellate court until 2006. So  
5 it's a relatively new, specific right in the  
6 federal civilian system also.

7 COL COOK: Do the victims, then,  
8 when they come in and the allocution is made,  
9 does the victim then make their statement  
10 under oath? And, I mean, how much do they say  
11 this would not be in the interest of justice,  
12 or do they start contesting some of the  
13 comments of the person?

14 I mean, is this under oath? Do  
15 they challenge, well, what that person said is  
16 not true, he or she or whoever it was, what  
17 they're saying is not true, this is what  
18 really happened. How far does that statement  
19 go? Just as a matter of practice.

20 CHAIR JONES: Again, I don't know  
21 because I've never seen it happen. I got off  
22 the bench a year ago and I've never seen it

1       happen.  But, you know, one judge in one  
2       district, so.

3                   MS. GARVIN:  Ma'am, I'm happy to  
4       provide some information.

5                   CHAIR JONES:  What I want to know  
6       is this.  Look.  I think the concept of a  
7       victim having input with respect to a plea  
8       bargain makes perfect sense and obviously you  
9       have to correlate talking to the prosecutor in  
10      the federal system who's going to be making  
11      that decision versus going to the convening  
12      authority hearing with the military justice  
13      system.

14                   But in the military system, I  
15      assume -- or maybe I'm wrong.  Does the  
16      accused plead to every charge, or does the  
17      plea bargain permit a plea of lesser than the  
18      all charges?  I know there's an agreed upon  
19      term.

20                   COL COOK:  Whatever the charge  
21      sheet says, all of them by the end will be  
22      accounted for.  The accused, they could not



1 enter a plea on some and maybe the trial  
2 counsel will withdraw some of the charges or  
3 just not proceed with them.

4 They could plea to the offence  
5 itself. They can plea to lesser included, but  
6 what's on that charge sheet is going to be  
7 addressed in the court and they do plead to  
8 each thing that's alleged unless there's been  
9 an agreement to withdraw that charge or  
10 dismiss it.

11 CHAIR JONES: But is that done by  
12 the trial counsel or by the convening -- well,  
13 that would be part of the convening authority.

14 COL COOK: Part of the deal that's  
15 considered by --

16 BG DUNN: And the convening  
17 authority -- and you really, if you get in a  
18 situation where you're really not addressing  
19 every charge, because there could be two  
20 charges of the convening authority agrees to  
21 dismiss after the plea is accepted and the  
22 sentence is imposed. And when the convening

1 authority takes action, then, in accordance  
2 with the pretrial agreement, he or she will  
3 dismiss those remaining charges.

4 CHAIR JONES: So potentially a  
5 victim might want to come in at the point  
6 where this plea is being taken and say I don't  
7 like this plea because there are three charges  
8 that were originally referred and now they're  
9 not here anymore. So is that the --

10 MS. GARVIN: Yes, and that aligns  
11 with civilian.

12 BG DUNN: They can't do that. The  
13 victim can't do that because the judge does  
14 not know the quantum portion of the plea.

15 CHAIR JONES: Wouldn't the Judge  
16 know what was referred and then what changed  
17 afterwards?

18 COL COOK: Yeah, but for each of  
19 the offenses that the accused pleas to, the  
20 Judge is going through all of the elements of  
21 that charge to make sure the defendant knows  
22 what exactly are you saying you did and have

1 you met all the elements on each of the  
2 charges that are plead to. And that has  
3 nothing to do with the quantum portion of  
4 itself. It's the --

5 BG DUNN: Right. But the problem  
6 you could have is, say you have six charges,  
7 and the accused comes in, has a plea  
8 agreement, comes in and is going to plead to  
9 charges 1, 4 and 5.

10 Then that's what the military  
11 judge goes through the process with charges 1,  
12 4 and 5. And the military judge doesn't  
13 inquire or know what has happened to 2, 3 and  
14 6.

15 CHAIR JONES: So he doesn't know  
16 that 2, 3 and 6 were referred?

17 BG DUNN: Right. Well, he knows  
18 they're referred, but he doesn't know, you  
19 know, what the next step is going to be with  
20 regard to those because the accused is  
21 pleading to these.

22 MS. GARVIN: So, if I may, that's

1 actually relatively similar, in that when the  
2 victim comes in on the civilian side at the  
3 front end, one piece of what they could do is  
4 say this plea is inadequate because it's  
5 dropping critical charges that are relevant to  
6 the proceeding and therefore it's not in the  
7 interest of justice to accept this limited  
8 plea.

9 CHAIR JONES: That what I would  
10 imagine happens in the civil court.

11 MS. GARVIN: That's what they do.  
12 And I will say, when I say the victim, and one  
13 of our other recommendations is about the SVC,  
14 you know, in the civilian system right now,  
15 this is predominately done by victim's counsel  
16 coming in and saying, you know, the victim  
17 objects to this, has a right to be heard.  
18 They're exercising their right to be heard by  
19 saying this plea is not in the interest of  
20 justice because dismissal or releasing of  
21 charges 2 and 3, which are critical to  
22 understanding the facts, makes it not in the

1 interest of justice.

2 CHAIR JONES: I think I finally  
3 got it. No matter what the victim says, the  
4 judge can't do anything about it. This is  
5 already heard with the convening authority.

6 BG DUNN: Right. In that first  
7 part, the victim, I think we all agree, should  
8 be heard by the convening authority in some  
9 fashion, not necessarily face-to-face. And  
10 then on sentencing. But I think that first  
11 part of the court-martial is not constructed  
12 in any way for the victim to be --

13 CHAIR JONES: In other words, the  
14 victim, if I've got it, has already had their  
15 opportunity to let the convening authority  
16 know how they feel about what the charges  
17 should be, and actually then appearing when  
18 this has gotten to the military judge. The  
19 military judge can't change anything.

20 BG DUNN: Correct.

21 CHAIR JONES: You can accept the  
22 plea or you can say on whatever the guy's

1 willing to plea to. Or gal. But he can't  
2 turn around and say, oh, and I think this  
3 victim's right. You should have also plead to  
4 that.

5 BG DUNN: Right. The military  
6 judge has no authority in that regard.

7 MS. GARVIN: Part of the  
8 Subcommittee's conversation though in  
9 exercising or envisioning the right to align  
10 with the CVRA is the judge still has the  
11 authority to reject the plea.

12 CHAIR JONES: Only because there's  
13 a failure to allocute. He can't reject it or  
14 the whole plea because, oh, you didn't plead  
15 to these and I'm sorry I'm not accepting this  
16 plea. That's the difference.

17 BG DUNN: That's the convening  
18 authority's decision.

19 CHAIR JONES: That's up to the  
20 convening authority, so getting up there at  
21 that stage wouldn't make any sense, I don't  
22 think.

1 COL COOK: I agree.

2 CHAIR JONES: It's the convening  
3 authority that you have to get your  
4 information to and your position to. Which  
5 you know, I know.

6 MS. GARVIN: No. I appreciate the  
7 detailed descriptions that the Panel is going  
8 through in order to get through all the  
9 recommendations.

10 The Subcommittee's focus, and it  
11 sounds like you all have a grip on it. The  
12 Subcommittee's focus was the two rights,  
13 confer about whether things go forward and  
14 along the way and have an absolutely  
15 meaningful right to be heard about the plea  
16 itself separate and apart from the right to  
17 sentence.

18 As long as that is being achieved  
19 as a separate right, not being relegated to  
20 the right to sentence, the military will be  
21 coming in line with the federal Crime Victims'  
22 Rights Act.

1                   If it is lumped into the  
2                   sentencing portion, or only the right to  
3                   confer about whether a case goes forward,  
4                   there is a gap in the rights in the military.

5                   CHAIR JONES: I don't think any of  
6                   us intended there to be that gap. I think  
7                   right from the get go we've been including the  
8                   right to confer with the convening authority  
9                   in whatever manner about any plea bargain.

10                   And I think all we're talking  
11                   about now is, is there an appropriate moment  
12                   in a courtroom to be heard? And I think at  
13                   the point of an allocution before a judge  
14                   doesn't make sense.

15                   So, I mean, are we talking now  
16                   basically about when else can a victim be  
17                   heard in court about a plea bargain? We all  
18                   agree that --

19                   MS. GARVIN: They get to be heard  
20                   by the convening authority.

21                   CHAIR JONES: -- at every stage  
22                   that a convening authority should be conferred



1 with about a plea bargain, the victim should  
2 be able to do that.

3 MS. GARVIN: So, just for  
4 clarification --

5 CHAIR JONES: I'm only confused  
6 about what court proceeding is it that you  
7 believe that they need to be heard in. And so  
8 maybe we can go to the second one.

9 MS. GARVIN: So just for language  
10 clarification, so the Subcommittee used the  
11 right to confer in one recommendation and the  
12 right to be heard in a second recommendation  
13 intentionally. Heard not meaning in person,  
14 but heard meaning something other than two-way  
15 communication. Heard meaning one-way  
16 communication I get to pass along to you.

17 And then we wanted to make sure it  
18 was meaningful to align with the civilian  
19 rights, meaning before it was accepted. We  
20 believed that was both in court and out of  
21 court. If what the Panel is saying is there's  
22 not an opportunity in court for that, then I

1 believe the Panel needs to figure out, if it's  
2 going to accept the recommendation in theory,  
3 where is the moment to ensure the victim is  
4 heard on plea in the proceedings or in the  
5 process? I should use the word process rather  
6 than proceedings.

7 CHAIR JONES: You say heard means  
8 one-way communication, is that right? And  
9 that's how you're --

10 MS. GARVIN: Heard means it is me  
11 saying to you, writing to you, telling you  
12 exactly what I think. It is the victim's  
13 voice being present, actively present,  
14 somewhere in the process.

15 MR. BRYANT: In the State of  
16 Virginia's process, our own Victim Rights Act,  
17 and my memory of what goes on in the federal  
18 Victim Rights Act from having been in the U.S.  
19 Attorney's Office, is that they come in and  
20 they can speak directly.

21 It doesn't mean it's going to  
22 change the judge's mind or that he's not going

1 to accept the plea, but sometimes it might.  
2 But they actually can come into court, in the  
3 State of Virginia's system, and address the  
4 judge and say I don't think this plea is  
5 adequate or covers the offenses committed  
6 against. And even if they're not there, the  
7 prosecutor has an obligation by law to inform  
8 the judge if the victim disagrees.

9 "Your Honor, we are reducing this  
10 to attempted rape and I want you to know that  
11 the victim totally disagrees with that  
12 decision to reduce this, as well as she  
13 totally disagrees with the recommended  
14 sentence." So sometimes the victims don't  
15 want to come in and be in open court but the  
16 prosecutor still has that obligation if they  
17 don't come.

18 Sometimes I've seen it work the  
19 other way. The judge is leery that the  
20 prosecution gave up on the case and I've had  
21 a couple of instances where my prosecutors  
22 have had the victim there to say, no, judge.

1 I'm the victim of this and this is what I  
2 want. And the judge still rejects the plea.  
3 So at least it's the opportunity to be heard.

4 MS. GARVIN: And that aligns with  
5 the federal, the state practice you described  
6 aligns with the federal that you've also  
7 described. And that's where the Subcommittee  
8 was trying to get to.

9 MR. BRYANT: But I have to say,  
10 like Judge Jones, in my own federal  
11 experience, I can't recall, in the 13 years,  
12 where we actually had a victim come in and say  
13 they disagreed with what was going on, what  
14 the full agreement was.

15 But at the same time, the  
16 prosecutor's still required to say, "Your  
17 Honor, the victim in this case does not agree  
18 with the government's plea agreement."

19 And the other thing is, I think  
20 this came up, yes, in every system there's a  
21 witness stipulation of facts that the judge,  
22 in the state system, in the federal system,

1 like the military system, goes over ad  
2 infinitum.

3 The first time, when I first got  
4 out of law school and went and had a case as  
5 a defense attorney in federal court, after all  
6 that judge went through I wondered why this  
7 guy was pleading guilty myself. You know, why  
8 would you do that with all the warnings?  
9 That's what you get from a federal judge.  
10 Anyway, that's just an aside.

11 CHAIR JONES: So where does confer  
12 turn into heard? I mean, we know that a  
13 victim can confer on a plea bargain, right,  
14 with the convening authority?

15 MS. GARVIN: The way we crafted it  
16 in our recommendations was confer about  
17 whether the case is moving forward or not.  
18 Charges.

19 CHAIR JONES: Okay.

20 MS. GARVIN: Heard was about the  
21 plea.

22 CHAIR JONES: Oh, so you're not

1 using the conferral, here are my thoughts  
2 about -- are we talking about a written  
3 statement to the convening authority? That  
4 would be a one-way statement that says this is  
5 what I think happened in this case, he should  
6 plead to everything or he should plead to  
7 this?

8 MS. GARVIN: That's where  
9 Recommendation 32(b) came in with the  
10 parenthetical that said could be in writing or  
11 in person, because we were acknowledging that  
12 piece here.

13 We separated confer and the right  
14 to be heard on plea because confer is the  
15 right to be a part of things along the way and  
16 understand what is happening along the way.  
17 That is what the right to confer under the  
18 federal CVRA and under the NDAA means. It  
19 means you understand how things are going,  
20 what's happening.

21 We grounded it in conferring with  
22 regard to charge referral because that is a

1 critical moment along the process that we  
2 heard testimony and took evidence on that was  
3 a gap.

4 And then the right to be heard was  
5 about this critical moment, the second  
6 critical moment about whether the case is  
7 going to go away or go in a very different  
8 direction. Yes, I'm sorry.

9 REP. HOLTZMAN: I just have read  
10 the whole of Recommendation 32, including  
11 32(a) and 32(b). I think, as drafted, it  
12 solves the other problems that you've raised  
13 because it says the proposed changes -- look  
14 at A. It says the proposed changes should  
15 provide the victim the right to be heard  
16 regarding a plea with appropriate  
17 consideration to account for military pre-  
18 trial agreement practice. So if it doesn't  
19 make any sense, then it doesn't have to  
20 happen.

21 MS. GARVIN: That is where the  
22 Subcommittee landed, as we did not specify the

1 moment.

2 REP. HOLTZMAN: Right. So that if  
3 the moment to be heard is vis-a-vis the  
4 convening authority, then the victim would  
5 have a right to submit a written document to  
6 the convening authority or to ask to be heard  
7 and could be accepted, could be rejected.

8 In terms of being heard in court,  
9 which what you're saying, General Dunn, is  
10 that it's a meaningless point to make a  
11 comment because the judge is just bound by  
12 accepting the plea or rejecting the plea as to  
13 whether or not the facts stated meet the legal  
14 standard.

15 Okay, so there's no real  
16 discretion there, just a dissent, you know, so  
17 you can't say in the interest of justice I'm  
18 for or against the plea. Well, if it doesn't  
19 make sense, there's nothing in Recommendation  
20 32 that would require that the victim be heard  
21 at that point.

22 MS. GARVIN: You are correct.



1                   REP. HOLTZMAN: You know, so I  
2 think maybe the language solves the problem.

3                   MS. GARVIN: Representative  
4 Holtzman, you're correct. What the  
5 Subcommittee did was try to leave this, the  
6 moment of what this right looks like, to a  
7 later time to accommodate what is and isn't  
8 appropriate.

9                   REP. HOLTZMAN: So I'm just trying  
10 to say that the concerns that have been raised  
11 appropriately here by Colonel Cook and General  
12 Dunn, I think is solved by the language. And  
13 then we don't have to worry that we're  
14 imposing something new on a system that would  
15 be irrelevant to how it actually works.

16                   And if that's the case then  
17 perhaps we can just go forward and accept  
18 Recommendation 32. Would that be too radical?

19                   MS. GARVIN: I retract everything  
20 I said and leave it to Representative  
21 Holtzman.

22                   REP. HOLTZMAN: Is that something

1 we could do? I want other readers here to  
2 validate what I --

3 BG DUNN: No, 32 and all of its  
4 associated findings, I mean, it says an  
5 analogous opportunity for the victim to be  
6 heard in the military justice system is before  
7 the convening authority decides to accept the  
8 plea. I agree with that 100 percent. I was  
9 concerned because, Meg, you said both/and in  
10 court. Sorry, that's what started me down  
11 that path.

12 MS. GARVIN: So let me be clear --

13 BG DUNN: The language that's on  
14 the slides, I am fine.

15 REP. HOLTZMAN: So you have no  
16 problem with it?

17 BG DUNN: I have no problem with  
18 it.

19 REP. HOLTZMAN: Colonel Cook, what  
20 do you think?

21 COL COOK: When I had made the  
22 suggestion to combine the two is because I

1 didn't necessarily think there was much -- I  
2 don't mind. They can be done the same way.  
3 I don't mind having it separated so that we  
4 are recognizing two different things.

5 I will note that your  
6 recommendation for Number 31 never says the  
7 right to confer. It says the findings where  
8 you note what's going on in the civilian  
9 statute, and you just talk about the fact that  
10 they can convey it. That's all fine.

11 The language in 32 is fine with  
12 me, for the most part. The only question I  
13 want to clarify is, as long as 32(a) is the  
14 right to be heard regarding a plea, it's by  
15 the convening authority because it's not a  
16 question of the perfect consideration for the  
17 military pre-trial practice, it's because  
18 that's what it is. It's got to be the  
19 convening authority.

20 But the second part that says the  
21 recommended changes include a right to be  
22 heard before the convening authority decides

1 to accept or reject. That's what the first  
2 one says. What else does it include, is what  
3 my concern is.

4 If you are saying in any way by  
5 the language that's there it includes this,  
6 and if you want to change that to say the  
7 recommended change means the right to be heard  
8 before the -- the recommended change provides  
9 a right to be heard before the convening  
10 authority decides, fine.

11 But if it includes I'm just  
12 concerned that when we've opened the  
13 suggestion that you're also saying it might  
14 include the right to be heard in front of a  
15 military judge. And at that point I think  
16 it's too late based on all the things we've  
17 just discussed.

18 CHAIR JONES: Any other thoughts?

19 REP. HOLTZMAN: But 32, if I might  
20 just say, doesn't discuss the judge. It talks  
21 about the convening authority.

22 So includes the right to be heard

1 before the convening authority decides to  
2 accept, reject or propose it. So I don't see  
3 how the judge comes into that.

4 Am I misreading it? Because I'm  
5 just trying to allay your concerns and if we  
6 need to change language here then we should  
7 change language. But if we don't really --

8 COL COOK: I'm wondering, Meg, was  
9 there anything else that it was going to  
10 include? That's the only question I have, is  
11 it says it includes --

12 MS. GARVIN: I don't have a  
13 specific recollection of the Subcommittee.  
14 When I said both/and the court, that was part  
15 of a conversation. We did not specifically  
16 say here the include was more than that with  
17 regard to the convening authority. I don't  
18 have a recollection of that.

19 COL COOK: If it's limited to the  
20 convening authority then I have no objection.

21

22 CHAIR JONES: Well, neither would

1 I, but I don't know if it's limited.

2 COL COOK: Because that's not  
3 clear.

4 CHAIR JONES: Yes. On the phone.

5 PROF. HILLMAN: Sorry, Judge  
6 Jones. This is Beth. I have to sign off in  
7 eight minutes so I don't know if we're going  
8 to -- just to let you know on that. I think  
9 the language that's drafted, I'm in support of  
10 the language as drafted.

11 CHAIR JONES: You think the  
12 language in this recommendation is what?

13 PROF. HILLMAN: I just said I am  
14 in support.

15 CHAIR JONES: Oh. Okay. Thanks.

16 REP. HOLTZMAN: Well, I think that  
17 if the Committee conversation suggests that  
18 we're not talking about the right to be heard  
19 before the judge, in 32(b), that should  
20 satisfy everybody's concern about the meaning  
21 of that one section.

22 CHAIR JONES: I understand Colonel

1 Cook's concern with the word include. So  
2 maybe we could just modify that, unless you're  
3 talking about being heard by anyone but the  
4 convening authority. Are you saying the  
5 recommended changes ensure the right to be  
6 heard before the convening authority?

7 REP. HOLTZMAN: Is that fine with  
8 you?

9 COL COOK: That it ensures the  
10 right to be heard by the convening authority,  
11 yes. In 32(a), I would just add after the  
12 words "regarding a plea" -- the right to be  
13 heard regarding a plea, the right to be heard  
14 by the convening authority regarding a plea.  
15 I'd put the words convening authority into  
16 32(a).

17 My concern is these are going to  
18 be stand-alone recommendations. Nobody's  
19 going to go and look for some of the  
20 background discussions. So I'd rather leave  
21 this is what was intended and make it clear  
22 that they don't have to go search for it and

1 nobody can misinterpret it.

2 REP. HOLTZMAN: Are you talking  
3 about (b)?

4 COL COOK: I'm talking about in  
5 32(a) where it says the proposed change should  
6 provide victims with the rights we heard  
7 regarding a plea.

8 I just want to modify that to say  
9 the right to be heard by a convening authority  
10 regarding a plea with appropriate  
11 consideration to the pre-trial agreement  
12 practice.

13 So the convening authority goes  
14 into Part (a). And (a) gets clarified to say  
15 this is what it ensures. It doesn't mean it  
16 includes anything else other than what it  
17 currently states.

18 CHAIR JONES: And would accept it  
19 with that additional language. Does anyone  
20 else still have a disagreement with respect to  
21 this?

22 PROF. HILLMAN: Judge Jones, let



1 me just ask, for the Subcommittee. This  
2 means, if we put this in, then the victim is  
3 never going to be heard in court.

4 CHAIR JONES: I'm sorry. I  
5 couldn't understand what you said, Judge  
6 Hillman.

7 CHAIR JONES: I think Professor  
8 Hillman's saying that if we put this language  
9 in, it means it's not going to be heard in  
10 court. Well, I think this language doesn't go  
11 there. That's right.

12 At the moment, it ensures the  
13 right to be heard before the convening  
14 authority, which we're all in agreement makes  
15 sense. And also amended in 32(a), again, it  
16 reiterates it's the right to be heard by the  
17 convening authority.

18 So we're saying yes to that and we  
19 really haven't found a moment in court yet  
20 where we think there is an appropriate moment  
21 for the victim to be heard with respect to the  
22 plea bargain. I think that's a fair --

1                   PROF. HILLMAN: My only question,  
2                   for the Victims' Services Subcommittee, is  
3                   that sufficient? Because we're not only  
4                   saying we haven't found a moment. We're  
5                   saying there's no right to be heard in court  
6                   if we narrow it to the convening authority  
7                   because the convening authority is never in  
8                   court. And I just want to understand what  
9                   we're saying will not happen.

10                  REP. HOLTZMAN: Well, this doesn't  
11                  apply to sentencing, isn't that correct?

12                  CHAIR JONES: Right. Right.

13                  MS. GARVIN: The victim has a  
14                  separate and distinct right to be heard at  
15                  sentencing. This would not touch -- I will  
16                  say the preclusion of the opportunity to be  
17                  heard in court if, by chance, there is an  
18                  opportunity. I hear the Panel clearly saying  
19                  they do not believe that currently with regard  
20                  to plea there is an opportunity in court that  
21                  makes sense. The Subcommittee did, during  
22                  discussions, contemplate that if there was a

1 moment that made sense in court that it would  
2 be available.

3 So if the Panel is precluding that  
4 future potential, that would be in conflict  
5 with the Panel contemplating it.

6 CHAIR JONES: Well, right now all  
7 we're doing adopting the right to do what can  
8 be done by a victim right now. And at the  
9 moment, we can't contemplate a moment that  
10 makes sense. So I don't think we're  
11 precluding anything, but I'm not sure there's  
12 anything out there that's an opportunity that  
13 we are precluding.

14 Obviously, Professor Hillman,  
15 we'll hear more from your Subcommittee on this  
16 issue. Correct?

17 PROF. HILLMAN: You Honor, not on  
18 the victims' rights so much because that went  
19 with the Victims' Services Subcommittee, but  
20 recommendations on how to bring sentencing in  
21 alignment with the civilian practices, yes,  
22 you will hear more on that.

1                   CHAIR JONES: Okay. And then we  
2 can think about it then. Okay, then I think  
3 with the amendments that make it clear what  
4 we're talking about their right to be heard by  
5 the convening authority from the victim, 32,  
6 32(a) and 32(b) are accepted. Okay. Next,  
7 Meg.

8                   MS. GARVIN: Recommendation 37 is  
9 next. Recommendation 37 was discussed during  
10 the last meeting and there were some changes  
11 proposed, but the Panel did not loop back  
12 around and finish discussion of it.

13                   The findings with regard to this  
14 one, which is labeled Victim Unsworn Statement  
15 During Sentencing. The findings with regard  
16 to this, the Subcommittee, again, did a  
17 comparison.

18                   Our job was to look at the  
19 civilian rights, the CVRA, and see if they  
20 were incorporated. The CVRA includes an  
21 opportunity for the victim to be reasonably  
22 heard at sentencing by allowing a statement

1 that's neither under oath nor subject to cross  
2 examination.

3 In fact, in the materials you'll  
4 see the Subcommittee reviewed and was  
5 presented with, the case of Kenna v. District  
6 Court, which interpreted the federal Crime  
7 Victims' Rights Act and the right to be heard  
8 and noted that it was akin to a defendant's  
9 right of allocution, which is an unsworn, not  
10 under oath moment.

11 Under military rules, a sexual  
12 assault victim may present evidence of impact.  
13 That is, financial, social, psychological and  
14 medical impact of an offense, that unless  
15 there's an agreement from the defense, the  
16 victim has to testify under oath and is  
17 subject to cross-examination. So in order to  
18 bring it in line with the Federal Crime  
19 Victims' Rights Act, it was a clarification  
20 that the victim's right in military  
21 proceedings to be heard at sentencing when it  
22 is not with regard to aggravation on

1 mitigation, but it would be a right of  
2 allocution.

3           So in the federal system if the  
4 victim is being used as aggravation or a  
5 mitigation with regard to a sentence rather  
6 than with regard to impact, those moments,  
7 they are subject to cross-examination and it's  
8 under oath. But when they are doing their  
9 allocution, which is impact, they are not  
10 subject to cross-examination. And so the  
11 subcommittee made a recommendation that they  
12 be allowed to do it unsworn.

13           The language in front of you is  
14 the modification that came out of your  
15 deliberation last time. So I will read the  
16 modified version that you all have in front fo  
17 view and make a comment from the subcommittee  
18 with regard to one piece of it.

19           So the current amended  
20 Recommendation 37 is that the Secretary of  
21 Defense recommends the President changes to  
22 the manual for the court's martial and

1 prescribe appropriate regulations to provide  
2 the right to make an unsworn victim impact  
3 statement not subject to cross-examination  
4 during the pre-sentencing proceeding with the  
5 following safeguards.

6           The members should be instructed  
7 similarly to the instruction they received  
8 when the accused makes an sworn statement. If  
9 there was a, quote, new matter that could  
10 affect sentence brought up the in victim's  
11 unsworn statement, sentencing could be delayed  
12 so they have time to respond. And the unsworn  
13 statement should be in writing and available  
14 to the defense counsel before sentencing,  
15 subject to the same objections available to  
16 the government regarding the accused's unsworn  
17 statement.

18           With regard to the subcommittees,  
19 that is your modified language that is  
20 currently before you with regard to the  
21 evidence and information that the subcommittee  
22 received. We did spend significant time

1 talking about whether it should be in writing  
2 and available to the defense prior to the  
3 moment and we had concluded it should not be  
4 in order to align it with the CVRA and to  
5 align the practice, in large part because  
6 asking a survivor to -- and we had significant  
7 conversation about the impact that sentencing  
8 has on survivors -- asking a survivor to put  
9 their statement in writing in advance and  
10 submit it to others to read in advance can  
11 actually add to the trauma they experience.

12 And so we made the recommendation  
13 that since the federal courts have determined  
14 the Federal Crime Victims' Rights Act right to  
15 be heard at sentencing is right of allocution,  
16 we are making it a right of allocution to  
17 alignment.

18 MS. KING: And just for the  
19 subcommittee or for the committee's  
20 recollection, there was an alternative  
21 statement from Mr. Cassara that I read. It's  
22 on Page 153 of your report, for the people who



1 may not have been here at the last meeting.

2 MS. GARVIN: So you have language  
3 in front of you that was crafted by the Panel  
4 last time. The first edits in bullet 2 align  
5 with the subcommittee's conversations and  
6 deliberations. The last one with regard to  
7 the writing does not align.

8 BG DUNN: Yes, but I think worked  
9 -- we tried to work it out last time to  
10 comport with the military sentencing process,  
11 which is so different in terms of the  
12 immediacy and the time than the federal  
13 sentencing process is.

14 So, you know, there has to be some  
15 mechanism that allows the defense a quick  
16 opportunity to respond to matters that the  
17 victim may raise on sentencing.

18 Unlike in the federal system,  
19 where you've got really all the facts laid out  
20 and probably any rebuttal to what the victim  
21 might say unless one statement is available  
22 there, but that's not the case in the military

1 proceedings.

2 MS. GARVIN: I just wanted to -- I  
3 was asked to re-present this one and note that  
4 we had discussed that and that was not where  
5 we had landed, so I was asked to kind of put  
6 that before the Panel again.

7 And also to note that after having  
8 reviewed the transcript from the last hearing,  
9 I did see the conversation about this and the  
10 very detailed and substantive conversation  
11 about this.

12 What I will say with regard to  
13 that is there was discussion about in the  
14 federal practice there is a pre-sentence  
15 report and the victim participates in that and  
16 therefore I believe it was actually said on  
17 the record there are no surprises in federal  
18 sentencing, and I think that's a misstatement  
19 with regard to what happens in federal  
20 practice with regard to victims.

21 They may participate in a pre-  
22 sentence report. They do not always submit an

1 independent statement. Their pre-sentence  
2 report writer generally writes their statement  
3 or can write their statement. They may attach  
4 a statement to the pre-sentence report, but  
5 very often their actual statement is the  
6 allocution that has not been heard by anyone  
7 before and that happens at sentencing and the  
8 constitutional right of the defendant in that  
9 moment is to rebut that statement but not to  
10 cross-examine. So I just wanted clarification  
11 on the record of that.

12 COL COOK: Going back to the point  
13 that General Dunn had just said. One of the  
14 safeguards that you have included into the  
15 recommendation says, well, you know, if there  
16 is a surprise, we can always get a delay and  
17 let the defense the opportunity -- it doesn't  
18 work. It's not that easy.

19 I mean, the courts martial where  
20 the cases are. They can happen incredibly  
21 quicky. You took out the safeguard that Mr.  
22 Cassara had recommended on Page 155 that said

1 that if a victim doesn't agree to at least a  
2 pre-sentencing interview, they don't get the  
3 opportunity to be spoken to.

4 So the way I'm reading this now is  
5 the defense would get no rights. There's not  
6 an absolute right for them to get access to  
7 the victim to at least understand what might  
8 come out in court. They wouldn't necessarily  
9 see that statement in advance because we hold  
10 the victim's rights. And when it comes out in  
11 court, if they don't like what comes out, then  
12 your case gets the opportunity to request a  
13 delay and go out and get evidence.

14 In a military court-martial  
15 process, I don't think that there's an  
16 adequate safeguard that protects the rights of  
17 the accused as well and this is a justice  
18 system. The victim does have that right to be  
19 heard and should be heard and should be able  
20 to say how this has detrimentally affected  
21 every aspect of their life. I agree with  
22 that.

1                   I also agree with the concept that  
2                   there is a person sitting there who's now been  
3                   convicted of a crime, about to be sentenced  
4                   for a crime, their due process rights are at  
5                   issue as well and then a constitutional piece  
6                   of that's going to outweigh. I don't think  
7                   that just saying we can delay, but you're  
8                   sitting in Afghanistan or Baghdad or Nigeria,  
9                   wherever it is we are, that that will  
10                  adequately protect the defense interest in  
11                  that case.

12                  MS GARVIN: I certainly respect  
13                  your assessment of it. The conversation we  
14                  had as a subcommittee was the analysis of what  
15                  constitutional right actually attaches to the  
16                  defendant at the time and it is a right of  
17                  rebuttal.

18                  It is not a right of cross-  
19                  examination. And rebuttal in the federal  
20                  system happens on the fly and we were making  
21                  a recommendation to align it. And the  
22                  subpoints here came after substantial

1 negotiation at the subcommittee level. It did  
2 not originally include those. And then the  
3 recommendation to ensure that defendant's  
4 rights were protected included the three  
5 bullets that we had put forward.

6 So I certainly understand the  
7 Panel's position on this and have been asked  
8 and am representing the subcommittee's  
9 position that in writing and available to  
10 defense before sentencing is not in line with  
11 the Federal Crime Victims' Rights Act or the  
12 rights that a victim of sexual assault would  
13 have in the civilian world and may be  
14 detrimental to victims.

15 CHAIR JONES: All right. Well,  
16 let me ask this, does anybody disagree with  
17 Recommendation 37 as it was amended. And I  
18 think it was the last thing we spoke about  
19 either -- at the end of the day the last time.

20 COL. COOK: Yes. I would disagree  
21 with it.

22 BG MCGUIRE: Disagree.

1 CHAIR JONES: Recommendation 37 as  
2 amended?

3 BG MCGUIRE: Yes.

4 PROF. HILLMAN: This is Beth. I  
5 disagree with the amendment.

6 CHAIR JONES: Okay.

7 COL. COOK: Now, I disagree with  
8 it as is and I disagree with it as amended.  
9 So that's the distinction. I disagree with  
10 the recommendation.

11 REP. HOLTZMAN: I disagree with it  
12 as amended.

13 CHAIR JONES: All right. Well,  
14 you know what, I think it could take us a  
15 very long time to unravel this. And this is  
16 not an easy one. I personally would like to  
17 go back and reread the sections in the report  
18 and think about this. So, Ms. Garvin, you  
19 have brought us to an impasse.

20 (Laughter.)

21 CHAIR JONES: I'm joking. All  
22 right. Let's go to 38 then and we're still

1 holding on to 37.

2 MS. GARVIN: So again, this was  
3 brought up in your last discussion but was not  
4 resolved. It was asked to be continued until  
5 today. The finding 38-1 and 38-2 are the  
6 findings that support it.

7 Finding 38-1 discussed the  
8 Kastenberg decision, which is that the court  
9 of appeals for the Armed Forces had addressed  
10 the issue of whether a victim has the right to  
11 be heard through counsel with regard to certain  
12 issues, absent formal clarification regarding  
13 whether references to a victim's right to be  
14 heard includes through counsel litigation on  
15 this issue is likely to continue.

16 Our recommendation is that the  
17 Secretary of Defense recommend to the  
18 President changes to the manual for courts-  
19 martial and prescribe appropriate regulations  
20 to clarify that all victims rights include the  
21 right for the victim to be heard include the  
22 right to be heard through counsel.



1           I did review, again, the  
2 transcript from the last hearing and I noted  
3 that there was discussion about whether this  
4 recommendation coming from the subcommittee  
5 was about would allow for the counsel to be  
6 the one that testified or presented the --  
7 it's about the right to be heard and ensuring  
8 that the right to be heard is meaningful.  
9 It's not about evidentiary submissions. It's  
10 about presentation of information to the  
11 adjudicator, decision maker, whoever is on the  
12 receiving end of the right to be heard.

13           Kastenberg -- this was squarely  
14 presented in Kastenberg, but it was on a  
15 narrow moment of rape shield. And it was, the  
16 discussion was, does the victim have to be the  
17 one that stands up there by herself or himself  
18 and debate the legal aspects of rape shield,  
19 right, or can their lawyer do it for them.  
20 That was a core piece of Kastenberg that  
21 actually had to be litigated and decided  
22 whether the right to be heard included that

1 the lawyer could stand up and make the  
2 argument.

3 And I will tell you, and I told  
4 the subcommittee so it's part of our  
5 deliberations, this has actually had to happen  
6 in civilian systems across the country, that  
7 you have to figure out -- when it says the  
8 victim has the right to be heard -- does that  
9 mean through counsel, when it has legal  
10 argument or not?

11 And so the committee made the  
12 recommendation about that counsel, that when  
13 the victim has a right to be heard, not when  
14 they're a witness because they don't have a  
15 right to be a witness. Testimonial  
16 introduction is not a right. But when they  
17 have the right to be heard, does that  
18 contemplate that that could be exercised  
19 through counsel? And we here make the  
20 recommendation that your clarify that, yes, it  
21 contemplates that counsel can present  
22 information.

1 COL. COOK: Then can you clarify  
2 the wording of the recommendation itself to  
3 say it includes the right to be heard on legal  
4 aspects of opinion case as opposed to -- to be  
5 taken out of saying, is it anything  
6 evidentiary, is this person now going to  
7 testify in terms of information that would  
8 have otherwise.

9 If it's put that way and we're  
10 asking the Secretary of Defense to clarify  
11 that piece of it, and you could say to clarify  
12 -- maybe it's what right the victim has to be  
13 heard during the case. And just leave it and  
14 that and let them consider it. So look at the  
15 cases, what's out there and carve out what's  
16 there but I just, as long as it's not the  
17 evidentiary piece, the fact that you have a  
18 victim standing up and arguing at a rape  
19 shield statute, I think that's ridiculous and  
20 unfair probably.

21 But that doesn't mean if you're  
22 asking for the factual basis behind it and

1 providing evidence to that affect but that  
2 wouldn't be the counsel providing it, it would  
3 be the victim at that point. But that's a  
4 line that could be drawn through the court  
5 proceedings.

6 MR. BRYANT: May I ask a question?  
7 This is a curiosity question really, but it's  
8 related to this. I ask everybody. Was it  
9 ever contemplated that victim counsel from the  
10 military would be victim counsel in a civilian  
11 prosecution?

12 Because I learned last Friday that  
13 in the city of Virginia Beach and this is just  
14 -- I'm quoting now. We have -- we meaning I'm  
15 talking to the prosecutor -- we have a have a  
16 handful of Navy cases that we are prosecuting  
17 and we are getting calls from victims' counsel  
18 in the civilian prosecutions. Now, there was  
19 no information that they were causing a  
20 problem. They were just getting calls saying,  
21 I'm victim's counsel and, yes, you have the  
22 right to talk to my client.

1                   So I'm just wondering what in the  
2                   concept of this if anybody ever thought or  
3                   understood that this was going to carry over  
4                   to, in our area, many, many, many sexual  
5                   assault prosecutions in the civilian courts  
6                   involving military victims?

7                   MS. GARVIN: I don't believe I can  
8                   answer that question. I don't know if it was  
9                   contemplated by anybody. I don't know.

10                  MR. BRYANT: Okay.

11                  CHAIR JONES: Can I just ask you,  
12                  because I haven't read Kastenberg. What did  
13                  they decide in Kastenberg? What did the court  
14                  --

15                  MS. GARVIN: Victim counsel can  
16                  represent the victim and has standing to aid  
17                  in the assistance in presenting legal  
18                  arguments.

19                  CHAIR JONES: So isn't that the  
20                  end of the story?

21                  MS. GARVIN: It was limited to  
22                  412, rape shield. So the issue is, is are we

1 going to have to, well, someone may correct  
2 me. I don't believe they decided on 513 but  
3 I could be wrong. I'm looking to see if  
4 anyone can shake their head yes or no.

5 COL. HAM: It's a 412 issue. This  
6 is Colonel Ham and it did not specify that the  
7 attorney had the right to speak. That was  
8 left to the discretion of the military judge,  
9 if I recall correctly. Is that right, Ms.  
10 Garvin?

11 MS. GARVIN: Yes. Yes. So what  
12 the scope of what the right to be heard  
13 counsel gets to do is slightly up in the air.  
14 It was a narrow 412 issue, so rape shield, not  
15 a 513, which is the privileges issue. And now  
16 there's a whole myriad of other rights that  
17 the victim now has the right to be heard on  
18 and so the subcommittee discussed are we going  
19 to -- is there going to be litigation on every  
20 single right to be heard about what it means.

21 And we were recommending that you  
22 preempt that because when a victim is about to

1 be heard about their right, their lawyer  
2 should have standing. The order specifically  
3 asked -- I just wanted to point this out to  
4 you. In part of our directives, we were asked  
5 to look at this issue about legal standing to  
6 represent the victim by counsel. And so this  
7 was one of our areas to look at and this was  
8 where we came down on it.

9 COL. COOK: Can we just refer the  
10 issue to the joint services committee to  
11 consider it as part of the, or the UCMJ Review  
12 Board that's actually looking at potential  
13 changes, instead of us making that change.

14 I mean, this thing's just saying  
15 SECDEF tell the President the changes, but it  
16 doesn't tell them the substance of that those  
17 changes should be. I think there's going to  
18 need to be more input and probably more input  
19 than what we can provide from the point of  
20 view of this Panel.

21 CHAIR JONES: Well, we are -- go  
22 ahead, Liz.

1                   REP. HOLTZMAN: I think this is  
2 relatively simple and straightforward. It  
3 just says that when the victim has a right to  
4 be heard, that that right include the right to  
5 be heard through counsel.

6                   And if that's going to avoid  
7 litigation, isn't that a good thing?  
8 Especially on an issue like this where I don't  
9 think everyone in this room would find  
10 objectionable the fact that the victim's  
11 counsel can represent the victim in court.

12                   That's what they're there for. So  
13 if anyone's going to litigate it, let's just  
14 avoid -- that's what I thought the objective  
15 here was, a potential issue of litigation.

16                   COL. COOK: Then I would add the  
17 words you just said, on has the right to be  
18 heard on legal issues. It just says the right  
19 to be heard. So that concept of whoever's  
20 testifying or whatever, has the right to be  
21 heard on legal issues. Let the person  
22 advocate for them.



1 MS. GARVIN: That would  
2 accommodate the discussions that the  
3 subcommittee had. I will note this one. I'm  
4 not trying to throw a hank out. That's the  
5 wrong word. Whatever word. I was thinking  
6 some wrinkle in things, that's the word.

7 I don't want what you all decide  
8 to be perceived as limiting something that  
9 already exists, which is folks can read other  
10 folks' victim impact statements into the  
11 record, generally speaking. So, and victim  
12 counsel sometimes read victim impact  
13 statements. So they wouldn't -- they would be  
14 being heard, so I don't want it to be  
15 perceived as taking that component away, but  
16 heard on legal issues would accommodate the  
17 discussion otherwise, so.

18 CHAIR JONES: Well, I guess I was  
19 surprised we needed this. So maybe that means  
20 we should make the recommendation and avoid  
21 litigation. And so the only question is do we  
22 put on -- I can't imagine anyone would not

1 permit someone, a counsel, to read on behalf  
2 of his client a statement. But you are  
3 shaking your head and you say, you never know,  
4 right.

5 MS. GARVIN: I have been befuddled  
6 by this for 11 years in my practice. I've --

7 CHAIR JONES: So are you objecting  
8 to on legal issues?

9 MS. GARVIN: Not at all. I think  
10 that align with the subcommittee's  
11 discussions.

12 CHAIR JONES: All right. Then  
13 does anyone dissent from this recommendation,  
14 adding the words on legal issues. No? Okay.  
15 38's accepted. How many -- who do -- let's  
16 see.

17 Professor Hillman, are you still -  
18 - I think you're gone. Professor Hillman, are  
19 you still there? Okay. And Mai's gone, so I  
20 think we might have to adjourn.

21 COL. HAM: Ma'am, we have one  
22 public comment.

1 CHAIR JONES: Oh, okay.

2 COL. HAM: In person.

3 CHAIR JONES: Then we should  
4 definitely -- Ms. Garvin, I'm really sorry  
5 that we weren't able to get through everything  
6 --

7 MS. GARVIN: I certainly  
8 understand the importance of public comment.

9 CHAIR JONES: It was still very  
10 helpful.

11 MS. GARVIN: Absolutely.

12 CHAIR JONES: It's been very  
13 helpful having you here and I do want to take  
14 the time now to have the public comment.  
15 Thanks a lot. We'll be seeing you again.

16 MS. GARVIN: Yes.

17 COL. HAM: Ma'am, the public  
18 comment is Ms. Jen McClendon. And she's here.  
19 Her written statement is in your folders and  
20 also posted to the website.

21 CHAIR JONES: Thank you.

22 PUBLIC COMMENT

1 CHAIR JONES: Good afternoon, Ms.  
2 McClendon.

3 MS. MCCLENDON: Good afternoon.  
4 Can you hear me?

5 CHAIR JONES: Yes.

6 MS. MCCLENDON: Okay. I'm going  
7 to attempt to make this a little bit more  
8 brief than I had originally developed it to  
9 be. I want to thank the Panel for hearing me  
10 today.

11 My name is Jenny McClendon and I'm  
12 coming before this Panel to introduce myself  
13 as the founding mother of a collaborative  
14 think tank that wishes to address this and  
15 other sexual assault related issues.

16 I wish to address finite questions  
17 of this Panel and other Panels that have to  
18 have anything to do with rape in the military.  
19 This think tank is about a year old. We  
20 didn't necessarily expect to come forward this  
21 quickly, but your Panel was convening and your  
22 Panel is eventually going to disband, so we

1 wanted to be heard here first.

2 My cofounder is Diana Danis of the  
3 National Women's Veteran's Conference and  
4 former professor at the University of Colorado  
5 at Denver. Together, we have hand-selected  
6 people from a number of age groups, people who  
7 served at different times and people who have  
8 varied experiences in and outside of the  
9 military.

10 Our think tank includes myself.  
11 I'm a philosophy, ethics, logic, humanities  
12 and history professor. I'm a public educator  
13 and a mother, protector and provider for four  
14 young children.

15 My cofounder, Diana Danis, is a  
16 former faculty of the University of California  
17 -- I'm sorry, I work for the University of  
18 California. University of Colorado at Denver.  
19 Sociologist, speaker, cultural diversity  
20 instructor and social activist.

21 Amber Mathwig is a graduate  
22 student of Gender Studies. She's a veteran

1 Master-at-arms, which means that she is a  
2 military police officer who would have  
3 investigated some of these cases. Today,  
4 she's labeled as a feminist on gender in the  
5 military.

6 Monisha Rios is a licensed  
7 clinical social worker and macro social worker  
8 and she's a post-graduate student in humanist  
9 psychology relating to trauma care.

10 Geri Lynn Weinstein Mathews is a  
11 licensed clinical social and she's the  
12 coproducer of the film Justice Denied, which  
13 has to deal with specifically men who were  
14 assaulted in service.

15 Ginny Branam you heard from last  
16 week. She's a registered nurse, activist,  
17 educator. She is also a teacher. And she's  
18 currently decided to go back to school to  
19 become a forensic psychologist.

20 Rosie Palfy served as a combat  
21 correspondent in the Marine Corps, and she's  
22 currently a veteran advocate for homeless

1 veterans in Cleveland, Ohio. And she's well  
2 awarded in both the military and in her  
3 practice outside the military.

4 I'm going to skip an entire  
5 paragraph for the sake of time. At this time,  
6 I'm reporting to you that I really like the  
7 way that your legal discussions are going. I  
8 might comment that when a victim's statement  
9 is written, there might be some undue command  
10 influence on that statement.

11 When I was on active duty, some of  
12 the things that I witnessed, I was encouraged  
13 to see them differently than I see them today.  
14 I was encouraged to understand things through  
15 watered-down terms. And I think that that's  
16 something that you may want to consider, when  
17 it comes to victim's statements.

18 A lot of victims, if they want to  
19 keep their career are going to have to go  
20 along to get along and say, you know, it was  
21 terrible but I'm getting past it. It's not a  
22 very good victim impact statement if you want

1 a long sentence for a perpetrator. And if you  
2 want a discharge for a perpetrator, that's not  
3 going to be helpful.

4           There's been significant advocacy  
5 on this issue. My think tank doesn't deviate  
6 from any of the advocacy. There have been  
7 films such as Service: When Women Come  
8 Marching Home, the Invisible War and Justice  
9 Denied which I mentioned earlier. We don't  
10 deviate from any of their requests either. We  
11 don't deviate from the idea of taking the  
12 reporting out of the chain of command, but  
13 that's not, by itself, going to solve the  
14 problem.

15           What we're here to talk about is  
16 culture change. And legal action, legal  
17 activity can drive culture change. That's  
18 part of the reason that we selected an  
19 interdisciplinary team is because culture  
20 change is going to require people from varied  
21 backgrounds.

22           We're developing a set of courses



1 that we want to present to the war colleges.  
2 We want to present to several universities,  
3 and the goal of these courses is to help  
4 facilitate culture change through a  
5 transformative, competency-based instruction  
6 that will be offered to both senior, enlisted  
7 leadership and senior officer leadership.

8           What I witnessed on active duty is  
9 middle management problems, and I don't mean  
10 to deviate that much from my statement, but  
11 middle management problems were really, really  
12 critical to whether a case got out of the  
13 chain of command, got out of the division. So  
14 the first class petty officer in the Navy, the  
15 Chief, the junior officers, the Department  
16 Head, they would hear of a case and sometimes  
17 the Commanding Officer couldn't. In fact, on  
18 behalf of my own Commanding Officer, when he  
19 got the information, he was absolutely  
20 flabbergasted. It was the first time he had  
21 heard of it, of some of the issues that were  
22 happening on the ship that I was on.

1                   So we're developing this set of  
2 competency-based courses to help facilitate  
3 culture change, kind of in tandem with the  
4 legal activity that you guys are discussing  
5 and hashing out here. I'm going to skip  
6 another paragraph except to say one thing out  
7 of this paragraph.

8                   When I went into the military, I  
9 was already well-educated. Not as well  
10 educated as later in life but was already  
11 well-educated. I was a strong woman and still  
12 am. I was a self defense instructor and still  
13 am. And I never expected in any way -- I was  
14 one of those people who thought oh, well, that  
15 would never happen to me. It just doesn't  
16 happen to people like me.

17                   And I'm sorry to say that that  
18 wasn't true. I didn't expect to see the  
19 blatant violence that I saw. And what shocks  
20 me and what I want to bring forth to you guys  
21 today, because it needs to influence legal  
22 discussion on this, is there are blatant

1       excuses for violence within the ranks.

2                       When I was on active duty, I  
3       witnessed a first class petty officer telling  
4       me basically, we need to torment each and  
5       every one of you junior enlisted people in  
6       case we're ever captured as a division, we  
7       might say to the enemy, well, at this point,  
8       this person's going to break. You need to  
9       stop.

10                      I don't -- if the enemy is going  
11       to torture prisoners of war, I don't think  
12       they're going to stop because senior  
13       leadership within the division says oh, you've  
14       hit their breaking point. So some of these  
15       excuses really need to be addressed. And if  
16       they can be addressed legally, that would be  
17       helpful.

18                      When I challenged service members,  
19       they would give outrageous excuses. You ever  
20       think about the prisoner of war status that  
21       was used as an example of why we need to  
22       torture our junior enlisted personnel?

1                   As an undergraduate, I was a  
2 Holocaust Studies major. Well, Holocaust  
3 Studies minor. History major with an emphasis  
4 in Holocaust Studies. I sat in hearings with  
5 Holocaust survivors. I listened to testimony  
6 of Holocaust survivors. And I've personally  
7 interviewed at least two Holocaust survivors,  
8 one of which was a political prisoner of war  
9 during the Holocaust. And not one of them  
10 needed to be tortured by somebody in order to  
11 be ready to be tortured there.

12                   So some of the things that, some  
13 of the conversations that go on as a junior  
14 enlisted, toward junior enlisted people need  
15 to be brought forth and perhaps addressed  
16 legally. Excuses for violence probably should  
17 have some type of legal ramifications. Now I  
18 know that in our American culture, we don't  
19 like to police verbiage. We don't like to  
20 police words. But the military does answer to  
21 a different calling. And, again, I don't mean  
22 to deviate so much.

1                   I'm going to skip another  
2 paragraph. After a training episode, a senior  
3 enlisted person, I want to talk about the  
4 concept of anti-training. When the military  
5 comes forward, we often hear about their  
6 training improvements. And I believe that  
7 they're improving their training processes.  
8 I'd like to sit in on some of the training  
9 processes that are going on, but I believe  
10 that most members of the military are on the  
11 right side of this.

12                   The problem is is that the people  
13 who are on the wrong side of this can provide  
14 a pretty convincing argument. And a lot of  
15 times after there's been a training episode,  
16 you'll have an anti-training episode, which is  
17 where perhaps a training episode would include  
18 some victim testimony, would include some  
19 problems with not using victim-blaming  
20 language. And maybe the training episode is  
21 fantastic. It could be a remarkable  
22 experience for the soldiers and sailors that

1 witness this. Then the next morning at  
2 quarters, a senior enlisted person would say  
3 something like, look, those people that are  
4 complaining about rape, maybe 20 percent of  
5 them are honest people and maybe this does  
6 happen, but in reality most of them are guilty  
7 of buyer's remorse.

8           Buyer's remorse is probably --  
9 buyer's remorse and the character of the  
10 victim fallacy are probably the number one  
11 excuses for rape going on in the military,  
12 rape and sexual assault and harassment. Anti-  
13 training happens probably every time there's  
14 a training evolution, which almost negates  
15 training.

16           Another problem with training is  
17 the -- that if I tell you this is not allowed  
18 in my Navy anymore. I'm a Navy veteran, so  
19 this is not allowed in my Navy anymore. A lot  
20 of times what's been said is not allowed in  
21 the Navy will be renamed. So when hazing was  
22 declared illegal long ago and far away, it was

1 now termed extra-military instruction, paint  
2 locker counseling.

3           So you were not being hazed  
4 anymore, but you were still being taken into  
5 a paint locker and physically assaulted by  
6 your Chief. It was just called something  
7 else. So you can't charge somebody for  
8 something that's not currently on the books.  
9 These things that make the legal conversation  
10 very difficult. So I've covered anti-training  
11 and I've covered some of the problems with  
12 training.

13           Another problem with training is -  
14 - and I use an example from math. When I was  
15 on active duty I was asked to be the command  
16 math tutor. And I enjoyed that part of my  
17 position. If I teach you the Pythagorean  
18 theorem as  $A^2 + B^2 = C^2$  and then I say, now that you  
19 understand the Pythagorean theorem, please  
20 reconstruct this wall behind you.

22           That's not really taking the

1 training to the level that it needs to go.  
2 It's basically asking you to apply a theory to  
3 a set of circumstances that you haven't  
4 necessarily been prepared for. For that  
5 reason, I'd like to have people, like my think  
6 tank and some of the other advocacy groups,  
7 heard a little bit more often by the  
8 Department of Defense and by members of the  
9 Congress because I've sat in almost every one  
10 of these hearings one way or another, whether  
11 it was sitting at home with my kids watching  
12 them or -- not having the kids watch them  
13 necessarily, but sitting at home -- or in the  
14 hearings themselves.

15           And I hear over and over again the  
16 we're training, we're training, we're  
17 training. When I sat in the civil rights  
18 hearing authority training, hearing authority  
19 inquiries, one of the SAPRO officers said, I  
20 don't even use PowerPoint in my training. I'm  
21 not sure that the method or modality of the  
22 training is as important as the content of the



1 training and how to apply the training. So  
2 I'd like to be heard more often about this  
3 training matter. I mean I am, after all, a  
4 teacher after I got out of the military.

5 So some of the things that are  
6 said in these training episodes when I was on  
7 active duty are -- I gave a list, and the list  
8 I'll explain in a minute. I suspect that this  
9 training is well-intended. Treat others with  
10 respect. Real soldiers don't rape. That's a  
11 great message, real soldiers don't rape. It's  
12 not the message that's happening, but it's a  
13 great message.

14 Not in my service. One of the --  
15 I used to hear it all the time. Not in my  
16 Navy. Don't talk to women. I'm just going to  
17 look around at the women in the room, see what  
18 you're thinking. We don't retaliate. That  
19 has not been the experience that you guys have  
20 heard from anybody, has it? We don't  
21 retaliate. We take all allegations seriously.  
22 Ad infinitum.

1 All of these have some merit  
2 except for the don't talk to women, and I put  
3 that in there because that's what I heard when  
4 I was being trained in the mid-1990s at Fleet  
5 ASW Training Center in California, out in San  
6 Diego. Don't talk to women. If you talk to  
7 women, they'll charge you with rape. That  
8 does two things. It gives men the idea that  
9 women are the enemy. And it gives women  
10 who've been assaulted the idea that you'd  
11 better not report that because it will just  
12 prove Statement A.

13 It seems to lend too much credence  
14 to Statement A. Some male veterans, after  
15 they get out of the military, because they've  
16 been taught such harsh attitudes toward women  
17 have difficulty maintaining employment. I  
18 have a person that I know. Actually, it's a  
19 family member who hired two male veterans.  
20 They couldn't work for her because they  
21 couldn't work for a woman. And here she was  
22 trying to do her due diligence as an American

1 citizen. America hires heroes. But both of  
2 these male veterans walked off the job at  
3 different times.

4 I'm going to skip this next  
5 paragraph. I'm interested in continuing this  
6 conversation. I know that the lifespan of  
7 this Panel is limited. The conversation needs  
8 to continue even after you guys disband. I'm  
9 asking this Panel to hear my colleague,  
10 Monisha Rios, at the end of the month. She's  
11 already contacted people in New York. I'm  
12 asking the Department of Defense to continue  
13 to hear from me. I live in the DC metro area.  
14 I can be reached. And I can get time. I can  
15 make time happen, despite my many  
16 responsibilities. I can make time happen. I  
17 thank you for hearing me and I want to thank  
18 everybody that is on the right side of this  
19 matter.

20 I want to thank the members of the  
21 Department of Defense that are very  
22 uncomfortable with these hearings because

1 they've been standing on the right side of  
2 this matter for their entire careers.  
3 Hopefully for the world, the kids that are  
4 coming up today, to include my own, I'd like  
5 us to have a safer world for them to live in.  
6 Thank you.

7 CHAIR JONES: Well, I want to  
8 thank you, Ms. McClendon. That was a very  
9 worthwhile presentation for us to hear. And  
10 the specific examples you were there, you are  
11 a person who can speak with authority. Your  
12 group sounds terrific with -- between their  
13 education and their experience. And I guess  
14 I should add that, you know, obviously I come  
15 to this task with a great deal of energy. So  
16 I can't thank you enough for coming. We'd  
17 very much like to hear from your colleague and  
18 you say she'll be coming to New York --

19 MS. MCCLENDON: Yes, I believe  
20 so.

21 CHAIR JONES: -- near the end of  
22 the month. And we'd be delighted to hear from

1 her.

2 MS. MCCLENDON: We should have the  
3 white paper that we promised last hearing  
4 ready for you guys. It's in production now.

5 CHAIR JONES: Is that the one  
6 Jamie Wi was talking about?

7 MS. MCCLENDON: Yes. Yes.

8 CHAIR JONES: Okay. Thank you.

9 MS. MCCLENDON: And we'll have  
10 more if you need more.

11 CHAIR JONES: No. I very, very  
12 much appreciate this. Thanks very much.

13 Yes. I can't hear you, Maria.  
14 Are you closing the meeting?

15 COL. HAM: The Panel has finished  
16 its work for today, ma'am.

17 CHAIR JONES: All right, anybody  
18 else? The Panel has finished its work for  
19 today. Thank you.

20 (Whereupon, the hearing in the  
21 above-entitled matter was concluded at 1:35  
22 p.m.)

<b>A</b>				
<b>a.m</b> 1:13 4:2	<b>accepts</b> 154:10,14	170:16,18 189:7	<b>adequate</b> 171:5	<b>advocates</b> 10:16
<b>abide</b> 112:5	<b>access</b> 70:19 196:6	189:19 192:14	196:16	18:20 27:1,4,6
<b>ability</b> 68:6	<b>accommodate</b>	198:11	<b>adequately</b> 197:10	51:13 61:2,18
<b>able</b> 5:22 28:1 41:4	95:21 121:9	<b>action</b> 7:8 57:13	<b>adhere</b> 11:21	78:7 147:12
60:17 67:22 68:4	146:12 177:7	103:6 162:1	<b>adjourn</b> 3:19	<b>advocating</b> 111:5
82:10 93:16 96:1	209:2,16	216:16	210:20	<b>affect</b> 33:19 39:5
98:13 101:12	<b>accommodates</b>	<b>actions</b> 108:8 113:9	<b>adjudicator</b> 201:11	58:2,3 95:9 99:17
169:2 196:19	149:8	<b>active</b> 36:7,11,16	<b>adjudicators</b>	146:8 191:10
211:5	<b>accommodating</b>	37:11 50:16	148:18	204:1
<b>above-entitled</b> 90:7	121:4	105:20 215:11	<b>administering</b> 20:7	<b>affirmative</b> 124:14
229:21	<b>account</b> 104:12	217:8 219:2	<b>administrative</b>	<b>afforded</b> 102:10
<b>absence</b> 55:16	175:17	223:15 225:7	26:19 27:12 103:5	103:8,13,18
<b>absent</b> 200:12	<b>accountability</b> 5:21	<b>actively</b> 170:13	<b>Admiral</b> 1:17	<b>Afghanistan</b> 65:20
<b>absolute</b> 196:6	6:7,19,19 7:6 9:10	<b>activist</b> 213:20	35:12 38:2 48:9	197:8
<b>absolutely</b> 167:14	9:17 11:4 12:1	214:16	52:6 57:1 59:12	<b>afternoon</b> 90:11
211:11 217:19	<b>accountable</b> 6:15	<b>activity</b> 216:17	60:20	91:1 138:3 212:1
<b>absorbed</b> 39:18	7:16 8:9,11 11:16	218:4	<b>admirals</b> 33:2,14	212:3
<b>accept</b> 4:8 6:1 74:8	12:7 20:5	<b>acts</b> 25:11	43:18	<b>afterward</b> 12:8
111:11 112:15	<b>accounted</b> 160:22	<b>actual</b> 62:6 110:9	<b>admire</b> 33:5	<b>age</b> 213:6
113:18 114:10	<b>accurate</b> 13:3	110:14 195:5	<b>admittedly</b> 43:13	<b>aggravation</b> 189:22
123:5 126:14	54:20 140:19	<b>ad</b> 10:13 173:1	51:11	190:4
129:21 130:18	<b>accused</b> 17:12 59:5	225:22	<b>adopt</b> 24:5 63:5	<b>ago</b> 89:5 159:22
133:9 141:15	112:17 116:22	<b>add</b> 10:14 99:19	69:22 70:10 81:9	222:22
150:20 151:4	117:14 118:19	107:13,21 114:4	138:20	<b>agree</b> 11:10,12 13:4
154:2 155:6,14,14	150:22 153:8,13	120:20 130:3,8	<b>adopted</b> 15:22	19:16 32:8 56:20
156:1 164:7	153:20 156:5	131:6,7 183:11	81:12	58:5 64:12,15
165:21 170:2	158:7 160:16,22	192:11 208:16	<b>adopting</b> 187:7	72:1,8 78:15 80:3
171:1 177:17	162:19 163:7,20	228:14	<b>ADULT</b> 1:3	114:13,15,17
178:7 180:1 181:2	191:8 196:17	<b>adding</b> 30:11 108:4	<b>advance</b> 192:9,10	118:16 123:10
184:18	<b>accused's</b> 82:9	124:19 129:22	196:9	130:2,16,19
<b>acceptable</b> 15:10	154:3 191:16	210:14	<b>advancing</b> 31:5	132:19 136:19
122:10 129:20	<b>achieve</b> 23:8 114:5	<b>addition</b> 15:4 18:6	<b>advice</b> 10:17 40:1	151:17 165:7
<b>acceptance</b> 107:13	114:13 157:22	18:14 26:12	45:19 59:3 63:19	167:1 168:18
155:17 157:19	<b>achieved</b> 167:18	109:19	108:22 124:13	172:17 178:8
<b>accepted</b> 15:13	<b>achieves</b> 116:5	<b>additional</b> 6:5 15:7	125:4 144:4	196:1,21 197:1
62:20 68:13,17	141:18	27:14,15,16 48:1	<b>advising</b> 64:7	<b>agreed</b> 39:13 87:11
81:6 83:12 89:20	<b>acknowledged</b>	81:9,13 82:19	<b>advisory</b> 88:18	117:17 130:7
100:17,20 101:14	144:20	83:5 91:15 98:1,9	<b>advocacy</b> 216:4,6	158:9 160:18
111:17,20 156:19	<b>acknowledging</b>	184:19	224:6	<b>agreeing</b> 61:20
161:21 169:19	121:10 174:11	<b>address</b> 61:16	<b>advocate</b> 15:4 19:8	126:22
176:7 188:6	<b>act</b> 24:7,7,8 25:11	70:16 94:4 109:16	54:16 57:6,7 58:9	<b>agreement</b> 16:4
210:15	25:12,14,19 26:17	147:22 156:13	58:22 60:21 63:11	107:9 111:20
<b>accepting</b> 108:3,5	63:6,12 69:18	171:3 212:14,16	63:19 64:7,11	112:16,20 113:7
123:2 125:20,22	102:7 103:15	<b>addressed</b> 58:5	67:16 105:21	113:13 116:10,21
129:8 149:12	105:14 143:5	139:1 161:7 200:9	106:3 147:21	117:9 118:12,17
166:15 176:12	150:2 155:4,11	219:15,16 220:15	208:22 214:22	124:18 129:5
	159:3 167:22	<b>addressing</b> 161:18	<b>advocated</b> 79:15	131:18 133:4,7

139:15 143:9,22 144:3,17,18 145:2 145:5 146:3 149:5 153:7 161:9 162:2 163:8 172:14,18 175:18 184:11 185:14 189:15	<b>allies</b> 21:4,13 <b>allocate</b> 158:15 <b>allocute</b> 166:13 <b>allocution</b> 159:8 168:13 189:9 190:2,9 192:15,16 195:6 <b>allow</b> 110:10 132:3 132:4 138:6 201:5 <b>allowed</b> 93:15 117:5 121:21 122:1,5 190:12 222:17,19,20 <b>allowing</b> 106:9 116:13 188:22 <b>allows</b> 100:9 193:15 <b>alluded</b> 63:21 <b>alternative</b> 192:20 <b>amazing</b> 41:5 <b>Amber</b> 213:21 <b>amended</b> 94:19 96:12,17 122:9 126:15 127:3 133:7,10,12,13 185:15 190:19 198:17 199:2,8,12 <b>amending</b> 82:7 141:17 <b>amendment</b> 109:19 127:21 129:6,8 199:5 <b>amendments</b> 23:17 24:17 25:1 81:10 82:19 83:6 94:11 188:3 <b>America</b> 227:1 <b>American</b> 220:18 226:22 <b>analogous</b> 102:9,20 104:15 178:5 <b>analysis</b> 21:2 134:4 197:14 <b>analyze</b> 23:1 103:17 <b>analyzing</b> 20:8 <b>and/or</b> 108:2,5	129:8 <b>anecdotal</b> 43:5 51:11 55:9 <b>anecdote</b> 49:20 <b>anonymous</b> 37:5 <b>answer</b> 34:7 38:3 40:6,17 95:18 205:8 220:20 <b>answering</b> 43:10 <b>Anti</b> 222:12 <b>anti-training</b> 221:4 221:16 223:10 <b>anticipate</b> 148:11 <b>anybody</b> 101:4 198:16 205:2,9 225:20 229:17 <b>anymore</b> 41:18 162:9 222:18,19 223:4 <b>anyone's</b> 208:13 <b>anyway</b> 69:17 173:10 <b>apart</b> 157:6 167:16 <b>apologies</b> 138:12 <b>apologize</b> 28:1 <b>appeals</b> 200:9 <b>appear</b> 75:16,19 140:13 149:20 <b>appeared</b> 50:10 <b>appearing</b> 123:6 165:17 <b>appears</b> 75:21 140:17 <b>appellate</b> 159:4 <b>applied</b> 70:13 <b>apply</b> 72:7 74:5 139:20 186:11 224:2 225:1 <b>appointed</b> 22:1 <b>appointment</b> 84:9 85:6 <b>appreciate</b> 28:4 41:1 60:11 61:16 167:6 229:12 <b>appropriate</b> 75:10 168:11 175:16 177:8 184:10	185:20 191:1 200:19 <b>appropriately</b> 177:11 <b>approve</b> 87:7 <b>approximately</b> 40:3 <b>area</b> 6:6 30:18 36:14 73:21 137:2 205:4 227:13 <b>areas</b> 5:11 6:3 84:14 207:7 <b>arguably</b> 49:6 51:10 <b>argue</b> 50:14 158:12 <b>arguing</b> 203:18 <b>argument</b> 202:2,10 221:14 <b>arguments</b> 205:18 <b>armed</b> 48:17 50:20 51:6 200:9 <b>Army</b> 13:8 14:5 15:1 36:17 37:12 37:17 42:15 46:3 105:20 <b>Article</b> 67:17 74:18 75:3,12,15 77:21 79:2,16,19 81:10 81:17 82:5,20 83:6 125:3 <b>articulate</b> 129:10 <b>artillery</b> 65:15 <b>aside</b> 53:1 173:10 <b>asked</b> 34:10 37:14 49:1,9,10,12 91:16 95:1 194:3 194:5 198:7 200:4 207:3,4 223:15 <b>asking</b> 36:7,11 41:21 96:5,9,10 96:16 101:12 192:6,8 203:10,22 224:2 227:9,12 <b>asks</b> 101:6 <b>aspect</b> 39:10 44:10 121:11 196:21 <b>aspects</b> 27:8 44:3	45:9 201:18 203:4 <b>assault</b> 1:3 5:15 6:21 7:22 8:13,21 9:8 15:20 17:8,19 17:22 18:1,5,8 20:19 21:19 22:7 23:2,15 24:6,18 25:5,17 26:2 28:21 29:3,17 31:1,6 32:8,13 44:8 51:22 52:20 55:22 70:8,14 72:16 73:8 82:1 89:1 92:14,15,18 93:2 94:14 106:2 158:11 189:12 198:12 205:5 212:15 222:12 <b>assaulted</b> 214:14 223:5 226:10 <b>assaults</b> 18:21 19:2 20:5,20 21:11,15 24:15 <b>assess</b> 85:11 <b>assessing</b> 10:6 <b>assessment</b> 5:20 8:22 15:18,22 64:9 69:19 70:2 88:21 96:14 197:13 <b>assessments</b> 64:4 <b>assets</b> 82:9 <b>assigned</b> 10:1 42:1 85:1 92:20,22 <b>assignment</b> 94:5 <b>assignments</b> 27:7 <b>assistance</b> 205:17 <b>associated</b> 47:17 178:4 <b>associations</b> 47:3,5 <b>assume</b> 9:19 58:8 160:15 <b>assumes</b> 97:1 <b>assuming</b> 40:8 154:14 <b>ASW</b> 226:5 <b>attach</b> 195:3
---	--	---	--	--

<b>attaches</b> 197:15	107:21,22 109:7	<b>avoid</b> 208:6,14	168:16 219:4	<b>beyond</b> 9:10,16
<b>attempt</b> 18:14	111:10,13 112:15	209:20	224:2	23:16 40:20 41:7
122:6 212:7	113:2,3,5,17	<b>awarded</b> 215:2	<b>basis</b> 203:22	81:11 87:19
<b>attempted</b> 171:10	114:7,9 115:1	<b>aware</b> 19:2 41:16	<b>bath</b> 135:11	<b>BG</b> 14:22 86:15,18
<b>attempts</b> 17:20	116:15,18 117:17	58:12 65:21 81:16	<b>battalion</b> 66:12	88:6 105:17
<b>attend</b> 28:1	117:21 120:8	<b>awful</b> 44:17	<b>battle</b> 33:21 34:3	135:13 140:3,20
<b>attention</b> 44:1	122:19,21 129:5		<b>Beach</b> 36:13	143:7 144:14,21
<b>attitude</b> 45:15	131:14,15 134:19	<b>B</b>	204:13	153:5 156:2
<b>attitudes</b> 226:16	135:17,22 142:3	<b>b</b> 130:20 133:21	<b>befuddled</b> 210:5	161:16 162:12
<b>attorney</b> 2:5,5	142:10,13,14,20	134:5 184:3	<b>began</b> 4:5	163:5,17 165:6,20
50:19 79:20	143:3,4,13 146:1	223:18	<b>beginning</b> 6:16	166:5,17 178:3,13
102:16 104:21	146:1 150:19	<b>baby</b> 135:11	29:16 140:6	178:17 193:8
173:5 206:7	151:8 153:2	<b>back</b> 42:21 47:4	<b>begun</b> 24:13	198:22 199:3
<b>Attorney's</b> 47:8	160:12 161:13,17	62:4 78:10 90:4	<b>behalf</b> 96:9 210:1	<b>bifurcated</b> 121:11
170:19	161:20 162:1	96:10 129:14	217:18	<b>big</b> 78:22
<b>attributable</b> 39:15	165:5,8,15 166:6	138:15 143:20	<b>beholden</b> 50:16	<b>biggest</b> 57:4
<b>authorities</b> 17:5	166:11,20 167:3	147:21 188:11	<b>beings</b> 54:6	<b>bill</b> 26:20 27:10
24:4 35:4 39:20	168:8,20,22	195:12 199:17	<b>belief</b> 40:9	<b>binding</b> 77:8 79:5
67:14 81:15,20	173:14 174:3	214:18	<b>believe</b> 15:11 19:10	<b>bit</b> 25:21 30:15
82:7 84:14 85:2	176:4,6 178:7	<b>backdrop</b> 9:13	19:22 23:5 24:10	63:21 76:11 98:16
85:14 135:14	179:15,19,22	<b>background</b> 40:22	25:7 27:11 34:21	101:4 120:12
<b>authority</b> 9:22	180:10,21 181:1	183:20	35:22 36:3 44:6	212:7 224:7
15:16,19 16:5,7	181:17,20 183:4,6	<b>backgrounds</b>	44:22 51:2 62:11	<b>blank</b> 36:22
16:18 17:1,1,6,8	183:10,14,15	216:21	63:7 84:3 86:9	<b>blatant</b> 218:19,22
17:16 18:12 19:11	184:9,13 185:14	<b>bad</b> 57:20	97:15 123:11	<b>board</b> 32:3 207:12
19:17 20:1,10,17	185:17 186:6,7	<b>Baghdad</b> 197:8	127:20 138:2	<b>bodies</b> 88:7
21:6 22:5,9,11,13	188:5 224:18,18	<b>balance</b> 29:1 54:21	169:7 170:1	<b>body</b> 19:1 47:4
23:7,14 24:2,12	228:11	<b>balances</b> 54:10	186:19 194:16	<b>books</b> 223:8
25:14 26:4 29:13	<b>authority's</b> 83:8	<b>ballot</b> 38:8	205:7 206:2 221:6	<b>both/and</b> 115:17
30:7 31:3 32:10	104:13 149:9	<b>bar</b> 47:3,5	221:9 228:19	116:2 143:3 178:9
32:17 33:18 35:3	166:18	<b>Barbara</b> 1:13,16	<b>believed</b> 169:20	181:14
35:15 36:2,20	<b>authorization</b>	<b>bargain</b> 118:3	<b>belongs</b> 28:10	<b>bound</b> 75:1,6
37:6 38:16 39:7	27:14 85:5	123:2,3 149:12	154:6	176:11
39:18,19,20 40:1	<b>authorized</b> 17:2,17	152:1 160:8,17	<b>bench</b> 159:22	<b>bracket</b> 119:19
40:3,5 42:5,12	<b>authorizing</b> 84:8	168:9,17 169:1	<b>beneficial</b> 51:15	<b>Branam</b> 214:15
43:15,20 44:7	<b>automatically</b>	173:13 185:22	<b>benefit</b> 59:3 80:19	<b>break</b> 90:4 219:8
54:12,18 55:8,13	58:17	<b>bargaining</b> 119:15	<b>best</b> 22:19 81:6	<b>breaking</b> 219:14
55:17 57:5 58:7	<b>available</b> 13:11	<b>based</b> 15:11 19:19	100:10 134:20	<b>brief</b> 48:13 52:17
58:21 59:1 63:10	95:8 98:21 99:16	93:12 94:5 95:9	<b>Beth</b> 16:1 60:3 69:8	212:8
63:18 64:8,10	100:6 187:2	97:10,15,20 99:17	85:17 118:22	<b>briefed</b> 5:10
74:17,17 75:1	191:13,15 192:2	106:18 138:2	119:4,5 130:14,15	<b>briefly</b> 60:8 90:8
77:9 81:14,19	193:21 198:9	140:10,16 147:10	132:12 182:6	<b>brigade</b> 41:7 66:13
83:8 84:5,13,15	<b>avenue</b> 1:12 148:22	151:12 180:16	199:4	<b>BRIGADIER</b> 1:17
84:21 87:1,2 94:4	157:13	<b>basic</b> 7:14 9:13	<b>better</b> 42:3 45:20	1:18
95:15 97:18 103:1	<b>average</b> 34:11 38:1	16:17	45:21 70:7 115:5	<b>brilliant</b> 61:13
103:10 104:8,9	38:6 39:6 42:14	<b>basically</b> 8:16 64:1	115:7 117:3	<b>bring</b> 40:18 58:10
105:16 106:3	43:12	82:22 84:11 101:6	226:11	58:13 109:6



187:20 189:18 218:20 <b>broad</b> 97:12 <b>broader</b> 9:15 <b>Brooklyn</b> 53:18 <b>brought</b> 134:9 191:10 199:19 200:3 220:15 <b>Bryant</b> 1:19 16:2 31:15,16,17 32:1 47:19 63:21,22 64:18,19 65:8,9 68:10 69:11 72:3 72:4,5 74:4,8 76:18 77:4,14 83:10 170:15 172:9 204:6 205:10 <b>building</b> 145:13 <b>built</b> 71:20 <b>bullet</b> 56:4 193:4 <b>bullets</b> 198:5 <b>buyer's</b> 222:7,8,9	<b>caring</b> 53:17 <b>carried</b> 138:4 <b>carry</b> 106:3 205:3 <b>carve</b> 32:14 203:15 <b>case</b> 17:18 22:10 54:16 63:8,16 76:8 79:20 102:13 103:6 104:7,11,22 106:2 107:8,20 108:2,6 109:9 111:21 113:4,6 114:8 115:13 123:1 131:17 139:21 140:6 142:22 143:13 144:8 145:11 146:2 147:9 149:4 154:12,14,18 159:2 168:3 171:20 172:17 173:4,17 174:5 175:6 177:16 189:5 193:22 196:12 197:11 203:4,13 217:12 217:16 219:6 <b>cases</b> 15:20 20:2,22 21:19 25:21 26:1 26:2,3,7 44:20 53:20 63:14 79:3 79:10,17 102:17 103:12 104:14 136:1 195:20 203:15 204:16 214:3 <b>Cassara</b> 192:21 195:22 <b>category</b> 69:11 <b>caught</b> 86:4 <b>cause</b> 32:15 38:4 39:2 46:7 76:4,5 77:7 <b>caused</b> 19:1 <b>causing</b> 70:5 204:19 <b>CDR</b> 100:18 <b>Center</b> 15:5 226:5	<b>centers</b> 15:15 <b>central</b> 60:15,18 <b>centrally</b> 71:19 <b>Ceremonial</b> 1:12 <b>certain</b> 35:6 75:5 200:11 <b>certainly</b> 33:5 91:7 97:14 100:1 106:5 106:8 115:6 116:5 135:14 156:15 197:12 198:6 211:7 <b>cetera</b> 140:17 156:7 <b>chain</b> 17:10 18:2,4 18:11 26:21 28:16 30:7 31:8 41:5,6 41:14,21 42:4,8 50:16 73:4 216:12 217:13 <b>chair</b> 1:13,16 3:12 4:3 5:8 11:7 12:10 13:21 14:12 14:16,20 15:8 16:12 31:11,16,20 47:18 48:7 52:6 56:18 59:15,21 60:2,5,9 62:2,19 64:1 65:7 67:9 68:20,22 69:5,9 69:13,16 71:13,22 72:4,10 74:7 77:3 78:3,19 80:5,8,20 81:3 82:14,17 83:11,19 85:21 86:2,7,14,17 87:13 88:10 89:18 90:9,16,18 96:4 96:15,19,22 97:21 98:12 99:21 100:4 100:13 101:2,18 106:20 108:12,17 109:1,13 112:9 117:19 118:2,5,9 118:22 119:3,5,9 120:16,21 122:8 122:14 125:19	126:2,8,10,13 127:5,9 128:2,5,9 128:19,22 129:18 130:5,15 131:1 132:7,12,22 133:18,21 134:7 134:10,14 136:2,6 136:11,14,17 137:11 138:14 139:13 149:11,18 151:16,22 152:12 158:14,19 159:20 160:5 161:11 162:4,15 163:15 164:9 165:2,13,21 166:12,19 167:2 168:5,21 169:5 170:7 173:11,19 173:22 180:18 181:22 182:4,11 182:15,22 184:18 185:4,7 186:12 187:6 188:1 198:15 199:1,6,13 199:21 205:11,19 207:21 209:18 210:7,12 211:1,3 211:9,12,21 212:1 212:5 228:7,21 229:5,8,11,17 <b>chairman</b> 77:15,16 <b>challenge</b> 68:5 116:9,13 159:15 <b>challenged</b> 219:18 <b>challenges</b> 21:19 <b>chance</b> 120:6 186:17 <b>change</b> 11:14 13:1 21:12 32:10 49:2 49:6,16 50:12 52:21 53:4 55:3 55:15 60:22 87:1 107:12 125:3,6 129:10,11 130:9 146:22 165:19 170:22 180:6,7,8 181:6,7 184:5	207:13 216:16,17 216:20 217:4 218:3 <b>changed</b> 75:12 113:10 126:1,14 132:4 162:16 <b>changes</b> 24:11,20 24:22 25:7 31:5 35:2 50:4 51:17 51:20 52:1,4 56:8 60:17 112:13 131:22 139:1 175:13,14 179:21 183:5 188:10 190:21 200:18 207:13,15,17 <b>changing</b> 31:4 55:21 85:12 108:14 <b>channel</b> 99:14 <b>channels</b> 18:3 57:7 73:13 99:10 <b>character</b> 222:9 <b>charge</b> 50:13 74:20 153:22 158:10 160:16,20 161:6,9 161:19 162:21 174:22 223:7 226:7 <b>charged</b> 38:4 <b>charges</b> 23:15 32:11 35:6 45:3 54:14 63:16,20 105:5 160:18 161:2,20 162:3,7 163:2,6,9,11 164:5,21 165:16 173:18 <b>charging</b> 44:2 67:13 105:4 <b>check</b> 54:21 124:21 <b>checks</b> 29:9 54:9 57:21 <b>chief</b> 38:9,20 217:15 223:6 <b>children</b> 213:14 <b>CHRISTEL</b> 2:2
<hr/> <b>C</b> <hr/> <b>C</b> 223:18 <b>California</b> 213:16 213:18 226:5 <b>call</b> 25:12,19 65:15 <b>called</b> 108:21 223:6 <b>calling</b> 10:18 75:22 220:21 <b>calls</b> 26:20 69:19 204:17,20 <b>cap</b> 150:21 152:16 156:12 157:1 <b>capability</b> 20:14 <b>capacity</b> 65:14 <b>capstone</b> 13:6 <b>captain</b> 36:17 <b>captains</b> 36:16 <b>captured</b> 219:6 <b>care</b> 44:2 136:16 144:9 214:9 <b>career</b> 215:19 <b>careers</b> 228:2 <b>carefully</b> 18:19				

<b>circles</b> 29:3 36:9	<b>clearly</b> 8:14 12:8 75:18 154:16 186:18	<b>colleges</b> 217:1	41:5,6,15,21 42:4 42:8 46:8 50:17 57:16,17 58:3 71:21 72:1 73:4 92:20 94:3 99:10 137:5 215:9 216:12 217:13 223:15	<b>comment</b> 3:17 12:9 27:16 31:13 52:9 67:10 68:9 91:16 100:14 105:18 106:20,22 176:11 190:17 210:22 211:8,14,18,22 215:8
<b>circumstances</b> 74:16 75:5 224:3	<b>Cleveland</b> 215:1	<b>colonel</b> 1:18 2:4,4 11:7,8 36:17 56:19 59:15 69:6 78:14 82:21 89:13 98:12 112:11 120:3 122:10 125:2 126:22 132:9 133:5 138:9 139:16 177:11 178:19 182:22 206:6	<b>commander</b> 2:5 4:13,18 5:5,9,15 6:6,19 7:6,15 8:7 11:3 15:16 16:22 18:11 19:11 21:9 23:1 25:13 29:18 29:19 33:6 34:13 37:15,18 41:7 45:4 48:18 49:2,7 51:18 52:3 54:2 58:9,13 62:13 63:1 64:22 66:12 66:12,13 81:5 83:3 84:1,4,17 88:12,15 89:10 90:2 93:1,8 95:8 95:15 98:20,21 99:11,13 103:9 135:3 137:2	<b>comments</b> 3:12 11:6 30:22 39:14 48:8 52:11 56:22 59:18 60:11 71:8 74:2 76:15 83:9 85:15 89:11 107:10 117:12 159:13
<b>cities</b> 44:18	<b>client</b> 204:22 210:2	<b>Colorado</b> 213:4,18	<b>commander's</b> 78:16 94:4	<b>committed</b> 22:8 34:6 153:16 156:6 171:5
<b>citizen</b> 38:6 227:1	<b>climate</b> 5:20 31:4 69:19	<b>Columbia</b> 1:12	<b>commanders</b> 6:15 7:21 8:11 9:1,10 10:5,9,15,21 12:11,16 13:9 14:6 15:3,6,19 16:5 17:4,6,7 19:15,20 20:2,11 20:18 22:4,16 24:3 25:16 28:18 29:8,13 30:2,8,12 32:18 43:19,20 44:22 47:12 51:1 51:3,4,13 65:10 66:19 97:17	<b>committee</b> 17:20 38:16 39:1
<b>city</b> 204:13	<b>clinical</b> 214:7,11	<b>combat</b> 114:16 214:20	<b>commanding</b> 30:6 31:2 217:17,18	<b>committee's</b> 192:19
<b>civil</b> 29:6 164:10 224:17	<b>closing</b> 229:14	<b>combine</b> 143:17 178:22	<b>commands</b> 42:18 61:10 71:4	<b>Committees</b> 84:2
<b>civilian</b> 9:3,12 21:8 21:18,21 22:13 28:12 38:17 49:13 57:11 104:19 105:3 115:7 119:16 120:10 121:20 147:19 150:2 153:18 154:22 155:1,10 159:6 162:11 164:2,14 169:18 179:8 187:21 188:19 198:13 202:6 204:10,18 205:5	<b>Code</b> 17:3 18:17 23:7 24:17 48:15 81:10	<b>combined</b> 113:9	<b>common</b> 37:22	<b>commodore</b> 36:15
<b>civilians</b> 44:21 121:18	<b>cofounder</b> 213:2,15	<b>combining</b> 107:4 108:6	<b>communication</b> 105:15 169:15,16 170:8	<b>community</b> 19:1 57:12 59:4
<b>claim</b> 52:18	<b>COL</b> 11:9 12:14 14:2,14,18 56:20 68:15,21 69:3 71:10,15 78:15,22 89:15 98:10,13 100:9 106:22 108:16,20 109:2 111:3,14 112:18 113:22 116:9 117:22 118:4,7,10 124:3 125:1,8,22 126:3 128:13 131:5 133:14,20 136:18 138:11,13 139:17 142:2 145:9 147:5,8 148:13 149:2,13 150:17 152:7 158:1,18 159:7 160:20 161:14 162:18 167:1 178:21 181:8,19 182:2 183:9 184:4 195:12 198:20 199:7 203:1 206:5 207:9 208:16 210:21 211:2,17 229:15	<b>come</b> 33:8 39:2 55:19 67:1 71:12 87:20 90:4 97:7 99:6 117:15 143:8 157:9 158:20 159:8 162:5 170:19 171:2,15 171:17 172:12 196:8 212:20 216:7 228:14	<b>company</b> 66:11	<b>comparable</b> 76:22 156:9
<b>clarification</b> 139:17 169:4,10 189:19 195:10 200:12	<b>COLLEEN</b> 1:17	<b>comes</b> 7:19 39:11 40:11 113:13 154:5 158:5 163:7 163:8 164:2 181:3 196:10,11 215:17 221:5	<b>comparison</b> 188:17	
<b>clarifications</b> 11:11	<b>College</b> 5:18	<b>coming</b> 61:22 124:13 164:16 167:21 201:4 212:12 228:4,16 228:18		
<b>clarified</b> 73:9 184:14	<b>collaborative</b> 212:13	<b>command</b> 5:20 6:18 9:16,19 17:10 18:3,4,11 22:8 26:22 28:16 30:7,16,17 31:8		
<b>clarify</b> 15:1 69:4 73:22 83:14 111:4 133:15 179:13 200:20 202:20 203:1,10,11	<b>colleague</b> 227:9 228:17			
<b>clarifying</b> 134:2				
<b>class</b> 217:14 219:3				
<b>clear</b> 20:9 21:20 69:12 70:1 72:6 73:15 75:15 120:5 136:12,20 178:12 182:3 183:21 188:3				
<b>cleared</b> 66:16				

<b>competency-based</b> 217:5 218:2	149:19 167:13 168:3,8 169:11	134:21 203:14 207:11 215:16	200:4	166:17,20 167:2 168:8,20,22
<b>competent</b> 54:8	173:11,13,16	<b>consideration</b> 7:10	<b>continues</b> 57:17	173:14 174:3
<b>complaining</b> 222:4	174:13,14,17	121:1 175:17	<b>continuing</b> 65:6	176:4,6 178:7
<b>complement</b> 6:13	179:7	179:16 184:11	69:11 72:7 227:5	179:15,19,22
<b>complete</b> 4:15	<b>Conference</b> 213:3	<b>considerations</b>	<b>contrary</b> 54:6 61:9	180:9,21 181:1,17
<b>completely</b> 77:4	<b>conferral</b> 141:4	27:17 76:16	<b>controlled</b> 29:19	181:20 183:4,6,10
87:22 100:19	142:21 174:1	<b>considered</b> 26:8	<b>convene</b> 17:2 20:17	183:14,15 184:9
145:4	<b>conferred</b> 168:22	29:8 59:8 116:11	22:6	184:13 185:13,17
<b>complicating</b> 120:7	<b>conferring</b> 104:16	125:11 137:10	<b>convened</b> 53:20	186:6,7 188:5
<b>comply</b> 134:21	174:21	161:15	<b>convening</b> 15:16	212:21
<b>component</b> 209:15	<b>confess</b> 129:1	<b>considering</b> 61:17	16:5,18 17:1,1,5,6	<b>conversation</b> 102:2
<b>comport</b> 193:10	138:16	<b>considers</b> 146:1	17:16 18:11 19:11	127:12 129:15
<b>comprised</b> 88:18	<b>confidence</b> 19:12	<b>constant</b> 10:16	19:16 20:10 21:5	138:2 152:22
<b>concept</b> 58:5 88:7	46:2	<b>constantly</b> 38:13	22:5,9,11 23:6	153:4,8 166:8
160:6 197:1 205:2	<b>confident</b> 45:17,18	38:19	24:4,12 25:13	181:15 182:17
208:19 221:4	46:15 67:4,6	<b>constitute</b> 18:15	26:4 28:6 35:3,15	192:7 194:9,10
<b>concern</b> 26:15 70:3	<b>conflated</b> 144:16	<b>Constitution</b> 1:12	36:2,19 37:6	197:13 223:9
87:14 97:13	<b>conflict</b> 22:6 78:12	<b>constitutional</b>	38:16 39:7,17,18	227:6,7
123:14 180:3	122:11 187:4	195:8 197:5,15	39:19,20,22 40:2	<b>conversations</b>
182:20 183:1,17	<b>conflicts</b> 139:10	<b>constructed</b> 165:11	40:5 42:5,12	193:5 220:13
<b>concerned</b> 178:9	<b>confuse</b> 81:7	<b>constructive</b> 51:3	43:15,20 44:7	<b>convey</b> 104:6
180:12	<b>confused</b> 129:1	<b>consultants</b> 84:10	54:12,18 55:8,13	105:22 107:7,18
<b>concerns</b> 57:4	146:9 169:5	85:8	55:16 57:5 58:6	108:7 109:11
104:7,10 107:18	<b>confusion</b> 73:17	<b>consultation</b> 63:10	58:21 59:1 63:10	111:19 113:1
108:1 113:1 114:3	131:4	<b>contacted</b> 227:11	63:17 64:8,10	114:3 122:17
122:18,22 131:13	<b>Congress</b> 6:14	<b>contain</b> 76:5	67:14 74:17 75:1	126:4 131:13
131:16 140:7	17:14 22:21 23:13	<b>contemplate</b>	77:9 81:14,19	145:10,21,22
148:14 177:10	24:5,11,15 33:22	186:22 187:9	82:7 83:8 84:13	146:14 151:6
181:5	35:1,2,9 63:5	202:18	85:1,14 87:2	179:10
<b>concluded</b> 192:3	67:18 69:21 70:10	<b>contemplated</b>	103:1,10 104:8,9	<b>conveyed</b> 106:15
229:21	81:9 110:8 135:21	204:9 205:9	104:13 105:15	116:16 137:5
<b>concludes</b> 90:1	224:9	<b>contemplates</b>	106:3 107:21,22	140:8,15 142:1
<b>conclusion</b> 20:16	<b>Congressional</b>	202:21	109:7 111:10,13	<b>convicted</b> 197:3
29:7 55:14,20	65:22	<b>contemplating</b>	112:14 113:1,3,5	<b>conviction</b> 20:22
<b>conclusions</b> 16:20	<b>connection</b> 71:6	187:5	113:17 114:7,9	<b>convincing</b> 221:14
<b>concur</b> 80:2	<b>consciousness</b> 45:1	<b>contemporary</b> 54:5	115:1 116:15,18	<b>Cook</b> 1:18 11:9
<b>conditions</b> 93:11	53:17	<b>contemptible</b> 51:22	117:17,21 120:7	12:14 14:2,14,18
<b>conduct</b> 10:6	<b>consensus</b> 84:16	<b>content</b> 224:22	122:19,21 131:14	56:19,20 59:16
158:15	<b>consequence</b> 12:2	<b>CONTENTS</b> 3:10	131:15 134:19	68:15,21 69:3
<b>conducted</b> 89:8	<b>consequences</b>	<b>contesting</b> 159:12	135:14,16,22	71:10,15 78:15,22
<b>conducting</b> 37:5	20:12 84:20	<b>context</b> 92:3,8 96:9	142:3,10,13,14,20	89:13,15 98:10,13
<b>confer</b> 57:5 58:21	153:15	101:21	143:2,4,13 145:22	100:9 106:22
101:20 102:6,9,13	<b>consider</b> 25:22	<b>continue</b> 30:2,18	146:1 149:8	108:16,20 109:2
102:15 103:2,12	96:18 101:5 104:9	63:9 148:3 200:15	150:19 151:7	111:3,14 112:11
104:20 115:12	107:22 122:21	227:8,12	153:2 160:11	112:18 113:22
141:2 144:7	127:19 131:15	<b>continued</b> 129:12	161:12,13,16,20	116:9 117:22
			161:22 165:5,8,15	

118:4,7,10 120:3	113:14 114:2	171:2,15 173:5	122:15 131:8,10	155:20 184:17
122:10 124:3	116:16 117:14	176:8 178:10	<b>credence</b> 226:13	186:19 191:20
125:8,22 126:3,22	120:8 122:17	181:14 185:3,10	<b>credibility</b> 89:6	214:18,22 223:8
128:13 131:5	124:8 131:12	185:19 186:5,8,17	<b>credible</b> 20:3	<b>CVRA</b> 102:12
133:5,14,20	135:6 137:19	186:20 187:1	<b>crime</b> 5:13 32:14	104:17,19 121:3
136:18 138:9,11	140:8,15 142:13	189:6 196:8,11	38:18 51:22 52:22	141:2 152:20
138:13 139:16,17	146:15,18,21,22	200:8 204:4	55:19 102:7	166:10 174:18
142:2 145:9 147:5	147:16,19 148:8	205:13 208:11	103:14 105:14	188:19,20 192:4
147:8 148:13	148:19 161:2,12	<b>court's</b> 190:22	143:5 155:4,11	
149:2,13 150:17	164:15 191:14	<b>court-martial</b> 17:9	159:3 167:21	<b>D</b>
152:7 158:1,18	200:11,14,22	17:16 23:16 39:3	189:6,18 192:14	<b>D.C</b> 1:13
159:7 160:20	201:5 202:9,12,19	42:6 45:14 103:7	197:3,4 198:11	<b>damage</b> 18:22
161:14 162:18	202:21 204:2,9,10	103:8 110:7,10,15	<b>crimes</b> 1:3 17:20	<b>dangerous</b> 44:5
167:1 177:11	204:17,21 205:15	116:12 117:12	23:15 25:17 26:9	<b>Danis</b> 213:2,15
178:19,21 181:8	206:13 207:6	125:5 129:11	26:10 34:6 52:20	<b>daughters</b> 34:3
181:19 182:2	208:5,11 209:12	151:1,10 153:6	53:2,5 59:6 156:6	<b>day</b> 42:21 43:4
183:9 184:4	210:1	154:4 165:11	<b>criminal</b> 18:9	198:19
195:12 198:20	<b>counsel's</b> 102:22	196:14	21:21 102:17	<b>days</b> 36:11
199:7 203:1 207:9	109:5 112:5	<b>court-martialed</b>	106:6	<b>DC</b> 227:13
208:16	<b>counseling</b> 223:2	34:17	<b>critical</b> 28:18 30:9	<b>deal</b> 46:11 93:3,13
<b>Cook's</b> 183:1	<b>counter</b> 112:16	<b>courtroom</b> 1:12	47:13 164:5,21	94:20 117:3
<b>coproducer</b> 214:12	<b>country</b> 34:3 202:6	33:1 65:4 168:12	175:1,5,6 217:12	143:22 161:14
<b>core</b> 201:20	<b>couple</b> 26:14 48:13	<b>courts</b> 15:20 22:6	<b>cross</b> 99:17 189:1	214:13 228:15
<b>Corn</b> 5:16	171:21	34:1 36:2,20 63:8	197:18	<b>deals</b> 107:6
<b>Corps</b> 105:21	<b>course</b> 13:6 43:1	108:14 110:20	<b>cross-examination</b>	<b>Dean</b> 35:18
214:21	50:11 72:14 108:9	111:1 124:1 127:2	189:17 190:7,10	<b>death</b> 66:20
<b>correct</b> 62:8,16,18	120:21	127:14 137:21	191:3	<b>debate</b> 68:5 201:18
86:12,20 126:20	<b>courses</b> 13:10,10	192:13 195:19	<b>cross-examine</b>	<b>decades</b> 48:17
128:18 129:5	14:7,10,19 15:4	200:18 205:5	195:10	<b>decide</b> 34:16
149:21 165:20	216:22 217:3	<b>courts-martial</b>	<b>CSS</b> 87:15 88:5,13	108:13 205:13
176:22 177:4	218:2	17:2 20:1,17	120:13 126:17	209:7
186:11 187:16	<b>court</b> 1:11 24:3	32:11,19 35:16	138:18	<b>decided</b> 150:8
206:1	29:15 58:18,22	37:7 43:16 108:21	<b>cultural</b> 31:5	201:21 206:2
<b>correctly</b> 77:6	74:16,20 82:1	114:12 123:16	213:19	214:18
206:9	84:8 85:4 103:4	124:5 126:12	<b>culture</b> 216:16,17	<b>decides</b> 63:20
<b>correlate</b> 160:9	109:21 111:8,15	130:10 131:3	216:19 217:4	112:15 178:7
<b>correspondent</b>	115:3,16 116:1,7	132:1	218:3 220:18	179:22 180:10
214:21	116:20 117:20	<b>cover</b> 25:17 40:18	<b>curiosity</b> 204:7	181:1
<b>corresponding</b>	118:4 121:22	<b>covered</b> 223:10,11	<b>current</b> 16:6 17:15	<b>deciding</b> 10:7
125:5	123:7 126:6 134:6	<b>covers</b> 171:5	18:6 19:15 24:12	111:10
<b>costs</b> 26:19 27:12	142:3 143:4	<b>crafted</b> 173:15	92:13 106:17	<b>decision</b> 10:22
<b>counsel</b> 56:10	148:11,16 149:20	193:3	110:9 118:18	17:17 31:8 47:1
63:16 64:5,5	150:1,3,6,9,17	<b>create</b> 94:13 98:8	124:22 190:19	47:14 50:6 51:1
102:10,17 103:3	152:18 155:17	104:15	<b>currently</b> 85:1	53:8 54:13 55:17
104:6 106:11	159:4 161:7	<b>created</b> 128:15	102:10 103:13	63:7,9 65:14,15
107:17 108:7	164:10 168:17	<b>creation</b> 25:15	104:5 107:17	65:16 66:6 67:12
111:19 112:22	169:6,20,21,22	104:4 107:15	122:16 131:12	102:21 103:11

104:11 108:2	197:10 198:10	<b>described</b> 133:5	88:4 92:21 114:17	<b>disband</b> 212:22
113:3 116:19	200:17 203:10	172:5,7	117:16 119:14	227:8
118:3 123:1	218:12 224:8	<b>describing</b> 55:5	140:14,18 143:19	<b>discharge</b> 216:2
131:17 135:17	227:12,21	<b>description</b> 61:8	144:13 153:17	<b>disciplinary</b> 57:13
141:5 148:18	<b>defer</b> 77:14 110:4	<b>descriptions</b> 167:7	154:21 175:7	<b>discipline</b> 19:19,21
150:5,5,10,16,19	112:7,11 139:6	<b>desertion</b> 26:9 53:3	179:4 193:11	20:13 40:13 43:8
152:14 154:2	<b>defined</b> 8:14 12:8	<b>designated</b> 2:2 24:3	213:7 220:21	57:20
155:10 160:11	<b>definitely</b> 211:4	<b>despite</b> 21:12 30:4	227:3	<b>disclosed</b> 94:9
166:18 171:12	<b>delay</b> 195:16	81:6 227:15	<b>differently</b> 215:13	<b>discovery</b> 84:7 85:4
200:8 201:11	196:13 197:7	<b>detail</b> 158:8	<b>difficult</b> 28:20	<b>discrete</b> 144:11
<b>decision-making</b>	<b>delayed</b> 100:21	30:13 41:22 145:8	223:10	157:12,18
150:14	102:3 126:5	167:7 194:10	<b>difficulty</b> 144:22	<b>discretion</b> 28:10
<b>decisionmaking</b>	191:11	<b>details</b> 130:19	226:17	81:12,19,22
21:10	<b>delete</b> 107:19	<b>determination</b> 79:4	<b>diligence</b> 33:5	134:20 135:15
<b>decisions</b> 10:4 21:7	<b>deleted</b> 128:4,8,20	<b>determine</b> 70:14	226:22	137:14 149:9
21:22 22:17,19	<b>deliberate</b> 4:7 6:1	100:10 134:20	<b>direct</b> 40:4 70:12	176:16 206:8
34:1,14 40:14	69:2 123:5	<b>determined</b> 192:13	73:8 74:13 84:18	<b>discretion's</b> 136:20
45:12 46:14,21	<b>deliberated</b> 64:14	<b>determining</b>	91:5 104:3 107:15	<b>discretionary</b>
47:9 51:7,8,9	77:10 100:19,20	153:12 156:5	110:4 122:7,15	138:5
57:19 67:7,14	<b>deliberating</b> 47:20	<b>detriment</b> 30:19	131:10	<b>discuss</b> 5:22 54:13
116:4 141:13	78:20 91:3	<b>detrimental</b> 198:14	<b>directed</b> 7:2,5	87:15 90:5 109:7
<b>deck</b> 62:10 72:12	<b>deliberation</b> 11:6	<b>detrimentally</b>	<b>directing</b> 110:20	118:16 134:12
91:17 92:6 101:17	190:15	196:20	<b>direction</b> 7:18	138:4 180:20
<b>declared</b> 222:22	<b>deliberations</b> 3:15	<b>develop</b> 7:5 79:19	175:8	<b>discussed</b> 5:14 70:4
<b>dedicated</b> 9:21	15:21 31:13 34:10	<b>developed</b> 71:5	<b>directive</b> 105:8	87:5,6 142:4,5
10:12,20 13:5	110:6 113:18	212:8	154:19	180:17 188:9
53:16	193:6 202:5	<b>developing</b> 216:22	<b>directives</b> 148:20	194:4 200:7
<b>defend</b> 66:8	<b>delighted</b> 228:22	218:1	207:4	206:18
<b>defendant</b> 162:21	<b>delivery</b> 137:15	<b>deviate</b> 216:5,10,11	<b>directly</b> 102:9	<b>discussing</b> 218:4
195:8 197:16	<b>demand</b> 53:5	217:10 220:22	135:5 137:18	<b>discussion</b> 15:11
<b>defendant's</b> 189:8	<b>demographic</b> 29:1	<b>device</b> 109:22	142:10 170:20	54:15 58:9,14
198:3	<b>Denied</b> 214:12	157:15	<b>Director</b> 2:4 5:12	64:16 80:14 84:12
<b>defendants</b> 75:22	216:9	<b>dialogue</b> 51:12	<b>disagree</b> 32:3 33:11	91:12,21 94:11
<b>defense</b> 1:1 6:14	<b>Denver</b> 213:5,18	<b>Diana</b> 213:2,15	47:16 60:13 83:10	95:4 107:2 119:14
7:1 9:18 23:18	<b>deny</b> 117:14	<b>dictate</b> 47:6	83:14 198:16,20	119:19 121:16
24:19 25:3 70:11	<b>Department</b> 1:1	<b>Diego</b> 226:6	198:22 199:5,7,8	125:18 126:15
73:7 74:13 75:22	5:13 6:13 23:17	<b>differ</b> 86:9	199:9,11	127:17 129:13
79:20 84:18 88:17	24:19 25:2 88:19	<b>difference</b> 28:15	<b>disagreed</b> 172:13	140:16,22 141:6
88:19 89:6 104:3	89:5 217:15 224:8	49:5,9,17,21	<b>disagreement</b>	143:16 188:12
105:11 107:15	227:12,21	51:21 52:2 77:18	54:17 67:15 132:9	194:13 200:3
108:13,19 117:14	<b>depending</b> 117:8	77:22 109:18	184:20	201:3,16 209:17
118:19 131:10,21	<b>depends</b> 150:4	117:7 121:10	<b>disagreements</b>	218:22
142:9 158:16	<b>deployed</b> 137:3	156:15 166:16	83:15	<b>discussions</b> 6:17
173:5 189:15	<b>derailed</b> 139:11	<b>differences</b> 79:1	<b>disagrees</b> 171:8,11	99:8 125:21
190:21 191:14	<b>dereliction</b> 18:15	121:4,9	171:13	183:20 186:22
192:2 193:15	57:22 66:17	<b>different</b> 29:2	<b>disapprove</b> 81:21	209:2 210:11
195:17 196:5	<b>describe</b> 26:1	37:20 61:14,19		215:7

<b>disgrace</b> 56:2	<b>drafted</b> 116:2 175:11 182:9,10	<b>edits</b> 193:4	<b>endeavor</b> 55:11	65:13,18 208:8
<b>dismiss</b> 161:10,21 162:3	<b>drafting</b> 132:20	<b>educated</b> 218:10	<b>ended</b> 142:5	<b>essentially</b> 26:19 77:8 115:20 156:22
<b>dismissal</b> 164:20	<b>draw</b> 55:20	<b>education</b> 228:13	<b>endorse</b> 51:17	<b>establish</b> 8:15 88:18
<b>dispose</b> 103:11 114:7	<b>drawn</b> 55:14 204:4	<b>educator</b> 213:12 214:17	<b>enemy</b> 219:7,10 226:9	<b>establishments</b> 70:20
<b>disposition</b> 104:8 104:11,14 107:8 107:20 108:2,6 109:9 111:22 123:1 131:17 139:21 140:7 145:11 146:2 149:4	<b>drilled</b> 41:12 42:2	<b>effect</b> 35:21 43:7 56:11 98:21 99:6 100:10	<b>energy</b> 228:15	<b>et</b> 140:17 156:7
<b>dispute</b> 153:1	<b>drive</b> 216:17	<b>effective</b> 22:2 59:13 70:3	<b>enforce</b> 20:3 148:15	<b>etcetera</b> 70:20
<b>disregards</b> 116:19	<b>dropping</b> 123:15 123:17 164:5	<b>effectiveness</b> 20:14 88:22	<b>enforcement</b> 49:12	<b>ethical</b> 47:2,11
<b>dissent</b> 16:1,15 27:19 52:15 68:11 68:11 176:16 210:13	<b>due</b> 54:20 78:18 93:10 197:4 226:22	<b>effects</b> 43:8	<b>engender</b> 68:6	<b>ethics</b> 213:11
<b>dissenters</b> 52:12	<b>Dunn</b> 1:18 14:21 14:22 59:17 86:15 86:17,18,19 87:12 87:19 88:6 105:17 114:15 120:3 135:13 140:3,20 143:7 144:14,21 149:14 153:5 156:2 161:16 162:12 163:5,17 165:6,20 166:5,17 176:9 177:12 178:3,13,17 193:8 195:13	<b>effort</b> 28:5 33:8 56:5 73:22	<b>enhance</b> 7:6 24:17	<b>evaluate</b> 25:3 74:15 84:20
<b>dissenting</b> 16:14	<b>duties</b> 11:19,21 42:2 85:6	<b>efforts</b> 6:14 7:18 9:9 19:4 80:16 81:7	<b>enjoyed</b> 223:16	<b>evaluated</b> 24:14 71:6
<b>dissents</b> 62:12	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>eight</b> 53:14 182:7	<b>enlisted</b> 34:12 36:21 41:2 73:1 217:6 219:5,22 220:14,14 221:3 222:2	<b>evaluations</b> 7:9 89:7
<b>distance</b> 83:17	<b>duties</b> 11:19,21 42:2 85:6	<b>either</b> 6:1 23:8 24:5 34:8 75:8 100:20 100:21 140:12 145:14 198:19 216:10	<b>enormous</b> 56:10	<b>event</b> 66:3,4 70:15 135:4
<b>distinct</b> 141:1 186:14	<b>duties</b> 11:19,21 42:2 85:6	<b>elected</b> 22:1	<b>enormously</b> 51:14 51:14	<b>events</b> 66:20
<b>distinction</b> 25:10 199:9	<b>duties</b> 11:19,21 42:2 85:6	<b>element</b> 132:14 152:17 158:16	<b>ensure</b> 8:12,21 9:18 11:18 12:11,17 73:8,9 94:3 106:13 109:15 115:10 116:3 122:6 157:5,17 170:3 183:5 198:3	<b>eventually</b> 66:16 212:22
<b>district</b> 1:11,11 160:2 189:5	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>elements</b> 153:21 162:20 163:1	<b>ensures</b> 183:9 184:15 185:12	<b>everybody</b> 15:11 55:20 58:4 60:12 119:8 122:10 129:20 133:7 136:16 149:18 204:8 227:18
<b>diversity</b> 213:19	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>elevate</b> 64:4	<b>ensuring</b> 100:5 201:7	<b>everybody's</b> 59:8 182:20
<b>division</b> 37:18,19 114:16 217:13 219:6,13	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>elevated</b> 17:10	<b>enter</b> 161:1	<b>everyone's</b> 139:15
<b>document</b> 176:5	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>elevating</b> 64:8	<b>entering</b> 123:2 131:17	<b>evidence</b> 20:16 21:8 23:5 49:3,4 49:15,16,21 53:3 53:6 79:6,22 93:7 93:13 94:21 95:12 95:21 97:16 102:18 105:1 106:9 141:21 142:9 148:6,8,19 175:2 189:12 191:21 196:13 204:1
<b>DoD</b> 8:11 11:13,19 71:7 73:8 88:21 88:22 92:17 102:14	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>eliminated</b> 21:5	<b>entire</b> 8:2 29:16,20 59:4 215:4 228:2	<b>evidenced</b> 97:20
<b>doing</b> 40:11 45:18 46:5,15 57:21 67:6 84:21 106:11 110:6 156:4 187:7 190:8	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>eliminating</b> 23:6	<b>entirely</b> 75:15	<b>evidentiary</b> 201:9 203:6,17
<b>domestic</b> 49:10	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>Elizabeth</b> 1:16,19 5:3	<b>entities</b> 21:8 89:8	
<b>doubt</b> 35:14 70:21	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>eloquently</b> 35:17	<b>enumerated</b> 24:19	
<b>draft</b> 124:22	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>embrace</b> 119:22	<b>envisioning</b> 166:9	
	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>emphasis</b> 220:3	<b>episode</b> 221:2,15 221:16,17,20	
	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>empirical</b> 49:3	<b>episodes</b> 225:6	
	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>employed</b> 21:4	<b>equals</b> 223:18	
	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>employment</b> 226:17	<b>erring</b> 30:8	
	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>enacted</b> 17:14 24:16	<b>error</b> 51:1 86:19	
	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7	<b>encouraged</b> 13:11 215:12,14	<b>especially</b> 58:22	
	<b>duty</b> 18:15 36:11 36:16 37:12 41:3 41:4,9,18 42:1 50:16 57:22 61:4 66:17 92:22 93:10 94:4 105:20 215:11 217:8 219:2 223:15 225:7			

<b>eviscerate</b> 115:20	61:19 213:8	<b>fair</b> 75:14 86:4	32:20	183:7
<b>evolution</b> 222:14	<b>expert</b> 85:7,7 148:2	185:22	<b>felt</b> 33:18	<b>finish</b> 4:12 11:4
<b>evolved</b> 29:12	<b>experts</b> 5:1 84:9	<b>fairly</b> 69:22	<b>feminist</b> 214:4	91:2 188:12
<b>exactly</b> 87:14	110:5	<b>fairness</b> 57:9 59:14	<b>Fernandez</b> 1:20	<b>finished</b> 229:15,18
127:11 130:21	<b>explain</b> 4:4 8:5	<b>fallacy</b> 222:10	48:4,6 59:17,19	<b>finite</b> 27:4 212:16
138:17 162:22	92:8 117:4 148:21	<b>familiarity</b> 53:14	59:20 90:15,17	<b>fired</b> 105:22
170:12	225:8	<b>families</b> 82:10	136:4,5,8,13,15	<b>first</b> 4:3 6:9 7:8
<b>examination</b> 189:2	<b>explained</b> 28:9	<b>family</b> 36:10	<b>field</b> 13:18 37:12	16:21 22:8 41:2
197:19	<b>explaining</b> 148:9	226:19	37:17 43:14	41:10 42:20,22
<b>example</b> 7:19 14:5	<b>explains</b> 147:19	<b>fantastic</b> 40:20	<b>fighting</b> 51:21	43:1 52:18 53:10
40:16 44:12	<b>explanatory</b> 128:14	221:21	<b>figure</b> 101:7,12,13	92:7 107:13
219:21 223:14	<b>extend</b> 8:22 9:10	<b>far</b> 115:5 138:2	129:16 142:18	130:18 131:7
<b>examples</b> 228:10	12:15	159:18 222:22	170:1 202:7	133:11 151:1
<b>excessive</b> 30:6	<b>extension</b> 8:19	<b>fascinating</b> 50:8	<b>file</b> 92:18 93:15	152:15 153:6
<b>excuses</b> 219:1,15	<b>extensive</b> 119:13	<b>fashion</b> 134:17	94:14	154:3 155:2 156:8
219:19 220:16	<b>extent</b> 84:2 151:5	165:9	<b>filed</b> 101:8	159:2 165:6,10
222:11	<b>external</b> 88:19	<b>fatigue</b> 70:6	<b>filing</b> 72:21	173:3,3 180:1
<b>execute</b> 148:10,16	89:16	<b>fault</b> 86:4	<b>fill</b> 106:18	193:4 213:1
150:13	<b>extra-military</b>	<b>favor</b> 62:15 76:20	<b>film</b> 214:12	217:14,20 219:3
<b>exempted</b> 26:7	223:1	78:5	<b>films</b> 216:7	<b>fits</b> 126:12
<b>exercise</b> 148:21	<b>F</b>	<b>feasibility</b> 79:8	<b>final</b> 77:11 89:9	<b>five</b> 36:15
149:1	<b>face</b> 21:14,18 22:5	84:12,20	<b>finality</b> 115:18	<b>flabbergasted</b>
<b>exercised</b> 202:18	<b>face-to-face</b> 165:9	<b>feasible</b> 145:16	<b>finally</b> 55:7 165:2	217:20
<b>exercising</b> 164:18	<b>facilitate</b> 217:4	146:6	<b>financial</b> 189:13	<b>flagging</b> 138:22
166:9	218:2	<b>federal</b> 2:2 28:12	<b>find</b> 11:22 20:15	<b>fleet</b> 8:2 226:4
<b>exigencies</b> 13:13	<b>facility</b> 39:17 42:14	102:7 103:14	22:4 26:15 39:8	<b>flexibility</b> 93:8,9
<b>exist</b> 34:18 47:11	42:15 44:16	105:14 137:21	43:14 50:7 101:7	<b>flexible</b> 149:7
57:17	<b>fact</b> 6:22 12:1	143:5 144:12	105:8 121:15	<b>flip</b> 42:7
<b>existing</b> 27:3 98:4	16:21 21:11 30:2	152:20 155:4,11	157:12 208:9	<b>flipped</b> 142:6
<b>exists</b> 141:2 209:9	46:16 52:21 58:16	155:13,17 157:21	<b>finding</b> 13:2,7,20	<b>floating</b> 82:20
<b>expect</b> 38:15	105:1,11 113:13	158:2,4,6,6 159:3	14:4 76:4 200:5,7	<b>Floor</b> 1:12
212:20 218:18	117:8 153:20	159:6 160:10	<b>findings</b> 16:17 21:1	<b>flux</b> 76:11
<b>expectations</b> 8:6	156:6 179:9 189:3	167:21 170:17	23:21 28:7 33:8	<b>fly</b> 197:20
<b>expected</b> 7:17 8:8	203:17 208:10	172:5,6,10,22	72:18 76:6 78:1	<b>fo</b> 190:16
12:12 218:13	217:17	173:5,9 174:18	81:21 92:2,7,9,11	<b>focus</b> 22:22 28:14
<b>expedite</b> 127:16	<b>factor</b> 109:5 122:2	189:6,18 190:3	93:12 95:2 101:21	167:10,12
<b>expedited</b> 92:16,19	122:6	192:13,14 193:12	102:4,5 103:22	<b>focused</b> 15:6
94:15 101:9	<b>factors</b> 70:15	193:18 194:14,17	116:11 126:18	<b>folders</b> 211:19
<b>expenditure</b> 27:13	<b>facts</b> 76:6 158:13	194:19 197:19	151:11 178:4	<b>folks</b> 209:9,10
<b>experience</b> 21:3	164:22 172:21	198:11	179:7 188:13,15	<b>follow</b> 45:2
40:20 53:11 59:2	176:13 193:19	<b>feedback</b> 88:22	200:6	<b>followed</b> 40:1
61:17 68:2 172:11	<b>factual</b> 121:12	<b>feel</b> 31:21 78:20	<b>finds</b> 20:9 77:7	<b>following</b> 33:12
192:11 221:22	203:22	165:16	<b>fine</b> 14:20 81:2,4	69:19 70:13 191:5
225:19 228:13	<b>faculty</b> 213:16	<b>felonies</b> 26:11	123:9 130:17,20	<b>follows</b> 23:21
<b>experienced</b> 28:11	<b>failure</b> 9:8 24:14	<b>felony</b> 20:1 26:1,7	145:12 146:3	<b>Force</b> 42:15
33:3 47:7 64:6,11	72:16 166:13	38:5,16	149:10 178:14	<b>forces</b> 48:17 50:20
<b>experiences</b> 40:19		<b>felony-level</b> 32:12	179:10,11 180:10	51:6 58:20 200:9

<b>forcible</b> 17:19	<b>front</b> 41:10 93:22	148:17 149:21	124:1 125:15,18	124:16 130:22
<b>forefront</b> 38:10,14	111:9 114:9	150:4 151:14,19	132:5 166:20	156:11 163:11
38:19	115:16 116:1	152:4,8,13 154:19	204:17,20 215:21	168:3 170:17
<b>foreign</b> 49:11	117:17 121:21	156:14 158:12,17	<b>Ginny</b> 214:15	173:1 184:13
<b>forensic</b> 214:19	125:10 131:8	159:1 160:3	<b>give</b> 8:3 34:17	<b>going</b> 4:11 6:20 7:3
<b>forfeiture</b> 82:9	164:3 180:14	162:10 163:22	36:21 37:8 54:2	13:14 14:9,22
<b>forget</b> 42:20	190:13,16 193:3	164:11 166:7	89:16 135:3	32:5,9 33:20,22
<b>form</b> 124:8	<b>Frost</b> 5:12 89:4	167:6 168:19	219:19	34:7,9,12,15,16
<b>formal</b> 116:17	<b>full</b> 4:14 18:19	169:3,9 170:10	<b>given</b> 25:8 26:13	34:21 38:3,22
200:12	80:14 129:21	172:4 173:15,20	35:17 148:20	39:2,4 40:17
<b>formally</b> 129:21	172:14	174:8 175:21	<b>gives</b> 226:8,9	41:10 43:7,9 44:2
<b>formed</b> 63:9	<b>fully</b> 9:21 25:3	176:22 177:3,19	<b>giving</b> 13:4	44:6,8,20 45:2
<b>former</b> 19:15 42:2	85:11	178:12 181:12	<b>glad</b> 91:9	46:18 49:8 50:17
79:13 153:1 213:4	<b>functions</b> 10:1	186:13 188:8	<b>go</b> 6:7 8:18 11:8	51:17,20 52:3
213:16	46:11	193:2 194:2	12:18 13:11 23:9	54:3 55:1,5 56:4
<b>formulate</b> 71:7	<b>fundamental</b> 21:12	197:12 199:18	23:12,19 25:9	58:3,10,13 59:11
<b>formulation</b> 70:12	28:15 48:16,19	200:2 205:7,15,21	26:4 31:21 33:4	65:17 75:16 79:1
71:2	<b>fundamentally</b>	206:10,11 209:1	36:19 46:2 52:5	79:19 83:16 87:8
<b>Fort</b> 15:3	48:14	210:5,9 211:4,7	57:13,13,14 60:9	90:9,22 91:4,10
<b>forth</b> 47:5 218:20	<b>funding</b> 55:6 84:9	211:11,16	62:4 67:2 68:1	91:11,14 92:1,8
220:15	85:7	<b>gather</b> 129:20	76:13 78:10 82:21	93:17 100:2,15
<b>forward</b> 18:12	<b>further</b> 23:14 24:2	<b>gee</b> 35:9	91:1,6,11,14	101:20 107:20
55:19 68:1 98:7	24:11 33:4 59:18	<b>gender</b> 213:22	95:19 96:10 99:13	112:5,11 113:6
114:6 124:16	83:7 85:10 154:12	214:4	104:21 109:4	124:9 126:14
141:15 142:16,22	<b>future</b> 75:16 187:4	<b>general</b> 1:17,18	113:6,14 118:10	129:22 133:22
144:8 167:13	<b>FY14</b> 81:17	14:21 17:15 32:11	118:13,16 119:5	139:10,20 143:10
168:3 173:17		32:17,19 35:10,10	130:11 131:3	145:6,7,16 146:5
177:17 198:5	<b>G</b>	35:12,16 36:2,20	132:18 136:6	147:5,9 151:9
212:20 221:5	<b>gal</b> 166:1	37:7 38:2 39:3	138:15 141:15	156:19 160:10,11
<b>found</b> 17:7,21	<b>gap</b> 106:18 168:4,6	42:6,8 43:16,21	142:9,12 144:1,3	161:6 162:20
21:17 27:3 39:17	175:3	44:14 45:13 58:22	146:5 147:4	163:8,19 167:7
42:18 92:12	<b>Garvin</b> 2:3 90:11	59:17,18 74:16	150:22 151:9	170:2,21,22
157:14 185:19	90:12 91:3,7 96:4	86:17 87:11,18	154:11 155:8	172:13 174:19
186:4	96:7,16,20 97:14	114:15 120:3	158:8,17 159:19	175:7 179:8 181:9
<b>founding</b> 212:13	97:22 100:1,5,12	149:14 176:9	167:13 168:7	182:7 183:17,19
<b>four</b> 38:8 213:13	101:15,19 106:8	177:11 195:13	169:8 175:7,7	185:3,9 195:12
<b>Fourteen</b> 72:12	109:12,14 111:12	<b>General's</b> 105:21	177:17 183:19,22	197:6 203:6 205:3
<b>fourth</b> 44:10 53:13	112:6 115:4	<b>generally</b> 37:2 64:5	185:10 196:13	206:1,18,19
<b>framing</b> 92:6	118:20 120:19,22	72:15 142:10	199:17,22 207:21	207:17 208:6,13
<b>frankly</b> 42:4 44:15	123:9,11,19	195:2 209:11	214:18 215:19	212:6,22 215:4,7
46:10 67:13 69:20	125:16 126:9,11	<b>generals</b> 15:5 33:1	220:13 224:1	215:19 216:3,13
70:6 82:18	127:7,10 128:10	33:14 43:18 66:10	<b>goal</b> 11:15,17,20	216:20 218:5
<b>fraternization</b> 58:2	128:18 129:2	<b>generic</b> 12:18	125:13 217:3	219:8,10,12 221:1
<b>free</b> 31:21 78:21	134:1,8 137:12	<b>genesis</b> 89:9	<b>goals</b> 7:16 114:5	221:9 222:11
<b>freely</b> 50:18	138:12 140:19,21	<b>Geoffrey</b> 5:16	<b>goes</b> 7:14 9:16 47:4	225:16 227:4
<b>Friday</b> 1:7 204:12	142:4 144:5,15	<b>Geri</b> 214:10	51:12 64:20 65:18	<b>gold</b> 13:17
<b>FRIED</b> 2:2	146:9 147:7,15	<b>getting</b> 45:19 123:6	87:19 113:5 124:4	<b>golly</b> 67:2



<b>good</b> 4:3 7:19 8:7 19:20 40:13 43:8 45:19 57:19 76:10 78:4 81:4 136:15 144:21 208:7 212:1,3 215:22	<b>guys</b> 218:4,20 225:19 227:8 229:4	<b>harsh</b> 226:16 <b>HARVEY</b> 1:19 <b>hashing</b> 218:5 <b>hat</b> 148:1 <b>hats</b> 5:6 <b>hazed</b> 223:3 <b>hazing</b> 222:21 <b>head</b> 206:4 210:3 217:16 <b>headed</b> 60:14 <b>headquarters</b> 37:19 <b>hear</b> 4:5 61:17 65:5 69:8 86:11 93:6 116:15 128:6 135:4 148:6 186:18 187:15,22 212:4 217:16 221:5 224:15 225:15 227:9,13 228:9,17,22 229:13	168:12,17,19 169:7,12,13,14,15 170:4,7,10 172:3 173:12,20 174:14 175:2,4,15 176:3 176:6,8,20 178:6 179:14,22 180:7,9 180:14,22 182:18 183:3,6,10,13,13 184:6,9 185:3,9 185:13,16,21 186:5,14,17 188:4 188:22 189:7,21 192:15 195:6 196:19,19 200:11 200:14,21,22 201:7,8,12,22 202:8,13,17 203:3 203:13 206:12,17 206:20 207:1 208:4,5,18,19,21 209:14,16 213:1 214:15 217:21 224:7 225:2,20 226:3	<b>hesitancy</b> 77:2 <b>hesitation</b> 40:6 <b>hey</b> 58:11 <b>hi</b> 37:5 136:6 <b>hierarchy</b> 28:21 <b>high</b> 30:3 59:1 67:19 <b>higher</b> 45:11,11 46:14 54:18 67:12 67:17 71:19 <b>highest</b> 45:13 <b>highly</b> 66:4 <b>Hillman</b> 1:19 16:1 16:9,11 27:18,21 31:12 35:18 48:3 59:22 60:3,4,7,10 62:17 69:7,8,10 69:15 80:7,9 81:1 82:4,12,16 83:13 85:16,17 86:1,3 86:12,18 87:11 118:21 119:1,4,7 119:10 122:11,12 123:8 130:13,16 132:11,13 134:11 138:16,21 182:5 182:13 184:22 185:6 186:1 187:14,17 199:4 210:17,18
<b>gotten</b> 165:18 <b>government</b> 47:6 102:16 154:13 191:16 <b>government's</b> 172:18 <b>grade</b> 9:20 37:12 37:17 43:14 <b>graduate</b> 213:21 <b>grant</b> 102:15 105:11 <b>grants</b> 102:12 <b>grappling</b> 157:17 <b>great</b> 46:10 56:2 64:21 90:16 93:3 93:13 94:20 137:8 225:11,13 228:15 <b>Green</b> 2:4 82:21 <b>grip</b> 167:11 <b>groomed</b> 30:17 <b>grooming</b> 30:16 <b>grounded</b> 174:21 <b>grounds</b> 47:10 76:8 <b>group</b> 26:5 74:14 75:9 84:19 228:12 <b>groups</b> 19:8 213:6 224:6 <b>guard</b> 41:3,3,8,18 41:20 42:1,2,17 <b>guess</b> 11:7 25:22 47:19 65:4 71:17 96:22 100:16 209:18 228:13 <b>guidance</b> 7:21 8:3 <b>guided</b> 103:21 <b>guilty</b> 117:1,3 151:3 153:21 154:3 158:7,11 173:7 222:6 <b>guy</b> 173:7 <b>guy's</b> 165:22	<b>half</b> 73:1 <b>Ham</b> 2:4 125:1,2 206:5,6 210:21 211:2,17 229:15 <b>hand-selected</b> 213:5 <b>handful</b> 91:15 204:16 <b>handle</b> 55:4 56:12 <b>handled</b> 43:21 <b>handles</b> 56:12 <b>hands</b> 53:8 99:11 99:12 102:22 <b>hank</b> 209:4 <b>happen</b> 55:5 95:14 105:2,9 106:10 110:1 113:4 115:16 130:22 138:6 149:9 152:15 159:21 160:1 175:20 186:9 195:20 202:5 218:15,16 222:6 227:15,16 <b>happened</b> 30:21 109:16 159:18 163:13 174:5 <b>happening</b> 137:22 174:16,20 217:22 225:12 <b>happens</b> 29:5 106:14 119:20 121:20 137:21 141:11 164:10 194:19 195:7 197:20 222:13 <b>happy</b> 77:12 88:10 91:8 139:5 148:2 160:3 <b>harassment</b> 222:12 <b>hard</b> 80:11,15 <b>harmful</b> 128:17	<b>heard</b> 19:8 34:22 35:6 39:22 40:2 43:17 44:19 52:19 61:1 79:11 89:3 93:3 94:21 95:13 95:21 98:3 105:1 106:9 107:6 111:6 112:14,20 114:14 115:11 121:6 126:6 134:6 137:18 139:7 140:12 141:8,20 141:22 142:9,20 143:2,6,8 144:3,8 144:12,17 145:14 146:4 147:11 148:7,20 149:21 149:22 150:3,7,9 150:11,12,13 151:20 152:6,9 154:5,17 155:2,5 155:12,16,21,22 156:21 157:3,8,19 158:5 164:17,18 165:5,8 167:15	<b>hearing</b> 45:22 46:5 71:14 77:20 100:14 102:1 160:12 194:8 201:2 212:9 224:18,18 227:17 229:3,20 <b>hearings</b> 75:17 220:4 224:10,14 227:22 <b>hears</b> 117:6 142:15 <b>held</b> 8:8 12:7 20:4 141:8 146:13,20 153:3 <b>help</b> 10:22 30:11 61:5 78:10 82:4 217:3 218:2 <b>helpful</b> 71:3 211:10 211:13 216:3 219:17 <b>helps</b> 92:8 <b>heroes</b> 227:1	<b>Hillman's</b> 185:8 <b>hired</b> 226:19 <b>hires</b> 227:1 <b>history</b> 54:5 213:12 220:3 <b>hit</b> 219:14 <b>hoc</b> 10:13 <b>hold</b> 6:14 7:15 8:11 11:16 82:8 88:10 126:15 196:9 <b>holding</b> 125:20 200:1 <b>holistic</b> 58:14 59:9 <b>Holly</b> 1:18 144:1 <b>Holocaust</b> 220:2,2 220:4,5,6,7,9 <b>Holtzman</b> 1:16 5:3

52:9,10 56:19	54:1,19 55:7	125:14 224:22	<b>incorporated</b> 14:18	<b>inquire</b> 163:13
57:1,3 112:8,10	127:12,16 135:19	<b>impose</b> 81:13	15:2 188:20	<b>inquiries</b> 224:19
113:20 123:14	216:11 226:8,10	<b>imposed</b> 157:7	<b>increase</b> 19:12	<b>insert</b> 86:21 87:2
126:19 130:2,7,17	<b>identical</b> 23:12	161:22	20:19,22	<b>installation</b> 92:21
132:19 134:13,15	<b>identify</b> 11:17	<b>imposing</b> 177:14	<b>increased</b> 30:5	<b>instance</b> 70:14
138:7 139:18	<b>ill-advised</b> 56:13	<b>improper</b> 58:1	<b>incredibly</b> 195:20	73:17
149:16 175:9	<b>illegal</b> 222:22	<b>improve</b> 20:20	<b>independent</b> 18:10	<b>instances</b> 171:21
176:2 177:1,4,9	<b>imagine</b> 40:21 43:2	<b>Improvement</b> 24:8	21:7 88:21 89:7,8	<b>instructed</b> 191:6
177:21,22 178:15	164:10 209:22	25:12,19 26:17	195:1	<b>instruction</b> 14:19
178:19 180:19	<b>immediacy</b> 193:12	<b>improvements</b>	<b>indicate</b> 21:9 95:2	191:7 217:5 223:1
182:16 183:7	<b>immediate</b> 131:8	221:6	<b>indicating</b> 96:11	<b>instructor</b> 213:20
184:2 186:10	131:10 132:4	<b>improving</b> 221:7	<b>individual</b> 22:18	218:12
199:11 208:1	133:2	<b>in-court</b> 152:2	70:8 141:8	<b>integrate</b> 121:5
<b>home</b> 57:14 216:8	<b>immediately</b>	<b>in-person</b> 137:20	<b>individuals</b> 93:15	<b>integrating</b> 129:14
224:11,13	138:20	<b>inadequate</b> 164:4	95:13 98:2 141:22	<b>intended</b> 31:17
<b>homeless</b> 214:22	<b>impact</b> 20:10 22:17	<b>inappropriate</b> 64:4	<b>Infantry</b> 41:3	47:21 138:6 168:6
<b>honest</b> 222:5	25:3 28:22 58:14	<b>incidence</b> 20:19	<b>infinitum</b> 173:2	183:21
<b>honestly</b> 19:22	115:12 118:14	25:4 31:6	225:22	<b>intending</b> 137:14
35:22	189:12,14 190:6,9	<b>incident</b> 70:8	<b>influence</b> 46:8	<b>intense</b> 10:12
<b>Honor</b> 27:21 66:1	191:2 192:7	<b>incidents</b> 18:5	215:10 218:21	<b>intent</b> 94:21 109:15
82:12,16 85:16	209:10,12 215:22	<b>include</b> 9:1 25:16	<b>inform</b> 171:7	115:9 125:10
86:13 97:15	<b>impactful</b> 141:13	95:7 98:19 112:13	<b>informal</b> 39:8	141:12
100:18 123:8	<b>impacts</b> 85:12	127:2 129:10	43:12	<b>intentionally</b> 144:6
126:20 138:22	<b>impasse</b> 199:19	133:6,11 179:21	<b>informally</b> 146:21	169:13
171:9 172:17	<b>impede</b> 18:13	180:2,14 181:10	<b>information</b> 10:3	<b>intentioned</b> 33:3
187:17	<b>implement</b> 7:4 8:4	181:16 183:1	79:15 107:7 109:3	56:15
<b>Honorable</b> 1:13,16	27:5 105:12	198:2 200:20,21	114:6 115:10	<b>interdisciplinary</b>
1:16 2:2	<b>implementation</b>	208:4 221:17,18	137:16 160:4	216:19
<b>hope</b> 10:20 38:12	7:22 104:4 107:16	228:4	167:4 191:21	<b>interest</b> 22:6,10,19
38:21	122:15 131:11	<b>included</b> 26:11	201:10 202:22	51:15 61:7 155:15
<b>Hopefully</b> 228:3	142:7	125:4 161:5	203:7 204:19	155:18,19 157:4
<b>Hospital</b> 36:10	<b>implementations</b>	195:14 198:4	217:19	159:11 164:7,19
42:11	25:7	201:22	<b>inherent</b> 22:5 93:7	165:1 176:17
<b>host</b> 58:18	<b>implemented</b> 24:20	<b>includes</b> 27:12	93:8 95:15 97:17	197:10
<b>Houck</b> 1:17 5:3	25:1,2	152:16 180:5,11	<b>initial</b> 15:18,21	<b>interested</b> 227:5
48:10 52:7 57:1	<b>implementing</b> 6:20	180:22 181:11	150:19	<b>interesting</b> 50:2,7
59:12	<b>implicate</b> 139:2	184:16 188:20	<b>initiate</b> 32:11,19	<b>interests</b> 59:8
<b>Houck's</b> 60:20	<b>implies</b> 149:21	200:14 203:3	35:6	106:15 145:10
<b>House</b> 66:2	<b>import</b> 104:18	213:10	<b>initiated</b> 45:3,4	<b>international</b> 29:21
<b>human</b> 54:6	<b>importance</b> 6:18	<b>including</b> 9:2 26:2	<b>initiatives</b> 8:1,5,14	<b>interpreted</b> 189:6
<b>humanist</b> 214:8	139:7 141:21	73:10 85:3 141:17	24:13	<b>interpreting</b> 159:2
<b>humanities</b> 213:11	211:8	168:7 175:10	<b>input</b> 110:12,17	<b>interrupt</b> 83:17
<b>hypothetical</b> 35:11	<b>important</b> 9:4	<b>inclusion</b> 130:9	113:15 115:17,19	119:8
	16:19 24:13 27:8	<b>inconsistent</b> 87:8	122:7,7 135:16	<b>interview</b> 196:2
	28:3 31:4 41:15	87:17	141:9,10 143:19	<b>interviewed</b> 220:7
	56:8 73:20,21	<b>incorporate</b> 132:1	147:14 149:3,4	<b>interviews</b> 10:3
	93:14 110:21	140:1	160:7 207:18,18	<b>introduce</b> 212:12
<b>I</b>				
<b>idea</b> 8:7 34:5,11				
37:22 39:1,5 53:7				

**introduction**  
202:16  
**introductory** 11:15  
**intuition** 55:12  
**investigated** 18:8  
214:3  
**investigating** 74:18  
75:2 76:2,3 77:7  
78:6  
**investigation** 18:13  
**investigations**  
20:21  
**investigative** 18:9  
74:20  
**investigators** 70:22  
**Invisible** 216:8  
**involve** 26:18 27:11  
42:4  
**involved** 42:7 51:7  
59:6,10 66:3  
147:9  
**involving** 63:14  
205:6  
**ire** 42:18  
**irrelevant** 177:15  
**irresponsible** 55:2  
**issue** 7:14 16:17  
26:14 27:10 52:11  
61:10 93:4 134:16  
156:10 159:4  
187:16 197:5  
200:10,15 205:22  
206:5,14,15 207:5  
207:10 208:8,15  
216:5  
**issues** 7:11 10:18  
14:8 21:14 60:12  
61:15 139:14  
200:12 208:18,21  
209:16 210:8,14  
212:15 217:21  
**it'd** 139:18 146:16  
**iteration** 116:3

**J**

**JAG** 13:8,16 14:3,5  
14:11

**jail** 57:14  
**JAMES** 1:17  
**Jamie** 229:6  
**January** 15:17  
**Jen** 211:18  
**Jenny** 212:11  
**Jim** 5:3  
**job** 57:21 61:7  
188:18 227:2  
**jobs** 38:22  
**joined** 16:1  
**joint** 74:14 75:8  
84:19 125:11  
207:10  
**joking** 199:21  
**Jones** 1:13,16 4:3  
11:9 12:10 13:21  
14:12,16,20 15:8  
16:11,12 29:14  
30:10 31:9,11,15  
31:16,20 35:12  
45:9 47:18 48:7  
49:17 52:6,11  
53:2 56:18 59:15  
59:21 60:1,2,5,9  
62:1,2,19 64:1,19  
65:4,7 67:9 68:15  
68:20,22 69:5,7,9  
69:13,16 71:10,13  
71:22 72:3,4,10  
74:7 76:18 77:3  
78:3,19 80:5,7,8  
80:10,20 81:3  
82:14,17 83:11,13  
83:19 85:21 86:2  
86:7,14,17 87:13  
88:10 89:18 90:9  
90:16 96:4,15,19  
96:22 97:21 98:10  
98:12 99:21 100:4  
100:13 101:2,18  
106:20 108:12,17  
109:1,13 112:9  
117:19 118:2,5,9  
118:21,22 119:2,3  
119:5,9 120:16,21  
122:8,12,14

125:19 126:2,8,10  
126:13 127:5,9  
128:2,5,9,19,22  
129:18 130:5,13  
130:15 131:1  
132:7,11,12,20,22  
133:15,18,21  
134:7,10,13,14  
136:2,6,11,14,17  
136:18 137:11  
138:14 139:13  
149:11,18 151:16  
151:22 152:12  
158:14,19 159:20  
160:5 161:11  
162:4,15 163:15  
164:9 165:2,13,21  
166:12,19 167:2  
168:5,21 169:5  
170:7 172:10  
173:11,19,22  
180:18 181:22  
182:4,6,11,15,22  
184:18,22 185:4,7  
186:12 187:6  
188:1 198:15  
199:1,6,13,21  
205:11,19 207:21  
209:18 210:7,12  
211:1,3,9,12,21  
212:1,5 228:7,21  
229:5,8,11,17  
**Joye** 5:12 89:4  
**judge** 10:15 11:9  
15:4 16:11 22:13  
27:1,5 29:14  
30:10 31:9,15  
45:9 49:17 51:13  
52:10 53:2 54:16  
57:6,7 58:9,21  
59:22 60:21 61:1  
61:18 62:1 63:11  
63:19 64:7,11,19  
65:4 67:6,16  
68:15 69:7 71:10  
72:3 76:18 78:7  
79:2,13,14,16,22

80:7,9 83:13  
86:22 87:3,20  
88:8 96:7 98:10  
105:21 106:2  
111:9 112:8 115:3  
117:6,7,9,15  
118:12,21 119:1  
120:19,19 122:12  
127:22 128:3,7,12  
128:21 129:2  
130:13 132:11,20  
133:15 134:13  
136:18 151:4,21  
153:8,12 154:1,9  
154:10,14 156:4  
156:11 160:1  
162:13,15,20  
163:11,12 165:4  
165:18,19 166:6  
166:10 168:13  
171:4,8,19,22  
172:2,10,21 173:6  
173:9 176:11  
180:15,20 181:3  
182:5,19 184:22  
185:5 206:8  
**judge's** 170:22  
**judges** 77:20 78:8,8  
79:9 84:15  
**judgments** 10:6  
**judicial** 25:15  
30:10 49:12  
**jump** 79:6  
**junction** 134:9  
146:17  
**junior** 9:11 64:6  
67:21 68:4 72:19  
73:1,11 217:15  
219:5,22 220:13  
220:14  
**jurisdiction** 26:3  
106:6  
**jurisdictions** 21:18  
21:22 49:13  
119:17  
**justice** 5:14 10:8  
17:4 18:16,17

19:12 20:7,12  
21:3,13,21 23:8  
24:8 25:12,18  
26:16 29:10,11,22  
48:15 51:15 54:4  
54:9 74:14 75:9  
81:11 84:18  
104:14 155:15,18  
155:19 157:4  
159:11 160:12  
164:7,20 165:1  
176:17 178:6  
196:17 214:12  
216:8

**K**

**Kastenberg** 200:8  
201:13,14,20  
205:12,13  
**keep** 45:16 82:10  
92:14 99:12,13  
143:9 144:22  
145:17 215:19  
**keeping** 145:10  
149:7,16  
**Kenna** 189:5  
**kept** 118:4,5,7  
144:6  
**kicking** 67:11  
**kids** 224:11,12  
228:3  
**kind** 10:22 13:6  
111:21 121:11  
194:5 218:3  
**kinds** 132:15  
**KING** 2:5 100:18  
192:18  
**knew** 42:2 115:6  
**know** 4:16 7:16 9:6  
10:2 12:4,12  
31:20 32:5 34:5  
36:1,22 37:1,6  
38:1,5 40:12,13  
41:8,9,17 42:3,22  
43:3,9 46:5 48:3  
51:13 55:8,12,20  
67:6 71:4 72:14

77:3 82:19 90:19 95:13,16 97:9,12 98:4 101:11 106:14 115:5 116:14 117:2 118:11 121:22 122:1 125:11 127:18 131:7 135:7,7 139:3 140:4,15,16 143:12 144:1 145:7 150:1 151:6 151:17 152:1,2 153:9,13,20 154:16 158:3 159:20 160:1,5,18 162:14,16 163:13 163:15,18,19 164:14,16 165:16 167:5,5 171:10 173:7,12 176:16 177:1 182:1,7,8 193:14 195:15 199:14 205:8,9 210:3 215:20 220:18 226:18 227:6 228:14 <b>knowing</b> 79:18 156:12 <b>knowledge</b> 17:12 36:14 55:16 <b>known</b> 24:8 97:19 <b>knows</b> 39:6 93:1 124:21 149:19 162:21 163:17 <b>KYLE</b> 2:4	96:12,17 98:14 99:19 127:11 130:12 135:20 136:19 142:8 169:9 177:2,12 178:13 179:11 180:5 181:6,7 182:9,10,12 184:19 185:8,10 190:13 191:19 193:2 221:20 <b>large</b> 51:5,11 102:20 105:8 140:22 192:5 <b>larger</b> 98:8 <b>largest</b> 53:13 <b>late</b> 57:22 180:16 <b>Laughter</b> 199:20 <b>launch</b> 65:14 <b>law</b> 5:17,18 18:6 47:4 49:12 144:13 171:7 173:4 <b>lawyer</b> 47:6 58:10 201:19 202:1 207:1 <b>lawyers</b> 22:1 26:5 26:22 46:21,22 61:13 65:5 <b>lays</b> 79:22 <b>leaders</b> 9:2,6 11:18 12:17,18 20:3 22:15 88:21 <b>leadership</b> 13:7 14:10 217:7,7 219:13 <b>learned</b> 72:17 204:12 <b>learns</b> 93:1 <b>leave</b> 31:7 98:14,20 107:12 128:17 137:14 139:22 142:17 143:21 145:20 177:5,20 183:20 203:13 <b>Leavenworth</b> 15:3 <b>leaves</b> 29:1 132:17 <b>leaving</b> 98:18	111:14 142:5 149:3 <b>leery</b> 171:19 <b>left</b> 110:1 206:8 <b>legal</b> 9:21 10:12 13:5 14:7 15:2,5 27:8 30:7 57:19 176:13 201:18 202:9 203:3 205:17 207:5 208:18,21 209:16 210:8,14 215:7 216:16,16 218:4 218:21 220:17 223:9 <b>legally</b> 141:1 219:16 220:16 <b>legislation</b> 16:6 17:14 35:15 63:13 67:18 75:13,19 <b>legitimacy</b> 29:20 <b>lend</b> 226:13 <b>lengthier</b> 153:19 <b>lessen</b> 70:17 <b>lesser</b> 160:17 161:5 <b>let's</b> 199:22 208:13 210:15 <b>letter</b> 147:14 <b>level</b> 27:2 45:14 46:14 54:18 59:2 65:3,11,11 71:19 103:8 141:6 198:1 224:1 <b>levels</b> 66:5 114:17 143:19 <b>liberty</b> 36:6 <b>licensed</b> 46:21 50:9 50:19 214:6,11 <b>LIEUTENANT</b> 2:4 <b>life</b> 66:20 196:21 218:10 <b>lifespan</b> 227:6 <b>light</b> 129:3 <b>lighting</b> 70:19 <b>likelihood</b> 70:17 <b>likens</b> 29:4 <b>limit</b> 32:10 81:18	83:7,7 <b>limited</b> 93:10 164:7 181:19 182:1 205:21 227:7 <b>limiting</b> 209:8 <b>limits</b> 81:12,13 <b>line</b> 6:11 61:4 66:21 90:21 131:7 136:3 167:21 189:18 198:10 204:4 <b>lines</b> 12:11,13 107:13,19 <b>list</b> 225:7,7 <b>listed</b> 76:21 <b>listened</b> 18:19 19:14 73:15 220:5 <b>listening</b> 115:3 <b>litigate</b> 208:13 <b>litigated</b> 201:21 <b>litigation</b> 200:14 206:19 208:7,15 209:21 <b>little</b> 7:2 25:21 50:1 63:21 70:21 71:14 87:7 96:6 98:16 101:4 120:12 212:7 224:7 <b>live</b> 227:13 228:5 <b>living</b> 92:22 94:5 <b>Liz</b> 132:9 207:22 <b>local</b> 71:21 72:1 <b>location</b> 92:21,22 127:18 <b>locker</b> 223:2,5 <b>logic</b> 213:11 <b>logistically</b> 145:15 <b>long</b> 12:8 40:4,17 66:14 83:17 89:5 167:18 179:13 199:15 203:16 216:1 222:22 <b>longer</b> 26:3 75:19 125:9 132:5 <b>look</b> 37:21 99:15 160:6 175:13 183:19 188:18 203:14 207:5,7	222:3 225:17 <b>looked</b> 79:8 84:2 93:20 <b>looking</b> 56:3 89:13 121:3,5 206:3 207:12 <b>looks</b> 177:6 <b>loop</b> 188:11 <b>lose</b> 59:11 <b>lost</b> 85:20 111:17 <b>lot</b> 36:12 44:17 59:2 70:3 84:12 85:10 121:17 148:9 158:8 211:15 215:18 221:14 222:19 <b>love</b> 86:11 <b>lower</b> 42:18 <b>lower-level</b> 39:19 <b>lowest</b> 72:20 <b>luck</b> 136:15 <b>lumped</b> 168:1 <b>Lynn</b> 214:10
<b>M</b>				
<b>M-U-S-T</b> 54:12				
<b>ma'am</b> 63:22 81:1 160:3 210:21 211:17 229:16				
<b>macro</b> 214:7				
<b>magistrate</b> 85:6				
<b>Mai</b> 1:20 59:19 90:13,16 136:4,6				
<b>Mai's</b> 210:19				
<b>main</b> 68:7				
<b>maintain</b> 19:20 20:4				
<b>maintaining</b> 226:17				
<b>major</b> 5:11 39:16 42:15 44:16 220:2 220:3				
<b>majority</b> 19:18 31:18 35:22				
<b>maker</b> 141:5 155:10 201:11				
<b>makers</b> 148:18				

<b>making</b> 10:6 11:1 11:13 46:21 47:2 47:14 50:6 51:2 53:8 73:12 76:11 80:22 98:8 102:21 104:11 106:12 108:2 114:18 116:17 118:2 119:12 120:2,5 123:1 127:13 131:16 144:16 153:19 156:18 160:10 192:16 197:20 207:13	<b>marshal</b> 103:4 <b>martial</b> 15:21 22:7 24:4 29:16 34:2 36:3,21 58:18 59:1 63:8 74:16 74:21 82:1 84:8 85:4 108:14 109:22 110:20 111:2,16 116:21 124:2 126:7 127:2 127:14 190:22 195:19 200:19 <b>Master-at-arms</b> 214:1 <b>materials</b> 189:3 <b>math</b> 223:14,16 <b>Mathews</b> 214:10 <b>Mathwig</b> 213:21 <b>matter</b> 5:1 72:17 88:9 90:8 148:2 159:19 165:3 191:9 225:3 227:19 228:2 229:21 <b>matters</b> 40:5 103:3 193:16 <b>McClendon</b> 211:18 212:2,3,6,11 228:8,19 229:2,7 229:9 <b>McGuire</b> 1:17 59:18 198:22 199:3 <b>meal</b> 134:17 <b>mean</b> 35:10,11 42:6 43:11 54:4 58:17 97:1,5 113:8 124:3 130:4 134:16 135:3 136:22 140:17 143:16 145:3 148:10 149:19 150:1 154:12 156:8 159:10,14 168:15 170:21 173:12 178:4 184:15 195:19	202:9 203:21 207:14 217:9 220:21 225:3 <b>meaning</b> 141:5 155:5 169:13,14 169:15,19 182:20 204:14 <b>meaningful</b> 105:13 122:7 143:2 156:18 157:3 167:15 169:18 201:8 <b>meaningless</b> 115:21 135:9 176:10 <b>means</b> 30:3 54:14 94:13 97:6 98:9 99:6 100:6 101:7 113:2 134:21 154:11,13 156:7 170:7,10 174:18 174:19 180:7 185:2,9 206:20 209:19 214:1 <b>meant</b> 6:12 147:2 <b>measures</b> 23:3 70:16 <b>mechanism</b> 92:13 105:9 193:15 <b>mechanisms</b> 98:1 104:4 105:12 107:16 122:16 131:11 142:7,19 <b>Medal</b> 65:22 <b>medical</b> 42:10 93:10 94:6 95:6 95:10 97:2,8,11 97:18 98:18 99:2 99:18 189:14 <b>meet</b> 135:15 176:13 <b>meeting</b> 1:5 90:10 91:9 92:1 93:20 94:10 95:4 101:1 135:21 188:10 193:1 229:14 <b>meetings</b> 102:19 121:17	<b>Meg</b> 2:3 90:11,12 120:17 138:15 140:11 178:9 181:8 188:7 <b>member</b> 5:19 16:13 18:2 48:10 76:19 79:14 85:5 90:12 90:19 226:19 <b>members</b> 4:19,20 4:22 5:4,6 22:8,18 28:6,17 62:14 72:19 73:10 80:16 80:18 90:20 93:9 100:22 115:5 191:6 219:18 221:10 224:8 227:20 <b>memorize</b> 41:13 <b>memory</b> 32:21 33:16 170:17 <b>men</b> 33:21 214:13 226:8 <b>mention</b> 60:19 <b>mentioned</b> 30:10 53:2 216:9 <b>merely</b> 27:15 88:3 156:5 <b>merit</b> 226:1 <b>message</b> 225:11,12 225:13 <b>met</b> 1:11 163:1 <b>method</b> 137:15 141:10 224:21 <b>metrics</b> 7:6 <b>metro</b> 227:13 <b>mid-1990s</b> 226:4 <b>middle</b> 217:9,11 <b>militaries</b> 49:11 <b>military</b> 11:18 12:17 13:13 17:4 18:2,9,17 19:3,5 19:12,19 20:12 21:3,7,13,16,20 23:7 24:7,18 25:6 25:11,18,20 26:5 26:9,16,20,22 27:8 28:13,19,21	28:22 29:1,5,10 29:11 30:20 31:1 31:7 34:19 36:1 39:6,16 40:15,21 41:17 44:16 45:4 45:5,22 46:10 47:12 48:15 50:5 50:6,9,12 52:1 53:1,1,10 54:9 56:2,11 57:11,16 59:11 61:12 66:18 67:1 70:22 72:20 73:10 74:14 75:9 77:19 78:8 79:2,9 79:12,13 81:11 84:15,18 86:22 87:2,20 102:11 103:13,17 104:2 104:14 105:6 106:7 110:5 111:9 116:21 117:7 119:16,22 121:4 130:9 145:5 150:17 151:3 153:5,6 154:1,21 156:4,10 157:2,14 160:12,14 163:10 163:12 165:18,19 166:5 167:20 168:4 173:1 175:17 178:6 179:17 180:15 189:11,20 193:10 193:22 196:14 204:10 205:6 206:8 212:18 213:9 214:2,5 215:2,3 218:8 220:20 221:4,10 222:11 225:4 226:15 <b>mind</b> 36:4 38:11,14 38:21 39:11 43:6 65:21 170:22 179:2,3 <b>minds</b> 38:19 <b>minor</b> 220:3
--	---	---	--	--

<b>minute</b> 44:20,22 46:19 62:5 90:4 225:8	192:3 195:9 201:15	<b>necessarily</b> 14:1,3 70:2 87:1 114:11 115:1 130:19 165:9 179:1 196:8 212:20 224:4,13	<b>night</b> 110:14 <b>Nobody's</b> 183:18 <b>non-judicial</b> 103:5 <b>noncommissioned</b> 7:12 9:2,11 <b>noncriminal</b> 70:15 <b>nonsense</b> 54:4 <b>Norfolk-Virginia</b> 36:13 <b>normal</b> 42:8 <b>norms</b> 29:21,21 <b>note</b> 30:1 120:20 179:5,8 194:3,7 209:3 <b>noted</b> 57:4 123:19 189:8 201:2 <b>notes</b> 32:22 33:16 <b>noting</b> 22:3 103:20 <b>notion</b> 49:8 123:6 <b>nuance</b> 77:22 147:6 147:10,13 <b>nuances</b> 11:11 <b>number</b> 4:21 18:3 19:14 72:17 111:4 113:10 115:2 131:20 179:6 213:6 222:10 <b>numerous</b> 24:20 65:19 <b>nurse</b> 214:16	<b>objections</b> 101:5 191:15 <b>objective</b> 8:15 208:14 <b>objectives</b> 103:21 <b>objects</b> 164:17 <b>obligation</b> 171:7,16 <b>obstruction</b> 18:16 <b>obviously</b> 10:8,15 36:5 74:22 75:3 75:12 77:14 86:8 100:16 109:16 118:3 129:4 160:8 187:14 228:14 <b>occasions</b> 13:12 <b>occur</b> 44:12,15 <b>occurred</b> 115:19 <b>occurs</b> 46:19 <b>OCS</b> 41:3 <b>odd</b> 44:4 <b>offence</b> 161:4 <b>offense</b> 32:20 58:7 69:20 153:22 189:14 <b>offenses</b> 17:18 22:7 32:8,12 38:5 44:12 63:15 81:20 82:2 162:19 171:5 <b>offer</b> 88:20 98:11 112:16,16 <b>offered</b> 56:22 70:19 217:6 <b>office</b> 5:13 47:8 53:13 170:19 <b>officer</b> 34:12 37:12 37:18 41:19,20 42:17 59:2 75:3 76:2,3 77:7 79:3,9 214:2 217:7,14,17 217:18 219:3 <b>officer's</b> 74:19 <b>officers</b> 7:11,12 9:2 9:3,11,11,19 30:6 30:16,17 31:2 37:1,8 43:14 44:14 49:12 77:20 78:7 217:15
<b>minutes</b> 40:7 182:7	<b>moments</b> 109:15 109:17 143:3 190:6	<b>necessary</b> 20:2 85:10 128:16 133:17 <b>necessity</b> 45:8 <b>need</b> 10:9 19:20 52:19 53:4 54:15 55:15 56:9 58:8 58:12 79:7 89:6 95:22 101:4 108:17 111:3 114:11 123:18 169:7 181:6 207:18 219:4,8,15 219:21 220:14 229:10 <b>needed</b> 209:19 220:10 <b>needs</b> 38:1 40:8 127:19 144:19 170:1 218:21 224:1 227:7 <b>negates</b> 222:14 <b>negative</b> 85:11 <b>negatively</b> 22:17 <b>negotiating</b> 60:14 <b>negotiation</b> 198:1 <b>neighborhood</b> 36:8 36:12 <b>neighborhoods</b> 36:13 <b>neither</b> 181:22 189:1 <b>never</b> 42:20 74:22 158:20 159:21,22 179:6 185:3 186:7 210:3 218:13,15 <b>new</b> 17:13 19:3 25:19 53:19 75:18 124:19 159:5 177:14 191:9 227:11 228:18 <b>Nigeria</b> 197:8	<b>Monisha</b> 214:6 227:10 <b>monolithic</b> 61:12 <b>month</b> 40:6 227:10 228:22 <b>months</b> 36:7 105:19 <b>morale</b> 33:19 35:8 39:5 43:7 58:4 <b>morning</b> 4:4,11 5:2 41:11 42:21 138:3 222:1 <b>mother</b> 212:13 213:13 <b>mouth</b> 43:3 <b>move</b> 62:21 72:11 98:7 111:18 142:15,22 144:7 154:15 <b>moving</b> 173:17 <b>myriad</b> 206:16	<hr/> <b>N</b> <hr/> <b>N.W</b> 1:12 <b>name</b> 37:9 38:7,8 41:4 42:19 212:11 <b>narrow</b> 186:6 201:15 206:14 <b>nation</b> 56:3 <b>National</b> 213:3 <b>Naval</b> 36:9 <b>Navy</b> 7:20,20 13:8 14:5 36:16,16 42:15 204:16 217:14 222:18,18 222:19,21 225:16 <b>Navy's</b> 7:22 <b>NDAA</b> 17:14 81:17 102:15 141:3 174:18 <b>near</b> 228:21 <b>nearly</b> 48:21 73:1
<b>misconduct</b> 53:21 153:16 <b>misinterpret</b> 184:1 <b>misreading</b> 111:1 181:4 <b>missed</b> 91:8 127:5 <b>mission-ready</b> 19:22 <b>misstatement</b> 194:18 <b>missteps</b> 30:18 <b>mistake</b> 61:21 <b>mistakes</b> 53:18 54:7 <b>mitigation</b> 190:1,5 <b>mix</b> 32:15 <b>MJIA</b> 24:9 25:9 26:8,11 27:5,17 <b>modality</b> 224:21 <b>modification</b> 24:2 190:14 <b>modifications</b> 6:2 15:10,13 91:22 93:21 <b>modified</b> 190:16 191:19 <b>modifies</b> 81:17 <b>modify</b> 4:8 7:9 16:7 23:14 98:17 183:2 184:8 <b>modifying</b> 84:5,13 84:21 88:9 99:5 <b>moment</b> 25:21 86:16 93:18 102:21 105:4 115:18 117:20 141:13 150:14 155:3,5 156:20 168:11 170:3 175:1,5,6 176:1,3 177:6 185:12,19 185:20 186:4 187:1,9,9 189:10				

224:19	<b>opinions</b> 61:15	142:18	99:5,5 102:20	192:22 213:6,6,7
<b>official</b> 2:2 22:10	151:6	<b>oversight</b> 24:6 85:4	105:8 109:18	216:20 218:14,16
<b>oh</b> 54:1 55:3 62:8	<b>opportunity</b> 27:22	<b>owe</b> 56:5	110:3,5,12 113:2	219:5 220:14
69:9,13 97:21	48:22 79:21 98:4		113:17 114:18	221:12 222:3,5
112:7 128:9	111:17 116:14	<b>P</b>	116:5,7 120:13	224:5 227:11
136:11 166:2,14	117:15 126:6,17	<b>P-R-O-C-E-E-D-...</b>	121:17 124:12,15	<b>perceived</b> 209:8,15
173:22 182:15	137:7 145:20	4:1	125:17,17 126:4	<b>percent</b> 178:8
211:1 218:14	150:15 154:17	<b>p.m</b> 229:22	127:3 133:12,22	222:4
219:13	165:15 169:22	<b>packet</b> 124:16	137:17 138:3,8	<b>perception</b> 59:13
<b>Ohio</b> 215:1	172:3 178:5	<b>page</b> 101:18 142:7	140:22 148:13	<b>perfect</b> 51:4 133:1
<b>okay</b> 12:20 14:12	186:16,18,20	192:22 195:22	149:6 151:1,10	160:8 179:16
14:20 16:12 32:1	187:12 188:21	<b>pain</b> 18:22 56:1	153:6 154:3,9	<b>perform</b> 9:22
48:8 62:8 68:21	193:16 195:17	<b>paint</b> 223:1,5	156:8 161:13,14	<b>performance</b> 7:9
72:10,13 74:11	196:3,12	<b>Palfy</b> 214:20	165:7,11 166:7	8:22
81:3,4 82:21	<b>opposed</b> 60:16	<b>panacea</b> 53:9	174:15 179:12,20	<b>perimeter</b> 66:8
86:14 89:14 90:21	135:5 203:4	<b>panel</b> 1:3,11 3:12	181:14 184:14	<b>permanent</b> 92:19
96:15,19 118:9	<b>opposing</b> 77:2	3:14,14 4:5,14,19	192:5 202:4 207:4	125:12
119:5 126:8 133:8	<b>opposite</b> 44:19 46:6	4:20 5:5,10 15:22	207:11 216:18	<b>permit</b> 68:3 92:17
133:20 134:9	87:22	18:19 28:6 31:14	223:16	160:17 210:1
136:12,13 139:14	<b>options</b> 72:21 73:9	47:20 50:10 51:17	<b>participate</b> 91:9	<b>perpetrator</b> 216:1
145:9 158:18	73:11 95:7 98:20	53:19 62:15 74:8	194:21	216:2
173:19 176:15	<b>order</b> 8:11 19:21	77:16 80:12,18	<b>participates</b> 194:15	<b>person</b> 17:2 28:2
182:15 188:1,2,6	20:1 40:13 43:8	84:8 85:4 88:18	<b>particular</b> 22:10	34:7 38:3 39:6
199:6 205:10	57:19 85:10 89:5	89:3 90:10,19	35:11 37:11,13	42:14 55:18 59:6
210:14,19 211:1	104:1 105:6	91:11,21 98:7	39:15 61:20 65:16	68:7 90:18 135:1
212:6 229:8	152:19 167:8	100:19 101:16	65:20 66:2 73:21	140:13 141:11
<b>old</b> 212:19	189:17 192:4	117:8 120:14	85:19 120:15	145:14 146:5,6,12
<b>on-site</b> 13:10,12	207:2 220:10	125:12 127:19	135:19	146:17 147:3
14:1,7	<b>ordered</b> 75:19	129:6 167:7	<b>particularly</b> 7:19	159:13,15 169:13
<b>once</b> 41:19 99:10	<b>organization</b> 20:13	169:21 170:1	72:19 89:4	174:11 197:2
118:11	22:18,20	186:18 187:3,5	<b>parts</b> 109:8 121:15	203:6 208:21
<b>one-on-one</b> 13:18	<b>organizations</b>	188:11 193:3	134:5 150:18	211:2 221:3 222:2
<b>one-way</b> 169:15	18:10 22:16 89:7	194:6 207:20	<b>pass</b> 169:16	226:18 228:11
170:8 174:4	<b>orientation</b> 94:3	212:9,12,17,21,22	<b>passed</b> 102:8 159:2	<b>person's</b> 219:8
<b>ones</b> 10:5 34:16	<b>original</b> 94:1 96:11	227:7,9 229:15,18	<b>passing</b> 124:14	<b>personal</b> 17:12
91:16 132:15	<b>originally</b> 62:7	<b>Panel's</b> 198:7	<b>passionate</b> 55:21	<b>personally</b> 18:22
<b>onus</b> 50:6	162:8 198:2 212:8	<b>panels</b> 70:5 212:17	<b>path</b> 178:11	141:22 146:13,13
<b>open</b> 11:5 110:2	<b>ought</b> 70:17 75:7	<b>paper</b> 229:3	<b>PATRICIA</b> 2:4	146:20 147:9
171:15	146:7	<b>paragraph</b> 215:5	<b>paying</b> 43:22	151:16 199:16
<b>opened</b> 180:12	<b>outpost</b> 65:17	218:6,7 221:2	<b>pending</b> 91:11,21	220:6
<b>operate</b> 58:3	<b>outrageous</b> 219:19	227:5	129:7,9	<b>personnel</b> 26:18
<b>operational</b> 20:14	<b>outside</b> 18:4 26:21	<b>paraphrase</b> 92:11	<b>people</b> 11:16 28:11	27:12,15 73:2,11
28:19	99:9,12 213:8	<b>Pardon</b> 62:6	36:1,7,21 37:4	94:6 95:7,10 97:2
<b>operationalized</b>	215:3	<b>parenthetical</b>	41:6,14,18 42:16	97:11 98:19 99:3
152:5	<b>outweigh</b> 197:6	146:10 174:10	51:6,7,9 53:15,17	99:14,18 219:22
<b>opinion</b> 134:22	<b>overlooked</b> 89:22	<b>part</b> 11:10,17 14:9	54:6,8 55:7,12	<b>persons</b> 88:19
203:4	<b>override</b> 74:18	51:12 59:8 78:1	56:15 59:9 81:7	<b>perspective</b> 53:12

57:10 58:10 60:13 94:19 <b>persuade</b> 117:15 <b>petty</b> 217:14 219:3 <b>phase</b> 154:15 <b>phenomenon</b> 50:3 <b>philosophy</b> 213:11 <b>phone</b> 16:9 90:14 136:10 182:4 <b>physical</b> 70:18 <b>physically</b> 147:3 223:5 <b>picture</b> 42:11 <b>pictures</b> 42:9 <b>piece</b> 110:17 120:7 120:15 121:12,12 124:18 129:12 134:17 137:14,17 138:5 152:18 153:3 156:17 164:3 174:12 190:18 197:5 201:20 203:11,17 <b>pieces</b> 121:7 <b>place</b> 44:18 65:16 93:9 98:2 103:22 104:5 106:5,13 107:17 118:15 122:16 131:12 137:3 142:18 <b>placed</b> 21:6 66:7 <b>places</b> 14:8 75:10 <b>Plan</b> 7:4 <b>plane</b> 136:9 <b>planning</b> 86:10 <b>play</b> 9:7 51:3 67:5 67:5 157:9,13 <b>played</b> 48:15,20 55:2 <b>plea</b> 107:14 108:3,5 109:10 110:12,16 111:7,11,16,20 112:16 113:7,12 113:19 114:10 115:14 116:10,21 117:9 118:3,12,17 119:15 121:6,11	121:12,13,20 123:2,3 124:18 129:9 131:18 134:8 137:21 139:22 141:15 143:1 144:9,17,18 145:2,5,11 146:2 147:1 149:5,12 150:20,21 151:4 152:1,10,16 153:7 153:14,15 154:3 154:10,11,15 155:3,5,6,7,14,15 155:17,19 156:1,3 156:7,19 157:3,19 158:21 160:7,17 160:17 161:1,4,5 161:21 162:6,7,14 163:7 164:4,8,19 165:22 166:1,11 166:14,16 167:15 168:9,17 169:1 170:4 171:1,4 172:2,18 173:13 173:21 174:14 175:16 176:12,12 176:18 178:8 179:14 183:12,13 183:14 184:7,10 185:22 186:20 <b>plead</b> 117:3 158:7,9 160:16 161:7 163:2,8 166:3,14 174:6,6 <b>pleading</b> 151:2 153:21 158:10 163:21 173:7 <b>pleas</b> 158:6 162:19 <b>please</b> 67:7 72:18 78:20 86:19 96:18 119:9 223:20 <b>plus</b> 4:21 223:18 <b>podium</b> 62:4 <b>point</b> 14:4 17:10 27:20 32:5 33:1 33:13 39:1 49:17 60:8 61:20 62:11	65:10 66:15,18 75:14 76:9 77:17 78:4 87:8,21 90:4 97:5 108:15 117:6 117:12 119:21 132:20 134:2,12 162:5 168:13 176:10,21 180:15 195:12 204:3 207:3,19 219:7,14 <b>point's</b> 115:7 <b>points</b> 50:21 52:16 152:14 <b>police</b> 38:9,21 214:2 220:19,20 <b>policies</b> 24:20 102:14 <b>policy</b> 23:18 92:17 102:14 <b>political</b> 220:8 <b>politics</b> 89:2 <b>pool</b> 27:4 <b>poorly</b> 116:2 <b>portion</b> 99:1 116:11 117:10,13 118:11,13 123:12 124:14 139:22 141:18,20 145:1,7 156:10 162:14 163:3 168:2 <b>portions</b> 145:19 <b>Portsmouth</b> 36:9 42:10 <b>position</b> 19:16 30:13 32:18 37:9 78:9 80:21 88:5 97:3 143:11 167:4 198:7,9 223:17 <b>positions</b> 9:20 20:8 <b>positive</b> 85:11 124:20 <b>positively</b> 12:3 <b>possibility</b> 47:1 107:4 <b>possible</b> 8:16 95:14 <b>possibly</b> 82:6 <b>post</b> 37:13,15,20	81:18 <b>post-graduate</b> 214:8 <b>post-trial</b> 81:14 <b>posted</b> 211:20 <b>potential</b> 76:14 139:1 150:21 187:4 207:12 208:15 <b>potentially</b> 38:4 162:4 <b>power</b> 29:9 <b>powerful</b> 18:20 <b>PowerPoint</b> 91:14 224:20 <b>powers</b> 93:8 <b>practice</b> 17:15 18:7 27:8 106:9,16 158:2,3 159:19 172:5 175:18 179:17 184:12 192:5 194:14,20 210:6 215:3 <b>practices</b> 187:21 <b>pre</b> 175:17 194:21 <b>pre-agreement</b> 124:15 <b>pre-decision</b> 142:21 <b>pre-sentence</b> 194:14 195:1,4 <b>pre-sentencing</b> 191:4 196:2 <b>pre-trial</b> 85:13 179:17 184:11 <b>precharging</b> 105:3 <b>precise</b> 119:20 120:11 <b>precisely</b> 29:5 <b>precluding</b> 187:3 187:11,13 <b>preclusion</b> 186:16 <b>predominately</b> 164:15 <b>preempt</b> 206:22 <b>prefer</b> 32:10 54:13 <b>preference</b> 113:15	<b>preferences</b> 104:7 104:10 107:19 108:1,8 122:18,22 131:14,16 137:4 <b>prejudice</b> 83:1 <b>preliminary</b> 49:18 75:17 <b>premise</b> 60:18 <b>preparations</b> 66:7 <b>prepared</b> 224:4 <b>prepares</b> 9:21 <b>preparing</b> 9:19 45:1 <b>prescribe</b> 191:1 200:19 <b>present</b> 1:15 2:1 27:19 100:22 170:13,13 189:12 202:21 217:1,2 <b>presentation</b> 45:15 152:3 201:10 228:9 <b>presentations</b> 91:4 <b>presented</b> 5:19 15:18 16:13,14 57:18 189:5 201:6 201:14 <b>presenting</b> 16:16 79:15 205:17 <b>presents</b> 79:20 <b>President</b> 46:4 81:13 131:22 190:21 200:18 207:15 <b>Presidential</b> 5:17 <b>presiding</b> 1:13 <b>pressure</b> 46:7 <b>pretrial</b> 107:9 108:22 112:20 119:14 124:13 125:4 135:6 139:3 143:9,22 144:3,4 162:2 <b>pretty</b> 73:15 221:14 <b>prevent</b> 13:13 24:7 <b>preventing</b> 21:14
--	--	--	--	--



23:3	102:22 103:18	186:1 187:17	38:7,20 40:15	<b>psychology</b> 214:9
<b>prevention</b> 5:15	108:9 148:17	199:4	45:5 50:9 53:12	<b>public</b> 1:5 3:17
6:21 8:1,13,21 9:9	151:11 170:4,6	<b>profession</b> 45:6	54:3 67:5 102:6	52:13 117:20
89:1	189:21 194:1	<b>professional</b> 34:18	102:13 104:16	210:22 211:8,14
<b>previous</b> 19:4	204:5	40:15 53:9 54:3	105:22 120:9	211:17,22 213:12
<b>primarily</b> 39:9	<b>process</b> 20:12	55:4	160:9 171:7,16	<b>publicly</b> 34:22
<b>primary</b> 33:17	21:10 25:16 29:16	<b>professor</b> 1:19 5:16	204:15	<b>pull</b> 58:6,8
<b>prior</b> 104:10 108:1	47:14 48:22 49:3	5:17 16:1,9,10	<b>prosecutor's</b>	<b>pulled</b> 71:18
111:9,12 122:22	49:7 50:1,5,13	27:18 31:11 48:3	172:16	<b>punishment</b> 103:5
131:16 192:2	51:2 52:3 67:21	60:6 62:3 69:9	<b>prosecutorial</b>	157:7
<b>prisoner</b> 219:20	70:13 71:2,8,12	80:8 82:3,5 83:20	21:22 25:15 28:9	<b>punishments</b> 35:5
220:8	71:17,20 86:22	86:18 122:11	53:21 54:11 55:1	<b>pure</b> 155:5
<b>prisoners</b> 219:11	87:3 88:8 99:15	123:9 134:11	<b>prosecutors</b> 25:20	<b>purely</b> 154:2
<b>privilege</b> 30:22	104:15 106:4,13	138:16,16 185:7	28:11 34:18 35:17	155:22
52:19	106:17 110:9	187:14 210:17,18	46:20 50:7,13	<b>purpose</b> 24:21
<b>privileges</b> 206:15	112:3 114:18	213:4,12	53:9 55:4 171:21	116:20
<b>probable</b> 76:4,5	115:5,6 119:13,15	<b>profile</b> 30:3	<b>prospect</b> 47:8	<b>pursue</b> 103:4
77:7	120:2 126:7	<b>profound</b> 56:11	<b>protect</b> 197:10	<b>pursuing</b> 103:7
<b>probably</b> 70:7	127:17 132:4,5	<b>Program</b> 8:1	<b>protected</b> 94:8	<b>purview</b> 37:17
87:21 135:7	139:2,8 142:21	<b>programs</b> 6:22 8:3	198:4	45:17
148:14 193:20	145:4,5,8 149:6	8:14 24:21 89:1	<b>Protection</b> 63:6	<b>put</b> 28:5 33:7,10
203:20 207:18	151:13 153:19	<b>promised</b> 229:3	69:18	50:5,12 57:6 62:5
220:16 222:8,10	154:7 156:11	<b>promote</b> 10:19,20	<b>protector</b> 213:13	72:18 98:2 99:16
222:13	157:6 163:11	19:13	<b>protects</b> 196:16	108:10 109:3,6,10
<b>probation</b> 57:14	170:5,5,14,16	<b>proof</b> 36:4 76:7	<b>prove</b> 54:15 226:12	112:2 114:1,6,8
<b>problem</b> 19:3,5	175:1 193:10,13	<b>proponents</b> 49:2,10	<b>proven</b> 59:13	125:9,12 127:11
23:2 27:9 29:2	196:15 197:4	49:11	<b>provide</b> 10:16 13:9	127:20,21 129:16
30:8 56:5,16,16	<b>processes</b> 71:5	<b>proposal</b> 50:3	13:18 14:6 15:7	132:5,14 133:2
56:17 57:15 60:15	110:15 140:20	56:14	96:8 101:21	136:19 139:19
71:16 89:15	221:7,9	<b>proposals</b> 50:4	103:18 160:4	148:1 157:1
105:18 163:5	<b>procurement</b> 84:10	<b>propose</b> 112:15	175:15 184:6	183:15 185:2,8
177:2 178:16,17	85:8	130:11 181:2	191:1 207:19	192:8 194:5 198:5
204:20 216:14	<b>produced</b> 55:22	<b>proposed</b> 94:11	221:13	203:9 209:22
221:12 222:16	<b>production</b> 229:4	127:11 175:13,14	<b>provided</b> 7:20	226:2
223:13	<b>productive</b> 51:14	184:5 188:11	<b>provider</b> 213:13	<b>puts</b> 30:12
<b>problems</b> 28:20	52:4	<b>prosecute</b> 31:8	<b>provides</b> 67:17	<b>putting</b> 30:6 53:8
32:16 101:13	<b>PROF</b> 16:11 27:21	47:9	180:8	88:7 116:10
175:12 217:9,11	59:22 60:3,7,10	<b>prosecuted</b> 44:21	<b>providing</b> 59:3	124:12
221:19 223:11	62:17 69:7,10,15	<b>prosecuting</b> 22:12	204:1,2	<b>Pythagorean</b>
<b>procedural</b> 29:22	80:7,9 81:1 82:12	104:21 204:16	<b>provision</b> 67:20	223:17,20
<b>procedures</b> 104:12	82:16 83:13 85:16	<b>prosecution</b> 21:6	82:5 97:18 124:20	
<b>proceed</b> 161:3	86:1,3,12 87:11	25:5 26:21 52:22	<b>provisions</b> 67:15	
<b>proceeding</b> 79:12	118:21 119:1,4,7	171:20 204:11	81:17 143:10	<b>Q</b>
115:22 116:7	119:10 122:12	<b>prosecutions</b> 20:21	<b>psychological</b>	<b>qualifications</b> 27:2
150:6,9,15 155:12	123:8 130:13,16	44:17 204:18	189:13	<b>qualified</b> 27:5
164:6 169:6 191:4	132:11,13 138:21	205:5	<b>psychologist</b>	<b>qualify</b> 68:16
<b>proceedings</b> 9:5	182:5,13 184:22	<b>prosecutor</b> 27:1	214:19	<b>quality</b> 20:21
				<b>quantum</b> 117:10

117:13 121:12,15 145:1,7 152:17 156:10,16 162:14 163:3 <b>quarters</b> 222:2 <b>quasi</b> 30:9 <b>quasi-judicial</b> 9:22 10:18 84:6,22 <b>question</b> 14:13 40:4 42:5 49:1,9 71:11,17 75:4 97:1 106:12 128:1 158:1 179:12,16 181:10 186:1 204:6,7 205:8 209:21 <b>questionable</b> 51:8 <b>questioned</b> 66:9 <b>questions</b> 11:6 31:14 41:21 57:18 89:12 212:16 <b>quick</b> 193:15 <b>quickly</b> 6:17 124:1 125:18 212:21 <b>quicky</b> 195:21 <b>quite</b> 13:3 30:15 54:20 76:22 126:20 128:6 <b>quote</b> 41:4 44:13 191:9 <b>quoting</b> 204:14	<b>rape</b> 17:19 158:11 171:10 201:15,18 203:18 205:22 206:14 212:18 222:4,11,12 225:10,11 226:7 <b>rate</b> 20:22 <b>re-adopt</b> 65:3 <b>re-present</b> 95:1 194:3 <b>reached</b> 227:14 <b>read</b> 23:22 73:6 92:10 94:12 96:8 133:5 175:9 190:15 192:10,21 205:12 209:9,12 210:1 <b>readers</b> 178:1 <b>reading</b> 8:7 86:5 134:18 196:4 <b>reads</b> 8:20 9:17 23:13 115:2 <b>ready</b> 220:11 229:4 <b>real</b> 52:17 73:22 176:15 225:10,11 <b>realistically</b> 34:8 <b>reality</b> 121:19 146:12 222:6 <b>realize</b> 47:3 78:5 <b>realized</b> 6:18 <b>really</b> 8:19 29:11 30:9 32:15,15 35:13 43:6,22 44:2 54:10 67:20 80:11 81:18 159:18 161:17,18 181:7 185:19 193:19 204:7 211:4 215:6 217:11,11 219:15 223:22 <b>reason</b> 25:6 31:7 33:17 34:20 35:20 61:3 62:9 68:8 73:5 76:10 94:7 138:19,21 140:4 216:18 224:5	<b>reasonable</b> 29:7 <b>reasonably</b> 188:21 <b>reasons</b> 26:12 36:10 <b>reassigned</b> 27:6 <b>rebut</b> 195:9 <b>rebuttal</b> 193:20 197:17,19 <b>recall</b> 7:1 41:2,19 77:6 138:17 172:11 206:9 <b>recap</b> 7:2 <b>receive</b> 9:20 10:10 65:22 <b>received</b> 93:6 97:16 97:20 102:19 115:11 191:7,22 <b>receiving</b> 201:12 <b>reciprocal</b> 57:8 <b>recognize</b> 19:7 <b>recognizing</b> 69:1 179:4 <b>recollection</b> 181:13 181:18 192:20 <b>recommence</b> 117:13 <b>recommend</b> 11:14 12:3 13:1 23:2 24:1,5 64:15 120:12 127:21 132:2 139:10 200:17 <b>recommendation</b> 6:9,10,11 7:13 8:10,17,18 9:13 9:14,15 10:11,19 11:12 12:15,19,21 13:1 23:9,10,11 23:20,20,22 24:1 31:19 32:3,4,4,6 45:10 62:5,6,22 63:2,5 64:16 67:11 68:12,14,16 70:9 71:9,16 72:8 72:9 73:20 74:6,9 74:12,19 75:2,6 76:17,21 77:1,2,5	77:19 78:5,11,16 78:18 80:2,22 81:6,8 83:2,4,12 83:21 85:19,22 86:8 87:4,9,10,15 87:16 88:5,11,13 88:16 89:9,20 91:5,20 92:7 93:19 94:1,6,12 94:22 95:5,12 96:12,18 97:2,10 98:6,8,16 99:2,18 100:16 101:16 102:4 104:1 105:10,19 107:4 108:11 109:21 110:4 112:12,22 114:2 122:9 123:22 124:6 126:16,17 129:4 129:21 131:6 132:2 133:9,11,15 133:22 134:3,18 138:20 143:14 146:8 149:3 151:15 152:9 169:11,12 170:2 174:9 175:10 176:19 177:18 179:6 182:12 188:8,9 190:11,20 192:12 195:15 197:21 198:3,17 199:1,10 200:16 201:4 202:12,20 203:2 209:20 210:13 <b>recommendations</b> 4:9,13 6:3,6,12 11:3 15:12 16:8 28:4,7 33:9,12 40:18 45:10 47:17 48:12 62:12,15,20 76:7,12 78:1 87:6 88:16 90:1,6 91:2 91:12,17 92:4 95:9,20 97:11	119:12 120:14 132:17 138:18 140:5 143:20 164:13 167:9 173:16 183:18 187:20 <b>recommenders</b> 112:13 <b>recommended</b> 30:5 73:6 112:13 113:11 171:13 179:21 180:7,8 183:5 195:22 <b>recommending</b> 63:12 69:21 76:13 78:10 82:18 88:3 109:20 116:6 121:10 123:13 132:16 149:14 152:11,13,19 206:21 <b>recommends</b> 16:6 63:16 131:21 190:21 <b>reconcile</b> 69:1 <b>reconsider</b> 96:5 <b>reconstruct</b> 223:21 <b>record</b> 39:14 60:21 61:3 72:6 83:15 90:8 107:11 119:21 194:17 195:11 209:11 <b>recounted</b> 29:14 <b>recurrence</b> 70:18 <b>recuse</b> 22:11 <b>redound</b> 30:19 <b>reduce</b> 20:18 29:13 31:6 81:22 171:12 <b>reduces</b> 81:22 <b>reducing</b> 20:5 23:4 171:9 <b>refer</b> 15:20 17:8 23:15 63:8,20 113:5 207:9 <b>reference</b> 123:16 127:1 129:14 130:3,8
<b>R</b>				
<b>radar</b> 44:9,13,14 <b>radical</b> 49:6 177:18 <b>raise</b> 54:17 110:22 134:15 135:9 193:17 <b>raised</b> 175:12 177:10 <b>ramifications</b> 220:17 <b>random</b> 36:5,18 37:3,5 <b>range</b> 10:22 61:14 <b>rank</b> 28:22 32:18 <b>ranks</b> 219:1				

<b>references</b> 200:13	200:19	<b>Rep</b> 52:10 112:8,10	216:20	60:20 89:1 90:10
<b>referral</b> 74:19	<b>rehabilitative</b>	113:20 123:14	<b>required</b> 22:11	<b>responsibilities</b>
174:22	157:9	126:19 130:2,7	95:6 172:16	11:19,22 84:6,22
<b>referred</b> 18:8 63:17	<b>reinforce</b> 49:19	132:19 134:13,15	<b>requirement</b> 57:8	85:13 103:16
111:21 162:8,16	<b>reiterate</b> 28:8	138:7 139:18	123:17 145:21	227:16
163:16,18	<b>reiterates</b> 185:16	149:16 175:9	<b>requirements</b> 8:22	<b>responsible</b> 20:6
<b>refers</b> 101:19	<b>reiterating</b> 92:2,5	176:2 177:1,9,22	58:11	44:1
143:13	<b>reject</b> 4:8 112:15	178:15,19 180:19	<b>requires</b> 113:12	<b>rest</b> 32:14 132:17
<b>reflect</b> 55:11	154:10 166:11,13	182:16 183:7	124:14	<b>restricted</b> 72:21
<b>reforms</b> 24:5 25:4	180:1 181:2	184:2 186:10	<b>requiring</b> 79:8	73:3,12,19 92:15
<b>refuse</b> 18:12	<b>rejected</b> 100:20	199:11 208:1	104:5 107:17	92:18 93:14,15
<b>regard</b> 16:8 21:17	176:7	<b>repeat</b> 43:11	122:17 131:12	94:14 95:22 99:13
24:10 26:6 27:9	<b>rejecting</b> 176:12	<b>report</b> 3:14 4:12	149:6	100:7 101:8
53:4 94:22 95:4	<b>rejects</b> 29:21 172:2	5:19 7:3 13:2	<b>reread</b> 199:17	<b>restricting</b> 35:3
102:21 103:11	<b>related</b> 27:7 204:8	15:15 16:16 17:22	<b>research</b> 5:17 55:9	<b>restriction</b> 27:13
110:19,21 115:14	212:15	18:4 29:4 30:14	<b>residence</b> 13:15	<b>result</b> 20:13 117:16
123:22 129:7,12	<b>relates</b> 84:5	68:18 69:20 72:16	<b>resident</b> 13:10,12	158:13
134:4 141:14,17	<b>relating</b> 214:9	72:21 73:3,12,14	14:3,7,9	<b>results</b> 23:8 55:11
142:15 143:1	<b>relationship</b> 58:1	73:18,19 76:2	<b>residential</b> 14:1	72:22
144:7,8,18 146:11	<b>relatively</b> 159:5	77:11 80:12,14,19	<b>resisting</b> 46:13	<b>resume</b> 90:10
147:1 152:9 155:1	164:1 208:2	85:18 86:5 92:14	<b>resolve</b> 120:14	<b>retain</b> 15:19 16:5
155:3 163:20	<b>releasing</b> 164:20	92:18 93:2,17	<b>resolved</b> 118:12	31:2 134:20 138:8
166:6 174:22	<b>relegated</b> 167:19	94:15,16 98:22	200:4	<b>retaining</b> 139:19
181:17 186:19	<b>relevant</b> 88:13	99:4,19 101:8,10	<b>resources</b> 27:14	<b>retaliate</b> 225:18,21
188:13,15 189:22	164:5	192:22 194:15,22	<b>respect</b> 10:9,17	<b>retired</b> 1:17,17,18
190:5,6,18 191:18	<b>rely</b> 28:13	195:2,4 199:17	22:22 26:6,14,16	1:18 36:8,12,15
191:20 193:6	<b>remain</b> 19:21 20:2	226:11	27:16 29:2 33:7	36:16,17
194:12,19,20	20:6	<b>reported</b> 70:13	33:10 34:13 35:8	<b>retract</b> 177:19
200:11	<b>remaining</b> 15:14	<b>reporting</b> 5:7 19:13	40:22 46:11 54:20	<b>review</b> 28:7 45:11
<b>regarding</b> 104:7	62:14 90:5 162:3	20:20 21:11 25:5	62:3 64:17,21	45:12 46:1,3,13
107:7,20 111:6	<b>remains</b> 16:4 145:5	72:15 73:9 215:6	67:13 71:8 74:3	47:1,13 53:20
112:20 175:16	<b>remarkable</b> 221:21	216:12	76:6,8,17 78:18	54:19 59:9 63:14
179:14 183:12,13	<b>remarks</b> 31:18	<b>reports</b> 4:6 16:3	81:20 89:12	64:9 65:2,12,17
183:14 184:7,10	47:21 48:2,13	18:7 93:14,16	119:12 139:14	66:19 67:3,3,7,17
191:16 200:12	49:18	96:1 134:3	160:7 184:20	68:1,6 70:12 71:2
<b>regardless</b> 97:22	<b>remember</b> 37:11	<b>represent</b> 205:16	185:21 197:12	71:5,7,12,17,19
143:8 148:22	41:6,14	207:6 208:11	225:10	71:20 72:15 74:14
155:7 157:20	<b>remorse</b> 222:7,8,9	<b>Representative</b>	<b>respected</b> 28:13	75:9,10,10 84:19
<b>regards</b> 79:4	<b>removal</b> 21:9 25:13	56:22 57:3 130:17	<b>respectfully</b> 33:11	126:17 201:1
114:18 129:6	<b>remove</b> 16:7 50:4	177:3,20	47:16	207:11
134:5 151:19	51:1	<b>representing</b> 198:8	<b>respond</b> 19:5 70:7	<b>reviewable</b> 47:10
<b>region</b> 42:16	<b>removed</b> 17:11	<b>request</b> 92:15,19	191:12 193:16	<b>reviewed</b> 66:9,11
<b>registered</b> 214:16	19:17	94:7,15 196:12	<b>responding</b> 21:15	75:8 101:22
<b>regret</b> 80:12	<b>removing</b> 19:10	<b>requests</b> 216:10	24:15 52:14	110:13 189:4
<b>regulation</b> 112:4	20:10,17 49:2,6	<b>require</b> 7:10 10:5	<b>response</b> 1:3 4:5	194:8
114:20	52:2	64:9 125:3,6	6:21 8:1,13,21 9:9	<b>reviewers</b> 76:14
<b>regulations</b> 191:1	<b>renamed</b> 222:21	135:21 176:20	21:21 24:17 29:17	<b>reviewing</b> 94:18

<b>reviews</b> 70:16	167:16,19,20	224:17	<b>saying</b> 13:21 44:5	<b>secretarial</b> 63:14
<b>revised</b> 77:21	168:2,7,8 169:11	<b>Rios</b> 214:6 227:10	61:10 64:20 80:21	<b>secretaries</b> 7:2 8:12
<b>rid</b> 108:10	169:12 170:8	<b>road</b> 139:9	111:19 113:20,22	8:20 11:20 45:12
<b>ridiculous</b> 203:19	173:13 174:13,15	<b>role</b> 4:12,17 5:4,8	114:1,4 117:19,21	97:7 98:2 101:6
<b>right</b> 5:7 6:11 15:9	174:17 175:4,15	5:14 9:7 15:15	124:4,7 125:7	<b>secretary</b> 6:22 9:18
15:14 45:18 46:2	176:2,5 177:6	21:5 23:1 29:18	126:3,21 131:2	46:3 65:2 67:19
46:16 53:18 59:21	179:7,14,21 180:7	30:9,10 33:6	136:8 151:7,9	70:11 73:7 74:13
62:3,21 67:5,7,9	180:9,14,22	48:16,18,20 51:3	158:10 159:17	84:17 88:17,20
68:12 69:5,13	182:18 183:5,10	51:18 55:1 62:13	162:22 164:16,19	94:13 100:10
74:7,12 77:4 80:5	183:12,13 184:9	62:22 64:22 78:16	169:21 170:11	104:3 105:11
80:20 82:8,11,14	185:11,13,16	81:5 83:3,22 84:4	176:9 180:4,13	107:15 108:13,18
82:20 83:11,19	186:5,12,12,14	84:16 88:12,15	183:4 185:8,18	131:9,21 190:20
87:13 88:4,14	187:6,7,8 188:4	89:10 90:2 104:13	186:4,5,9,18	200:17 203:10
89:18,19 90:14	189:7,9,20 190:1	148:4	197:7 203:5	<b>Secretary's</b> 94:2
99:22 100:4,12,13	191:2 192:14,15	<b>roll</b> 139:4	204:20 207:14	<b>section</b> 11:4 16:15
101:2,3,14,20	192:16 195:8	<b>room</b> 66:1 208:9	<b>says</b> 40:11 62:10	63:6 69:17 182:21
102:6,9,13,15	196:6,18 197:15	225:17	112:12,18,19	<b>sections</b> 199:17
103:8,12,20	197:16,18 198:15	<b>Rosie</b> 214:20	116:22 122:20	<b>sector</b> 29:6
104:20 105:14	199:13,22 200:10	<b>routine</b> 120:4	134:19 146:18	<b>securing</b> 100:7
106:10,16 107:7	200:13,21,22	<b>RSS</b> 86:20 87:5,10	158:7 160:21	<b>security</b> 70:19
109:1 110:7,10	201:7,8,12,19,22	<b>rule</b> 125:5	165:3 174:4	<b>see</b> 5:2 28:15,17
111:6,15 112:14	202:8,13,15,16,17	<b>rules</b> 74:1 125:10	175:13,14 178:4	31:7 34:8 35:14
112:19 114:1,6,8	203:3,12 204:22	189:11	179:6,7,20 180:2	38:7 60:15 77:22
118:7,9,19 120:17	206:7,9,12,17,20	<b>run</b> 30:2 139:9	181:11 184:5	78:11 79:21 97:13
121:6 124:19	207:1 208:3,4,4		195:15 202:7	117:10 129:22
125:8 126:2,13,13	208:17,18,20	<b>S</b>	208:3,18 219:13	137:7 143:7 154:4
128:22 129:19	210:4,12 221:11	<b>sadly</b> 54:5	<b>school</b> 13:16 15:5	154:6,20 181:2
130:5 131:1 132:1	227:18 228:1	<b>safeguard</b> 195:21	173:4 214:18	188:19 189:4
132:7,22 133:13	229:17	196:16	<b>Schools</b> 13:8 14:3,6	194:9 196:9 206:3
133:17,19 134:21	<b>rights</b> 102:7,20	<b>safeguards</b> 191:5	14:11	210:16 215:13,13
135:4,13 137:11	103:13,15,18	195:14	<b>scope</b> 75:15 206:12	218:18 225:17
138:8 140:11	104:2 105:7	<b>safer</b> 228:5	<b>scored</b> 72:20	<b>seeing</b> 211:15
141:1,7,8 143:6	106:19 114:14	<b>sailors</b> 38:12 66:21	<b>scourge</b> 51:21	<b>seen</b> 35:13 50:20
144:2,12,14,17,19	115:20 141:1	221:22	<b>screen</b> 80:3	159:21,22 171:18
144:19 145:10,14	143:5 145:19	<b>sake</b> 215:5	<b>scrutinized</b> 66:4	<b>sees</b> 115:1
146:4,20 147:17	147:20 148:9,16	<b>San</b> 226:5	<b>search</b> 85:5 183:22	<b>selected</b> 216:18
149:20,20,22	148:21,22 150:2	<b>SAPRO</b> 7:11 8:12	<b>searches</b> 84:8	<b>selecting</b> 84:7
150:3,7,9,11,12	151:20 154:21	11:13 73:8 99:14	<b>SECDEF</b> 207:15	<b>selections</b> 85:5
150:13 151:6	155:4,11 159:3	224:19	<b>second</b> 22:15 116:6	<b>self</b> 218:12
152:6,8 154:20	167:12,22 168:4	<b>SAPRO's</b> 7:4	128:3,7,10,13	<b>Senate</b> 66:6
155:13,21 156:2	169:19 170:16,18	<b>SARCs</b> 95:7 98:19	131:20 140:10	<b>send</b> 33:21 34:2
156:21 157:8,12	184:6 187:18	<b>sat</b> 220:4 224:9,17	141:19 152:17	46:4 67:19
157:15,18,21	188:19 189:7,19	<b>satisfaction</b> 114:22	153:2 154:9 169:8	<b>senior</b> 9:19 10:15
158:5 159:5 163:5	192:14 196:5,10	<b>satisfy</b> 158:15	169:12 175:5	13:9 14:6 15:19
163:17 164:14,17	196:16 197:4	182:20	179:20	16:4 17:6 20:18
164:18 165:6	198:4,11,12	<b>save</b> 31:18	<b>Secondly</b> 53:7	22:4 27:1 45:5
166:3,5,9 167:15	200:20 206:16	<b>saw</b> 158:20 218:19	<b>secret</b> 118:6,8	63:15 68:7 88:20

217:6,7 219:12 221:2 222:2 <b>sense</b> 37:16,22 55:10 133:1 160:8 166:21 168:14 175:19 176:19 185:15 186:21 187:1,10 <b>sensibilities</b> 106:1 <b>sent</b> 8:2 <b>sentence</b> 82:1 118:1 128:4,8,11 128:14 131:20 134:18 139:19 141:18 154:17 155:22 157:20 161:22 167:17,20 171:14 190:5 191:10 194:22 216:1 <b>sentenced</b> 197:3 <b>sentencing</b> 118:11 118:13 119:13 120:13 139:1 144:9,12 152:6,7 154:15 155:8 157:8,10 165:10 168:2 186:11,15 187:20 188:15,22 189:21 191:11,14 192:7,15 193:10 193:13,17 194:18 195:7 198:10 <b>separate</b> 26:5,20 83:16 113:9 143:10,20 144:11 144:19,22 145:4 145:11,18,19,19 157:6,11,18 167:16,19 186:14 <b>separated</b> 140:5,21 174:13 179:3 <b>separating</b> 149:4 <b>sergeant</b> 41:11 42:20,22 43:1 65:22 <b>serious</b> 17:3 26:2,7	26:11 52:22 53:20 56:7 66:20 <b>seriously</b> 225:21 <b>served</b> 50:18 213:7 214:20 <b>serves</b> 51:15 <b>service</b> 8:12,20 11:20 74:15 75:8 84:19 94:2,12 98:1 101:6 102:14 125:11 214:14 216:7 219:18 225:14 <b>services</b> 2:3,3 4:18 7:3,8,18 45:13 61:14 90:6,13,20 106:7 120:1 122:4 139:6 186:2 187:19 207:10 <b>serving</b> 103:9 <b>session</b> 15:14 83:3 <b>set</b> 8:5 25:19 151:13 216:22 218:1 224:3 <b>Seventeen</b> 74:11 81:2 <b>sex-related</b> 63:15 <b>sexual</b> 1:3 5:15 6:21 7:22 8:13,21 9:8 15:20 17:8,19 17:22 18:1,5,7,21 20:5,19,20 21:11 21:15,19 22:7 23:2,15 24:6,15 24:18 25:5,17 26:2 28:21 29:3,4 29:17 30:20 31:1 31:6 32:8,13 44:7 51:22 52:20 55:22 69:20 70:8,14 72:16 73:8 81:20 82:1 88:22 92:13 92:14,18 93:2 94:14 106:2 158:11 189:11 198:12 205:4 212:15 222:12	<b>shake</b> 206:4 <b>shaking</b> 210:3 <b>she'll</b> 228:18 <b>sheet</b> 153:22 160:21 161:6 <b>Sherry</b> 2:5 101:14 <b>shield</b> 201:15,18 203:19 205:22 206:14 <b>ship</b> 217:22 <b>shocks</b> 218:19 <b>short</b> 47:15 66:14 <b>showed</b> 72:22 <b>showing</b> 62:7 <b>shows</b> 54:5 <b>side</b> 59:10 164:2 221:11,13 227:18 228:1 <b>sign</b> 182:6 <b>significant</b> 9:7 24:16 26:18 27:11 49:5 50:22 51:20 81:11 93:18 116:5 123:12 191:22 192:6 216:4 <b>significantly</b> 29:12 81:18 83:7 <b>silence</b> 52:14 <b>silver</b> 56:4 <b>similar</b> 21:20 31:21 82:5 134:3 164:1 <b>similarly</b> 191:7 <b>simple</b> 208:2 <b>simply</b> 23:13 64:3 75:6 <b>single</b> 50:8 120:9 206:20 <b>sit</b> 79:9 221:8 <b>site</b> 13:14 39:11,16 44:16 73:16 80:15 <b>sitting</b> 80:1 197:2,8 224:11,13 <b>situation</b> 146:7,10 161:18 <b>situations</b> 121:20 <b>six</b> 163:6 <b>Sixteen</b> 86:1	<b>SJA</b> 40:2,11 45:19 54:14 109:6 114:16,16 142:14 <b>SJAs</b> 13:18 <b>skip</b> 215:4 218:5 221:1 227:4 <b>slide</b> 72:12 91:17 92:6 101:17 <b>slides</b> 178:14 <b>slightly</b> 98:18 206:13 <b>Smith</b> 35:10,11,12 <b>social</b> 36:8 189:13 213:20 214:7,7,11 <b>society</b> 19:18,19 <b>Sociologist</b> 213:19 <b>sodomy</b> 17:19 <b>soldier</b> 34:11 38:1 42:19 <b>soldiers</b> 38:13 66:21 221:22 225:10,11 <b>solidified</b> 132:6 <b>solution</b> 29:9 56:17 <b>solve</b> 30:8 56:4,15 216:13 <b>solved</b> 57:15 177:12 <b>solves</b> 175:12 177:2 <b>solving</b> 28:20 <b>somebody</b> 57:12,21 58:16 124:21 137:7 220:10 223:7 <b>somewhat</b> 76:22 <b>sons</b> 34:2 <b>sooner</b> 86:22 87:3 87:20 <b>sorrow</b> 56:1 <b>sorry</b> 40:16 60:5 62:8 68:15 71:13 71:15 80:10 85:20 86:2 91:8 96:7 108:16 112:7 119:1,7 122:14 123:21 127:5 128:5 133:14	136:2 139:11 147:7 151:20,21 158:2 166:15 175:8 178:10 182:5 185:4 211:4 213:17 218:17 <b>sort</b> 46:6 60:17 120:9 144:2 <b>sorting</b> 145:1 <b>sorts</b> 42:16 66:9 <b>sounds</b> 99:21 139:15 167:11 228:12 <b>South</b> 5:18 <b>speak</b> 27:22 32:16 50:17 53:11 86:15 86:19 156:16 170:20 206:7 228:11 <b>speaker</b> 213:19 <b>speaking</b> 52:12 142:11 209:11 <b>special</b> 53:19 54:16 56:9 147:15 148:8 148:19 <b>specific</b> 7:10,21 8:4 11:14 27:10,16 84:5,22 94:7 97:6 97:9 103:15 104:6 107:18 109:20 121:2,7 122:18 123:17,22 129:12 131:13 159:5 181:13 228:10 <b>specifically</b> 7:5 15:6 17:13 25:9 26:9 53:1 110:11 110:16 121:5 137:13 147:22 148:4,7 181:15 207:2 214:13 <b>specificity</b> 110:18 126:11 <b>specified</b> 109:22 <b>specify</b> 110:11 175:22 206:6 <b>specifying</b> 32:8
---	---	--	---	--

<b>speculation</b> 49:19	118:14 125:17	<b>stressed</b> 19:18	152:10 153:4	47:10 79:5 158:15
<b>spelling</b> 54:22	140:12 143:12	41:15	156:14 157:16	186:3
<b>spend</b> 123:20	158:21 159:9,18	<b>strike</b> 65:15	169:10 172:7	<b>suggest</b> 49:4
191:22	174:3,4 188:14,22	<b>strikes</b> 45:7	175:22 177:5	<b>suggesting</b> 71:11
<b>spends</b> 148:9	191:3,8,11,13,17	<b>strong</b> 218:11	181:13 185:1	71:18 76:12
<b>spent</b> 40:4	192:9,21 193:21	<b>strongly</b> 80:1	186:2,21 187:15	138:10
<b>spirit</b> 19:1	195:1,2,3,4,5,9	127:13	187:19 188:16	<b>suggestion</b> 129:3
<b>spoke</b> 198:18	196:9 210:2	<b>struck</b> 44:3	189:4 190:11,17	135:9 178:22
<b>spoken</b> 196:3	211:19 215:8,10	<b>structural</b> 134:4	191:21 192:19	180:13
<b>square</b> 87:9	215:22 217:10	<b>structure</b> 57:16	197:14 198:1	<b>suggestions</b> 15:9
<b>squared</b> 223:18,18	226:12,14	<b>student</b> 213:22	201:4 202:4	<b>suggests</b> 182:17
223:19	<b>statements</b> 48:1	214:8	206:18 209:3	<b>sum</b> 47:15
<b>squarely</b> 201:13	61:9 65:3 209:10	<b>Studies</b> 213:22	<b>subcommittee's</b> 6:3	<b>supervised</b> 22:1
<b>staff</b> 2:4 10:16	209:13 215:17	220:2,3,4	47:16 72:15 78:11	<b>Supervising</b> 2:4,5
63:11,19 64:7,11	<b>states</b> 1:1,11 37:13	<b>study</b> 5:11 10:4	80:14 83:4 94:19	<b>supervisors</b> 9:3,12
67:16 80:10,11,17	49:14 50:20 51:5	85:10 88:3,7	96:13 97:16	12:16,17
106:2 130:11	53:13 66:5 105:20	<b>sub-recommend...</b>	109:14 166:8	<b>supply</b> 66:8
<b>staffed</b> 26:22	106:7 184:17	95:11	167:10,12 193:5	<b>support</b> 20:16 23:6
<b>stage</b> 74:22 166:21	<b>stating</b> 12:3 60:22	<b>subcommittee</b> 2:3	198:8 210:10	23:22 43:6 53:3
168:21	<b>stationed</b> 37:14	2:3 3:14 4:13,14	<b>subcommittees</b> 4:7	60:17 82:11 95:22
<b>stand</b> 41:18 97:17	<b>status</b> 93:10 219:20	5:4,5,8,19 6:17	4:10,17,21,22	182:9,14 200:6
117:11 202:1	<b>statute</b> 179:9	15:15,18 16:3,13	51:19 70:4 191:18	<b>supported</b> 21:1
<b>stand-alone</b> 183:18	203:19	16:15 18:18 20:9	<b>subject</b> 4:22 65:11	49:7 50:11
<b>standard</b> 13:17	<b>statutory</b> 27:13	21:2 22:22 23:4	65:17 66:19 107:1	<b>supportive</b> 48:11
176:14	125:6	26:13 28:5,17	148:2 189:1,17	<b>supposed</b> 12:5
<b>standardize</b> 71:3	<b>stay</b> 95:22	29:4 30:14 33:6	190:7,10 191:3,15	50:12 121:8
<b>standards</b> 8:6,15	<b>staying</b> 100:7	39:13 48:11,12	<b>submission</b> 134:22	<b>sure</b> 11:13 12:4,5
<b>standing</b> 41:10	<b>step</b> 29:15 147:21	51:19 56:21 62:14	137:9 146:11	37:10,10,20 43:15
74:5 203:18	163:19	63:1 64:2,3,22	<b>submissions</b> 201:9	60:9 80:3 91:20
205:16 207:2,5	<b>steps</b> 31:3	70:1 76:20 77:15	<b>submit</b> 96:3 113:16	105:12 106:12
228:1	<b>stick</b> 96:17	77:19 79:14 80:16	140:12 176:5	109:13 120:2
<b>stands</b> 65:20	<b>stipulation</b> 172:21	84:4,17 85:9,18	192:10 194:22	125:13 126:10,20
116:22 158:7	<b>stop</b> 24:7 25:11,14	86:10,21 88:12	<b>submitted</b> 112:17	127:14 128:2
201:17	46:18 67:22 219:9	90:3,13,18,20	<b>subordinate</b> 9:1,6	132:16 135:21
<b>stare</b> 36:22	219:12	92:3,12 94:2,22	<b>subpoints</b> 197:22	137:4,9 140:3
<b>start</b> 69:17 91:10	<b>stories</b> 43:5	95:3,19 96:10,21	<b>substance</b> 63:3	144:16 153:19
91:19 92:1,9	<b>story</b> 205:20	100:2 102:19	207:16	156:18 162:21
101:20 157:1,2	<b>straight</b> 83:4	103:16 104:1	<b>substantial</b> 102:2	169:17 187:11
159:12	<b>straight-forward</b>	110:19 115:6,9,15	197:22	224:21
<b>started</b> 178:10	69:22	116:6 119:11	<b>substantive</b> 194:10	<b>surprise</b> 195:16
<b>state</b> 28:12 46:22	<b>straightforward</b>	120:1 121:16,18	<b>success</b> 6:20 9:8	<b>surprised</b> 45:21
47:3,5 76:11	208:2	122:4 123:13,20	19:6 24:14 28:19	209:19
170:15 171:3	<b>strap</b> 137:5	127:13 134:2	28:20 48:16,19	<b>surprises</b> 194:17
172:5,22	<b>Strategic</b> 7:4	135:19 137:13	<b>successful</b> 23:3	<b>surrounding</b> 16:17
<b>stated</b> 176:13	<b>strategy</b> 45:21 67:1	138:18 139:6	<b>suddenly</b> 33:22	44:18 70:15
<b>statement</b> 27:19	<b>strength</b> 76:7	141:19,20 143:15	35:7,14 44:7	<b>survey</b> 36:5 37:5
60:20 83:16	<b>strengthen</b> 6:13	144:6 147:4 148:1	<b>sufficient</b> 23:5	39:9 43:13 70:6

72:22	<b>take</b> 13:19 17:18	<b>telephone</b> 1:19,20	89:19 91:7 100:17	76:9 78:4 79:5,6,7
<b>surveyed</b> 73:2	31:3 32:13 36:18	2:3	101:14 128:21	81:16 82:3,6
<b>surveys</b> 36:18 70:5	54:1 57:2,6,9	<b>tell</b> 72:11 111:5	132:8 136:17	86:20 87:6,13,18
<b>survivor</b> 192:6,8	59:10 80:21 90:3	112:2 122:13	211:21 212:9	87:21 88:14 89:3
<b>survivors</b> 30:22	99:1 118:18 125:8	146:21 153:10	227:17,17,20	89:22 90:3 92:5
93:5,18 192:8	127:3 132:18	202:3 207:15,16	228:6,8,16 229:8	98:14,17 99:21
220:5,6,7	136:9,16 199:14	222:17	229:19	100:19,21 101:2
<b>suspect</b> 225:8	211:13 225:21	<b>telling</b> 170:11	<b>thanks</b> 62:1 74:9	106:4 107:3
<b>SVC</b> 164:13	<b>taken</b> 33:18 35:16	219:3	78:9 90:6 136:14	117:22 118:20
<b>switch</b> 78:9	36:6 70:17 76:1	<b>temporary</b> 92:19	182:15 211:15	124:17 125:1,22
<b>switching</b> 84:14	115:19 136:20	<b>ten</b> 90:3	229:12	126:21,21 128:13
<b>sworn</b> 191:8	144:9 162:6 203:5	<b>term</b> 16:22,22	<b>theirs</b> 64:13	130:7,17,21 131:2
<b>synergy</b> 59:12	223:4	155:18 156:3	<b>theorem</b> 223:18,20	132:22 133:16
<b>synonymous</b> 16:22	<b>takes</b> 40:9,10 162:1	160:19	<b>theory</b> 170:2 224:2	135:18 138:9
<b>system</b> 10:8,13	<b>talk</b> 6:10 37:21	<b>termed</b> 223:1	<b>thing</b> 34:4 43:17	140:4 141:16
12:6 19:13 26:21	80:17 83:2 121:19	<b>terms</b> 32:7 35:4	44:4,5 45:7,18	143:7,18 144:15
29:10,12,20 51:5	122:5 137:13	40:21 43:8 47:2	46:16,19 62:10	144:21 145:15
53:15 54:9,11,21	141:5 146:5 179:9	61:21 65:2 87:4	67:7 114:13 161:8	146:7 147:10
55:3,15,21 56:12	204:22 216:15	120:2 139:8 140:6	172:19 198:18	148:3 149:13
58:20 60:14 68:4	221:3 225:16	155:7 156:17	208:7 218:6	151:2 156:8 160:6
104:15,19 105:3	226:2,6,6	157:2,9,20 176:8	<b>thing's</b> 207:14	165:2,7,10 166:2
117:7 118:18	<b>talked</b> 107:3	193:11 203:7	<b>things</b> 26:15 38:15	166:22 168:5,6,10
119:11,22 120:10	141:19	215:15	41:9 49:22 57:2	168:12 170:12
140:9 151:12	<b>talking</b> 32:17 37:1	<b>terrible</b> 215:21	57:20 66:9,18	171:4 172:19
155:10,13 157:14	37:2,3 69:17 78:6	<b>terrific</b> 228:12	67:4 70:21 71:1	174:5 175:11
157:21 158:6	84:7 85:19,21	<b>test</b> 155:13	88:3 96:14 121:2	177:2,12 178:20
159:6 160:10,13	87:22 97:6 101:3	<b>testified</b> 19:9 201:6	132:16 139:11	179:1 180:15
160:14 164:14	123:21,21 132:8	<b>testify</b> 189:16	142:12,15 167:13	182:8,11,16 185:7
171:3 172:20,22	136:22 143:18	203:7	174:15,19 179:4	185:10,20,22
172:22 173:1	147:11 156:17	<b>testifying</b> 208:20	180:16 209:6	187:10 188:2,2
177:14 178:6	160:9 168:10,15	<b>Testimonial</b> 202:15	215:12,14 220:12	193:8 194:18
190:3 193:18	174:2 182:18	<b>testimony</b> 18:20	223:9 225:5 226:8	196:15 197:6
196:18 197:20	183:3 184:2,4	61:11 75:20 76:1	<b>think</b> 4:16 10:19	198:18 199:14,18
<b>systematic</b> 56:8	188:4 192:1	79:11 93:4 106:10	11:16 15:9 16:18	203:19 207:17
<b>systems</b> 1:3 4:19	204:15 229:6	175:2 220:5	28:3 29:6,7 31:2	208:1,9 210:9,18
21:4,13 28:12,13	<b>talks</b> 30:15 180:20	221:18	31:20 35:21 37:15	210:20 212:14,19
39:13 63:4 64:3	<b>tandem</b> 218:3	<b>Texas</b> 5:18	37:21 38:5 39:4,5	213:10 215:15
64:13 68:18 69:2	<b>tank</b> 212:14,19	<b>text</b> 73:6 128:9	43:10,11 47:20	216:5 219:11,20
76:19 77:5,18	213:10 216:5	129:19	48:14 49:22 50:2	224:5
78:13,17 80:13	224:6	<b>thank</b> 27:22 31:9	50:14,22 51:10,16	<b>thinking</b> 12:10
83:1 84:1,3	<b>task</b> 228:15	31:11 47:18 48:7	52:1,2,13 54:5,19	69:21 209:5
103:17 202:6	<b>tasked</b> 121:2	52:5,6,10 56:17	54:22 55:10 56:7	225:18
<b>T</b>	<b>taught</b> 226:16	56:18 59:15,21	56:13 61:2 62:7	<b>thinks</b> 85:9
<b>TABLE</b> 3:10	<b>teach</b> 223:17	62:2 64:20 67:8	63:20 64:3 67:10	<b>third</b> 44:10
<b>tactic</b> 45:20 67:1	<b>teacher</b> 214:17	68:13 69:5,14,15	67:20 68:7 70:6	<b>thought</b> 28:9 32:1
<b>tailored</b> 7:20	225:4	72:2,10 74:7 80:5	71:1,5,22 72:11	52:13 56:14 73:2
	<b>team</b> 216:19	80:9 83:18,19	73:19 74:10 75:13	205:2 208:14

218:14	<b>train</b> 67:22	120:8 122:17	<b>type</b> 26:10 220:17	<b>unique</b> 19:18
<b>thoughts</b> 145:21,22	<b>trained</b> 28:10 50:8	124:8 131:12	<b>types</b> 70:21	<b>unit</b> 9:1,7 18:2
174:1 180:18	53:17 54:8 97:10	137:19 140:8,15		33:20 36:20 44:8
<b>three</b> 4:6,17 5:11	226:4	142:12 145:20	<hr/> <b>U</b> <hr/>	57:17 58:15 59:4
6:5 11:2,10 16:8	<b>training</b> 9:21 10:9	146:15,21,22	<b>U.S</b> 21:15 29:21	66:2,4,6
69:16 107:19	10:12,17,21 13:5	161:1,12 175:18	47:7 48:16 170:18	<b>United</b> 1:1,11
162:7 198:4	13:5,7,15,19,22	<b>tricky</b> 120:12	<b>UCMJ</b> 10:1,4	37:13 49:14 50:20
<b>three-star</b> 66:10	14:9,13,17 15:2,3	<b>tried</b> 105:8 121:8	23:14,17 25:1	51:5 53:13 66:5
<b>throw</b> 135:10,12	15:7 24:6 30:4,11	193:9	48:18,20,20	105:20 106:6
209:4	30:15 94:3 95:6	<b>troop</b> 43:12	207:11	<b>units</b> 35:8 51:14
<b>tied</b> 156:2,3	97:4 98:18 100:6	<b>troops</b> 34:5 39:21	<b>ultimately</b> 140:1	<b>universities</b> 217:2
<b>time</b> 25:8 40:11	221:2,6,7,8,15,17	40:3 45:2	<b>unable</b> 4:15	<b>University</b> 213:4
59:20 92:1 99:9	221:20 222:13,14	<b>trouble</b> 30:3 57:12	<b>unambiguous</b>	213:16,17,18
101:5 107:3,11	222:15,16 223:12	71:14	136:12	<b>unnecessary</b> 46:8
109:11 113:7	223:13 224:1,16	<b>troubling</b> 93:5	<b>unattainable</b> 136:1	<b>unnoticed</b> 50:1
123:20 132:14,18	224:16,17,18,20	<b>true</b> 34:9,9,21	<b>unchanged</b> 131:20	<b>unravel</b> 199:15
148:9 172:15	224:22 225:1,1,3	38:17 39:7,8	<b>unclear</b> 98:16	<b>unrealistic</b> 56:5
173:3 177:7	225:6,9 226:5	148:12 159:16,17	<b>uncomfortable</b>	<b>unrestricted</b> 18:7
190:15 191:12,22	<b>transcript</b> 102:1	218:18	227:22	73:12 93:3,17
193:4,9,12 197:16	194:8 201:2	<b>trust</b> 34:1,2 35:9	<b>under-reporting</b>	94:17 95:19 98:22
198:19 199:15	<b>transfer</b> 92:16,20	<b>try</b> 52:16 54:7	21:18	99:4,11,19 101:10
211:14 215:5,5	93:9,16 94:8,15	122:2 154:13,20	<b>undergraduate</b>	<b>unscientific</b> 36:5
217:20 222:13	96:1 97:8,19	177:5	220:1	43:13,13
225:15 227:14,15	100:8 101:9	<b>trying</b> 61:15	<b>underlying</b> 94:7	<b>unsure</b> 37:2
227:16	<b>transferred</b> 137:1	106:18 112:22	<b>undermines</b> 29:20	<b>unsworn</b> 188:14
<b>times</b> 65:19 213:7	<b>transfers</b> 94:5 95:9	128:16 142:17	<b>understand</b> 11:18	189:9 190:12
221:15 222:20	95:14 98:5,22	143:17 157:5,12	16:19 46:9,13	191:2,11,12,16
227:3	99:7,17	157:22 172:8	60:12 68:10 73:11	<b>unusual</b> 68:3
<b>today</b> 16:3 30:20	<b>transformative</b>	177:9 181:5 209:4	132:8 147:6,10,13	<b>unwilling</b> 50:17
35:18 41:17 102:3	217:5	226:22	156:15 158:21	<b>upcoming</b> 83:3
200:5 212:10	<b>translated</b> 146:15	<b>turn</b> 48:22 101:15	174:16,19 182:22	<b>USC</b> 102:8 103:19
214:3 215:13	<b>trauma</b> 192:11	166:2 173:12	185:5 186:8 196:7	<b>use</b> 37:22 121:14
218:21 228:4	214:9	<b>tutor</b> 223:16	198:6 211:8	170:5 223:14
229:16,19	<b>Treat</b> 225:9	<b>two</b> 24:16 25:11	215:14 223:20	224:20
<b>told</b> 35:18 202:3	<b>treating</b> 42:15	51:19 59:9 62:11	<b>understanding</b>	<b>useful</b> 119:18
<b>tools</b> 58:19	<b>trending</b> 75:17	62:19 66:10,14	32:21 61:21 72:20	
<b>topic</b> 9:16 33:15	<b>trial</b> 17:9,18 23:16	76:13 91:15	127:8 134:11	<hr/> <b>V</b> <hr/>
83:22	63:15,17 64:5,5	107:13 108:8	152:21 164:22	<b>v</b> 189:5
<b>torment</b> 219:4	74:20 79:17 80:1	109:8,17 113:9	<b>understands</b>	<b>VADM</b> 48:10
<b>torture</b> 219:11,22	81:19 85:13	140:17 141:1	153:14,14 156:6	<b>validate</b> 178:2
<b>tortured</b> 220:10,11	102:10,16,22	143:10,18 145:18	<b>understood</b> 14:21	<b>validation</b> 89:16
<b>total</b> 37:4	103:3 104:5 106:1	145:19 150:18	98:3 205:3	<b>values</b> 20:3
<b>totally</b> 171:11,13	106:11 107:17	152:14 161:19	<b>undue</b> 46:7 215:9	<b>vantage</b> 50:21
<b>touch</b> 186:15	108:7 109:5,9	167:12 178:22	<b>unfair</b> 203:20	<b>varied</b> 213:8
<b>touched</b> 9:4	111:19 112:5	179:4 220:7 226:8	<b>Uniform</b> 17:3	216:20
<b>town</b> 44:12,15	113:13 114:2	226:19	18:17 23:7 48:14	<b>variety</b> 35:4 50:21
<b>track</b> 44:19,21	116:16 117:8	<b>two-way</b> 169:14	81:10	103:3



<b>various</b> 4:8	191:2 193:17,20	<b>view</b> 28:14 132:21	212:9 215:16,18	133:9 187:15
<b>VAs</b> 95:7 98:19	194:15 196:1,7,18	138:7 190:17	215:22 216:2	211:15 229:9
<b>venue</b> 108:14	198:12 200:10,21	207:20	217:1,2 218:20	<b>we're</b> 10:17 30:11
<b>verbally</b> 140:16	201:16 202:8,13	<b>violation</b> 18:16	221:3 227:17,20	32:5,9 37:16
<b>verbiage</b> 43:2	203:12,18 204:3,9	47:11	228:7	45:22 46:5 60:14
220:19	204:10 205:15,16	<b>violations</b> 17:3	<b>wanted</b> 49:18 57:2	61:15 63:12 78:6
<b>version</b> 190:16	206:17,22 207:6	<b>violence</b> 29:4 30:20	60:10,19 69:3	78:19 80:22 81:16
<b>versions</b> 93:21 96:8	208:3,11 209:10	218:19 219:1	83:14 119:10	82:18 84:6 87:8
<b>versus</b> 160:11	209:11,12 215:22	220:16	130:8 143:1	87:22 88:2,3,14
<b>vested</b> 22:4 24:3	221:18 222:10	<b>Virginia</b> 204:13	169:17 194:2	90:9,22 91:10
<b>veteran</b> 213:22	<b>victim's</b> 103:12	<b>Virginia's</b> 170:16	195:10 207:3	101:12 107:20
214:22 222:18	104:6,10 107:18	171:3	213:1	125:22 126:14
<b>Veteran's</b> 213:3	108:1 114:3	<b>virtually</b> 19:7	<b>wants</b> 11:17 120:1	129:22 132:15
<b>veterans</b> 215:1	122:17,22 126:5	23:12	135:4	136:22 139:19
226:14,19 227:2	131:13,15 134:22	<b>vis-a-vis</b> 176:3	<b>war</b> 216:8 217:1	143:10,18 168:10
<b>VICE</b> 1:17	139:6 140:7,11	<b>vision</b> 86:21	219:11,20 220:8	177:13 182:7,18
<b>victim</b> 2:2,3 4:18	144:2 156:21	<b>visits</b> 39:12,16	<b>war-fighting</b> 34:14	185:14,18 186:3,4
17:13,21 19:12	164:15 166:3	44:16 73:16 80:15	45:2 65:13	186:9 187:7,10
55:19 59:7 75:18	170:12 189:20	<b>voice</b> 170:13	<b>warnings</b> 173:8	188:4 199:22
90:6,20 92:14	191:10 196:10	<b>volume</b> 21:2	<b>Washington</b> 1:13	203:9 216:15,22
103:2 104:16	200:13 204:21	<b>vote</b> 77:13	<b>wasn't</b> 37:20	218:1 219:6
108:7 110:12,17	208:10 215:8,17	<b>voted</b> 64:14	127:17 218:18	224:16,16,16
111:6 113:14	<b>victim-blaming</b>	<b>VPA</b> 70:11	<b>watch</b> 224:12	<b>we've</b> 5:11 17:7,21
116:14 117:5,11	221:19	<b>VSS</b> 112:12	<b>watched</b> 65:21	30:16 79:5 97:20
118:1,10,16 120:6	<b>victimless</b> 59:7		<b>watching</b> 224:11	126:16 143:17
122:4 134:6 135:5	<b>victims</b> 5:13 18:3	<b>W</b>	<b>water</b> 66:8 135:11	168:7 180:12,16
135:15 137:1,15	18:20,21 19:8,9	<b>wait</b> 32:2 77:12	<b>watered-down</b>	<b>wear</b> 5:6
137:18 139:7	30:19 52:19,20	80:17 120:12,18	215:15	<b>website</b> 211:20
142:19 143:12	56:1,6,10,12 59:5	138:19,21	<b>way</b> 12:6 26:1	<b>week</b> 11:5 40:5,7
145:6 147:5,8	63:6 69:18 72:16	<b>walk</b> 37:4	28:15,16 29:19	66:1 214:16
149:5 151:5 152:3	73:22 90:13 92:17	<b>walked</b> 227:2	40:20 42:11 52:5	<b>weight</b> 93:13
152:4 154:5,6,16	94:14 95:16,22	<b>wall</b> 42:9,12 223:21	55:18 58:2,20	<b>Weinstein</b> 214:10
155:2,4,9,16	102:7,11,12,15	<b>want</b> 4:4 27:18	87:19 105:2,3	<b>Welcome</b> 90:12
156:13 157:11,18	103:9,14 104:2,19	33:4,17 34:5 43:9	108:18 111:15	<b>welfare</b> 58:4
158:4,20 159:9	105:7,14 106:1,14	46:6 48:12 52:15	115:2,12 119:20	<b>well-educated</b>
160:7 162:5,13	114:14,21 115:10	53:10 56:15 65:10	120:9,11 139:2	218:9,11
164:2,12,16 165:3	120:1 124:15	72:5 80:10,21	143:21 151:13	<b>well-intended</b>
165:7,12,14	143:5 147:11,12	110:22 114:22	152:1 165:12	225:9
168:16 169:1	147:16 148:8,19	115:15 120:1	167:14 171:19	<b>well-run</b> 106:5
170:3,16,18 171:8	150:2 155:4,11	125:9 129:16	173:15 174:15,16	<b>well-taken</b> 115:8
171:11,22 172:1	159:3,7 167:21	130:3 135:9,10,11	179:2 180:4 196:4	<b>went</b> 27:17 41:2,8
172:12,17 173:13	171:14 184:6	137:3,9 145:18	203:9 215:7	41:13 42:21 66:13
175:15 176:4,20	186:2 187:18,19	160:5 162:5	218:13 224:10	66:15 90:8 110:3
178:5 185:2,21	189:7,19 192:14	171:10,15 172:2	152:1 165:12	110:6,14 173:4,6
186:13 187:8	194:20 198:11,14	178:1 179:13	167:14 171:19	187:18 218:8
188:5,14,21	200:20 204:17	180:6 184:8 186:8	173:15 174:15,16	<b>weren't</b> 99:9 211:5
189:12,16 190:4	205:6 215:18	209:7,14 211:13	179:2 180:4 196:4	<b>white</b> 65:22 66:2

229:3	193:8	<b>year-long</b> 48:21	163:16 164:21	110:3,21 111:4
<b>whiz</b> 35:9	<b>worker</b> 214:7,7	<b>years</b> 24:16 38:8	193:4	112:19,22 115:2
<b>who've</b> 226:10	<b>working</b> 80:11	50:19 53:14,22	<b>20</b> 1:12 6:4 53:21	120:18 123:21
<b>whoever's</b> 208:19	<b>works</b> 147:18	59:14 105:19	222:4	126:4,16 127:4,15
<b>Wi</b> 229:6	152:1 177:15	114:16 158:20	<b>2004</b> 102:8 159:2	129:13 130:1,18
<b>willing</b> 166:1	<b>world</b> 22:13 38:17	172:11 210:6	<b>2006</b> 159:4	131:20 133:6,11
<b>wish</b> 212:16	147:19 198:13	<b>York</b> 53:19 227:11	<b>2013</b> 7:4	133:12 139:22
<b>wishes</b> 212:14	228:3,5	228:18	<b>2014</b> 1:8 17:14 63:7	141:7 143:17,22
<b>withdraw</b> 161:2,9	<b>worry</b> 177:13	<b>young</b> 65:21 66:21	69:18	146:10 149:17
<b>witness</b> 172:21	<b>worth</b> 22:3	213:14	<b>21</b> 6:10	175:10 176:20
202:14,15 222:1	<b>worthwhile</b> 228:9		<b>23</b> 114:16	177:18 178:3
<b>witnessed</b> 18:22	<b>wouldn't</b> 38:18	<b>Z</b>	<b>25</b> 53:22	179:11 180:19
215:12 217:8	43:22 57:8 66:22	<b>zero</b> 49:16	<b>26</b> 91:17	188:5
219:3	95:16 146:14	<b>0</b>	<b>27</b> 6:12 50:19	<b>32(a)</b> 175:11
<b>witnesses</b> 73:16	147:2 162:15	<b>1</b>	<b>28</b> 6:4,12 12:9	179:13 183:11,16
76:1 84:10,11	166:21 196:8		105:19	184:5 185:15
85:7,8	204:2 209:13		<b>29</b> 7:13 8:10,17	188:6
<b>woman</b> 218:11	<b>wrinkle</b> 209:6	<b>1</b> 23:20,20 32:4	11:12 15:12	<b>32(b)</b> 174:9 175:11
226:21	<b>write</b> 143:12	47:17 62:13 163:9	<b>3</b>	182:19 188:6
<b>women</b> 33:21 216:7	146:18 147:13	163:11	<b>3</b> 68:14 71:9 72:8,9	<b>32A</b> 125:21 133:16
225:16,17 226:2,6	195:3	<b>1:35</b> 229:21	132:2 163:13,16	133:21 134:5
226:7,9,9,16	<b>writer</b> 195:2	<b>10</b> 16:15	164:21	<b>32B</b> 112:12,18
<b>Women's</b> 213:3	<b>writes</b> 195:2	<b>100</b> 178:8	<b>3(d)</b> 69:18 70:10	133:16 134:19
<b>wonder</b> 41:16	<b>writing</b> 135:1	<b>100,000</b> 39:21 40:3	<b>30</b> 8:18 9:13 12:15	138:20 139:14
47:12 119:19	137:20 141:12	<b>11</b> 210:6	15:12	141:18
<b>wondered</b> 85:17	146:11,17 170:11	<b>12</b> 37:3	<b>30th</b> 15:17	<b>32C</b> 125:21
173:6	174:10 191:13	<b>13</b> 6:4 172:11	<b>31</b> 9:15 12:21 15:12	<b>32s</b> 75:15
<b>wondering</b> 123:4	192:1,9 193:7	<b>14</b> 73:6 74:3,6,9	101:16 102:5	<b>33</b> 91:18
181:8 205:1	198:9	<b>15</b> 23:10,11,12	107:4,6,12 109:16	<b>333</b> 1:12
<b>word</b> 13:19 121:14	<b>written</b> 12:6 16:14	31:21 32:4 37:3	110:1 113:10,21	<b>34</b> 125:3
131:6,7,8 170:5	61:6 137:9 174:2	40:7 47:17 62:7	114:2,4 122:9	<b>37</b> 188:8,9 190:20
183:1 209:5,5,6	176:5 211:19	62:10,12	123:20 125:20	198:17 199:1
<b>wording</b> 12:22	215:9	<b>153</b> 192:22	126:1,14 127:3	200:1
107:1,12,14 203:2	<b>wrong</b> 51:10 53:10	<b>155</b> 195:22	128:4,8,9,14	<b>3771</b> 102:8 103:19
<b>wordings</b> 11:12	58:17 65:18	<b>16</b> 1:8 74:10 85:22	129:7,14,19 131:6	<b>38</b> 199:22
<b>words</b> 108:4 165:13	112:10 117:5	87:15 88:11	133:5,10,12,22	<b>38's</b> 210:15
183:12,15 208:17	130:4 149:17	<b>17</b> 74:11,12 77:1,2	138:8 139:20	<b>38-1</b> 200:5,7
210:14 220:20	160:15 206:3	78:2,11,16 81:4,6	141:7,17 142:5	<b>38-2</b> 200:5
<b>wordsmith</b> 129:16	209:5 221:13	158:20	143:17,21 149:3	<b>4</b>
<b>work</b> 28:4 33:5,7	<b>wrongdoing</b> 66:17	<b>18</b> 32:4 74:11 81:9	149:12,16 179:6	<b>4</b> 3:12 89:20 163:9
33:10 57:22 64:21		102:7 103:18	<b>31-1</b> 13:7 102:5	163:12
80:15 145:8 154:8	<b>X</b>	<b>19</b> 23:11 31:19,20	<b>31-4</b> 102:5	<b>412</b> 205:22 206:5
171:18 193:9	<b>Y</b>	32:6 47:17 62:5,9	<b>32</b> 74:18 75:3,12	206:14
195:18 213:17		<b>2</b>	77:21 79:2,9,16	<b>45(d)</b> 76:21
226:20,21 229:16	<b>yeah</b> 50:15 162:18	<b>2</b> 62:22 63:6 64:16	79:19 107:5,8	<b>5</b>
229:18	<b>year</b> 50:11 66:14	67:11 68:12,16	108:17 109:16,22	
<b>worked</b> 53:16	159:22 212:19	101:17,18 163:13		

**5** 6:4 91:20 92:9  
94:22 95:20 96:13  
98:16 100:20  
101:5,14 105:19  
163:9,12  
**5-1** 92:11  
**5-5** 92:12  
**513** 206:2,15  
**5A** 95:5,12,20  
96:18 97:15 98:15  
100:17  
**5th** 4:5

---

**6**

**6** 3:15 67:17 163:14  
163:16  
**60** 81:10,18 82:5,21  
83:6  
**6th** 1:12 4:5,15 6:2

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**7**

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**8**

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**9**

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual  
Assault Crimes Panel Meeting

Before: US DOD

Date: 05-16-14

Place: Washington, DC

was duly recorded and accurately transcribed under  
my direction; further, that said transcript is a  
true and accurate record of the proceedings.

*Neal R Gross*

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Court Reporter

**NEAL R. GROSS**

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