

MILITARY JUSTICE REVIEW PANEL (MJRP)

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9TH MEETING

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OPEN SESSION

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TUESDAY
JANUARY 16, 2024

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The Military Justice Review Panel met
via Videoconference, at 10:00 a.m. EST, Dr.
Elizabeth Hillman, Chair, presiding.

PRESENT

Dr. Elizabeth Hillman, Chair
Judge Benes Z. Aldana
Col (R) Kirsten Brunson
MG (R) John Ewers*
Col (R) Will A. Gunn*
Judge Bruce E. Kasold*
MG (R) Robert Kenny
Col (R) Lawrence Morris*
Col (R) Tara Osborn
Judge James Redford
Capt (R) Bryan Schroder
Judge Jeri K. Somers*

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Official*
Mr. Pete Yob, Executive Director
Ms. Stacy A. Boggess, Senior Paralegal*
Ms. Jennifer Campbell, Chief of Staff
Ms. Alice Falk, Technical Writer-Editor*
Ms. Breyana N. Franklin, Communication
Specialist*
Ms. Nalini Gupta, Acting Deputy Executive
Director
Ms. Theresa A. Gallagher, Staff Attorney*
Ms. Amanda L. Hagy, Senior Paralegal*
Mr. Michael Libretto, Staff Attorney*
Mr. Chuck Mason, Staff Attorney
Ms. Marguerite McKinney, Management and Program
Analyst*
Ms. Janelle L. McLaughlinali, Paralegal*
Mr. Blake Morris, Paralegal*
Ms. Meghan Peters, Staff Attorney*
Ms. Stayce D. Rozell, Senior Paralegal*
Ms. Terri Saunders, Staff Attorney*
Ms. Kate Tagert, Staff Attorney
Ms. Eleanor Magers Vuono, Staff Attorney*

PRESENTERS:

Col (R) James A. Barkei, U.S. Army*
LtCol Jasmine N. Candelario, U.S. Air Force*
CDR Michael D. Crowe, U.S. Coast Guard*
CDR Sara de Groot, U.S. Navy*
Col Evah McGinley, U.S. Army*
Col Iain D. Pedden, U.S. Marine Corps*
RADM (R) Charles N. Purnell, U.S. Navy*
LtCol (R) Mark F. Rosenow, U.S. Air Force*

*attended virtually

CONTENTS

Welcome and Opening.

Former Military Judges Session 8
 Colonel (Retired) James A. Barkei,
 U.S. Army
 Rear Admiral (Retired) Charles N. Purnell,
 U.S. Navy
 Lieutenant Colonel (Retired) Mark F. Rosenow,
 U.S. Air Force

Victims' Counsel Session 103
 Colonel Evah McGinley, U.S. Army
 Commander Sara de Groot, U.S. Navy
 Lieutenant Colonel Jasmine N. Candelario,
 U.S. Air Force
 Colonel Iain D. Pedden, U.S. Marine Corps
 Commander Michael D. Crowe, U.S. Coast Guard

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

2 10:10 a.m.

3 CHAIR HILLMAN: Okay. Welcome,
4 everybody. Thank you for your patience. This is
5 actually the 9th meeting of the MJRP. This is
6 our first public session of the day.

7 Just a couple notes; I appreciate all
8 the technical assistance, everybody sorting
9 things out. A note for everyone that our open
10 meetings are being recorded and they'll be
11 transcribed. A verbatim transcript of the four
12 open sessions will be posted on the MJRP website.

13 So we have pretty good attendance;
14 among our expert panelists here, former military
15 judges who are joining us today.

16 So, Pete, shall I go ahead and
17 introduce them? Go ahead if you want to --

18 MR. YOB: Just one admin announcement.
19 We have seven persons we identified earlier at
20 the admin session who are still in the room. And
21 I believe we have at least one person, Mr. Kasold
22 -- Judge Kasold is on the line virtually.

1 Can you just let us know -- can you
2 hear us okay?

3 CHAIR HILLMAN: We have Colonel Gunn,
4 too, I see.

5 JUDGE KASOLD: Can you hear me?

6 PARTICIPANT: You have General Ewers,
7 you have Judge Kasold, you have Judge Gunn, you
8 have Judge Somers.

9 JUDGE KASOLD: This is Judge Kasold.
10 Can you hear me?

11 MR. YOB: We can. Thank you. So
12 we've got four members who are on, as you just
13 announced. So thank you.

14 We'll go right into the session.

15 Mike Libretto, are you on with us,
16 staff member?

17 MR. LIBRETTO: I am, sir. Bear with
18 me just a moment. I have been having some
19 difficulty touching base with Rear Admiral
20 Purnell, but I just got contacted with him. So
21 if we can just give me a few more minutes. And I
22 think I can get him on line via phone as well.

1 MR. YOB: It's a snow day. We'll take
2 one more minute.

3 MR. LIBRETTO: Okay. Thank you.

4 CHAIR HILLMAN: Thank you for your
5 perseverance. And thanks for everybody else for
6 being patient. It's a great opportunity for us
7 to hear from former military judges. The changes
8 in the system that we're working to understand
9 and assess have changed the roles of military
10 judges in some respects and we're anxious to hear
11 your thoughts about where things stand now in
12 comparison to the past and where we're headed.

13 Just checking in on the Panel members
14 who are joining us virtually, everybody doing
15 okay with respect to the sound from the room and
16 hearing the folks who are speaking on the Zoom?

17 JUDGE KASOLD: Yes.

18 PARTICIPANT: Yes.

19 JUDGE SOMERS: Yes, I can. Thank you.

20 CHAIR HILLMAN: Hey, good to see you
21 there, so thank you for joining us here.

22 JUDGE SOMERS: Good morning, everyone.

1 MG (R) EWERS: John Ewers. I can hear
2 you fine. Thanks.

3 CHAIR HILLMAN: Great. Okay. Maybe
4 we should -- while Michael is getting our third
5 -- Admiral Purnell on, maybe we could start with
6 introductions. So we have two -- Nalini, should
7 we just go ahead and start then with -- Mike was
8 going to do introductions, but the folks could
9 introduce themselves, our other military judges -
10 - former military judges?

11 JUDGE KASOLD: After you.

12 CHAIR HILLMAN: Okay. Another minute
13 just to --

14 (Simultaneous speaking.)

15 LTCOL (R) ROSENOW: Can I be heard?

16 CHAIR HILLMAN: You sure can. Go
17 ahead.

18 LTCOL (R) ROSENOW: Okay. Thank you
19 so much, ma'am. This is Mark Rosenow. I don't
20 know where I am on your screen, but I'll wave to
21 everybody that I can see. I'm joining you from
22 Washington, D.C. I'm in private practice now,

1 but I retired from the Air Force effective in
2 August of last year, 2023. I was a military
3 judge in two different assignments for five
4 years. I was a senior prosecutor, as you know
5 from my bio, for four years in (audio
6 interference) area defense counsel for two years
7 as well. Almost all of my time in the Air Force
8 besides a couple staff positions was focused on
9 military justice and their policy, prosecution,
10 defense, and trying them as a military judge.

11 Happy to be here and given the
12 incredible credentials of the people who are on
13 the Military Justice Review Panel I am very
14 circumspect that perhaps the most useful element
15 of what I can offer is recency. So I'll try and
16 really focus on things that are near in my
17 experience because in terms of volume it just
18 won't compare to some of the other backgrounds
19 that we have here. And thank you.

20 CHAIR HILLMAN: Thank you. Thank you
21 for that. And our U.S. Army former judge?

22 COL (R) BARKEI: Jim Barkei. Can

1 everybody hear me?

2 PARTICIPANT: Yes.

3 CHAIR HILLMAN: Sure can, sir.

4 COL (R) BARKEI: All right. I retired
5 on the 1st of October, retired from the bench as
6 a chief circuit judge in the First Circuit from
7 Fort Drum, New York. I am currently a managing
8 attorney for a district attorney's office in the
9 great state of Wisconsin.

10 Unlike Colonel Rosenow, I had a varied
11 career, both through operational assignments,
12 some leadership assignments, staff judge
13 advocate, and so forth. So I'll try to bring a
14 little bit different perspective. My tenure on
15 the bench was started as a trial judge obviously
16 at Fort Drum and then took over the chief
17 circuit. So most of my experience like Colonel
18 Rosenow's will be in the recency category. Look
19 forward to discussion today.

20 CHAIR HILLMAN: Thank you, Colonel
21 Barkei. And, Michael?

22 MR. LIBRETTO: Yes, ma'am. Thank you

1 very much. And I do appreciate both of those
2 gentlemen introducing themselves. Still waiting
3 to see if Retired Rear Admiral Charles Purnell
4 will be joining us, but perhaps he might be by
5 phone here shortly.

6 But in the interim we'll go ahead and
7 get started. As last time, unfortunately where
8 most of us are remote, so we'll be handling
9 things in much the same way.

10 The two gentlemen for now will be
11 prepared and have been provided the questions
12 that you all have drafted with your respective
13 teams. They're here to answer questions on
14 several of the topics of particular interest to
15 you including the expanded scope and use of
16 Article 30a, pre-referral proceedings; the use of
17 Article 16(c)(2)(A), judge-alone courts- martial,
18 special courts-martial; plea agreements and how
19 they compare as a practical matter to the formal
20 pretrial agreements including negotiation-
21 specified sentence; the handling and processing
22 of charges relating to retaliation, domestic

1 violence, and sexual harassment allegations; and
2 finally current sentencing procedures and
3 perspectives on reforming the current process to
4 one more similar to state and federal non-
5 adversarial proceedings.

6 The pre-drafted questions are not
7 intended to limit the topics to be discussed and
8 to the extent that they are able I'm sure the
9 panelists would be happy to provide their
10 perspectives on a wide range of military justice
11 issues. That said, because we do have a number
12 of topics to get through, we will be mindful of
13 the time spent on each and may be required to
14 move on to another topic before all questions can
15 be addressed.

16 We will attempt to reserve some time
17 at the end of the two-hour block, or hour and
18 forty-five minutes, I should say now, to circle
19 back to some of those questions if there are any
20 alibis. Much again like the last meeting we will
21 sort of go around and identify the questions to
22 be asked by the Panel, by the respective teams.

1 I will turn it over to Chair Hillman
2 at this point to get the questions going. I
3 believe that each of the teams, respected teams,
4 will be asking some questions for their
5 individual topics as well, but we'll begin with
6 -- Chair Hillman, if you'd like to start off the
7 conversation?

8 CHAIR HILLMAN: Great. Thank you.

9 Let's dig right into plea agreements
10 as that's at the top of our list here. So if you
11 could talk about your perspective on the current
12 plea agreements versus the prior PTAs, pre-2019,
13 that would be a great place for us to start, and
14 then anything else you want to tell us about plea
15 agreements.

16 LTCOL (R) ROSENOW: Jim, do you want
17 to go first, or do you want me to take this one?

18 Oh, it looks like we just had another
19 gentleman join us.

20 CHAIR HILLMAN: Colonel Rosenow, let's
21 hear from you and then Colonel Barkei.

22 LTCOL (R) ROSENOW: All right. Thank

1 you so much for that.

2 So I did obviously thread the needle
3 in terms of having the experience under the old
4 kind of negotiated agreements in a pretrial
5 agreement as well being there when plea
6 agreements first came in. I also had the
7 opportunity to go through some of your prior
8 transcripts from earlier sessions of the Panel
9 and I think we're of -- not of one mind, but of
10 similar minds that there's value in the certainty
11 that's available through the new plea agreement
12 system as set against the former pretrial
13 agreement system.

14 When people are negotiating for a
15 resolution, everybody has to leave kind of happy,
16 kind of upset, and there's a certainty that's
17 only available through this new system that I saw
18 encouraging individuals from the bench to reach
19 agreement where they might not have been able to
20 reach agreement before. So I think there's some
21 significant and real value in terms of finding
22 consensus that was not available before.

1 I also know that at some point there's
2 been conversation about, Is there a real concern
3 about having a meaningful sentencing proceeding
4 when the military judge might be so significantly
5 boxed in, as it were, on length of confinement
6 for instance, floor and ceiling; or whether or
7 not a punitive discharge will be adjudged? I
8 never really saw it that way or felt frustrated,
9 like I was running up against limits in that way.

10 As we all know -- I think it's
11 McIlwain, off the top of my head -- it's been a
12 couple -- even at a couple years it feels like it
13 since I've been there. But a military judge in
14 the military justice system is not a mere
15 referee. So there's an expectation that when you
16 get there the hardest thing that you're doing
17 might not be determining whether or not five or
18 six months is the appropriate sentence for this
19 individual. It might be ensuring that all the
20 terms are in accord with the law. It might be
21 ensuring that there's a fair process that's being
22 delivered for the stakeholders under the rules.

1 So those are the two things that
2 really came to the forefront of my mind with
3 respect to the distinction between plea
4 agreements and pretrial agreements.

5 CHAIR HILLMAN: Thank you.

6 Colonel Barkei?

7 COL (R) BARKEI: I'll start at the
8 macro level just a little bit. My interest in
9 the changes to the plea agreements at the start
10 was noting that it seems that the narrowing of
11 the sentence ranges and terms seem to give
12 commanders more power, whereas, much of the
13 changes from the MJA 2016 and moving forward,
14 even through the last NDAA, seem to be stripping
15 commanders of some of that discretion and power,
16 whether it's an inability to modify sentences
17 after findings or -- and obviously now with
18 special trial counsel -- an inability to effect
19 certain categories of special crimes. So I found
20 it interesting that we are now giving commanders
21 and SJAs, as their legal advisors and probable
22 principal negotiators, the ability to really

1 define a particular sentence.

2 As a judge I find that a little bit
3 limiting from the judge to be that counterbalance
4 to a staff judge advocate and a commander and
5 their determination of what an appropriate
6 sentence would be as those limits got narrower
7 and narrower as the command and staff judge
8 advocate became more comfortable with using the
9 new-found powers. So I just found it curious
10 that that's the direction we're moving there.

11 I will be a little bit of a contrarian
12 I guess on certainty. Just like Mr. Rosenow, did
13 review some of the prior transcripts, and that
14 seemed to be a common sentiment particularly
15 amongst the prosecutors who have testified before
16 the Panel before, talking about negotiating away
17 certain elements or certain offenses or other
18 things that may or may not go into a stipulation
19 to further elaborate on the crimes themselves or
20 the circumstances around there.

21 I think the old system, at least for
22 pre-2019, was just fine with certainty because

1 you took a floor and a ceiling for those
2 particular sentences. So there was some sense of
3 certainty walking in there to the court. So I
4 don't buy that the certainty is a primary
5 motivating factor or a beneficial change, for
6 that matter, for all of the parties.

7 The biggest reason for that, I think,
8 is at the time of negotiation for a narrow
9 sentence, I don't believe that a staff judge
10 advocate and a convening authority have all the
11 information at their fingertips as a judge would
12 after going through the sentencing proceeding.
13 That being the defense having the opportunity,
14 whether it's through an unsworn statement;
15 whether it's through gathering of last-minute
16 evidence; whether it's family members or
17 acquaintances, or even other members of their
18 command. Bringing forth more information than we
19 would have at the time of negotiating that
20 particular plea agreement I think is very
21 beneficial.

22 And not to say that a judge is an

1 expert on identifying remorse or something else
2 in that category, but I do think there is more
3 data, more facts, and certainly more emotion
4 available to a judge at a sentencing proceeding
5 when at least there is some type of range to
6 choose from that has been pre-negotiated by the
7 SJA and convening authority. So I think I --
8 like I said, I'm a little bit of the contrarian
9 on that certainty principle, and I'll stop there.

10 CHAIR HILLMAN: Thank you, Colonel
11 Barkei.

12 And thank you both for actually
13 spending some time looking at what we'd heard
14 from before and -- because we did particularly
15 want to talk to experienced judges who are no
16 longer sitting so we could get whatever
17 perspectives you have on these issues that might
18 be more difficult for judges to actually speak up
19 to us as they continue to sit on the bench.

20 Let me just see if our Panel members
21 have other questions related to plea agreements
22 in particular before we move onto another topic.

1 Colonel Brunson?

2 COL (R) BRUNSON: Hi. So. Colonel
3 Rosenow, I saw that you were a defense counsel.

4 Judge Barkei, I don't recall seeing
5 whether you were or not.

6 But I just -- I think back to my
7 experience as a defense counsel and the number of
8 times that I couldn't get the government to offer
9 a reasonable deal, and so my client pled naked.
10 And it's because we could put our trust in the
11 judge to have the experience to see kind of what
12 a case was really worth. And I just -- I want to
13 know what your thoughts are on that as we have
14 these very narrow, very specific sentences. And
15 as you mentioned, the SJA and the commander don't
16 necessarily have all the information at that
17 time.

18 Do you think -- is there still an
19 opportunity or a use of the naked plea and have
20 we lost that ability for the defense to really be
21 able to make their case?

22 LTCOL (R) ROSENOW: It's a great

1 question, and I can only really rely on my lived
2 experience, because as a defense counsel I was
3 operating under the pretrial agreement system. I
4 tended to -- and people make their own decisions
5 for whatever normal or abnormal reasons, but I
6 tended to not see a lot of naked, judge-alone
7 guilty pleas in my courtroom. I just didn't. I
8 know they were out there and I know that people
9 were doing them, but I didn't see it under the
10 plea agreement system.

11 I would think that the way that a
12 negotiation would go that would be helpful for
13 the defense who was an advocate and putting their
14 faith in the judge's wisdom and their
15 circumspection -- and maybe just like the
16 contradistinction between the case that they
17 planned to put on and what they expected the
18 government would do once maybe they tempered
19 their work a little bit to -- when they knew they
20 were going to get a guaranteed conviction and
21 they were just looking over the horizon to how
22 much are we going to increase sentence. Maybe

1 being able to raise that floor is a significant
2 benefit.

3 Of course the normal experience before
4 was there's a cap and you try and beat the cap,
5 right? And there wasn't going to be a floor
6 underneath it that was going to be drawn up. But
7 now through negotiation you could say, well at a
8 minimum there's going to be this or there's going
9 to be that. And it's a roundabout way of
10 answering that I think that the advocates, if
11 given the time -- and they are given the time
12 because as you all are I'm sure observing in
13 these conversations and your own research,
14 finding that there's many less cases as compared
15 to how much the system used to push through.

16 If given the time to look at the
17 individual circumstances in their case, they're
18 going to be able to put forward an argument for
19 an agreement. And if that argument is not
20 accepted (phonetic) -- or well received, I should
21 say, by the government, they're going to be able
22 to go in and make that decision in front of the

1 military judge.

2 So candidly, I wouldn't see a big
3 difference on that, and I think they still have
4 that opportunity to go with the judge.

5 COL (R) BARKEI: Ms. Brunson, I'll
6 chime in just a little bit. I echo Mr. Rosenow's
7 final conclusion that there is still room for a
8 naked plea. I think it all goes back to knowing
9 your judge if you're a defense counsel. And I
10 regret and apologize for not having been a
11 defense counsel to bring that perspective to the
12 table, but it's really knowing your judge, and
13 basically also assessing the negotiation tactics
14 and abilities of both the Office of the Staff
15 Judge Advocate and the convening authority.

16 So if the terms on the other side of
17 the table from the defense counsel aren't within
18 a client's prerogative to accept or something
19 that's advantageous to that particular case, I
20 think there is still room for accountability by
21 the actual plea of guilt, which is a major factor
22 obviously that we look at for those particular

1 pleas.

2 The naked part of it, again I think
3 forum has a lot to do with it. Are we at a
4 special court-martial? Are we at a general? And
5 the types of offenses that are still in play, at
6 least for my own assessment of a particular case,
7 would have a great effect on whether or not
8 advising a client or choosing to go through a
9 naked plea. And then it goes back into
10 resourcing the actual sentencing process.

11 I know from at least one of the other
12 questions that we were given is the emphasis and
13 the skills. And I guess we'll get there for
14 sentencing on what counsel are putting in there,
15 but I think that turns the table or the
16 responsibility back to the defense again, and,
17 quite frankly, upon the government in turn by
18 going through a naked plea to put that much more
19 preparation and emphasis into presenting that
20 particular sentencing case if you choose to go
21 naked.

22 So again, just coming full circle, I

1 think there's still an opportunity, but it goes
2 -- it comes to an even greater effect of knowing
3 your judge.

4 CHAIR HILLMAN: Thank you, Colonel
5 Barkei.

6 Mr. Libretto, did we successfully get
7 Admiral Purnell?

8 MR. LIBRETTO: Yes, ma'am, I believe
9 he has called in now.

10 Sir, are you on the line?

11 RADM (R) PURNELL: Yes, I am. Good
12 morning.

13 MR. LIBRETTO: Good morning, sir.

14 CHAIR HILLMAN: Good morning.

15 Thank you, Michael, for your
16 persistence.

17 We'd love to hear your thoughts,
18 Admiral Purnell, as you can hear us talking about
19 plea agreements here, but first if you could just
20 introduce your background a little more -- we do
21 have your bio with us -- and then let us know
22 what you'd like to add for our edification

1 related to the current plea agreement system.

2 RADM (R) PURNELL: All right. I was
3 on active duty until February 1st of last year.
4 My last position was as the chief judge of the
5 Department of the Navy for all Navy and Marine
6 Corps trial and appellate judges. Before that I
7 was the chief trial judge. And before that I was
8 the circuit judge in Norfolk for the central
9 judicial circuit. I'm currently serving as an
10 immigration judge. I have some experience as a
11 prosecutor and significant experience as a
12 defense counsel.

13 And I know you were talking about the
14 new plea agreements, but I didn't hear what the
15 question was that was being discussed. I got in
16 on the very last bit of the last answer.

17 CHAIR HILLMAN: Understood. Well,
18 we're grateful that you found a way to join us
19 this morning. So we asked for perspectives on
20 the current plea agreements versus the old
21 system; the pre-2019 system; the impact on
22 judicial discretion, of changes; and anything

1 else that you think is important for us to
2 understand as we assess how plea agreements are
3 working now.

4 RADM (R) PURNELL: I think that the --
5 one major disadvantage to the current system I
6 think is that it --

7 CHAIR HILLMAN: Admiral Purnell, did
8 we lose you there?

9 MR. YOB: I'd just ask, if you're on
10 virtually, could you please mute your connection
11 so we don't have any interference? If you're not
12 speaking please mute if you're on the connection.

13 CHAIR HILLMAN: It looks like we lost
14 Admiral Purnell; so, Michael, if you see him
15 return we will go right back as we were just
16 about to get that incredible insight from him.
17 So we were very close.

18 MR. LIBRETTO: Yes, ma'am, and I --
19 he's still in. He's on mute. So I've sent him a
20 message letting him know that.

21 CHAIR HILLMAN: Ah, okay. Well that's
22 helpful actually. We should -- okay. Well, we

1 will jump backwards then to pick up his comments
2 when he un-mutes, when we manage to reach him
3 again. But I think we'll move onto the next set
4 of questions about pre-referral judicial
5 authority. And I'd love your thoughts.

6 There are several more detailed
7 questions that we have here, but, Colonel Barkei,
8 let's start with you on this one. What are your
9 thoughts about how accessible to the defense the
10 pre-referral judicial proceedings are? What
11 effects do you think the expansion of matters
12 that are litigated under Article 30a are having
13 -- will have on the military justice system and
14 your overall sense of how that pre-referral
15 judicial authority is operating now?

16 COL (R) BARKEI: Sure. So I think for
17 obvious reasons the pre-referral authorities are
18 absolutely essential to our current process given
19 the nature and the amount of data and potential
20 evidence that third parties are holding, whether
21 it's in the military justice system or currently
22 in the civilian system. I'm working through --

1 it's rare for at least -- whether it's a
2 sensitive crime or what I'll characterize as a
3 serious crime where we're not reaching out to
4 obtain some type of administered pre-referral,
5 using the military term, systems. So it's an
6 absolutely necessary tool.

7 One potential negative that I had
8 heard early on in the process from the defense is
9 that it gives the particular reviewing judge
10 access to evidence and, whether it's through the
11 affidavit or otherwise, information about the
12 case that is one party-presented. Obviously we
13 depend on the judges to maintain their
14 independence and kind of push that stuff to the
15 side after we've acted on the pre-referral
16 warrant or subpoena.

17 I don't know that we have big enough
18 jurisdictions unless, we set up some type of
19 clearinghouse or special duty assignment to
20 handle those pre-referrals, to get away from the
21 presiding judge having access to those pre-
22 referral matters. So that's more of a resourcing

1 issue I think than it is necessarily a conflict
2 or concern, but it was just one that was brought
3 up early on in my tenure that I thought I would
4 raise.

5 So the negatives of that process are
6 obviously the time it takes upon returns. We are
7 extending our litigation aspects. At least that
8 was my assessment at the time that I -- that
9 would transpire between acting on a pre-referral
10 warrant. And then actually seeing the referred
11 charges was generally a relatively significant
12 amount of time. That obviously has to do with
13 the complexity of the data or the information
14 that's being returned.

15 But I think the critical question
16 that's asked here is the defense access. And I
17 do think that the defense is somewhat at a
18 disadvantage through the quick access, the
19 government's ability to have that unilateral --
20 with the assistance of rather large law
21 enforcement organizations to present that
22 affidavit and that request. It's something that

1 the defense, at least during my tenure -- I hope
2 they're getting more apt to use the process or
3 try to obtain more investigative subpoenas and
4 then get the assistance of staff judge advocates
5 as well and convening authorities.

6 But I do think that they suffer a
7 little bit from being able to obtain those in a
8 timely manner; because I do think from the
9 defense perspective and then from the judicial
10 perspective primarily, I think defense access to
11 greater third-party information prior to referral
12 would make the motions and litigation process
13 much more efficient and informed, having that
14 equal basis of the defense, whether it's a
15 victim's additional text messages or Facebook
16 posts or something of that nature that had to be
17 obtained through a third party just to present
18 that counterbalance. And that's obviously only
19 using one small example.

20 But I do think expanding the defense
21 access, whether it's through resourcing or
22 otherwise -- the Army just within the last couple

1 of years has tried to and has done or made an
2 increase in defense investigators and so forth.
3 That's great for individual investigation
4 processes, but what we're really talking about
5 here is that third-party possession of
6 information.

7 And I find it, in my current job,
8 Google's recent announcement about how they're
9 not going to be storing some of this information
10 in their own cloud services. It will be on the
11 individual handheld devices and therefore at a
12 limited period, as well as -- are really going to
13 throw some very interesting potential roadblocks,
14 not only just for Google and potential other
15 remote computing services and so forth, but I
16 could even see this extending into things like
17 medical records, or other health care information
18 and so forth. Where if companies start deciding
19 to remove these large storage applications, it's
20 really going to hamper all the parties, quite
21 frankly, from obtaining that necessary
22 information, or at least necessary to the extent

1 that we now know what these can prove; whether
2 it's through geo-fencing; whether it's content of
3 communications; whether it's locations of uses of
4 devices and so forth.

5 It was strange at first taking the
6 bench and working on these, but it became what I
7 think a very effective tool as I saw the case
8 very early on in the investigatory stage and then
9 when they were actually presenting the evidence
10 at trial. It's absolutely important and it's
11 important to a panel for a contested case as
12 well. Most of the contested cases that I saw,
13 taking on that more referee role rather than the
14 findings portion -- that kind of data and
15 information was really impactful upon a panel,
16 regardless of which side was able to present that
17 evidence. So I found that to be an advantage as
18 well, using that pre-referral authorities.

19 With that I'll hold off knowing that
20 there's plenty to come from others.

21 CHAIR HILLMAN: Thanks, Colonel
22 Barkei.

1 Colonel Rosenow?

2 LTCOL (R) ROSENOW: Thank you. The
3 Air Force experience might be -- may be
4 significant to the Panel, I don't know, but it is
5 certainly different. There was no overlap in my
6 time on the bench where we had this 309 pre-
7 referral judicial proceeding authority where the
8 same judge, at least to my knowledge, served in
9 that capacity and then served as the trial judge.
10 There's no admission or suggestion from the Air
11 Force Trial Judiciary that that would be a
12 disqualifying thing to have served an earlier
13 role and then served again as the finder of fact
14 or as the judge in a case with members. It just
15 wasn't the case.

16 Indeed, our docketing form that gets
17 sent out to the bases, at least at the time that
18 I was on the bench, had them fill out whether or
19 not a military judge had served as a preliminary
20 hearing officer. And if so, who was the judge?
21 And had a military judge been involved in 309
22 proceedings? And if so, who was the military

1 judge? And my understanding is that there was
2 some de-conflicting that went on there. So you
3 have a process that's maybe not required to be
4 that stovepiped, but is.

5 It is helpful in a certain sense of
6 allowing for an outside observer to go, Well, now
7 there's another look at this that's completely
8 and wholly independent from the earlier look,
9 although as a judge I'll admit to sua sponte
10 reconsidering many things across my time. So I'm
11 certainly able to judge my own work impartially.
12 So I would just say that that's a slight
13 distinction that would not present a disadvantage
14 or a frustration at least in the volume of work
15 that we were doing in the Air Force when these
16 things were coming through.

17 One comment I would add before moving
18 to the defense issue is, This is not new, but it
19 feels as if it is new. Often when you're getting
20 presented these applications it was not an
21 irregular thing at all for -- and we have our
22 whole system that's available for anyone to

1 review in terms of our Uniform Rules of Practice.
2 But it was not irregular at all for me to reject
3 an application, and sometimes just for
4 administrative requirements.

5 An easy example might be you did not
6 give me information that suggests that this was
7 pre-referral. That might be rejected in the
8 sense of a follow-up question back and forth
9 that's captured in a written record that's
10 ultimately attached to a record of trial, but it
11 is a rejection nonetheless in the first instance.

12 And if, as the previous speaker had
13 mentioned, if we are working against the clock
14 here and there hasn't been a preservation request
15 that's successful, or there is a disposition
16 policy that kicks these things out sooner rather
17 than later, there's some real concerns that the
18 advocates who are applying for these pre-referral
19 applications, or excuse me, submitting these pre-
20 referral applications aren't getting them right
21 in the first pass.

22 So I mention that just because it

1 seemed too often that the first pass was not the
2 final pass. And there are consequences that flow
3 therefrom, so there is an opportunity for
4 additional training. That opportunity obviously
5 will benefit all parties and litigants once it is
6 a more regular process to the defense counsel to
7 seek these same authorities.

8 Now on that point, I will tell you as
9 well, I never once ruled upon a defense request
10 the time I was on the bench. I did dozens of
11 these things across my years on the bench and I
12 never had one pass through from trial counsel. I
13 don't recall ever litigating either any kind of
14 criticism of a trial counsel decision with
15 respect to an earlier application either. So it
16 may be that these defense investigators -- and
17 there's a program in the Air Force that's moving
18 forward as well as we speak. But it may be that
19 when you have people who are more individually-
20 oriented towards a particular case and pursuing
21 evidence inside a particular case all the times
22 that these kinds of applications come through.

1 Then the last thing I would just say
2 is, Yes, if I was king for the day and I were
3 able to draft the rules and we could also have
4 the bandwidth of the judiciary to treat these
5 things, I certainly would like litigants to be
6 able to apply for these things without having to
7 go through the other side and not having to make
8 some kind of calculation of risk or benefit as to
9 whether or not they're indicating too much or
10 tipping their hands in some way.

11 Courts are independent for a reason
12 and we set ourselves apart from the litigants who
13 are engaged in this zealous advocacy so that we
14 can make a determination about the truth-finding
15 function of the court-martial downstream. But
16 the pre-referral authority is really about,
17 Should this even be a trial? So if I were king
18 for the day, as I had mentioned, I would like to
19 have it more expansive for everyone.

20 CHAIR HILLMAN: Thanks, Colonel
21 Rosenow.

22 Michael, did we get Admiral Purnell

1 back?

2 MR. LIBRETTO: Yes, ma'am, I believe
3 we did.

4 CHAIR HILLMAN: Admiral Purnell, if
5 you're back we'd love to hear from you on plea
6 agreements, and then maybe also on pre-referral
7 judicial authority if you have thoughts on that,
8 too. But we lost you right before you shared
9 what you wanted to let us know about the plea
10 agreement system.

11 RADM (R) PURNELL: Can you hear me
12 now, ma'am?

13 CHAIR HILLMAN: Indeed.

14 RADM (R) PURNELL: All right. So I'm
15 going to start with the more recent question
16 first. I think that we did not have much
17 difficulty implementing pre-referral authorities
18 in the Navy and Marine Corps. We're averaging, I
19 believe, about 600 requests a year. We have a
20 program that is similar to the Air Force's in
21 that the officer who is reviewing the request for
22 a pre-referral authority is typically different

1 than the judge that will preside at trial.

2 We try and use judges from different
3 circuits or judges that had been designated only
4 as special court-martial judges to do those.

5 Since this is almost entirely on paper, it
6 doesn't really require the reviewing judge to be
7 co-located. And so it's something we have been
8 able to do remotely.

9 I think that it is a tremendous
10 capability that has aided both the search for
11 truth and the ability of the government to assess
12 the merits of the case. I mean, I think it helps
13 in the truth-finding function. I think it is
14 slowing down the process significantly because in
15 a social media era the volume of discovery that's
16 returned from social media providers is
17 extraordinary, and so it adds -- not in every
18 case, but in many cases. And so it is something
19 that I think that is increasing the length of the
20 process.

21 We in the Navy and Marine Corps, I
22 believe, are rejecting maybe 5 to 10 percent of

1 the requests. And that's not primarily because
2 they're substantively deficient, but mostly
3 because they're procedurally or administratively
4 deficient. That is the biggest issue.

5 We worked with Reserve judges from our
6 Navy and Marine Corps judiciary -- Reserve
7 judiciary who were U.S. attorneys and also we had
8 a couple of Google executives in our military
9 judge Reserve community. And we worked with them
10 to implement our policies. And our understanding
11 is that our rejection rate is not really
12 different than the U.S. attorneys see in terms of
13 what comes back to them rejected.

14 And I do think the -- probably the
15 number one complaint I hear from the defense bar
16 is that the changes that make the process more
17 similar to the federal system failed in not
18 giving these authorities to defense counsel.
19 They note that their federal public defender
20 counterparts have the right to issue subpoenas
21 and to seek preservation directly. And so they
22 would I think argue that the system change

1 advantages trial counsel and it's one way in
2 which the defense wasn't afforded similar
3 opportunities.

4 The defense have been using pre-
5 referral authorities on occasion to challenge
6 pretrial confinement and have a handful of times
7 each year since pre-referral authorities were
8 granted challenge pretrial confinement, but
9 they're reluctant, I believe, to request the
10 assistance of trial counsel and to make
11 disclosures to request the government to seek
12 that information.

13 CHAIR HILLMAN: Thank you, Admiral
14 Purnell.

15 RADM (R) PURNELL: So that --

16 CHAIR HILLMAN: Go ahead, sir.

17 RADM (R) PURNELL: No, so that is what
18 I had to say really about the Article 30 pre-
19 referral authorities. I'm happy to answer any
20 questions.

21 With respect to the plea agreements,
22 I think that we made that transition fairly

1 successfully as well. I think it was -- I don't
2 think we expected a lot of difficulty
3 implementing that change and I don't think we
4 experienced it. The judges' role under the new
5 system is -- continues to be to safeguard and
6 ensure that a plea is provident. Now I think the
7 judge has the responsibility as well to ensure
8 that justice is being done in the plea agreement.

9 And I guess the one criticism or
10 observation that I would have is that I believe
11 that most military judges who had served before
12 and after the change just observed a significant
13 decline in the amount of effort expended by both
14 parties to present sentencing evidence. Because
15 if there's a term provided in the agreement, what
16 really is the incentive or the motivation to do
17 that? I think that there are really good reasons
18 to do that. I think we tried to pass what those
19 good reasons were in a training -- from a
20 training perspective to both the trial and
21 defense bars, to their TCAPs and DCAPs.

22 But I would say that the quality of

1 sentencing cases has declined dramatically
2 because -- and frankly, I think in most cases
3 there's not a reason to do so and so you might
4 expect that it would -- it wouldn't have an
5 effect on those cases where the sentencing really
6 matters because it's a judge-alone case and it's
7 not a plea.

8 But I think not doing it routinely in
9 every case has sort of degraded the competency
10 given that there aren't -- there are a small
11 number of cases being tried annually in the
12 services, and so I think that we're just not
13 seeing as much time and energy invested in
14 sentencing as we used to.

15 And again, I think for the majority of
16 cases that have plea agreements it's probably not
17 necessary or something that only has an impact
18 much later when there's information that's not in
19 the record on appeal. But that is a trade-off
20 that has been observed, I think.

21 CHAIR HILLMAN: Thanks, Admiral
22 Purnell.

1 I'm going to go off script a little
2 bit just to ask all of you about something you
3 just raised, which is the quality of advocacy and
4 the preparedness of counsel that you have seen in
5 your experience in more recent courts than we've
6 all been able to see that many of.

7 So, Admiral Purnell, we'll just start
8 with you and then we'll maybe go back through
9 Colonel Rosenow and Colonel Barkei.

10 Admiral Purnell, what do you think
11 about the preparedness of the advocates before
12 courts these days?

13 RADM (R) PURNELL: Well, I think that
14 in general I didn't -- when I was suggesting that
15 counsel were much less prepared or less thorough
16 in sentencing, it wasn't to suggest that they're
17 unprepared altogether. I think that it simply
18 shifted priorities and what they're focusing now
19 on is either contesting the case or advocacy to
20 the government or negotiating the plea, all the
21 things that used to be invested in. Just the
22 sentencing piece is what I saw drop off.

1 I will raise an issue that I think was
2 not directly asked by any of your questions, but
3 I think in a system that -- where the caseloads
4 are lower it's very difficult to build and retain
5 experience when there just aren't that many
6 contested cases in the system. Counsel simply
7 don't have the opportunities that they've had in
8 the past and so it's challenging. It's not
9 something I think you can necessarily train to or
10 obtain in classroom settings or in training
11 evolutions. It's something that's gained by
12 experience.

13 You know, you only see -- in a
14 training environment you don't have your case
15 fall apart because of a withering cross-
16 examination or a withering direct and then figure
17 out how to have to respond to that. It's just --
18 it doesn't provide that kind of environment.
19 There's really no substitute for experience. At
20 least in the Navy and Marine Corps when we're
21 trying well fewer than 200 cases a year and only
22 a fraction of those are contested, it's really

1 difficult to maintain experience levels.

2 So I would say that our trial counsel
3 and our defense counsel are smarter than ever and
4 come with as much dedication, investment, and
5 enthusiasm as I have ever seen, but I think
6 there's an issue about sustainability given that
7 the Navy and Marine Corps may be trying --
8 contesting -- fully contested cases, maybe 30 a
9 year. And so I don't think that your average
10 captain or major or lieutenant or lieutenant
11 commander has the same experience base that
12 they've had in the past.

13 As the chief judge I was a community
14 sponsor for the Military Judge Litigation Career
15 Track and was one of the plank owners of that
16 program. And certainly over the years the
17 experience levels of applicants has just
18 decreased significantly. And it's not that
19 there's -- they're not working. Their work has
20 shifted to other areas. There's far more --
21 hundreds of case reviews going on in every
22 command at the time. They're much -- to a much

1 higher degree than I think there was
2 historically.

3 But I think there is -- there was some
4 trepidation on the boards I sat to select career
5 litigators about that they tried five or six
6 contested cases. Is that really enough to make a
7 call that this is really time to admit them as a
8 career litigator? And at one point we might have
9 -- at the initiation of the track we might have
10 been seeing folks who had 20 or 30 contested
11 cases under their belt as sole counsel and now we
12 might see 5 or 6 or 7 typically as co-counsel,
13 you know, and not as the sole counsel.

14 So it's not -- it doesn't have
15 anything to do with the changes per se. It has
16 to do with determinations by commanders about
17 whether this process is efficient enough and/or I
18 think changes in societal attitudes and also to
19 the -- at least in the period of 2000 to 2018 or
20 2019 just the high ASVAB and high quality
21 recruits that are in the services.

22 I don't think that anyone should

1 underestimate the counsel that we have now, but I
2 don't think that I can say that the experience
3 level is the same for new career litigators now
4 as it was 10 or 20 years ago because they just
5 don't have the same opportunities to contest
6 cases.

7 CHAIR HILLMAN: Thank you, Admiral
8 Purnell.

9 Judge Redford has a follow-up.

10 JUDGE REDFORD: Admiral Purnell and
11 Colonel Barkei and Colonel Rosenow, this is Jim
12 Redford. Thank you for your service and your
13 distinguished careers of helping military justice
14 for so many decades.

15 Admiral, you just said that the
16 experiential level is a challenge. If, and I
17 guess I'd like to hear from all three if we have
18 time, Madam Chair, you're the king or queen of
19 the universe, you're the person who can make
20 everything happen.

21 What would you do, what changes would
22 you make to the system to obviate, if possible,

1 or lessen, the experience gap? What would you
2 do? Active duty, reserve, retired, retired
3 recall, the world's your oyster, tell us what you
4 would do.

5 LTCOL (R) ROSENOW: I guess I go first

6 PARTICIPANT: -- oh, go ahead, right,
7 please, Colonel.

8 LTCOL (R) ROSENOW: I guess I'll go.

9 All right, if I were in charge, the first thing
10 I'll say is what the Admiral just mentioned is
11 entirely adopted and true in my own experience in
12 the United States Air Force.

13 I went back and forth as he was
14 speaking because it was a lengthy and detailed
15 response, and I was nodding if you were following
16 along. And I wondered what adjective I would use
17 that would be acceptable, but not overstating for
18 emphasis.

19 I think it's a serious and a
20 significant problem, as it may -- as several or
21 both of those things together. You don't just
22 experience in terms of the courtrooms, Oh, they

1 missed an objection. It's the kind of evidence
2 that's brought to the courtroom. It's the kind
3 of witnesses that are marshaled for the trial.

4 It's the ability of that witness to be
5 able to give their testimony in a truthful manner
6 that's well received and allows for the fair
7 determination of the action where he or she isn't
8 distracted because they've been mistreated or
9 ignored on the way.

10 And I say that mistreatment not in
11 terms of any, you know, overstatement again.
12 It's just not the kind of delicate touch that you
13 might have through the thousands of hours of
14 experience that you get when you're dealing with
15 witnesses over and over and over and over again
16 and getting into the courtroom.

17 So I think it's a significant and
18 serious concern. To answer your question, if I
19 had my druthers, I've mentioned this to people in
20 company before, I think the real problem is at
21 the pipeline, there's no lateral hires, excuse
22 me, that are coming in.

1 It's a pipeline from recruiting,
2 brilliant people, and then giving them or not
3 giving them opportunities to become brilliant
4 litigators, and everything that goes into that.

5 So I think the easiest way, and I
6 don't think it would be necessarily easy, but the
7 easiest way that I would see is how do you
8 increase repetition? How do you allow for a
9 cadre of individuals who are committed early on
10 in their careers to doing this to be able to
11 continue to do this over and over?

12 My own experience, just using some
13 data points in case they would be useful as a
14 demonstration but not an answer, my own
15 experience was I went to Holloman Air Force Base
16 in New Mexico. Fairly busy, not the busiest base
17 in the world.

18 I raised my hand every time over two
19 years, and I was able to do eight cases, raising
20 my hand every single time over two years. One
21 time kind of as lead in a special court-martial,
22 but pretty much sitting second chair to people.

1 I became the Area Defense Counsel for
2 two years at Holloman, I did 40 cases, raising my
3 hand every time, traveling about 180 days on the
4 road, trying to do as many cases as I could, and
5 learn as much as I could and contribute as much
6 as I could to my clients.

7 And then I went to two more cycles as
8 a prosecutor ultimately, and I think with 94
9 cases in total as an advocate. And then I became
10 a judge, like I said, for five years and did 101
11 cases. Most of those cases are with numbers
12 across both branches.

13 Probably a third to a little bit more
14 than a third are with members included or, excuse
15 me, or with contested. You would call them
16 unlitigated cases.

17 So that's my experience of raising my
18 hand and also having leaders who were looking out
19 for me and kind of helping me build a path that
20 was atypical in the Air Force. This was before
21 we had a career litigation development plan that
22 they'd integrated and maybe will make difference.

1 But that's what you could do over my
2 years in the JAG Corps, which was 2008 to 2023,
3 if you raised your hand and you traveled nearly
4 as much as you possibly could. So I ended up
5 with about 200 cases.

6 If you go back ten years before me, a
7 guy or gal acting like me would have double that.
8 So I don't know exactly what the floor would be,
9 but I would humbly submit to you since I was
10 asked to answer the question, that I think you
11 need to look seriously at whether or not this is
12 a universally recognized skill for the
13 professional development of all JAGs.

14 Or if there's a specialized cadre that
15 we could start developing, not necessarily for a
16 first assignment or second assignment, but pretty
17 soon thereafter, to say you're on this path and
18 we're going to give you all of these
19 opportunities so that you can get better and
20 better and better.

21 But I know there are competing and
22 significant interests that are set against that,

1 including Article 6 and TJAG in every service
2 having the flexibility of putting the right
3 person to the right job at the right time.

4 So I'm circumspect enough to know that
5 while military justice is job one for me, in
6 terms of my own experience, the JAG Corps
7 provides in all the services so much more to the
8 warfighting arms of the country. Thank you.

9 CHAIR HILLMAN: Colonel Barkei? Thank
10 you, Colonel Rosenow.

11 COL (R) BARKEI: Yeah, I'll just tie
12 in on Mr. Rosenow's last comment. I do think the
13 bottom line answer to the question is it's a
14 career management issue for the JAG Corps itself.

15 It requires a significant change to
16 our progressive model to increase those
17 repetitions early and then throughout someone's
18 career, keeping in mind that in our pyramid
19 structure, at the end of the day, we still need
20 leaders in the JAG Corps who can advise
21 commanders on the other issues and the
22 administrative law issues, the ethics and so

1 forth.

2 And it can't just be a military
3 justice particularly, as the rules tend to remove
4 some of the commanders from that military justice
5 process. So in some effect, it almost -- it
6 creates a minimizing effect for those later stage
7 career management, or excuse me, leadership
8 advisory roles that commanders --

9 But I'd like to just take a moment to
10 compare some of my recent assessments managing a
11 district attorney's office. I don't think that
12 competency or preparedness is an issue for the
13 JAG Corps litigators.

14 I think, as the Admiral and Mr.
15 Rosenow put forward, and I think it's no surprise
16 to any member of the Panel, that the repetition
17 is probably the greatest challenge. It is not
18 competency, it's not training, it's not
19 preparedness, it's not caseload.

20 In my own practice now, some of the
21 attorneys that I observe, the time to prepare for
22 a very highly complex case is minimal compared to

1 what I think most judge advocates have available
2 to them.

3 And that's because of the amount of
4 time spent in court, which does add to their
5 litigation skills. But it's not in the final
6 stage of a findings, it's not in front of a jury
7 trial or a bench trial.

8 It's all of the motions and pre-
9 litigation matters. It's all of the literally
10 wheeling and dealing in front of a judge from the
11 initial appearance, on through arraignments,
12 pleas, and sentencings, and other motions
13 hearings that I think the civilian sector builds
14 up a little bit more of those comfort-in-
15 litigation skills, but not necessarily expertise
16 in the both procedural and substantive matters.

17 From my own experience being a
18 stickler for evidence, I know I've only been with
19 the DA's Office for six months, but I've yet to
20 hear an evidentiary objection in some of our jury
21 trials, or at least not one of prime substance.
22 So I don't think it's the competency, the

1 experiential factor.

2 And if I were king for the day, I
3 think, as Mr. Rosenow put it, we are in a
4 pipeline. We bring in young officers who, for
5 the most part, not consistently true across the
6 board, but for the most part, and having been the
7 Career Management Branch Chief for a while, we
8 bring in those officers who we have a vision of
9 being long-term in service. That's the hope, and
10 so they don't come in with a lot of experience.

11 I think our training programs are over
12 and above what most civilian agencies are able to
13 offer. We're in the process of hiring a new
14 young prosecutor in our office and the amount of
15 training that we're going to be able to offer
16 that individual, outside of literally leaders in
17 the DA's Office sitting down with that person,
18 are minimal to none when you compare it to what
19 we in the military offer our new prosecutors. So
20 I don't think that's the issue.

21 How to increase those repetitions --
22 both of your prior speakers are correct. It has

1 to be greater longevity in those primarily
2 focused litigation billets.

3 There can be a career sacrifice, which
4 has been my position for several years now, that
5 that can come back to haunt the individual and/or
6 the Corps itself in how we develop our leaders
7 and what they're able to -- the positions that
8 they're able to take later on in their career.

9 But as far as increasing those
10 repetitions, I will -- I don't have a great
11 answer, other than identifying those -- it could
12 be, I know the other services do this more than
13 the Army does, having some of those pooled
14 resources and experts.

15 We have those programs in the Army
16 too, the trial counsel assistance program, the
17 defense counsel assistance program, those experts
18 who kind of jump in and help out and so forth.
19 But that's not necessarily a repetition issue.

20 And unfortunately I don't have an
21 assessment, and I don't know if anyone can at
22 this point, of what the special trial counsel

1 program is offering in the increase of
2 repetitions for individuals or how much
3 assistance they're having in reaching out.

4 But one thing that the Army Judge
5 Advocate General's Corps has done, and this is
6 only about three or four years old now, is the
7 Admiral pointed out that a lot of the workload
8 for counsel is those other case reviews and so
9 forth.

10 What we did is we created military
11 justice advisors. They are at the command level
12 doing a lot of those case reviews, and then
13 transitioning those cases that are ripe for
14 litigation to our designated trial counsel, or to
15 our prosecutors.

16 I think it's great in theory, but I
17 don't know from the practicality that it's
18 actually resulting in any more litigation
19 opportunities. Because I just don't know that --
20 I think my general answer, and I better cut it
21 short here, is that I just don't think we're
22 litigating as an organization as much, period.

1 With those reduced, I know the case numbers prove
2 that over time.

3 But when you're talking about reduced
4 litigations across the board, incentives to
5 litigate and otherwise, I don't know that there's
6 a statutory or a organizational change that will
7 bring about more opportunities without somebody
8 signing up for 10, 15, or a 20-year career solely
9 dedicated to litigation.

10 CHAIR HILLMAN: Thank you, Colonel
11 Barkei. I'm going to -- we have a few, we have
12 some topics we'd like to hit. We have about 30
13 minutes left to get your insight on these issues.
14 I want to check in with the Panel members and see
15 if there's anything in particular they want to
16 follow up on.

17 First the folks who are joining us
18 remotely. General Ewers, Colonel Gunn, Judge
19 Kasold, Judge Somers, do you -- do the four of
20 you have any questions for our experts here?

21 JUDGE SOMERS: Hi, this is Judge
22 Somers. I don't have any questions. You've

1 covered everything that I was thinking of.

2 CHAIR HILLMAN: Okay, thank you.

3 Anybody else?

4 COL (R) GUNN: I don't right now.

5 CHAIR HILLMAN: Okay, thank you,
6 Colonel Gunn. Okay, folks in the room here then,
7 any questions?

8 MG (R) EWERS: I'm sorry, I'm sorry,
9 Dr. Hillman.

10 CHAIR HILLMAN: No, go ahead.

11 MG (R) EWERS: This is John Ewers
12 here. I just a got a little bit confused by the
13 timing issue. So, and I guess just in sheer
14 numbers, the phenomenon that was referred to by a
15 couple of the speakers about how our -- the
16 number of cases that we litigated has gone down,
17 that's the same complaint we had in 2005, 2010.

18 I'm just wondering, over the last 20
19 years, and in the last five years particularly
20 since I left the Marine Corps, how does the
21 caseload compare? How does the caseload compare
22 now to the way it was then? And what do you

1 think the new trial counsel, the Special Trial
2 Counsel Office, is going to do to the caseload?
3 Thanks.

4 CHAIR HILLMAN: Thanks, General Ewers.
5 Admiral Purnell, I think that's yours.

6 RADM (R) PURNELL: All right, well, I
7 think the caseloads when General Ewers retired
8 were probably in the Marine Corps and the Navy
9 somewhere between like 250 and 300 cases a year,
10 including general and special courts-martial.
11 Does that sound about right, sir? And --

12 MG (R) EWERS: Yeah, I'm sorry, yeah,
13 that sounds about right.

14 RADM (R) PURNELL: And so I think that
15 this last year for fiscal year 2023, the Navy did
16 about 165 courts-martial and the Marine Corps did
17 about 185. And so there's -- the rapid drop-off
18 isn't happening, but there's still erosion.

19 And the -- I talked with the chief
20 judge, and you know, it's very early still in
21 2024, but they said that extrapolating this
22 year's numbers so far would result in about 132

1 courts-martial in the Navy and the Marine Corps -
2 - I mean, in the Navy, not in the Marine Corps.
3 I don't have the Marine Corp's numbers.

4 So continued erosion, at least at the
5 margins. I think this really kind of answers the
6 last question, but to General Ewer's question
7 about the Office of Trial Counsel, I really think
8 that gives us the best opportunity to be able to
9 improve having the right resources in the right
10 places.

11 I'm aware that all of the services,
12 and I participated in a lot of these
13 conversations, went through a very exacting
14 review to figure out how many trial counsel they
15 really need for cover defenses and where they
16 should be located and what other support staff
17 they needed.

18 Because I have sense that we have the
19 wrong balance. And I think that each of the
20 services had tried to rectify it. But I think
21 that unity of effort is going to pay significant
22 dividends to make sure that we're having the

1 right types of officers and enlisted and
2 civilians in the process at the right places.

3 And they have the ability to quickly
4 move them around. And so the one change, you
5 know, that I would like to see, is to have the
6 defense counsel and then the trial counsel for
7 non-covered offenses also be in single commands
8 so that the leaders of those efforts could make
9 the same sorts of decisions.

10 I mean, they have pyramid
11 organizations that culminate in a chief defense
12 counsel for the Navy and a commander Naval Legal
13 Service Command who's ultimately in charge of the
14 trial counsel. But they're still organized in
15 command structures. And I'm not sure that that
16 is the most efficient or effective model.

17 So that's my answer to General Ewer's
18 question. I think the Office of Trial Counsel
19 has great promise and I would expect them on a
20 number of fronts to be able to sort of establish
21 what the worth of their case is, establish their
22 prosecutorial guidelines, and to be able to

1 figure out what level of experience and what
2 flavor of personnel are best suited to doing the
3 various steps in the process, with the hopes that
4 maybe litigation would be more constrained.

5 And I think that the Colonel raised a
6 good point also, is at some point it may be, I
7 think, necessary to review whether every judge
8 advocate needs to be certified, 27(b)-certified
9 as counsel of record in courts-martial. I just
10 don't know given the low number of cases, that
11 stretching it as thin as we are to get everybody
12 experience is necessarily a viable model for the
13 future.

14 Thank you.

15 CHAIR HILLMAN: Thank you. General
16 Ewers, any follow-up on that?

17 MG (R) EWERS: No, ma'am, thank you.

18 CHAIR HILLMAN: Okay, we're going to
19 shift into sentencing here, and I'm going to ask
20 you all to be a little bit brief in your
21 responses so that we can get any follow-up from
22 the Panel members that they might have.

1 So you can see the lineup of the
2 questions that were set out by our team that's
3 been thinking about the changes in the sentencing
4 processes. In particular, I just wanted to queue
5 up a couple of these.

6 The factual, the writing that's
7 required, writing a factual basis for sentencing
8 outside of the parameters. I'd like your
9 perspective on that. What you think about that.

10 And then the second one I'll queue up
11 right from the start is the presentencing
12 process, do you think an independent
13 presentencing authority would be an advisable
14 shift as opposed to what we have right now, the
15 process that has not been changed. So those two
16 things.

17 And let's start with Colonel Barkei.
18 After you, sir, we'll go to the Air Force and
19 then to the Navy.

20 COL (R) BARKEI: I'll try to be brief,
21 ma'am. On the parameters, I am not a proponent
22 of the system of particularly judiciary

1 illuminating what has been characterized as the
2 factual basis for going outside of the
3 parameters.

4 I think the danger there is creating
5 a false or a fictitious range of whether you call
6 it facts or we call it emotions or something
7 else, and this goes for both parties, that they
8 can further rely on to try to influence, whether
9 it's the lower or the upper range at those
10 particular parameters.

11 As I noted before, I think the judge
12 is in a different position from the convening
13 authority and the SJA or any other party at the
14 conclusion of those sentencing cases to make an
15 informed decision, independent decision, and
16 impartial decision.

17 And going outside of those parameters,
18 there are those cases that's part of what our
19 defense bar is for, is identifying those cases
20 that have those special circumstances where, you
21 know what, the facts, the emotions, the impact
22 upon the victim, whatever the case might be,

1 family history, don't really support a sentence
2 within these parameters. And then to fill in the
3 blank. So I'm not a great proponent of that.

4 As far as an independent review
5 authority to provide additional data points for a
6 sentencing, now, it's only the judge who
7 sentences. I think it's absolutely a great idea.
8 In my current civilian jurisdiction, the pre-
9 sentencing investigation is almost solely relied
10 upon by the judge in the sentencing process.

11 The opportunity to bring all of those
12 other assessments; whether it's social work;
13 whether it's mental health, behavioral health;
14 whether it's employment factors -- and those
15 professionals do a wonderful job, as our counsel
16 do as well, of digging into some family histories
17 and so forth.

18 I think adding that impartial view
19 will assist the court in identifying an
20 appropriate sentence for individuals. So I'm a
21 big proponent of incorporating or introducing
22 that independent authority.

1 Obviously there come some resources
2 and expertise there, but I don't believe our
3 counsel had the same expertise that that
4 individual or that organization would provide to
5 the court. I'll end there.

6 CHAIR HILLMAN: Thanks, Colonel
7 Barkei. Colonel Rosenow.

8 LTCOL (R) ROSENOW: I thank you for
9 the opportunity. I would slightly depart, I
10 think, on both issues. On the first in terms of
11 writing down and giving a written explication of
12 some departure from where the sentence may need
13 to fall, I'm very comfortable with that.

14 The right of automatic appeal,
15 especially in the cases that we're most focused
16 on here and the fact that a CCA is going to be
17 reviewing the decision of the military judge at
18 the trial level for me and the suggested
19 additional data that's available upon review
20 could be helpful in terms of explaining the
21 position of the military judge.

22 I'll tell you as well, and it's just

1 slightly adjacent, then I'll answer the second
2 question quickly. In all, it occurs to me that
3 with military judges being the sole source of
4 sentencing with the exception of capital cases,
5 it seems like a reprimand, which was something
6 that I adjudged in the appropriate cases.

7 A reprimand could well be written by
8 a military judge. I don't know if your charge
9 goes so far as to consider revisions to R.C.M.
10 1003. But from my vantage point, the military
11 judge is the sentencing authority as against now
12 a convening authority who in OSVP cases is going
13 to be another JAG, who is some ways is much
14 further removed from the circumstance as a JAG
15 than a commander who might have offered a
16 different host of experiences in terms of his or
17 her language that's going to be applied to the
18 entry of judgment if the reprimand is ultimately
19 approved.

20 It doesn't give the same kind of
21 reward as he or she might have in the past. So
22 something to think about, that maybe a military

1 judge could also be heard in the form of
2 specifying the language of a reprimand.

3 You can put it on the STR and it could
4 still go through the normal post-trial review
5 process with the convening authority; either
6 approving it or not on the entry of judgment
7 after he or she had consideration of everything
8 in post-trial.

9 And then, on timing, I really worry
10 about what the nature and purpose of military law
11 is in terms of bifurcation. I tend to agree
12 entirely with Colonel Barkei that you could get
13 perhaps to a better answer and maybe even at a
14 program it would more likely get to a better
15 answer.

16 I do worry about splitting these
17 things out over time -- having an individual and
18 having the, at that point, victims if there was a
19 victim-driven offense, because he or she would
20 have been convicted at that point, living with
21 that at some far-flung date. If you could
22 collapse that time, maybe that would allay some

1 of my concerns. But it does push against this
2 idea of efficiency.

3 And then it occurs to me, as well,
4 that if a plea agreement has already dictated
5 some serious, you know, cabined-in range of
6 choices -- So the military judge in terms of,
7 for instance, a punitive discharge or
8 confinement, how much additional time is
9 necessary to be able to have sufficient
10 information to reach a legally defensible and
11 appropriate, not just legally defensible but
12 appropriate, punishment for all the reasons that
13 we do impose punishment.

14 Thank you.

15 CHAIR HILLMAN: Thank you. Admiral
16 Purnell.

17 RADM (R) PURNELL: I think the judges
18 are well-equipped to provide their justifications
19 for departures. I'm not at all concerned about
20 that. I think they have the independence and
21 courage to do that. They've certainly not had
22 any difficulty in the last few years finding

1 unlawful command influence.

2 And so I think departing from a
3 sentence guideline is not something that judges
4 are going to be shy about doing. And frankly, I
5 think they have the time to be able to do a
6 really good job if they think a departure is
7 warranted.

8 I think that adding, you know, a
9 parole officer function might be ideal, but I
10 don't know if it's at all feasible, just given
11 that we're probably talking in all of the Navy
12 and Marine Corps maybe 50 or 60 contested cases
13 in a year. And I don't know that that's
14 particularly feasible to build another
15 infrastructure to be able to provide that.

16 And I don't know that the dividends it
17 pays would be worth the cost. I do think that
18 that would be ideal. And I have noted before my
19 concerns that counsel are losing experience in
20 doing sentencing cases because they don't really
21 do them now for plea cases. And so that just
22 shrinks the number of opportunities.

1 Frankly, if you've -- I read a lot of
2 parole reports. In immigration court, because I
3 work on a detained docket -- and I'm not really
4 convinced that they're always that helpful, or
5 they're so much more detailed than are already
6 provided. I mean, it's definitely within the
7 competency of counsel to be able to develop the
8 facts that a parole officer does.

9 And I think in cases where they have
10 the incentive to do so, because what the sentence
11 will be is very much up in the air and they, you
12 know, can obtain a benefit from -- for their
13 client on the defense side or for the enhanced
14 good order and discipline on the government's
15 side, they're incentivized to do it in contested
16 cases.

17 So I'm not terribly concerned about
18 the sentencing changes. Thank you.

19 CHAIR HILLMAN: Thank you. Just a
20 couple other sentencing questions, and then we'll
21 turn to the last two topics. Are there -- did
22 you, the last question that we put on here, did

1 you ever or did you know other judges who would
2 have liked to have tools at their disposal at
3 sentencing that they didn't have: rehabilitative
4 programs, suspension of sentence, anything like
5 that?

6 And along those lines too, did you
7 think the appropriate things were brought up for
8 consideration in sentencing? I know you all
9 weighed in on already whether a neutral party
10 would do that.

11 Did you have experience with or hear
12 other judges hear about not getting what they
13 needed in terms of sentencing, information on
14 sentencing, and not having the options available
15 that they wanted?

16 We'll start with you, Admiral Purnell.
17 Admiral Purnell?

18 RADM (R) PURNELL: I'm sorry, can you
19 hear me now?

20 CHAIR HILLMAN: Sure can, thank you.

21 RADM (R) PURNELL: Okay, I think the
22 -- you know, judges have broad -- they're in

1 control of the fact-finding process. So if
2 they're not getting things they think they need,
3 they can ask for them. And I don't think people
4 have been shy about doing that.

5 I'm aware of judges on a couple of
6 occasions who have continued sentencing
7 proceedings demanding more information because
8 they didn't feel they were getting what they
9 needed, either from the government or from the
10 defense in terms of just sheer information.

11 But no, the only thing -- I do think
12 it is worth exploring the possibility of Alford
13 pleas. Because sometimes I think getting to a
14 provident plea has been more difficult in some
15 cases than getting to a sentence.

16 And you know, I've seen maybe one or
17 two cases where I think people would have
18 preferred to have a diversion option. And so
19 we'll see. You know, I think time will tell what
20 discretion the Office of Chief Trial Counsel
21 uses.

22 My major concern in the way the

1 guidelines were being developed was that they
2 were being based on federal guidelines and not
3 really -- I think the reports they did were
4 excellent, and the work they did were great.

5 But you know, the one thing I didn't
6 see taken into consideration was the fact that in
7 many jurisdictions, yes, this is the recommended
8 sentence, but there are any number of cases that
9 wouldn't go forward and wouldn't be referred for
10 prosecution.

11 And we'll see if the extra
12 independence of the Office of Trial Counsel maybe
13 makes a decision not to prosecute in very
14 appropriate circumstances, like for first-time
15 offenders and less serious offenses; sending them
16 back to the command, whether they exercise that
17 option or not. Thank you.

18 CHAIR HILLMAN: Admiral Purnell.
19 Colonel Rosenow.

20 LTCOL (R) ROSENOW: I have no
21 significant concerns, either myself based on my
22 own experience, or conversations that I had

1 shared with other judges who were judging
2 sentences about the host of options that are
3 available under the manual in terms of
4 punishment. I think there's a wide-ranging
5 enough opportunity there.

6 And then certainly, although the judge
7 isn't considering it, the force has all kinds of
8 administrative actions that can be taken outside
9 and after a court-martial in terms of making sure
10 we have a fit fighting force.

11 So no concerns to express past that.
12 Thank you.

13 CHAIR HILLMAN: Thank you. And
14 Colonel Barkei.

15 COL (R) BARKEI: Neither myself nor
16 any of the judges that I communicated with
17 expressed any deficiencies in the tools that were
18 available. I would touch upon one thing that the
19 Admiral brought up, which is diversion programs.

20 I just did a little bit of a deep dive
21 for our office on use, because our diversion
22 program in our county is relatively new, and

1 there is some information that diversion programs
2 at a local level, that being in our county, are
3 far more successful than they are in a
4 correctional environment.

5 So if there were to be a change in the
6 military system where we do consider some other
7 types of, we'll call it rehabilitative
8 punishments rather than true punishments, there
9 is some evidence out there that in a correctional
10 setting, they're not nearly as effective as they
11 are if we did it in a pre-confinement atmosphere.
12 That's just one of the things there.

13 But as far as other tools that are
14 available, I don't think that there's any
15 deficiencies there for a judge to put on.

16 I will note that I -- the opportunity
17 to write into the record as well as in the STR
18 our recommendations to the convening authority on
19 carrying out or certain elements of suspensions -
20 - every time I did that, the convening authority
21 denied it, which is fine. That's within their
22 authority.

1 So I'm not sure how influential that
2 is. So that may be one thing that other judges
3 might comment on as far as our ability to
4 influence when we might have been restricted,
5 whether through a plea agreement or otherwise.

6 But in general, nothing further to add
7 on additional tools needed for the judiciary.

8 CHAIR HILLMAN: Okay, thank you. So
9 we have a few minutes left. There's a couple of
10 short questions here at the end. Let me just
11 canvas the Panel members and see if there's
12 anything anybody wants to follow up on with
13 respect to sentencing or the other areas that we
14 already talked about here.

15 So anybody on the virtual side?
16 General Ewers, Colonel Gunn, Judge Kasold, Judge
17 Somers?

18 JUDGE SOMERS: Nothing from me, thank
19 you.

20 COL (R) GUNN: No, thank you.

21 CHAIR HILLMAN: Okay, looking like
22 we're clear on the virtual screen. We're going

1 to go to Captain Aldana here in the room.

2 CAPT ALDANA: Hello, everyone. In
3 terms of appropriateness of sentence -- of
4 sentencing, have you seen any kind of disparities
5 across the board? In your own experience?
6 Anyone?

7 CHAIR HILLMAN: Admiral Purnell, let's
8 start with you. Any disparities, Admiral
9 Purnell, to Captain Aldana's question?

10 RADM (R) PURNELL: Disparities how?
11 I'm not sure what the question is.

12 CAPT ALDANA: In terms of the
13 appropriateness of sentence. I mean, obviously
14 you'd have, whether in your role as a chief trial
15 judge seen perhaps, you know, looking at certain
16 offenses thinking that that may not be the
17 appropriate sentence or very, you know?

18 RADM (R) PURNELL: No, I -- so I was
19 --

20 CAPT ALDANA: Sentences that weren't
21 appropriate for the offenses.

22 RADM (R) PURNELL: You mean with the

1 ranges? I think there are a couple of Category 4
2 offenses that I wondered about. I wondered -- I
3 can see some manslaughter situations that may not
4 call for a minimum ten-year sentence.

5 But in general, the ranges are so
6 broad that there was nothing that really stood
7 out, except, you know, that there were maybe one
8 or two offenses I might have viewed a little bit
9 differently.

10 But by and large, I think that they've
11 -- the sentencing commission did a good job in
12 addressing appropriate ranges that I think are
13 sort of consistent with what I have seen as being
14 broad ranges in both, you know, members and
15 judge-alone cases.

16 What I was struck with is that the
17 ranges are really very broad. And so they, I
18 think, still provide judges in contested
19 sentencing cases a very broad range of
20 alternatives. And then there's also the
21 opportunity -- is that the question you're
22 asking? I'm not sure if I've answered your

1 question.

2 CAPT ALDANA: Yes. And also in terms
3 of similar cases, is everyone, you know --
4 someone, accused one, who has the same similar
5 offenses -- getting similar appropriate sentence
6 or the same similar sentence?

7 RADM (R) PURNELL: So no one's been,
8 you know, sentenced under the new guidelines yet.
9 We'll see, I think. But there's not really data
10 pre-.

11 I mean, I think that was the reason
12 the sentencing was changed, was because there was
13 a perception that similarly situated accused were
14 getting different sentences from members based on
15 location or branch of service or just because
16 panels saw what seemed to be similar facts
17 differently.

18 So I think the whole establishment of
19 parameters and guidelines is an attempt to
20 address that concern. And so we'll see how that
21 pans out.

22 CAPT ALDANA: Okay, so okay, no

1 preliminary kind of anecdotal data from you.

2 Okay. How about the other judges?

3 CHAIR HILLMAN: Yeah, and let's just
4 -- Colonel Brunson has a follow-up, too, and then
5 we'll hear from the Air Force and the Army on
6 this.

7 Colonel Brunson.

8 COL (R) BRUNSON: Yeah, thank you. I
9 mean, this ship may have sailed and I think I'm
10 probably in the minority on the whole sentence
11 guidelines thing. I don't think they're
12 guidelines, I think they're mandates. And I hate
13 them, so I'll just say that.

14 But if, given that judges are doing
15 sentencing and we're supposed to individualize
16 sentencing, I'm really confused -- I'm not
17 confused. But I'll say I'm confused by why we
18 need the sentence mandates.

19 If the sentence is supposed to be
20 individual, then there are no similarly situated
21 accused. Every accused is different, and
22 everyone should be treated as an individual.

1 That's my argument.

2 So given that, with judges doing the
3 sentencing, as former judges, do you really see a
4 need for -- and I'm serious, I really want your
5 honest opinion -- Do you see a need for the
6 sentence so-called guidelines, especially given
7 that in order to give an individualized sentence
8 you now have to justify why you're going outside
9 of them?

10 You can clearly see where I'm coming
11 from.

12 CHAIR HILLMAN: Admiral Purnell, if
13 you're still on, why don't take that, then we'll
14 go to the Air Force and the Army.

15 RADM (R) PURNELL: Well, again, I
16 think my answer would be that the ranges are so
17 broad that I do think there's plenty of room
18 still for individualized.

19 I don't necessarily agree with
20 changing the system to begin with. I mean, I
21 think that it was fine before and wasn't -- I
22 think it was a matter of perceptions. And I

1 emphasized that was the perception they were
2 addressing. I don't know that that was what I
3 saw in reality. And I think members had
4 tremendous wisdom.

5 What I worry about now is lawyers who
6 have never been to sea or served with operational
7 units making determinations without that lived
8 experience of the members in their service. And
9 so, you know, I think this is going to be less of
10 a problem obviously with the Marine Corps than it
11 is with the other services.

12 But I understand the argument and I
13 don't think the argument for changing the system,
14 and I don't think that my initial fears have been
15 realized, given that in their wisdom, the
16 sentencing commission established such incredibly
17 broad ranges that are so close together. I think
18 they're still a great opportunity for
19 individualized sentences.

20 And I do think that judges have the
21 courage and the ability to deviate from
22 guidelines in appropriate circumstances and to

1 articulate what those are.

2 And I guess at least now that's a
3 transparent process that other participants in
4 the process are able to see and understand why
5 the sentence that was awarded is the sentence
6 that was given.

7 Just like we had, you know, military
8 judges had to do special findings when requested.
9 It's the same drill. And I do think that does
10 have the benefit of enhancing transparency.

11 So I think it's something of a mixed
12 bag. Thank you.

13 CHAIR HILLMAN: So if everybody could
14 stay on for a few more minutes, we'd like to take
15 everybody else's perspective on these questions.

16
17 So Colonel Rosenow on the questions
18 from Captain Aldana and Colonel Brunson.

19 LTCOL (R) ROSENOW: Thank you. So to
20 answer directly, "No," there's no need for
21 sentencing guidelines. The precedent prescribes
22 in the manual a range of sentences that are

1 permissible for any given offense. And then you
2 have on top of that the adjudicative forum,
3 right.

4 So if it's a general court-martial,
5 there's a greater range. If it's a special
6 court-martial, there's a more limited range. And
7 if it's an Article 16(c)(2)(A) special court-
8 martial, it's a more limited range still.

9 So I don't think that that's
10 necessary. I also, just because my own
11 experience informs, I have to doubt some of the
12 numbers that went into the system that ultimately
13 derived the numbers that further define the
14 boundaries of what an appropriate sentence might
15 be.

16 It's incredibly difficult to draw
17 comparisons between offenses, even when they're
18 notionally punished in the same way. Because you
19 don't know, for instance, why it was dealt down
20 to that level.

21 Plea agreements have done a lot in
22 terms of limiting how much we can discern as to

1 the meaning of the sentence that comes out once
2 the bounds are drawn more tightly.

3 So anyway, I would answer you directly
4 again at the end, I don't think that we need
5 them, but we can absolutely operate inside of
6 them for all the reasons that the Admiral has
7 pointed out.

8 And then going back to Judge Aldana's
9 earlier remark about disparate treatment, I can
10 only think of one circumstance in my own
11 experience on the bench where I would say that's
12 not a way that a CCA would look at it and say
13 that there was, you know, a disparate sentence in
14 terms of providing for appellant relief.

15 But on the ground and looking at them,
16 it was a consequence of the referral decision at
17 the base. There was a case that was involving
18 drug use that led to that special court-martial
19 non-BCD under Article 16(c)(2)(A).

20 And then there was one that went to a
21 special court-martial. And there were
22 distinctions with a difference, and meaningful

1 distinctions. So like I said, I don't have any
2 concerns of any kind of legal error there, at
3 least based on my experience with the cases.

4 But it did look, and it certainly may
5 well have appeared to an objective outside
6 observer, that the decision on referral that was
7 driven by consequences, or I'm sorry, driven by
8 considerations like timing and which witnesses
9 might be available first or after ultimately led
10 kind of inescapably to this person is available
11 to and experiences a punitive discharge. And
12 this other person doesn't.

13 That would be the only experience that
14 I could provide for you in case that's helpful.

15 CHAIR HILLMAN: Thank you. Colonel
16 Barkei.

17 COL (R) BARKEI: Really quick. I
18 would be the last person to compare judges and
19 their sentencing because they are getting
20 individualized cases, as Ms. Brunson pointed out.
21 So there could be a multitude of reasons for
22 those discrepancies, if there's even a viewed

1 discrepancy there.

2 I am not an overall fan of the
3 parameters. I do think there's a reason why we
4 have the judiciary appointments and directives in
5 establishing our capabilities and our
6 independence in making those decisions.

7 I would also add, you know, we're not
8 elected, we don't serve statutory tenures
9 necessarily.

10 If there is a judge who is completely
11 off his or her rocker, whether that's the
12 responsibility of the judiciary leadership -- or,
13 quite frankly, the TJAG himself or herself has
14 the ability to rectify or mollify that situation
15 through rescission of that particular assignment,
16 exercising their statutory authority. So I don't
17 think we're necessarily there.

18 But to go back to the -- well, I think
19 any other comments would just be a reiteration of
20 the prior two and respect for our time. So, not
21 a fan of the parameters and I would be careful
22 assessing judges just based purely upon their

1 sentence impositions.

2 Because it is truthful, each and every
3 accused has a different story. Each and every
4 fact pattern is actually different, whether it's
5 through victims, through intent, or otherwise.
6 So I just think it's a dangerous game to play.

7 CHAIR HILLMAN: Thanks, Colonel
8 Barkei. If you'd stay with us just for these two
9 last questions, we're going to get to the
10 concrete and away from the big and conceptual
11 here.

12 Just about the Article 16(c)(2)(A)
13 special courts-martial have you presided over
14 those and what are your thoughts about them?

15 And second, on the Article 140a
16 question, have you seen PIA not be properly
17 redacted -- PII not be properly redacted? And
18 have you seen any problems in motions and
19 pleadings regarding PII?

20 COL (R) BARKEI: I guess I'll go
21 quick. So I did preside over one 16(c)(2)(A),
22 and it was a naked plea.

1 I don't believe, going back to my SJA
2 days, that there are a lot of circumstances where
3 I would recommend the convening authority use
4 that forum based upon the abilities of that
5 particular court and what the punishments
6 available are for sentencing purposes. And that
7 just goes as a military justice philosophy.

8 Is there an advantage to the
9 authority? It's another tool, which I think is
10 fine. I think it's a great opportunity for brand
11 new judges to exercise their skills from the
12 bench.

13 The problem in our current structure
14 is the ability to assign those judges to those
15 particular cases without literally flying them
16 all over the world to give them those particular
17 opportunities.

18 For 140a, yes, there is PII that
19 escapes every now and then. I don't believe that
20 it is a rampant problem. I believe that our
21 safeguards in the post-trial process are adequate
22 due to the various levels of review of those

1 documents; whether it's the judicial review;
2 whether it's the authentication and certification
3 process; and also the post-trial paralegal
4 process that most of our OSJAs use, I think
5 impose sufficient safeguards.

6 Does that mean it's 100% accurate all
7 the time? No. We could, again, it becomes a
8 resource issue identifying additional personnel
9 and/or training of personnel and then giving them
10 extra duties or specific assigned tasks to focus
11 on redactions. But I have no personal concerns
12 with the 140a process.

13 CHAIR HILLMAN: Thank you. Colonel
14 Rosenow.

15 LTCOL (R) ROSENOW: Thank you. As
16 indicated, I think maybe two or three cases that
17 I presided over under Article 16(c)(2)(A), again,
18 I think it's exactly as said by Colonel Barkei.
19 If the conversation the SJA has with the
20 convening authority about whether this makes
21 sense for the adjudication of the offense.

22 As a judge, it was exactly as hard.

1 I mean, there's all the same kinds of legal
2 questions and concerns that you have to
3 adjudicate. It's just as serious a proceeding.
4 The stakes are just as high as any general court-
5 martial in terms of following the law and getting
6 it right and entering the findings of fact that
7 support your conclusions.

8 And then with respect to the Article
9 140a, at our level at the Air Force, the uniform
10 rules of practice that I applied, and I'm sure
11 it's going to be in the next iteration, which I
12 understand is inbound, it required them to remove
13 PII in the first instance.

14 It was not wholly uncommon for me to
15 catch something and send it back. And it was
16 exactly what my practice would be. If I found
17 something, and it wouldn't be hard to find
18 because they all tend to pop up in the same
19 places, this kind of PII, I'd send it back.

20 And then I would also engage special
21 victim's counsel in that process too if they had
22 a stake in it. And what I would essentially say

1 is everybody go back to the filings and we're
2 going to go back through. You're going to
3 substitute them out.

4 And if you don't substitute them out
5 because you think the original version needs to
6 be in part of the record, we'll move that into
7 the category of under seal. And then you can put
8 a properly redacted one on the record.

9 So I think the judges have all of the
10 powers and authorities they need if they're
11 inclined to do so to apply that standard in the
12 first instance when you're generating the record
13 earlier than when it might be going out to the
14 public.

15 CHAIR HILLMAN: Thank you. Admiral
16 Purnell.

17 RADM (R) PURNELL: I agree with the
18 earlier speakers. I don't have much to add. I
19 think that in Navy and Marine Corps, we've maybe
20 done about a dozen a year of the non-BCD special
21 courts-martial.

22 And the feedback I have is that those

1 cases are being as aggressively litigated and can
2 oftentimes raise as complex or serious issues as
3 in the other courts-martial forum.

4 I don't know that they're proving to
5 be a lot speedier than other forms of courts-
6 martial or more efficient. And I don't see that
7 they're being used a lot, except as original
8 charging decisions for cases that then get pled
9 back down to non-judicial punishment or an
10 administrative forum.

11 So we see a lot of them initially
12 referred that way. But the majority of them end
13 up being -- end up falling out. Thank you.

14 CHAIR HILLMAN: I want to thank you
15 for hanging with us for the extra time here and
16 managing, you know, the tech challenges and all
17 the rest. Also for your service and your insight
18 overall.

19 It's a huge benefit for our Panel to
20 be able to hear from you with the depth of
21 experience you have and the breadth. And your
22 subsequent experience too, you know, having

1 stepped down from being active military judges
2 too.

3 So on behalf of the whole Panel here,
4 thank you for your time and your service, and
5 we'll do the best we can to make good on the
6 insight that you've given us as we move ahead.
7 Thank you.

8 And with that, we're going to close
9 the public session. And go ahead, Pete.

10 MR. YOB: Just before we close, I'll
11 just put on for the record and for the
12 transcription that an update that we had seven
13 Panel members here physically present. Those
14 would include Chair Hillman, Panel members
15 Osborn, Kenny, Redford, Schroder, Brunson, and
16 Aldana.

17 We had five Panel members who were
18 virtually joining the session. Those would
19 include Panel members Kasold, Gunn, Somers,
20 Ewers, and Morris.

21 I also wanted to -- well, we can
22 conclude, but then I'd want to throw it over to

1 Nalini just for a schedule update.

2 CHAIR HILLMAN: Absolutely.

3 MR. YOB: Nalini.

4 MS. GUPTA: Sorry, we're going to go
5 forward with switching the RFI session to
6 tomorrow so that it can be in person. It will be
7 at 9:00 a.m.

8 We have representatives from four of
9 the services confirmed. Unfortunately, the Coast
10 Guard cannot join us. So we will follow up and
11 see if there's a way that they can provide input
12 perhaps in writing.

13 So in lieu of that RFI session this
14 afternoon, we will have more time for an
15 executive session for you to continue your
16 deliberations. And then when those are
17 concluded, we can continue with our breakout
18 sessions as planned for the teams to talk about
19 the RFIs they did receive last week.

20 CHAIR HILLMAN: Okay, thank you,
21 everybody.

22 MR. YOB: We'll take a break. I

1 believe -- let me ask. Lunch is available if you
2 ordered it. Is it here now? Okay.

3 Once you get your lunch and you come
4 back in the room, you can eat while we have a
5 working lunch meeting. The people who are
6 online, the Panel members and the staff, can
7 remain. It's not a public meeting, but obviously
8 the Panel members and staff can remain on there.

9 And we'll cover the topics we'd like
10 to cover in that session or I can give a recap of
11 the HASC and SASC meeting that we had. We want
12 to talk about OSTC possibly. I think Colonel
13 Osborn is going to lead that part of the
14 conversation. And then -- we'll see.

15 And then if we have time, I can start
16 covering the FY 2024 NDA changes that affect
17 military justice.

18 JUDGE SOMERS: Hi, could you clarify,
19 so the RFI session's moving until tomorrow, you
20 said at nine o'clock?

21 MR. YOB: That's correct.

22 JUDGE SOMERS: Okay, so then what are

1 we doing to replace it? Just I missed that part.

2 MR. YOB: The executive session that
3 we'll have will be this afternoon instead of
4 tomorrow morning. So we're kind of flipping
5 spaces.

6 JUDGE SOMERS: Got it, okay. Thank
7 you, I appreciate that.

8 MR. YOB: Sure, no problem.

9 COL BRUNSON: Jeri, I had a question
10 about that too. Do we have a the ethics training
11 then this afternoon?

12 MR. YOB: The ethics training is going
13 to be at noon tomorrow. Because it would have
14 been tomorrow morning, now that we have them in
15 the live panel, we've moved that. Dean Raab has
16 agreed to move that to noon tomorrow for us, and
17 that'll be about a 15-minute session.

18 Okay, so we'll break for lunch, but
19 we'll reconvene in just a couple minutes, as soon
20 as people are ready to talk further.

21 (Whereupon, the above-entitled matter
22 went off the record at 11:58 p.m. and resumed at

1 12:49 p.m.)

2 MR. YOB: We've got Chair Hillman,
3 Colonel Osborn, Major General Kenny, Judge
4 Redford, Captain Schroder, and Captain Aldana.

5 Any Panel members online, can you
6 please, well let me just go down the list.

7 Judge Kasold, are you online?

8 Colonel Gunn, are you online?

9 COL (R) GUNN: I am.

10 MR. YOB: Okay.

11 Judge Somers, are you online?

12 JUDGE SOMERS: Yes, I am.

13 MR. YOB: Major General Ewers?

14 MG (R) EWERS: Yes.

15 MR. YOB: Colonel Morris?

16 Morris is not. I think he had a
17 meeting, that's correct. And, Judge Kasold, back
18 with you, are you online?

19 Okay, so we've got three of the
20 members, Members Gunn, Somers, and Ewers, are
21 online virtually. This session is going to
22 include comments by victim counsel, Victim Legal

1 Counsel, Special Victim Counsel.

2 It's going to be exceed, I guess is
3 the right word, by Terry Gallagher, one of our
4 staff members

5 So I'll throw it over to Terry.

6 MS. GALLAGHER: Good afternoon, Chair
7 Hillman, and Military Justice Review Panel. The
8 victim counsel presenters have all virtually
9 joined us. Thank you to each of them for their
10 flexibility today.

11 Tab 3 of your materials from today
12 contain the presenters' impressive biographies
13 and the topics and questions they're prepared to
14 respond to.

15 Tab 4 of the initial read ahead packet
16 also has the prepared questions.

17 The topics are the same as those
18 addressed by the former military judges.

19 So, I'm going to briefly introduce the
20 presenters and then we can jump straight to the
21 questions.

22 Representing the Air Force we have

1 Lieutenant Colonel Jasmine Candelario, the Deputy
2 Chief of the Victims' Counsel Division.

3 Representing the Army is Colonel Evah
4 McGinley, the Program Manager for Special Victims
5 Counsel.

6 For the Navy, we have Commander Sara
7 de Groot, the Operations Officer for the Victims
8 Legal Counsel Program.

9 For the Marine Corps, we're joined by
10 Colonel Iain Pedden, the Chief Victims' Legal
11 Counsel and Officer in Charge of the Victims'
12 Legal Counsel Organization.

13 Our Coast Guard representative is
14 Commander Michael Crowe, the Senior Special
15 Victims Counsel.

16 The goal here is to have each of the
17 representatives answer the questions. So if need
18 be, I'll kind of try to prompt responses if
19 people haven't appropriately chimed in.

20 We're going to attempt to reserve a
21 few minutes at the end for some wrap up
22 questions, if that's possible.

1 Chair Hillman, back to you to start
2 the questioning.

3 CHAIR HILLMAN: Thank you, Terry, and
4 thank you to everybody for joining us today.
5 It's a huge benefit to the Panel to hear directly
6 from you on these issues that we're considering.

7 We have quite a few topics here. I'm
8 going to ask that you stick to the order that
9 Terry just introduced you in, just so we can move
10 from one to another with relative dispatch.

11 And we'll start with plea agreements.
12 Your perspective on the current plea agreements
13 as compared to the prior PTAs. And also, any
14 observations you have about how they're being
15 administered, and how they're effective or could
16 be improved.

17 So we'll start then, let's see, we'll
18 go in the order that Terry said out.

19 MS. GALLAGHER: Yes. Yes, it was the
20 Air Force, the Army, Navy, Marine Corps, and
21 Coast Guard.

22 So if you would like to kick off with

1 the first question, Lieutenant Colonel Jasmine
2 Candelario would answer.

3 LTCOL CANDELARIO: Yes, ma'am. So, in
4 general, we're finding the changes and additions
5 to R.C.M. 705, the plea agreements, thus far
6 appear to allow more flexibility, transparency,
7 and certainty.

8 And especially the certainty with
9 regard to the victim in some cases.

10 CHAIR HILLMAN: Okay, thank you for
11 that brief and succinct answer. That's awesome.

12 Okay, over to the Army.

13 COL MCGINLEY: Ladies and gentlemen,
14 good afternoon. So, in general, we concur with
15 the Air Force on that way ahead.

16 Predictability has been the key
17 difference between the current and the former
18 plea agreement arrangement.

19 And we have found that generally
20 speaking, our clients tend to appreciate having
21 that certainty that there will be some sort of
22 floor; some sort of minimum.

1 We might have anticipated that with a
2 floor and a ceiling, it might be more difficult
3 for the accused to enter into a plea agreement.

4 But as a practical matter, that does
5 not seem to have been the case, which has been a
6 positive.

7 We do appreciate the greater focus on
8 getting to the right sentence, rather than just
9 sort of a, an attempt to beat the deal.

10 However, and this will be our theme
11 throughout, I think, as with other changes in the
12 Military Justice system, we just haven't seen
13 enough yet to truly determine whether or not,
14 what things we might want to tweak; what things
15 we might want to recommend changes for.

16 Many of our counsel also don't have
17 experience with the prior system. They've now
18 only known the new system. So, we're learning
19 and developing as we go.

20 CHAIR HILLMAN: Thank you.

21 To the Navy.

22 CDR de GROOT: Thank you. So, I agree

1 and concur with the current PTA. It does give
2 us, and help victims legal counsel manage
3 expectations going into a guilty plea, at least
4 to know that the accused will be held accountable
5 in a way that they're aware of and can see.

6 Whether or not it's effective from the
7 victims' standpoints, since we don't really have
8 a say in the PTA, we don't have access to the ROI
9 in the Navy.

10 We don't get to see whether or not the
11 deal that the trial counsel, defense counsel, and
12 convening authority have created, is a, a good
13 deal.

14 We can't speak to that but we can
15 speak to being able to manage the victim's
16 expectation under the current PTA system vice the
17 old -- I'm sorry, the current plea agreement
18 system vice the old PTA as before.

19 When I was a practicing VLC under the
20 old PTA system, and the ability to plead the deal
21 was devastating. Over.

22 CHAIR HILLMAN: Thank you. Is Colonel

1 Pedden on from the Marine Corps?

2 Still muted there.

3 (Pause.)

4 CHAIR HILLMAN: We're still not
5 getting any audio there.

6 MS. GALLAGHER: Could you try to call
7 in, Colonel Pedden?

8 CHAIR HILLMAN: Okay, we'll head to
9 the Coast Guard then while we're waiting for
10 Colonel Pedden to get the audio connected.

11 FEMALE SPEAKER: He can't get his
12 audio working.

13 CHAIR HILLMAN: Is Commander Crowe
14 there?

15 CDR CROWE: Yes, I'm here.

16 (Simultaneous speaking.)

17 CHAIR HILLMAN: Oh, good, go ahead,
18 please.

19 CDR CROWE: Great. So I'll echo my
20 colleagues that overall, the new plea agreement
21 system generally more positive for our clients to
22 the element of having a fairly certain outcome

1 during the sentencing hearing, as far as a range
2 of confinement is very helpful in managing their
3 expectations and leading to better satisfied
4 outcome.

5 And I'll also echo that this system
6 really relies on communication and --

7 (Simultaneous speaking.)

8 CHAIR HILLMAN: Hang on, sorry, hang
9 on one second, Commander Crowe.

10 If you're not Commander Crowe, if you
11 could mute right now that would be great.

12 So, go ahead, Commander Crowe. Thank
13 you.

14 CDR CROWE: Thank you, ma'am. I was
15 just saying that this system really relies on
16 good communication between the government and the
17 STCs/VLCs to ensure that our clients are informed
18 of the nature of the deal and can have adequate
19 opportunity to weigh in on --

20 (Simultaneous speaking.)

21 CHAIR HILLMAN: So, thank you,
22 Commander Crowe, for reckoning with that.

1 Can we mute people on the -- can our
2 team mute somebody there? Do we have the power?

3 MR. YOB: It's an individual calling
4 with the 301 area code, could you please mute?

5 (Pause.)

6 CHAIR HILLMAN: Okay, so a little
7 clunky as we're going through there. Do we have
8 the Marine Corps back? Did Colonel Pedden call
9 in?

10 Okay, I think not so I'm just going to
11 ask if there are further questions.

12 Captain Aldana has a question.

13 CAPT ALDANA: Hello, Commander de
14 Groot, I think you had mentioned that (audio
15 interference) counsel have no say in the plea
16 agreement process.

17 Or, did I misheard you say that
18 because isn't the opportunity to (audio
19 interference) still available?

20 CDR de GROOT: So, we are offered an
21 opportunity, because the government should, if
22 it's available to them and if they're able to

1 reasonably connect with VLC or a victim who is
2 not represented by VLC, to let us know.

3 However, it is very trial counsel-
4 dependent, convening authority-dependent as to
5 whether or not they will truly factor in victims'
6 input. But, really, the deal is between the
7 convening authority and the defense counsel. The
8 victim is reasonably notified and is
9 knowledgeable that it is going to happen.

10 But it is unclear to us, especially
11 when we don't have access to the ROI if this is a
12 good deal. If we're just being said, this is
13 what the convening authority and the defense
14 counsel want.

15 And so you can have input, but with no
16 knowledge to back up whether or not this is a
17 good deal, it makes it more challenging. But we
18 are notified, for the most part, that a plea
19 agreement is happening and what the results are.

20 CAPT ALDANA: If I can get a follow-up
21 question. Commander Crowe, you said that you had
22 an opportunity to weigh in. Is that a meaningful

1 or not?

2 CDR CROWE: Captain, in my experience
3 it is a meaningful opportunity to weigh in. That
4 all of our -- all of my clients -- and in my
5 prior experience as a prosecutor as well -- are
6 given an opportunity to review the proposed plea
7 agreement, and provide input directly to the
8 convening authority and the staff judge advocate.

9 CAPT ALDANA: Can I get an input from
10 the other services, as well?

11 Thank you.

12 COL MCGINLEY: Sure. From the Army
13 side, we concur also. Although to Commander de
14 Groot's point, it is dependent upon the
15 relationship with the prosecutorial team.

16 We're working hard to ensure that we
17 have a good relationship there and, so far,
18 that's yielded good results.

19 So in that way it's meaningful for us.

20 LTCOL CANDELARIO: From the Air Force
21 standpoint, we would concur, as well. We are
22 given meaningful opportunity to participate in

1 the negotiation process for the most part.

2 But it does really depend on the local
3 prosecution team, and now OSTC and, you know, how
4 early they bring the victim's counsel in.

5 CHAIR HILLMAN: Thank you, all.

6 I'm just checking on the Marine Corps
7 status. Do we have the Marine Corps back in the
8 room?

9 COL PEDDEN: I believe so. Can you
10 hear me now, ma'am?

11 CHAIR HILLMAN: We can. Go ahead,
12 Colonel.

13 COL PEDDEN: Thank you, ma'am.

14 If I can, I'll double back and just
15 back clean up on the first question response that
16 my technology did not support, or at least my
17 feeble skills with it didn't support.

18 As to the perspective on current plea
19 agreements versus the old PTAs, I think generally
20 speaking, most of our VLCs regard the changes as
21 an improvement.

22 That said, they're speaking more from

1 book learning than from experience. Most of them
2 were not practicing VLCs under the old PTAs.

3 So that said, I also think it's an
4 improvement as well. And I look forward to
5 gathering more empirical information on that as
6 our current observations are a little bit
7 anecdotal.

8 As to the second question with regard
9 to plea agreement negotiations, I think I shared
10 most of my colleagues sense that these are good
11 things, too.

12 I would note that I have a couple of
13 concerns. One of which is that the way that the
14 rules state those plea agreement requirements
15 seems more aspirational than directive.

16 And then secondly, there's not really
17 a remedy in the rule for those situations where
18 trial counsel or an SJA don't consult with a
19 victim.

20 Or provide such late notice that
21 there's no real meaningful opportunity to
22 deliberate on the nature of that plea agreement

1 with the advice of counsel, prior to providing
2 input on it.

3 So again, those observations are more
4 than somewhat anecdotal and I look forward to
5 gathering more information moving forward.

6 But those are my responses to your
7 first two questions.

8 Thank you.

9 CHAIR HILLMAN: Thank you.

10 We'll move to the next topic then
11 about pre-referral judicial authority.

12 What's your experience with the use of
13 the Article 30a proceedings prior to referral?

14 We'll start with Lieutenant Colonel
15 Candelario.

16 LTCOL CANDELARIO: Yes, ma'am. So,
17 Article 30a, I think it's a step in the right
18 direction. It provides an avenue for military
19 judges to help resolve contested issues, right,
20 early on; which, in essence, should help avoid
21 delays, improper search and seize, pre-trial
22 confinement violations, et cetera.

1 The problem our VCs are finding in the
2 field is that R.C.M. 309 does not consider victim
3 discovery issues, where the material may be
4 arguably in the possession of military
5 authorities.

6 We currently have a case before CAAF,
7 right now, that touches on this issue with regard
8 to medical records.

9 CHAIR HILLMAN: Okay, thank you.

10 Colonel McGinley?

11 COL MCGINLEY: Yes. So our SVCs'
12 experience with the use and utility of Article
13 30a is somewhat limited. We think it's a useful
14 tool to have if there is a potential, but it's
15 just not being heavily used by our SVCs.

16 That said, our counsel currently
17 appreciate the scope in terms of the matters to
18 be addressed, and also appreciate that it is
19 there should they need it.

20 Anecdotally, some of our counsel
21 actually found it more useful as prosecutors than
22 they did as SVCs. We just note that because in

1 those cases, actually the prosecutors' interests
2 benefitted our victims, as well. But they're
3 just not using it as much as SVCs.

4 CHAIR HILLMAN: Thank you.

5 Commander de Groot?

6 CDR de GROOT: So, our VLCs have not
7 used, or have not been privy to these hearings.
8 Most recently, the only opportunities they've had
9 in these proceedings have been with regards to
10 pre-trial confinement. So, not too much
11 information to pass.

12 CHAIR HILLMAN: Just to stay with you
13 a moment, Commander de Groot, is that because
14 they haven't tried, or they have tried and been
15 unsuccessful?

16 CDR de GROOT: It's because they
17 haven't tried, and so maybe that's something we
18 need to move forward and start working on in our
19 practice.

20 CHAIR HILLMAN: Not necessarily for my
21 question, I just wanted to make sure of what the
22 implication of what you said was.

1 Thank you for clarifying.

2 Colonel Pedden?

3 COL PEDDEN: Yes, ma'am, thank you,
4 and a couple things if I could.

5 I'd start by seconding my Air Force
6 colleague's observation about the lack of similar
7 language in R.C.M. 309 with respect to government
8 -- excuse me -- with respect to information
9 that's already in the possession of the
10 government.

11 On the rest of Article 30a, while not
12 rare, our counsel informed that the use of pre-
13 referral proceedings involving victim information
14 is also not common.

15 In some cases, it does enable other
16 things. One case comes to mind in particular
17 where our counsel used a pre-referral process to
18 petition the military judge for an appointment of
19 a designee in the case of deceased victims.

20 In other cases, Article 30a, in some
21 aspects of its implementation, including R.C.M.
22 703 -- and to the call of the question that Mr.

1 Libretto sent out -- it's not exactly properly
2 scoped and it lacks a little bit of specificity
3 and procedures necessary to safeguard victims'
4 rights.

5 For example, only victims named in a
6 specification can seek relief from a subpoena
7 (audio interference) and forgive me if I'm -- I
8 hope I'm not getting out too far ahead of your
9 questions with respect to Article 30a. Is this
10 within the scope of what you were asking about?

11 CHAIR HILLMAN: Yes, go ahead.

12 COL PEDDEN: Okay, thank you. With
13 respect to pre-referral subpoenas, in my view, a
14 victim's rights shouldn't be contingent on the
15 government's tactical decision about whether or
16 not to name a victim in a specification.

17 In particular, in light of United
18 States v. Hill, the CAAF case from several years
19 ago, that process is becoming far more common.
20 Wherein multiple victim sexual assault cases, for
21 example, the government will leave one of the
22 victims off the charge sheet if the proof, with

1 respect to that particular victim, isn't quite as
2 strong as the others.

3 They do that so that they can get the
4 propensity instruction under MRE 413, as to the
5 named victims' case. Those tactical decisions,
6 however, shouldn't bypass a victim's right to be
7 heard on matters related to the production of
8 private information.

9 We're seeking remedies to victims
10 named in a specification places the rights of
11 unnamed victims in the hands of government, in
12 the hands of government counsel, whose client has
13 competing interests with that of the victims.

14 Similarly, the play in language of the
15 current R.C.M. 703(g)(3)(I), limits the authority
16 to request relief to the person subpoenaed, which
17 is rarely the victim and that's problematic.
18 Although a recent publication in the Federal
19 Register announced that they would be looking to
20 change that so that either the person subpoenaed
21 or the victim could request that remedy. That
22 remedy is not -- excuse me -- that language isn't

1 in place yet.

2 I'd also point out that I think
3 there's a problem with the lack of definitions
4 under the rule.

5 And so where the rule does create
6 remedies to, they seek to quash the subpoena that
7 seeks private and confidential information; those
8 things are stated in the conjunctive in the
9 remedies section.

10 Meaning that a person seeking to quash
11 that subpoena will have to prove both of those
12 things.

13 So it says in the conjunctive what an
14 earlier portion of the rule says in the
15 disjunctive; and that's the heading under, I
16 think, R.C.M. 703(g)(3), which talks about
17 private or confidential information.

18 And so that conjunctive/disjunctive
19 disconnect I think is problematic, both for
20 victims and for other people seeking relief from
21 the subpoena.

22 And then lastly, I'd point out that

1 the terms private or confidential aren't defined
2 in the rule.

3 They are -- confidential rather, is
4 defined in several portions of the Military Rules
5 of Evidence.

6 I think that's going to invite our
7 judiciary to gravitate to the MRE to define what
8 is confidential.

9 And, in doing so, that will
10 potentially draw them to conclude that you can
11 only seek this remedy if what you're looking for
12 is a subpoena to quash; or excuse me, a quash of
13 the subpoena that seeks privileged information.

14 Even the CAAF's case in United States
15 v. Mellette, I think, lends a broader application
16 to what is actually private.

17 So I think the rule would benefit, and
18 30a proceedings generally would benefit, from a
19 little more definitional scooping there that was
20 more friendly to protecting victim privacy.

21 Thank you.

22 CHAIR HILLMAN: Thank you.

1 Commander Crowe?

2 CDR CROWE: Yes, our SVCs have not had
3 many opportunities to use the Article 30a
4 procedures as it relates to victims' practice.
5 Similar to the Navy and other services, I think
6 our prosecutors are using it for numerous things.
7 But as to victims in the Coast Guard, it is not
8 being taken advantage of.

9 Over.

10 CHAIR HILLMAN: Thank you. Some of
11 your comments are pointing out the relative
12 newness of the role that you're actually in right
13 now and you're describing to us, and maybe some
14 of the pieces that have yet to be clarified
15 around it.

16 Another part of the system that has
17 been changing, has been sentencing. Just want to
18 turn you towards the sentencing processes now and
19 your sense of how the processes in play right
20 now.

21 In particular, where victims have a
22 right to be heard but perhaps not more of a role

1 in that -- that -- process, counsel and the
2 victims, are there changes that would make that
3 be more effective actually in the system?

4 And let's go in reverse order now. So
5 why don't we start with you, Commander Crowe?

6 CDR CROWE: Thank you, ma'am.

7 So overall, I think that the
8 sentencing process works well. The concern I
9 would have with it is victims are fairly well
10 constrained into what they are permitted to speak
11 about in victim impact statements.

12 The case law and the judiciary have
13 crafted rules that are very well tied to direct
14 harm to the victims and the impact statements.

15 That can be problematic in some cases
16 where if the defense or the convicted person at
17 this point has very wide latitude in what they
18 are permitted to present on sentencing.

19 And unsworn statements, for example,
20 can often say almost anything that they want. In
21 that case, we trust the court to weed out what is
22 inadmissible and not appropriate for sentencing.

1 But we tell victims that they're not
2 allowed to say certain things or they get
3 objected to and sustained.

4 At times, that can leave the victims
5 feeling dissatisfied or, you know, left out,
6 that, how come some parts of the system get to
7 truly say what they're feeling; whereas, they
8 have been forced into a narrowly tailored
9 statement that may not capture exactly what their
10 feeling.

11 Over.

12 CHAIR HILLMAN: Thank you.

13 Judge Redford has a follow up.

14 JUDGE REDFORD: Commander Jim Redford,
15 I have a follow up.

16 Could you give an example of what
17 victims are not allowed to say in their version
18 of their allocution?

19 CDR CROWE: Yes, Judge.

20 So, we actually had a recent case
21 where the member was convicted of some fairly
22 violent domestic violence-related crimes against

1 his estranged spouse, and the mother of his
2 children.

3 The children were not victims of any
4 crimes in the case. However, they were aware of
5 the abuse that happened and, in some cases,
6 witnessed some of it. But they were very young.
7 So, not capable of speaking on their own behalf.

8 But they also weren't named victims,
9 and they were not able to articulate direct
10 enough harm to even be appointed representatives
11 to speak during sentencing.

12 And so, the victim, the mother, she
13 was able to speak of the harm and impact to
14 herself of the crimes.

15 But she felt very strongly that her
16 children were adversely impacted by the crimes
17 committed against her, and had no way to bring
18 those concerns to the court.

19 JUDGE REDFORD: Was that a judge
20 alone, or a member sentencing?

21 CDR CROWE: It was judge -- it was
22 members. I'm sorry.

1 JUDGE REDFORD: Thank you.

2 CHAIR HILLMAN: Colonel Pedden?

3 COL PEDDEN: Yes, ma'am. Thank you.

4 Judge Redford, Your Honor, if I could
5 also provide an anecdotal example of how this
6 might apply.

7 It's often the case that sexual
8 offenses are pled down to lesser offenses. An
9 assault consummated by a battery, for example, in
10 which case the scope of the victim's statement --
11 the victim's impact statement would be
12 drastically reduced.

13 That's a relatively common occurrence
14 with respect to plea agreements; in which case,
15 almost all are judge alone now and all will be
16 judge alone in very short order.

17 With respect to the call of the
18 question that Mr. Libretto sent out, I'd also
19 note that the substantive and procedural changes
20 relating to content and delivery of victim impact
21 statements could make this process significantly
22 more fair.

1 One of the things that I believe we
2 were asked, is whether or not this process should
3 more closely parallel that which takes place in
4 federal civilian, and state courts.

5 And my answer to that is, "Yes," on
6 both counts.

7 When the DAC-IPAD had previously
8 inquired of us on this issue, I noted that
9 removal of the previous language in R.C.M. 1001,
10 prohibiting victims to recommend specific
11 sentences, leaves the majority of the rule in its
12 prior form; which is a little bit problematic.

13 Although the new 2024 manual does
14 include authority to recommend a specific
15 sentence in a case, that's a little bit form
16 without substance set against the broader back
17 drop of a plea agreement negotiation process;
18 which allows the parties to negotiate a specified
19 sentence in a case.

20 So, while the victim may have had an
21 opportunity to comment on that during the plea
22 agreement negotiation process, being able to

1 recommend a specific sentence in the form of a
2 dismissal or a dishonorable discharge for
3 example, doesn't carry a lot of weight or meaning
4 in a case where that particular form of
5 punishment is not authorized by the terms of the
6 plea agreement.

7 The other thing I'd note is that in
8 previous testimony on this issue, I noted that
9 where the, as with my Coast Guard colleague I
10 believe, the R.C.M.s don't place the statements
11 of victims and accused with respect to unsworn
12 statements on an equal footing; which I find a
13 little bit problematic.

14 At that DAC-IPAD hearing, one of the
15 things that I pointed out was that under the
16 current rules the victim is required to submit a
17 proffer of the statement, which is reviewed by
18 the government and the defense.

19 If there are any objections to it,
20 then the parties and the military judge discuss
21 that matter on the record, sometimes at great
22 lengths. At the conclusion of which, if the

1 military judge determines that some portion is
2 not properly admitted under R.C.M. 1001, the
3 statement is redacted and then handed back to the
4 victim to recite what remains on the page.

5 Which seems problematic in light of
6 the fact that when the victim does, in fact,
7 recite what remains on the page, the victim will
8 be the only person in the room that hasn't been
9 allowed to speak the words that were contained in
10 the original submission.

11 In particular, in light of the
12 knowledge, training, and the experience possessed
13 by our military judges; and the legal presumption
14 that they follow the law and can omit
15 consideration of improper portions of an unsworn
16 statement made by an accused; we should afford
17 them similar latitude when considering unsworn
18 statements by victims and allow them to hear that
19 material and either state for the record that
20 they're not considering proffered portions, or
21 allow the law to presume that.

22 The other thing I'd point out is that

1 after the DAC-IPAD hearing on this subject, the
2 DAC-IPAD had several other folks testify before
3 the Panel after our testimony had concluded; that
4 testimony included statements by military judges.

5 If I could quote just briefly from the
6 March 30, 2023, report. One of the things that
7 the DAC-IPAD pointed out at the conclusion of
8 that testimony, and I'm quoting now I think from
9 page 14, was that all of the former judges agreed
10 that with the judge alone sentencing, there is no
11 reason that victims should not have the ability
12 to speak freely during their impact statements.

13 I would strongly second that in our
14 comment by the military judges, to give victims a
15 voice in that process, and including a voice
16 about those parts of the process that aren't
17 precisely germane, or directly flowing from an
18 offense to which the accused has pled guilty.
19 Actually, no longer the accused anymore.

20 And I think one of the other calls to
21 the question that members of the Panel submitted
22 to the VLC representatives was whether or not

1 this process should more closely parallel that of
2 state and federal district courts.

3 I agree that they should, and would
4 respectfully submit that we should be asking
5 important questions along the lines of why does
6 the military justice process depart from that
7 practice.

8 Why do victims of military offenders
9 have less rights than their civilian
10 counterparts?

11 And, I think those are important
12 questions that the Military Justice Review Panel
13 could consider, and make meaningful
14 recommendations on.

15 Thank you.

16 CHAIR HILLMAN: Thank you, Colonel
17 Pedden.

18 Commander de Groot?

19 CDR de GROOT: Absolutely, I concur
20 with my fellow sea service brethren. I have seen
21 personally as a prosecutor and as victims' legal
22 counsel, defense counsel, literally cross out and

1 object to large portions of victims' unsworn
2 statements.

3 A lot of it emotional responses to
4 what has occurred to them.

5 Also, concur with Colonel Pedden that
6 when a plea agreement comes down, and it
7 originally was a specification and a charge of a
8 penetration sexual assault and it's been pled
9 down to a touching of the breast or the buttocks,
10 and the victim is very much limited to, "How did
11 you feel about that?", it does not give a victim
12 a full voice in what actually happened to them or
13 what they -- how they were impacted by the crime.

14 So, concur with Colonel Pedden and
15 Commander Crowe. The victims should be allowed
16 to have a much fuller voice to talk about the
17 impact of the crimes that the accused was charged
18 with and allow the judge to decide what is
19 aggravation and what is not; much like what they
20 do with the accused's statements.

21 Over.

22 CHAIR HILLMAN: Thank you.

1 Colonel McGinley?

2 COL MCGINLEY: So from the Army
3 perspective, we don't disagree with anything that
4 my sister service colleagues have stated.

5 We'll emphasize that the biggest issue
6 for us is just maintaining the victim's ability
7 to have a voice.

8 That's essential in the process, both,
9 for we believe, for legal purposes; and, then
10 also, just for the well-being of our clients
11 overall.

12 We take a somewhat more cautious
13 stance because we're just not sure. Sentencing
14 is one piece of the process and we're not certain
15 with all of the changes that have recently gone
16 on, how we may get a more favorable result for
17 our clients just by virtue of some of those other
18 changes.

19 So we'd like to see how that goes
20 before making specific recommendations about how
21 to modify the sentencing procedure.

22 CHAIR HILLMAN: Thank you.

1 Colonel Candelario?

2 LTCOL CANDELARIO: I would say I would
3 concur with everything that everyone has said
4 thus far.

5 The limitations imposed on victims
6 during the sentencing process are, you know, just
7 unfair. Unfair from their perspective; unfair
8 from just how it plays out in court.

9 And I have also experienced as a VC --
10 as an SVC -- as an SVC myself, having my client's
11 statement redacted and how that impacted her; and
12 the fact that everyone else in the room knew
13 exactly what we were talking about but she wasn't
14 allowed to say it.

15 And, that was in a judge alone case.

16 With regard to making our system a
17 little bit more like the civilian system, just
18 one caution from my part.

19 Bifurcating findings from sentencing,
20 right. So splitting those up. Right now our
21 victims, our clients, are able to go from
22 findings for the most part within 24 hours,

1 sometimes sooner, into sentencing, right?

2 And that gives them some certainty; in
3 some cases some closure, right. And, that's not
4 the case in the civilian world and I understand
5 that.

6 So, moving towards having more time in
7 between findings and sentencing I think would be
8 negative for at least the clients that we're
9 seeing out there from the Air Force perspective,
10 right.

11 There are a lot of good things that
12 come from being able to run right into sentencing
13 and know that if your -- if the convict at that
14 point -- he or she is a convict, right? -- If the
15 convict at that time is sentenced to any
16 confinement, they are going into confinement
17 immediately.

18 And especially for our clients who
19 have safety concerns, our domestic violence
20 clients, it is really impactful for them to have
21 that.

22 CHAIR HILLMAN: Thank you, Colonel

1 Candelario.

2 Let's stay with you and we'll go,
3 swing back through the order the other direction
4 for the next sentences on this.

5 Judge Kasold, did you have a follow up
6 question?

7 JUDGE KASOLD: Yes, I'm just curious
8 from any of those who might want to talk.

9 If you have a significant crime
10 charged and the government believes it can't
11 prove it, so they go with a lesser charge, or
12 because the command needs to go with a lesser
13 charge, do the victims' representatives believe
14 they should, nevertheless, be able to provide
15 testimony on the greater uncharged offense; and
16 how does that weigh against prejudice that would
17 be present in such a situation?

18 I'm just interested in that because
19 what I heard was, Oh, if we're charged with a
20 higher offense but it doesn't go forward, we go
21 with the lesser, we can't comment on that.

22 And I'm just curious how they see the

1 balancing of all that.

2 Thank you.

3 CHAIR HILLMAN: Colonel Candelario?

4 LTCOL CANDELARIO: I think any
5 opportunity we can give our clients, the victims,
6 an opportunity to truly express what the crime,
7 you know -- what the crime has done to them, is
8 going to be beneficial, right.

9 At this point in the military justice
10 process, we are doing judge alone sentencing; and
11 from my perspective, right, we have to trust our
12 judges to be able to parse out what is proper and
13 improper, and make their sentencing decisions in
14 accordance with the rules under UCMJ.

15 But allowing, whether -- you know,
16 allowing a victim to express what he or she
17 thought happened to them and the effects of that
18 in court, it is greatly beneficial to them.

19 And so any opportunity we can give
20 them to do that, I think is a positive.

21 CHAIR HILLMAN: Thank you.

22 Colonel McGinley?

1 COL MCGINLEY: So I know one of my
2 colleagues gave an example of a victim that there
3 was a penetrative offense originally charged, and
4 then they were only able to testify about the
5 non-penetrative offense.

6 I think what we're seeing from our
7 SVCs is that the -- our clients come in with an
8 impression overall of what has happened to them.

9 And so, asking them to think back and
10 try to parse through exactly which impressions
11 they had of which portion as opposed to being
12 able to speak overall, even if they're not able
13 to speak about a specific offense that was not --
14 that didn't end up going through. That would be
15 -- I think that would be helpful.

16 CHAIR HILLMAN: Commander de Groot?

17 CDR de GROOT: Yes, so I think I
18 brought up this point. I do believe with judge
19 alone sentencing, the trial counsel is allowed to
20 provide aggravating evidence. Even in a plea
21 agreement they're allowed to put forward
22 aggravating evidence.

1 The rule written for victims is for
2 mitigation evidence, or impact to them. I think
3 victims should be able to offer some aggravation.

4 And where we've seen this is really
5 when a victim is very emotional about the
6 emotional impact to them due to a penetrative
7 offense, but can only talk to what a judge deems
8 is appropriate as an emotional response to a
9 touching event. Those are things that are being
10 redacted by some judges.

11 So, being allowed -- to allow the
12 victim to speak fully as to their experience and
13 their impact to the crime that was committed
14 against them, and allow the judge to use their
15 judicial discretion to disregard, not disregard,
16 but to hear and then come up with an appropriate
17 sentence based on what is -- what are the true
18 factors that they are allowed to, to consider
19 when coming up with their sentencing.

20 CHAIR HILLMAN: Thank you.

21 Colonel Pedden?

22 COL PEDDEN: Yes, ma'am, thank you.

1 And Judge Kasold, Your Honor, I think I heard you
2 ask basically a two-part question. And, I'll try
3 to answer them in order.

4 The first was whether a victim should
5 be allowed to speak as to the greater offense, if
6 you will. And you mentioned testimony but I
7 don't want to take your question out of context.
8 Obviously if the victim is providing testimony as
9 part of the government's case in aggravation, or
10 elects to submit a sworn statement, then the
11 victim will be subject to cross-examination.

12 And, I would presume that that cross-
13 examination would solve the problems with respect
14 to the scoping and prejudice that your question
15 addressed.

16 As to unsworn statements, again I
17 believe that the victim should be able to speak
18 to those issues because there is a separate and
19 unique harm that flows from the nature of
20 unwanted sexual touching, that isn't really
21 captured by a plea to a lesser offense agreed
22 upon by the accused and the government.

1 Whether or not the nature of those
2 agreements and the quantum of proof available to
3 the government will be different under the Office
4 of Special Trial Counsel paradigm, I believe it's
5 too soon to tell.

6 They have indicated that they will put
7 in place a higher prosecutorial standard when
8 determining whether or not to proceed with a case
9 initially. But I think we've got a lot to learn
10 about how they'll play out yet.

11 With respect to the prejudice issue,
12 if I could, I'd refer the Panel's attention back
13 to the DAC-IPAD report from March 30.

14 And not to insult anyone's
15 intelligence and I don't want to read to
16 everyone, but I do want to quote this portion,
17 "The military judges also agreed that there is
18 little to no risk of prejudice as the military
19 judge can easily set aside information contained
20 in the statement that is potentially unduly
21 prejudicial to the accused, and decide the
22 sentence based only on admissible information."

1 I think that's important. And again,
2 I'm trusting our highly trained, very well
3 experienced trial judiciary because it is as
4 important for them as it is for victims.

5 That's especially important in light
6 of the amount of voice and agency that a less
7 restrained, unsworn statement could afford a
8 victim.

9 They've been waiting a very long time
10 for their day in court. To have that day be
11 redacted seems like a separate unfairness that we
12 can resolve. Thank you.

13 CHAIR HILLMAN: Thank you.

14 Commander Crowe?

15 CDR CROWE: Thank you. Yes, not much
16 to add. I concur. I think the risk of prejudice
17 is not any greater than any of the other myriad
18 of issues that come up during trial, that judges
19 have access to lots of inadmissible potential
20 evidence that they might see during a trial.

21 And, they put those aside when needed
22 and can counter any instance of prejudice.

1 So, I concur with the Colonel. The
2 victims really look forward to that day in court
3 and when they have to be redacted, or constrained
4 in a way that they feel is unfair, that could
5 leave a bad taste in their mouth and sour the
6 whole experience.

7 Over.

8 CHAIR HILLMAN: Thank you.

9 Colonel Osborn?

10 JUDGE SOMERS: Excuse me, I have
11 question. Sorry to interrupt but it's kind of
12 the last two speakers.

13 So, I guess I'm confused. So, what is
14 the purpose for the judge to redact? Is it
15 because of the potential prejudice; because if
16 it's judge alone, as you've discussed, isn't it
17 the case that the judge could put that aside?

18 It just makes little sense to me to
19 have the actual statements redacted. And I guess
20 the redactions don't go up on appeal, so those
21 are just kind of lost.

22 Is that correct, or am I

1 misunderstanding?

2 CDR CROWE: I think you're correct,
3 ma'am. And I think that is kind of our
4 perspective is it doesn't make sense except
5 that's the way the rule is written, and that's
6 the way that the rule has been put into practice
7 now, so that's the way that we do it.

8 But I think our perspective is, like
9 as you pointed out, what is the harm for them to
10 do that.

11 CHAIR HILLMAN: Thank you, and thank
12 you Judge Somers.

13 Judge Somers, any follow up on that?

14 JUDGE SOMERS: No follow up, thank
15 you.

16 CHAIR HILLMAN: Okay, thank you.

17 Colonel Osborn has a question.

18 COL OSBORN: I don't have a question,
19 I just want to complete the record.

20 So, since I forgot which one of you
21 was quoting from the DAC-IPAD report, I think we
22 ought to say what's in the report that was in the

1 ellipses (audio interference) mention.

2 Actually, one judge in the February
3 22, 2023, public meeting, cautioned that the
4 victim's impact statement should relate only to
5 the crimes for which the accused was convicted,
6 footnote 63.

7 Also in the February 2020 DAC-IPAD
8 public meeting, a panel of several former
9 military judges provided information to the
10 committee and in general. They stated that they
11 limited a victim's impact statement when it
12 contained information they previously ruled
13 inadmissible, as well as when the statement
14 recommended a particular sentence for the
15 accused.

16 I don't normally like to read from the
17 reports but when other people read from the
18 reports, I just feel like we need to get a
19 complete record and not leave out some of the
20 pertinent information.

21 CHAIR HILLMAN: Thank you, Colonel
22 Osborn.

1 I have a couple more questions on
2 sentencing, but let me open it up to the other
3 Panel members who are actually on the -- joining
4 us virtually. Anybody not in the room have
5 questions with regard to sentencing, or anything
6 else before we continue?

7 COL MORRIS: I don't right now,
8 thanks.

9 CHAIR HILLMAN: Thanks, Colonel
10 Morris.

11 Anybody else?

12 MG (R) EWERS: Yes, Dr. Hillman, John
13 Ewers here. I'm just wondering if a couple of
14 different panel members talked about the problem
15 associated with the victim not being -- there's
16 basically no way to enforce anything that keeps
17 the victim informed.

18 Is there something that you've had in
19 mind specifically about how to remedy that? Yes,
20 I guess that's as far as my thinking takes me.
21 I'm just curious.

22 CHAIR HILLMAN: Thank you, General

1 Ewers.

2 I'll just run down so that for the
3 purpose of speed. Lieutenant Colonel Candelario,
4 anything you want to add on that and respond to
5 General Ewers' questions?

6 LTCOL CANDELARIO: I've thought about
7 this because I thought you were going to ask a
8 question I guess.

9 But I'm not sure if there could be a
10 rule written that says you must inform the victim
11 five days within, when you think you're going to
12 have plea negotiations and you must allow them a
13 certain amount of time to get back with you.

14 I just don't think that that's -- I'm
15 not sure that that's -- that we could write a
16 rule like that, or that's what we should do with
17 the military justice system.

18 But smarter minds than me. Anything
19 that you could do to ensure that there is an
20 opportunity for meaningful victim, if they're not
21 represented, or through their victim's counsel or
22 special events counsel, or with the legal counsel

1 if they are represented, meaningful discussion
2 about the plea agreement to include stipulations
3 of facts and, you know, confinement times and the
4 limits of confinement.

5 Giving max opportunity for meaningful
6 input is really what we need. But what that
7 would like I'm just not, I'm not very sure.

8 CHAIR HILLMAN: Thank you.

9 Colonel McGinley?

10 COL MCGINLEY: So because so far our
11 relationships with the prosecutorial teams have
12 been relatively solid, we haven't really had to
13 ponder deeply how we could make that more
14 enforceable.

15 I do definitely sympathize with my
16 colleague's point that there is not right now, a
17 way to drive that, to compel that sort of
18 cooperation of coordination. And so, we'd be
19 open to any recommendations or suggestions for
20 rules to add there.

21 I don't think our -- on the Army side,
22 I don't anticipate we would have much resistance

1 since our prosecutors are so far working well
2 with our SVCs.

3 CHAIR HILLMAN: Thank you.

4 Commander de Groot?

5 CDR de GROOT: So, I vaguely remember
6 numerous trainings I've had on things that are
7 happening in the civilian world and have happened
8 depending on their specific state, victims'
9 statutes.

10 But, and these are just my
11 suggestions, not the Navy's suggestions, we could
12 do a continuance that allows the government and
13 the victim -- the victim an opportunity to
14 actually consult with the government to ensure
15 that they're fully notified of the plea
16 agreement.

17 It could be the judge throws out the
18 plea agreement and says you have to renegotiate,
19 ensuring that the victim is fully informed.
20 These are things that I remember hearing from
21 other states where things like this have
22 happened.

1 Are these things that could happen in
2 the military justice system? I don't know, but I
3 do know that there are ways -- should be ways to
4 enforce these things and are being used in other
5 systems.

6 CHAIR HILLMAN: Thank you.

7 Colonel Pedden?

8 COL PEDDEN: Yes, ma'am, thank you.

9 And Major General Ewers in response to
10 your question, sir, I would agree with Commander
11 de Groot that potentially a continuance could be
12 one remedy.

13 I'd also like to point out that the
14 lack of enumerated remedies in a rule also
15 creates sort of a separate and problematic
16 parallel practice, where really the only remedies
17 available to victims through counsel are to make
18 other complaints that are outside the military
19 justice process, based on the counsel and SJA's
20 failure to properly coordinate with the victim.

21 That's something that I strongly
22 advocate against internal to the Marine Corps

1 victim legal counsel organization, at least with
2 respect to making professional responsibility or
3 Inspector General complaints, matters of routine
4 practice although they are authorized by statute
5 and our counsel can advise on those things.

6 We have to tell them it's an option.
7 It would be a much less appealing option if there
8 were enforceable remedies at law, available
9 within the R.C.M.

10 A continuance would be a good start.
11 A military judge inquiring of a victim during the
12 caring query -- not the caring query itself, but
13 the plea agreement negotiation inquiry process.

14 If the military judge were to inquiry
15 of the victim "Hey, have you had an opportunity
16 to provide meaningful input?" That might be
17 helpful as well.

18 I would think that to the extent that
19 a victim were not offered meaningful input, that
20 would be one matter among many that a military
21 judge might consider under the new rule, where
22 even though there is a specified sentence in the

1 plea agreement, the military judge may depart
2 from that.

3 I think the language in the new rule
4 is plainly unreasonable. I would think that a
5 victim's vocal advocacy about not having been
6 consulted could be one factor among many, that a
7 military judge might find was plainly
8 unreasonable.

9 Thank you.

10 CHAIR HILLMAN: Thank you.

11 Commander Crowe?

12 CDR CROWE: Thank you. I don't have
13 anything specific to add. I agree with my
14 colleagues that a mechanism to ensure that the
15 victim has meaningful participation would be a
16 good thing.

17 But I don't have any additional
18 recommendations that I would like.

19 CHAIR HILLMAN: Thank you. Okay,
20 we'll head back up to the top here, to Lieutenant
21 Colonel Candelario.

22 Just the other two questions about

1 sentencing involve different sentences for more
2 or less, the same similar offenses.

3 To what do you attribute differences
4 that you've seen in sentencing, and with regard
5 to plea agreements, did those seem similar with
6 respect to relatively comparable offenses in your
7 experience?

8 Lieutenant Colonel Candelario?

9 LTCOL CANDELARIO: Yes, ma'am.

10 So, really in my experience and from
11 what we're seeing out in the field, we really are
12 seeing sort of similar plea agreement terms for
13 what you would call similar cases.

14 Although I use the word -- nothing is
15 really similar, right? Every accused is
16 different. The facts and circumstances of every
17 case is different.

18 And for that matter, every victim is
19 different, right? I mean, what the victim or
20 client sees as their form of justice, or their
21 form of case resolution is going to be different.

22 So with all those caveats with regard

1 to PTAs, we are seeing similar -- similar plea
2 agreements.

3 And then I believe you first question
4 was on, was it on judge sentencing, whether we're
5 seeing the similar as well, ma'am?

6 CHAIR HILLMAN: Yes.

7 LTCOL CANDELARIO: Yes, so once again
8 like same caveat. Every case is going to be
9 weighed differently. The facts are different;
10 circumstances are different.

11 The convict is going to be different,
12 right. Mitigation and aggravation. But
13 generally I think just anecdotally speaking,
14 we're seeing similar, right.

15 But any inconsistencies I think, are
16 going to be covered by the sentencing parameters
17 and criteria that we have.

18 And I'm hoping that they will be
19 covered by that, but it's just too early to tell.
20 I've never practiced as a VC with the new
21 parameters and criteria.

22 And a lot of our counsel, we just

1 don't have enough data to say right now, ma'am.

2 CHAIR HILLMAN: So noted with respect
3 to all those caveats that you just set out.

4 Thank you.

5 Colonel McGinley?

6 COL MCGINLEY: So I'll echo the
7 caveats that my Air Force colleague has just laid
8 out.

9 First of all, we don't have hard data
10 regarding any patterns in either convening
11 authority plea agreements, or in the sentence
12 that is ultimately adjudged. So our information
13 is all anecdotal.

14 We believe each individual, not just
15 the accused, but each individual client may want
16 something dramatically different from another.

17 So, we may not infrequently see cases
18 that on the surface look very similar, if not
19 identical. But there's an individual human being
20 in our client behind each of those cases.

21 And they may want something very, very
22 different based on their own personal preference,

1 their life circumstances, or the rest.

2 So if there are differences there, we
3 would actually hope to see some differences there
4 taking into account the victim's preference.

5 But so far, we have not, again,
6 anecdotally observed any concerning pattern with
7 a wide disparity between sentences either in the
8 plea agreement, or the adjudged sentence.

9 CHAIR HILLMAN: Thank you.

10 Commander de Groot?

11 CDR de GROOT: I concur on the
12 different victims. But what I can't speak to --
13 I'm sorry, I'm not being articulate today.

14 But on victims wanting different
15 things even in the same case, not necessarily
16 being -- wanting different things when it comes
17 to the plea agreement and potential sentences.

18 With regards to the judge, the judge
19 isn't even in the plea agreement, it's very
20 difficult to say whether or not certain cases are
21 similarly situated because we don't have access
22 to the ROI.

1 We cannot tell what the evidence is
2 out there, what's available. And so, I cannot
3 speak to whether or not someone is accused or
4 similarly situated. I can only speak to that
5 each case is different.

6 And judges, do you have reputations
7 for either being nicer or not so nice. I had a
8 judge back in 2000 who was a very hard sentencer.
9 So depending on that judge, you made your plea
10 agreement accordingly.

11 CHAIR HILLMAN: Thank you.

12 Colonel Pedden?

13 COL PEDDEN: Yes, ma'am. Thank you.
14 And strong second for me to the sameness of my
15 colleagues. These are important caveats, right?
16 These victims are not monolithic. They are
17 different people with different cases, different
18 feelings, and different harms.

19 Our hope is that a robust and
20 informative sentencing process allows those facts
21 to become known, and inform the judge's
22 decisionmaking and deliberation on the imposition

1 with appropriate punishment.

2 For what it's worth, and this is just
3 my personal opinion cultivated over a couple of
4 decades -- and there's a great many judges both
5 in the Marine Corps and in the other services
6 whom I've known, and some of whom before I've
7 practiced -- I believe that our judges faithfully
8 apply the law. I think it's less a question of
9 empirical data and whether or not there's
10 disparate sentencing, than it is a question of
11 how the law and policy is written to inform their
12 decisionmaking process.

13 I think that, as many of my other
14 colleagues commented, it's really difficult to
15 quantify that at this early stage of proceedings.

16 And, although I generally have a
17 strong bias for action, I might counsel a little
18 bit of restraint of this one at least with
19 respect to collecting and analyzing that
20 information very, very carefully and, in
21 particular, with a view toward the unique
22 circumstances and facts of each individual case.

1 I won't miss an opportunity to weigh
2 in on my colleague Commander de Groot's comment
3 that access to case information is vitally
4 important, not only in assessing that, but also
5 for victims' legal counsel adequately to advise
6 their clients on what, for lack of a better way
7 to put it, what a case is worth in terms of
8 punishment.

9 So again, I agree with my colleagues
10 and think that we're very early in the process
11 right now to assess whether or not judges are
12 doing different things with similar cases.

13 Thank you.

14 CHAIR HILLMAN: Thank you.

15 Commander Crowe?

16 CDR CROWE: I concur particularly to
17 Colonel Pedden and Commander de Groot, that to
18 say a case is similarly situated is very
19 difficult from our seat.

20 Sure, we can compare the charges on a
21 charge sheet, but without knowing the full scope
22 of what's in the investigation, there are unique

1 factors about the accused. There are unique
2 factors about the victim.

3 There's unique factors about the
4 circumstances of the offenses, and all of those
5 could weigh on what an appropriate sentence is.
6 And for that reason, and very good reasons why
7 cases that on the surface may look to be similar
8 actually receive very different sentences. And I
9 think that could be a good thing from time to
10 time.

11 But from the VLC or SVC perspective,
12 being able to have access to that information so
13 that we, when a case does result in what looks
14 like maybe an anomalous sentence, we have the
15 ability to explain to our client and to others,
16 why maybe that sentence makes more sense than it
17 looks like from the outside.

18 Over.

19 CHAIR HILLMAN: Thank you. We have
20 about 10 more minutes or so. I want to see if
21 any of the Panel members have any questions they
22 want to raise right now before we move into the

1 last two relatively short topics.

2 I think Captain Aldana?

3 CAPT ALDANA: I just have a general
4 question. I believe I recall from previous panel
5 or speaker in previous meetings, and just
6 mentioned the confusion on the role of a SVC or
7 VLC in the military justice system.

8 I know probably the earlier onset of
9 the implementation probably was the case. Is it
10 pretty much entrenched now that people are
11 familiar, or folks are familiar with the role of
12 a SVC and VLC in the military justice system?

13 CHAIR HILLMAN: Let's start with
14 Commander Crowe, and we'll run back upstream this
15 time.

16 CDR CROWE: Yes, ma'am, thank you. I
17 think, generally, that the answer to the
18 Captain's question is yes. Obviously, the more
19 kind of separate from the system someone is, they
20 may not know what we deal with.

21 Dependents, clients, or from time to
22 time, through exceptions of policy we may

1 represent unaffiliated civilians who are victims
2 of crimes committed by a servicemember. And
3 those folks who maybe have little exposure to the
4 Coast Guard and the military at all, might be a
5 little confused at first with what our role is.

6 But I think within the system, defense
7 counsel, the judges, and the prosecutors, I think
8 our role is pretty well fleshed out. Obviously,
9 there's some anomalies from time to time, but
10 within the system, I think yes.

11 CHAIR HILLMAN: Thank you.

12 Colonel Pedden?

13 COL PEDDEN: Yes, ma'am. Thank you.

14 I think, generally speaking, I concur with
15 Commander Crowe; generally speaking, they know
16 who we are. That part is very well established.
17 What's not well established is, are things like
18 scope, and standing.

19 I think my Air Force colleague earlier
20 mentioned the case that they have before the
21 Court of Appeals for the Armed Forces right now,
22 with respect to whether or not a victim's counsel

1 had standing to make certain motions and
2 arguments at trial. And I don't want to misstate
3 the facts of their case, I'll let them speak to
4 it if they want to.

5 In other areas, we see problematic
6 issues in some interactions where there are
7 misunderstandings about the scope of our
8 authority as victim counsel, and to advise
9 clients.

10 There's another case wending its way
11 up through the Navy-Marine Corps Court of
12 Criminal Appeals process right now, where a
13 victim was questioned as a suspect and told that
14 she couldn't have her victim's counsel present,
15 even though the nature of what the law
16 enforcement agency suspected was directly related
17 to her having reported a sexual assault.

18 And so, there's some disagreement
19 there about standing and when you're entitled to
20 counsel, and things like that. And I think those
21 things will in some cases, work their way, you
22 know, find their resolution in the appellate

1 process.

2 But there's probably still other work
3 that could be done to solidify when and where we
4 can make certain objections; file certain
5 motions; and, when we're entitled to certain
6 pleadings and other information.

7 Thank you.

8 CHAIR HILLMAN: Thank you. Commander
9 de Groot?

10 CDR de GROOT: I will concur. I
11 remember my first motion session as a VLC. I
12 wasn't allowed to argue the motion. I could only
13 write the motion and submit it. And no one knew
14 where I was to sit. So, all of those have been
15 resolved. We know where to sit and we know that
16 we can walk to the podium and make an oral
17 argument.

18 Where we do still have work to do is
19 for other parties, trial and other folks being
20 gatekeepers to the information that we need in
21 order to properly advocate for our clients'
22 rights and still finding a role there, especially

1 with discovery. Much like the CAAF case that the
2 Air Force argued earlier. Over.

3 CHAIR HILLMAN: Thank you. Colonel
4 McGinley.

5 COL MCGINLEY: I concur with all that
6 has been said so far with what we've had on. I
7 said several times, we have a great relationship
8 with our prosecutorial team generally.

9 This would be the only area where
10 there might be a little bit of a rub, you know,
11 especially some very junior prosecutors may think
12 that the SVC is there to ensure that the victim
13 appears for trial as a witness.

14 That, of course, is not their role.
15 We provide legal guidance and advice to that
16 individual victim as a client. It's still the
17 prosecutor's responsibility to prepare for trial,
18 to prepare that witness for trial, and the rest.
19 But that would be our only snag. The system
20 overall seems to well recognize our position.

21 CHAIR HILLMAN: Thank you. Colonel
22 Candelario?

1 LTCOL CANDELARIO: I concur with my
2 colleagues on this one. The system recognizes
3 this, right. Where we have a little bit of work
4 to do is in the courtroom and evidentiary things.
5 And I believe it was already mentioned, you know,
6 we do have a case before CAAF for one of our hot
7 button issues.

8 CHAIR HILLMAN: Okay. Thank you. I
9 have two more areas that we wanted to ask you
10 about.

11 I'm going to go ahead and queue these
12 up together. We'll start with you, Lieutenant
13 Colonel Candelario. And then, give everybody
14 else a chance.

15 You can speak to both of these or one.
16 And, if you skip one, you can trust your other
17 colleagues will pick it up.

18 So, Commander Crowe, you're stuck with
19 answering the one that no one else answers if
20 that's what happens.

21 So, first, in the new punitive
22 articles, what kinds of services have you

1 provided, or your counsel team has provided, to
2 victims of the new offenses: Article 93a, Article
3 117a, 128b, 130, 132 retaliation, and 134 sexual
4 harassment? And has that affected the workload
5 of the teams you manage, or your own workload,
6 those offenses?

7 And then, second, is about the Article
8 16(c)(2)(A) special courts and your role in
9 those. Have your clients been able to
10 participate meaningfully in those? And what
11 kinds of concerns might your clients have about
12 those types of courts?

13 So, we'll start with you, Lieutenant
14 Colonel Candelario.

15 LTCOL CANDELARIO: Thank you, ma'am.
16 Well, there's a lot in this question. Okay. So,
17 with regard to the new punitive Articles,
18 specifically for 93a; 117a; 128b, but only
19 offenses (b)(1), (4), and (5), Article 130 and
20 132; those who are generally eligible for
21 services either by statute or by the Department
22 of the Air Force instruction, are receiving full

1 services.

2 And what I mean by full services is we
3 represent them in any military proceedings. We
4 enforce their rights and evidentiary privileges.
5 We attend interviews with them, with
6 investigators, trial counsel, and defense
7 counsel. We work with Commanders and the SARC or
8 to prep in the IC Program for protective orders
9 or expedited transfers.

10 We can assist in IG complaints. And
11 that is to include from -- with retaliation
12 complaints and written or verbal statements to
13 Congress for congressional complaints. We also
14 advise on collateral misconduct. And, we can
15 advocate during the MEV process and in NVA
16 hearings as well.

17 With specificity of looking at sexual
18 harassment, in 2021, the Air Force started
19 providing consultations for IPV victims,
20 interpersonal violence victims, and that includes
21 sexual harassment. It also includes other
22 workplace violence like bullying and harassing.

1 For those victims who are entitled to
2 that program, they receive a one-time consult
3 with a victim's counsel, covered by
4 confidentiality with regard to rights and options
5 and legal remedies.

6 If, after that one time consult that
7 victim or survivor or client wants to seek
8 additional services, they can do so through our
9 Extraordinary Circumstances Request Program.

10 And then, I believe the next question
11 was whether this has affected our workload? What
12 I will say is generally speaking --

13 CHAIR HILLMAN: Yes.

14 LTCOL CANDELARIO: Yes, ma'am.
15 Generally speaking, so far, 128b, right, domestic
16 violence clients, those clients, they need just
17 the additional support from victim's counsel.
18 Right.

19 Many of their cases involve civil law
20 issues, divorce and custody, which fall outside
21 of the scope -- our scope of representation for
22 our program.

1 We still have to advise them that it
2 falls outside of the scope and give them a warm
3 handoff to some resources. For instance, Article
4 Assistance Program, right.

5 So, more warm handoffs, more helping
6 agencies to ensure the clients receive legal
7 assistance for the things that they need that we
8 can't provide them.

9 There's also the addition of
10 heightened safety concerns, which go -- which
11 link up to civilian protective orders and
12 military protective orders. Right.

13 Our domestic violence clients just
14 have a lot more safety concerns than our other
15 types of sexual assault clients.

16 There's often more history and more
17 emotion involved in these cases, because of the
18 circle of violence. Because they tend to be over
19 a larger amount of time rather than a single
20 incident.

21 And that just means that there may be
22 more litigation or advocacy to be had. It would

1 be, you know, 412, rape shield, or with mental
2 health records.

3 Their assailants, right, their
4 intimate partners tend to know a little bit -- a
5 lot more, actually, about their mental health
6 visits or their medical visits and other things
7 that may or may not be involved with the case.

8 So, they are a heavier lift. I can't
9 quantify how much time, you know, how many hours
10 or the time. But, they are just a heavier lift
11 in general.

12 With regard to the one time consults,
13 we -- we have seen an up-tick since we started
14 the program in 2021. But, I can't provide any
15 real data as to, you know, how much more labor
16 intensive those cases are.

17 They really are a lot less, a lot less
18 than our domestic violence clients and our other
19 sexual assault clients, absolutely.

20 CHAIR HILL: Thank you. If everybody
21 can stay on for a few extra minutes, we'll take a
22 few more minutes to get the rest of the responses

1 to these questions.

2 So, over to you, Colonel McGinley.

3 COL MCGINLEY: Just to add onto the
4 Air Force without repeating a couple of different
5 things. First, many of our clients, if not most
6 of our clients, come to us with not just one UCMJ
7 Article that is at play.

8 So, we very, very frequently see a
9 mixture of different issues, different offenses
10 with the same client. And, we treat the client
11 holistically. We don't break that apart.

12 So, even though we don't provide, if
13 it were purely a sexual harassment case, we
14 wouldn't necessarily provide SVC services without
15 any exception to policy.

16 We rarely see a client coming in just
17 with that issue. It's usually a combination of
18 different factors. And we would not parse out
19 pieces of that and only advise the client on
20 certain pieces. We would advise the client as a
21 whole individual. And so, that's the emphasis
22 there.

1 The other thing we have, as the Air
2 Force mentioned, we work hand in glove with our
3 legal assistance colleagues. And so, we've got
4 sort of one foot in military justice, one foot in
5 legal assistance. And that's actually -- that's
6 worked relatively well. Because even issues that
7 we wouldn't normally have strictly SVC services
8 for, we have services via legal assistance.

9 And, in addition, our legal assistance
10 colleagues have been able to provide guidance on
11 separation agreements, other issues, protective
12 orders, advising domestic violence clients, which
13 has been helpful.

14 I believe you asked a question as well
15 regarding Article 16(c). We've seen that the
16 same as we've seen other case resolutions. It
17 really just depends on the individual client, the
18 individual case. Whether or not that is or is
19 not helpful, it's always good to have additional
20 options.

21 CHAIR HILLMAN: Thank you. Commander
22 de Groot?

1 CDR de GROOT: I concur with our Air
2 Force and Army SVCs and VLCs. We cover all of
3 these already, all of these punitive Articles, we
4 have already provided services for.

5 Sexual harassment is unique. We do
6 not offer automatic services to victims of pure
7 sexual harassment. But, like Colonel McGinley
8 says, we do treat our victims, our clients
9 holistically. So, normally they would come in
10 for a sexual assault and then perhaps the trial
11 counsel or command says its only sexual
12 harassment.

13 We will continue to represent this
14 victim even though -- because they originally
15 would have come to us for a sexual offense. But
16 we do allow for a waiver process if someone does
17 to come to us -- does come to us and it is a
18 purely sexual harassment case and it cannot be
19 resolved administratively and through
20 administrative processes.

21 Then we can do a waiver process
22 through our Chief of Victims Legal Counsel

1 Program, to get a waiver for us to represent this
2 victim.

3 When it comes to the special court-
4 martial, that is part of a plea agreement. It
5 has happened to numerous clients. Some are
6 happy. Some are unhappy with it. It is just
7 part of our practice.

8 But I would like to note that 90
9 percent of our cases never see court-martial,
10 never see a plea agreement. They will always go
11 -- they are headed towards administrative
12 resolution or nothing at all.

13 Our biggest concern right now, we
14 recently had a VLC whose client committed suicide
15 when OSTC declined to prosecute and sent the case
16 back to the command. The command, based on what
17 they had, determined that they were not going to
18 do anything, even administratively, to this
19 accused.

20 And the VLC had no idea. They knew
21 what was happening, but did not, could not manage
22 expectations of the victim. Because they had no

1 idea of the evidence and why things were going
2 that way.

3 So, I just want to note that most of
4 our cases do not go to court-martial. And so,
5 having access to information to help our clients
6 is of our -- is of utmost concern for our VLC.
7 Over.

8 CHAIR HILLMAN: Thank you. Colonel
9 Pedden?

10 COL PEDDEN: Yes, ma'am. Thank you.
11 So, a similar response from the Marine Corps
12 concurs with what my colleagues have put out to
13 you already.

14 I would note, especially with respect
15 to Colonel McGinley's comments from the Army
16 about treating clients holistically, that's the
17 Marine Corps approach, too.

18 And so, it's not necessarily
19 immediately apparent what triggered the
20 representation of a given client based on looking
21 at the charge sheet or a disposition report.

22 You know, what comes originally as a

1 compliant for say, a sexual assault, to which --
2 which would trigger entitlement for a victim's
3 legal counsel, that might get disposed of based
4 on something else that wouldn't trigger
5 entitlement to a victim's legal counsel.

6 In those cases involving the offenses
7 that you specifically asked about, at least one
8 of those, the Marine Corps has always done since
9 the beginning. We've provided victim's legal
10 counsel representation and advice for victims of
11 domestic violence since the inception of the
12 program.

13 As to the other charges -- Actually,
14 let me back up. And so, that doesn't really add
15 materially to the workload that we have now.

16 I've previously testified that were we
17 to add sexual harassment as an offense, it would
18 trigger automatic entitlement to victim's legal
19 counsel representation.

20 My best estimate is that that would
21 take about four more VLCs across the Marine Corps
22 enterprise. As it currently stands, the

1 exceptions to policy constitute a little bit less
2 of our volume of practice now than they did the
3 last time I appeared before this panel.

4 I think the last time I said it was
5 about 6.5 percent. Now, we're down to about 6
6 percent of the total Marine Corps VLCO caseload
7 being exceptions to policy.

8 Those come to us from a variety of
9 sources and methods. Those ETP requests, I weigh
10 them all on an individual basis. I'm the only
11 one with the authority to approve them in the
12 Marine Corps.

13 When I look at things like the nature
14 and severity of harm suffered by the victim, the
15 types of charges, the likelihood that complex
16 litigation will result, and things of that nature
17 and generally have arrived in favor of granting
18 those exception to policy requests where there
19 are significant issues.

20 Any particular issues that although
21 the case itself doesn't trigger an entitlement to
22 a VLC, the matters to be litigated in that case,

1 for example, an MRE 513 motion, might require a
2 lot of technical knowledge about the law.

3 So, in terms of the form that you
4 mentioned, you know, as with the Army, we treat
5 that as a disposition like any other and provide
6 our clients advise and representation during the
7 process.

8 I think one of the calls in the
9 questions that were submitted to us, had to do
10 with whether or not victims were able to express
11 their views on that particular -- that type of
12 outcome. My answer is a conditional yes.

13 But, in that case, largely they
14 express those views as part of a stated agreement
15 negotiation process and, obviously, not in the
16 court-martial itself; because that wouldn't be a
17 proper matter to come in under R.C.M. 1001.

18 So, thank you.

19 CHAIR HILLMAN: Thank you. Commander
20 Crowe?

21 CDR CROWE: All right. So, with
22 regard to the first question, services for the

1 new Articles.

2 So, we take the approach that we will
3 talk to anybody initially. So, like most of my
4 colleagues mentioned, our clients, you know,
5 don't always know, you know, what punitive
6 Article or what the crime was or whether they're
7 entitled to services.

8 So, we will take their call and talk
9 to anybody. And then, we put it upon ourselves
10 to determine, you know, what Articles are at play
11 and what services are required.

12 If there's a -- if it's outside of the
13 statutorily enumerated policies, we do have an
14 exception policy process similar to the factors
15 that Colonel Pedden mentioned. We waive those.

16 And then, another key factor is, like
17 what is our role? So, similar to the Navy, I
18 think where with the sexual harassment, kind of
19 if it's a standalone purely sexual harassment
20 case, you know, no other criminal misconduct
21 involved in this case, we would look to like is
22 there going to be a likelihood of military

1 justice action?

2 Is there a criminal investigation?

3 Or, is this purely an administrative action? And
4 if there is a role for us, like we're
5 anticipating that this is going to be complex,
6 that we might end up inside of a military justice
7 courtroom, or there is a criminal investigation,
8 you know, that could imperil our potential
9 client's rights, then we see a role for
10 ourselves.

11 We might grant an exception policy and
12 take a standalone sexual harassment case. But, I
13 will kind of echo some of the comments from my
14 other colleagues that I think those are fairly
15 rare.

16 We often see a client that they
17 initially complain on the sexual harassment case,
18 but, really, there are other activities going on
19 in the case that maybe haven't been reported yet
20 or maybe weren't properly investigated. And, it
21 turns into a full representation because there
22 are additional issues.

1 So, I think that that's -- kind of
2 highlights the importance of the approach of
3 treating our clients holistically. And, you
4 know, taking them for how they come to us and not
5 pigeonholing them, you know, based on what the
6 initial report might be.

7 And then, just quickly to the second
8 question about the new court-martial disposition.
9 I personally don't -- haven't had any clients
10 that have found themselves in that forum.

11 But just kind of echoing colleagues,
12 from experience, you know, there's some clients
13 who may, you know, fully support such a
14 disposition, because that is consistent with
15 their notions of justice in their particular
16 case.

17 Other clients, you know, might oppose
18 it, because they were hoping for, you know, the
19 max punishment available under general court-
20 martial. But, universally, in the Coast Guard,
21 our clients would have the opportunity to weigh
22 in on that again, you know, in the plea agreement

1 process before that charge was withdrawn from a
2 more serious forum and referred to the new forum.
3 Over.

4 CHAIR HILLMAN: Thank you. I want to
5 thank you all for taking time with us this
6 afternoon so that we could benefit from your
7 experience in this particular arena.

8 Navigating all the changes in military
9 justice, especially with respect to the folks
10 whose lives and dignity and, you know, well-being
11 you're helping to support through this process,
12 it's really important. And we couldn't do this
13 job without you.

14 So thank you so much. Take good care.
15 And with that, we'll wrap up this open session of
16 the Military Justice Review Panel.

17 MR. YOB: Thank you. I also want to
18 express my thanks to the VLC and SVC for being
19 here today and providing such great information
20 and such expertise.

21 So, thank you for your time and your
22 efforts. For the rest of us, let's take a ten

1 minute break. When we come back, we'll go into
2 an executive session that will be nonpublic.
3 There will be -- it will include Panel members
4 and staff.

5 We'll go over more of our
6 administrative announcements. Then, when we're
7 completed with that, we'll take another break.
8 And then you can go into an executive session
9 that does not include the -- just the Panel
10 members. That will conclude the day.

11 So, thank you. A ten-minute break.

12 (Whereupon, the above-entitled matter
13 went off the record at 2:10 p.m.)
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- a.m.** 1:10 4:2 99:7
abilities 22:14 93:4
ability 15:22 19:20
 29:19 39:11 50:4 64:3
 80:3 86:21 91:14
 93:14 108:20 132:11
 135:6 162:15
able 11:8 13:19 19:21
 21:1,18,21 30:7 32:16
 34:11 37:3,6 39:8
 44:6 50:5 51:10,19
 57:12,15 58:7,8 63:8
 64:20,22 72:9 73:5,15
 74:7 87:4 97:20
 108:15 111:22 127:9
 127:13 129:22 136:21
 137:12 138:14 139:12
 140:4,12,12 141:3
 142:17 162:12 169:9
 175:10 181:10
abnormal 20:5
above-entitled 101:21
 186:12
absolutely 27:18 28:6
 32:10 68:7 89:5 99:2
 133:19 173:19
abuse 127:5
accept 22:18
acceptable 49:17
access 28:10,21 29:16
 29:18 30:10,21 108:8
 112:11 144:19 158:21
 161:3 162:12 178:5
accessible 27:9
accord 14:20
account 158:4
accountability 22:20
accountable 108:4
accurate 94:6
accused 83:4,13 84:21
 84:21 92:3 107:3
 108:4 130:11 131:16
 132:18,19 134:17
 142:22 143:21 147:5
 147:15 155:15 157:15
 159:3 162:1 177:19
accused's 134:20
acquaintances 17:17
acted 28:15
acting 2:5 29:9 53:7
action 50:7 160:17
 183:1,3
actions 78:8
active 25:3 49:2 98:1
activities 183:18
actual 22:21 23:10
 145:19
- add** 24:22 34:17 56:4
 80:6 91:7 96:18
 144:16 149:4 150:20
 154:13 174:3 179:14
 179:17
adding 68:18 73:8
addition 172:9 175:9
additional 30:15 36:4
 68:5 69:19 72:8 80:7
 94:8 154:17 171:8,17
 175:19 183:22
additions 106:4
address 83:20
addressed 11:15
 103:18 117:18 142:15
addressing 82:12 86:2
adds 39:17
adequate 93:21 110:18
adequately 161:5
adjacent 70:1
adjective 49:16
adjudged 14:7 70:6
 157:12 158:8
adjudicate 95:3
adjudication 94:21
adjudicative 88:2
admin 4:18,20
administered 28:4
 105:15
administrative 35:4
 54:22 78:8 97:10
 176:20 177:11 183:3
 186:6
administratively 40:3
 176:19 177:18
Admiral 3:4 5:19 7:5
 10:3 24:7,18 26:7,14
 37:22 38:4 41:13
 43:21 44:7,10 48:7,10
 48:15 49:10 55:14
 59:7 62:5 72:15 75:16
 75:17 77:18 78:19
 81:7,8 85:12 89:6
 96:15
admissible 143:22
admission 33:10
admit 34:9 47:7
admitted 131:2
adopted 49:11
advantage 32:17 93:8
 124:8
advantageous 22:19
advantages 41:1
adversarial 11:5
adversely 127:16
advice 116:1 167:15
 179:10
advisable 66:13
- advise** 54:20 153:5
 161:5 165:8 170:14
 172:1 174:19,20
 181:6
advising 23:8 175:12
advisors 15:21 59:11
advisory 55:8
advocacy 37:13 44:3,19
 154:5 172:22
advocate 9:13 16:4,8
 17:10 20:13 22:15
 52:9 59:5 65:8 113:8
 152:22 166:21 170:15
advocates 21:10 30:4
 35:18 44:11 56:1
affect 100:16
affidavit 28:11 29:22
afford 131:16 144:7
afforded 41:2
afternoon 99:14 101:3
 101:11 103:6 106:14
 185:6
agencies 57:12 172:6
agency 144:6 165:16
aggravating 140:20,22
aggravation 134:19
 141:3 142:9 156:12
aggressively 97:1
ago 48:4 120:19
agree 71:11 85:19
 96:17 107:22 133:3
 152:10 154:13 161:9
agreed 101:16 132:9
 142:21 143:17
agreement 13:5,11,13
 13:19,20 17:20 20:3
 20:10 21:19 25:1
 38:10 42:8,15 72:4
 80:5 106:18 107:3
 108:17 109:20 111:16
 112:19 113:7 115:9
 115:14,22 129:17,22
 130:6 134:6 140:21
 150:2 151:16,18
 153:13 154:1 155:12
 158:8,17,19 159:10
 177:4,10 181:14
 184:22
agreements 10:18,20
 12:9,12,15 13:4,6
 15:4,4,9 18:21 24:19
 25:14,20 26:2 38:6
 41:21 43:16 88:21
 105:11,12 106:5
 114:19 128:14 143:2
 155:5 156:2 157:11
 175:11
Ah 26:21
- ahead** 4:16,17 7:7,17
 10:6 41:16 49:6 61:10
 98:6,9 103:15 106:15
 109:17 110:12 114:11
 120:8,11 168:11
aided 39:10
air 2:14,17 3:6,9 8:1,7
 33:3,10 34:15 36:17
 38:20 49:12 51:15
 52:20 66:18 74:11
 84:5 85:14 95:9
 103:22 105:20 106:15
 113:20 119:5 137:9
 157:7 164:19 167:2
 169:22 170:18 174:4
 175:1 176:1
Aldana 1:13 81:1,2,12
 81:20 83:2,22 87:18
 98:16 102:4 111:12
 111:13 112:20 113:9
 163:2,3
Aldana's 81:9 89:8
Alford 76:12
alibis 11:20
Alice 2:3
allay 71:22
allegations 11:1
allocation 126:18
allow 51:8 106:6 131:18
 131:21 134:18 141:11
 141:14 149:12 176:16
allowed 126:2,17 131:9
 134:15 136:14 140:19
 140:21 141:11,18
 142:5 166:12
allowing 34:6 139:15
 139:16
allows 50:6 129:18
 151:12 159:20
alternatives 82:20
altogether 44:17
Amanda 2:6
amount 27:19 29:12
 42:13 56:3 57:14
 144:6 149:13 172:19
Analyst 2:8
analyzing 160:19
and/or 47:17 58:5 94:9
anecdotal 84:1 115:7
 116:4 128:5 157:13
anecdotally 117:20
 156:13 158:6
announced 5:13 121:19
announcement 4:18
 31:8
announcements 186:6
annually 43:11
anomalies 164:9

anomalous 162:14
answer 10:13 25:16
 41:19 50:18 51:14
 53:10 54:13 58:11
 59:20 64:17 70:1
 71:13,15 85:16 87:20
 89:3 104:17 106:2,11
 129:5 142:3 163:17
 181:12
answered 82:22
answering 21:10
 168:19
answers 63:5 168:19
anticipate 150:22
anticipated 107:1
anticipating 183:5
anxious 6:10
anybody 61:3 80:12,15
 148:4,11 182:3,9
anymore 132:19
anyone's 143:14
anyway 89:3
apart 37:12 45:15
 174:11
apologize 22:10
apparent 178:19
appeal 43:19 69:14
 145:20
appealing 153:7
Appeals 164:21 165:12
appear 106:6
appearance 56:11
appeared 90:5 180:3
appears 167:13
appellant 89:14
appellate 25:6 165:22
applicants 46:17
application 35:3 36:15
 123:15
applications 31:19
 34:20 35:19,20 36:22
applied 70:17 95:10
apply 37:6 96:11 128:6
 160:8
applying 35:18
appointed 127:10
appointment 119:18
appointments 91:4
appreciate 4:7 10:1
 101:7 106:20 107:7
 117:17,18
approach 178:17 182:2
 184:2
appropriate 14:18 16:5
 68:20 70:6 72:11,12
 75:7 77:14 81:17,21
 82:12 83:5 86:22
 88:14 125:22 141:8

141:16 160:1 162:5
appropriately 104:19
appropriateness 81:3
 81:13
approve 180:11
approved 70:19
approving 71:6
apt 30:2
area 8:6 52:1 111:4
 167:9
areas 46:20 80:13
 165:5 168:9
arena 185:7
arguably 117:4
argue 40:22 166:12
argued 167:2
argument 21:18,19
 85:1 86:12,13 166:17
arguments 165:2
Armed 164:21
arms 54:8
Army 2:13,15 3:4,7 8:21
 30:22 58:13,15 59:4
 84:5 85:14 104:3
 105:20 106:12 113:12
 135:2 150:21 176:2
 178:15 181:4
arrangements 56:11
arrangement 106:18
arrived 180:17
Article 10:16,17 27:12
 41:18 54:1 88:7 89:19
 92:12,15 94:17 95:8
 116:13,17 117:12
 119:11,20 120:9
 124:3 169:2,2,7,19
 172:3 174:7 175:15
 182:6
articles 168:22 169:17
 176:3 182:1,10
articulate 87:1 127:9
 158:13
aside 143:19 144:21
 145:17
asked 11:22 25:19
 29:16 45:2 53:10
 129:2 175:14 179:7
asking 12:4 82:22
 120:10 133:4 140:9
aspects 29:7 119:21
aspirational 115:15
assailants 173:3
assault 120:20 128:9
 134:8 165:17 172:15
 173:19 176:10 179:1
assess 6:9 26:2 39:11
 161:11
assessing 22:13 91:22

161:4
assessment 23:6 29:8
 58:21
assessments 55:10
 68:12
assign 93:14
assigned 94:10
assignment 28:19
 53:16,16 91:15
assignments 8:3 9:11
 9:12
assist 68:19 170:10
assistance 4:8 29:20
 30:4 41:10 58:16,17
 59:3 172:4,7 175:3,5
 175:8,9
associated 148:15
ASVAB 47:20
atmosphere 79:11
attached 35:10
attempt 11:16 83:19
 104:20 107:9
attend 170:5
attendance 4:13
attended 2:19
attention 143:12
attitudes 47:18
attorney 2:6,7,7,10,11
 2:11,12 9:8
attorney's 9:8 55:11
attorneys 40:7,12 55:21
attribute 155:3
atypical 52:20
audio 8:5 109:5,10,12
 111:14,18 120:7
 147:1
August 8:2
authentication 94:2
authorities 27:17 30:5
 32:18 36:7 38:17
 40:18 41:5,7,19 96:10
 117:5
authority 17:10 18:7
 22:15 27:5,15 33:7
 37:16 38:7,22 66:13
 67:13 68:5,22 70:11
 70:12 71:5 79:18,20
 79:22 91:16 93:3,9
 94:20 108:12 112:7
 112:13 113:8 116:11
 121:15 129:14 157:11
 165:8 180:11
authority-dependent
 112:4
authorized 130:5 153:4
automatic 69:14 176:6
 179:18
available 13:11,17,22

18:4 34:22 56:1 69:19
 75:14 78:3,18 79:14
 90:9,10 93:6 100:1
 111:19,22 143:2
 152:17 153:8 159:2
 184:19
avenue 116:18
average 46:9
averaging 38:18
avoid 116:20
awarded 87:5
aware 63:11 76:5 108:5
 127:4
awesome 106:11

B

b 169:19
back 11:19 19:6 22:8
 23:9,16 26:15 35:8
 38:1,5 40:13 44:8
 49:13 53:6 58:5 77:16
 89:8 91:18 93:1 95:15
 95:19 96:1,2 97:9
 100:4 102:17 105:1
 111:8 112:16 114:7
 114:14,15 129:16
 131:3 138:3 140:9
 143:12 149:13 154:20
 159:8 163:14 177:16
 179:14 186:1
background 24:20
backgrounds 8:18
backwards 27:1
bad 145:5
bag 87:12
balance 63:19
balancing 139:1
bandwidth 37:4
bar 40:15 67:19
Barkei 2:13 3:3 8:22,22
 9:4,21 12:21 15:6,7
 18:11 19:4 22:5 24:5
 27:7,16 32:22 44:9
 48:11 54:9,11 60:11
 66:17,20 69:7 71:12
 78:14,15 90:16,17
 92:8,20 94:18
bars 42:21
base 5:19 46:11 51:15
 51:16 89:17
based 77:2,21 83:14
 90:3 91:22 93:4
 141:17 143:22 152:19
 157:22 177:16 178:20
 179:3 184:5
bases 33:17
basically 22:13 142:2
 148:16

basis 30:14 66:7 67:2
 180:10
battery 128:9
Bear 5:17
beat 21:4 107:9
becoming 120:19
beginning 179:9
behalf 98:3 127:7
behavioral 68:13
believe 4:21 12:3 17:9
 24:8 38:2,19 39:22
 41:9 42:10 69:2 93:1
 93:19,20 100:1 114:9
 129:1 130:10 135:9
 138:13 140:18 142:17
 143:4 156:3 157:14
 160:7 163:4 168:5
 171:10 175:14
believes 138:10
belt 47:11
bench 9:5,15 13:18
 18:19 32:6 33:6,18
 36:10,11 56:7 89:11
 93:12
beneficial 17:5,21
 139:8,18
benefit 21:2 36:5 37:8
 74:12 87:10 97:19
 105:5 123:17,18
 185:6
benefitted 118:2
Benes 1:13
best 63:8 65:2 98:5
 179:20
better 53:19,20,20
 59:20 71:13,14 110:3
 161:6
bias 160:17
Bifurcating 136:19
bifurcation 71:11
big 22:2 28:17 68:21
 92:10
biggest 17:7 40:4 135:5
 177:13
billets 58:2
bio 8:5 24:21
biographies 103:12
bit 9:14 15:8 16:2,11
 18:8 20:19 22:6 25:16
 30:7 44:2 52:13 56:14
 61:12 65:20 78:20
 82:8 115:6 120:2
 129:12,15 130:13
 136:17 160:18 167:10
 168:3 173:4 180:1
Blake 2:9
blank 68:3
block 11:17

board 57:6 60:4 81:5
boards 47:4
Boggess 2:2
book 115:1
bottom 54:13
boundaries 88:14
bounds 89:2
boxed 14:5
branch 57:7 83:15
branches 52:12
brand 93:10
breadth 97:21
break 99:22 101:18
 174:11 186:1,7,11
breakout 99:17
breast 134:9
brethren 133:20
Breyana 2:4
brief 65:20 66:20
 106:11
briefly 103:19 132:5
brilliant 51:2,3
bring 9:13 22:11 57:4,8
 60:7 68:11 114:4
 127:17
Bringing 17:18
broad 75:22 82:6,14,17
 82:19 85:17 86:17
broader 123:15 129:16
brought 29:2 50:2 75:7
 78:19 140:18
Bruce 1:15
Brunson 1:13 19:1,2
 22:5 84:4,7,8 87:18
 90:20 98:15 101:9
Bryan 1:17
build 45:4 52:19 73:14
builds 56:13
bullying 170:22
busiest 51:16
busy 51:16
buttocks 134:9
button 168:7
buy 17:4
bypass 121:6

C

CAAF 117:6 120:18
 167:1 168:6
CAAF's 123:14
cabined-in 72:5
cadre 51:9 53:14
calculation 37:8
call 47:7 52:15 67:5,6
 79:7 82:4 109:6 111:8
 119:22 128:17 155:13
 182:8
called 24:9

calling 111:3
calls 132:20 181:8
Campbell 2:3
Candelario 2:14 3:8
 104:1 106:2,3 113:20
 116:15,16 136:1,2
 138:1 139:3,4 149:3,6
 154:21 155:8,9 156:7
 167:22 168:1,13
 169:14,15 171:14
candidly 22:2
canvas 80:11
cap 21:4,4
capabilities 91:5
capability 39:10
capable 127:7
capacity 33:9
capital 70:4
Capt 1:17 81:2,12,20
 83:2,22 111:13
 112:20 113:9 163:3
captain 46:10 81:1,9
 87:18 102:4,4 111:12
 113:2 163:2
Captain's 163:18
capture 126:9
captured 35:9 142:21
care 31:17 185:14
career 9:11 46:14 47:4
 47:8 48:3 52:21 54:14
 54:18 55:7 57:7 58:3
 58:8 60:8
careers 48:13 51:10
careful 91:21
carefully 160:20
caring 153:12,12
carry 130:3
carrying 79:19
case 19:12,21 20:16
 21:17 22:19 23:6,20
 28:12 32:7,11 33:14
 33:15 36:20,21 39:12
 39:18 43:6,9 44:19
 45:14 46:21 51:13
 55:22 59:8,12 60:1
 64:21 67:22 89:17
 90:14 107:5 117:6
 119:16,19 120:18
 121:5 123:14 125:12
 125:21 126:20 127:4
 128:7,10,14 129:15
 129:19 130:4 136:15
 137:4 142:9 143:8
 145:17 155:17,21
 156:8 158:15 159:5
 160:22 161:3,7,18
 162:13 163:9 164:20
 165:3,10 167:1 168:6

173:7 174:13 175:16
 175:18 176:18 177:15
 180:21,22 181:13
 182:20,21 183:12,17
 183:19 184:16
caseload 55:19 61:21
 61:21 62:2 180:6
caseloads 45:3 62:7
cases 21:14 32:12
 39:18 43:1,2,5,11,16
 45:6,21 46:8 47:6,11
 48:6 51:19 52:2,4,9
 52:11,11,16 53:5
 59:13 61:16 62:9
 65:10 67:14,18,19
 69:15 70:4,6,12 73:12
 73:20,21 74:9,16
 76:15,17 77:8 82:15
 82:19 83:3 90:3,20
 93:15 94:16 97:1,8
 106:9 118:1 119:15
 119:20 120:20 125:15
 127:5 137:3 155:13
 157:17,20 158:20
 159:17 161:12 162:7
 165:21 171:19 172:17
 173:16 177:9 178:4
 179:6
catch 95:15
categories 15:19
category 9:18 18:2 82:1
 96:7
caution 136:18
cautioned 147:3
cautious 135:12
caveat 156:8
caveats 155:22 157:3,7
 159:15
CCA 69:16 89:12
CDR 2:14,15 107:22
 109:15,19 110:14
 111:20 113:2 118:6
 118:16 124:2 125:6
 126:19 127:21 133:19
 140:17 144:15 146:2
 151:5 154:12 158:11
 161:16 163:16 166:10
 176:1 181:21
ceiling 14:6 17:1 107:2
central 25:8
certain 15:19 16:17,17
 34:5 79:19 81:15
 109:22 126:2 135:14
 149:13 158:20 165:1
 166:4,4,5 174:20
certainly 18:3 33:5
 34:11 37:5 46:16
 72:21 78:6 90:4

certainty 13:10,16
16:12,22 17:3,4 18:9
106:7,8,21 137:2
certification 94:2
certified 65:8
cetera 116:22
chair 1:10,12 4:3 5:3
6:4,20 7:3,12,16 8:20
9:3,20 12:1,6,8,20
15:5 18:10 24:4,14
25:17 26:7,13,21
32:21 37:20 38:4,13
41:13,16 43:21 48:7
48:18 51:22 54:9
60:10 61:2,5,10 62:4
65:15,18 69:6 72:15
74:19 75:20 77:18
78:13 80:8,21 81:7
84:3 85:12 87:13
90:15 92:7 94:13
96:15 97:14 98:14
99:2,20 102:2 103:6
105:1,3 106:10
107:20 108:22 109:4
109:8,13,17 110:8,21
111:6 114:5,11 116:9
117:9 118:4,12,20
120:11 123:22 124:10
126:12 128:2 133:16
134:22 135:22 137:22
139:3,21 140:16
141:20 144:13 145:8
146:11,16 147:21
148:9,22 150:8 151:3
152:6 154:10,19
156:6 157:2 158:9
159:11 161:14 162:19
163:13 164:11 166:8
167:3,21 168:8
171:13 173:20 175:21
178:8 181:19 185:4
challenge 41:5,8 48:16
55:17
challenges 97:16
challenging 45:8
112:17
chance 168:14
change 17:5 40:22 42:3
42:12 54:15 60:6 64:4
79:5 121:20
changed 6:9 66:15
83:12
changes 6:7 15:9,13
25:22 40:16 47:15,18
48:21 66:3 74:18
100:16 106:4 107:11
107:15 114:20 125:2
128:19 135:15,18

185:8
changing 85:20 86:13
124:17
characterize 28:2
characterized 67:1
charge 49:9 64:13 70:8
104:11 120:22 134:7
138:11,13 161:21
178:21 185:1
charged 134:17 138:10
138:19 140:3
charges 10:22 29:11
161:20 179:13 180:15
charging 97:8
Charles 2:16 3:4 10:3
check 60:14
checking 6:13 114:6
chief 2:3 9:6,16 25:4,7
46:13 57:7 62:19
64:11 76:20 81:14
104:2,10 176:22
children 127:2,3,16
chime 22:6
chimed 104:19
choices 72:6
choose 18:6 23:20
choosing 23:8
Chuck 2:7
circle 11:18 23:22
172:18
circuit 9:6,6,17 25:8,9
circuits 39:3
circumspect 8:14 54:4
circumspection 20:15
circumstance 70:14
89:10
circumstances 16:20
21:17 67:20 77:14
86:22 93:2 155:16
156:10 158:1 160:22
162:4 171:9
civil 171:19
civilian 27:22 56:13
57:12 68:8 129:4
133:9 136:17 137:4
151:7 172:11
civilians 64:2 164:1
clarified 124:14
clarify 100:18
clarifying 119:1
classroom 45:10
clean 114:15
clear 80:22
clearinghouse 28:19
clearly 85:10
client 19:9 23:8 74:13
121:12 155:20 157:15
157:20 162:15 167:16

171:7 174:10,10,16
174:19,20 175:17
177:14 178:20 183:16
client's 22:18 136:10
183:9
clients 52:6 106:20
109:21 110:17 113:4
135:10,17 136:21
137:8,18,20 139:5
140:7 161:6 163:21
165:9 169:9,11
171:16,16 172:6,13
172:15 173:18,19
174:5,6 175:12 176:8
177:5 178:5,16 181:6
182:4 184:3,9,12,17
184:21
clients' 166:21
clock 35:13
close 26:17 86:17 98:8
98:10
closely 129:3 133:1
closure 137:3
cloud 31:10
clunky 111:7
co-counsel 47:12
co-located 39:7
Coast 2:14 3:10 99:9
104:13 105:21 109:9
124:7 130:9 164:4
184:20
code 111:4
Col 1:13,14,16,16 2:13
2:15,16 8:22 9:4 15:7
19:2 22:5 27:16 54:11
61:4 66:20 78:15
80:20 84:8 90:17
92:20 101:9 102:9
106:13 113:12 114:9
114:13 117:11 119:3
120:12 128:3 135:2
140:1 141:22 146:18
148:7 150:10 152:8
157:6 159:13 164:13
167:5 174:3 178:10
collapse 71:22
collateral 170:14
colleague 130:9 157:7
161:2 164:19
colleague's 119:6
150:16
colleagues 109:20
115:10 135:4 140:2
154:14 159:15 160:14
161:9 168:2,17 175:3
175:10 178:12 182:4
183:14 184:11
collecting 160:19

Colonel 3:3,5,7,8,9 5:3
9:10,17,20 12:20,21
15:6 18:10 19:1,2
24:4 27:7 32:21 33:1
37:20 44:9,9 48:11,11
49:7 54:9,10 60:10,18
61:6 65:5 66:17 69:6
69:7 71:12 77:19
78:14 80:16 84:4,7
87:17,18 90:15 92:7
94:13,18 100:12
102:3,8,15 104:1,3,10
106:1 108:22 109:7
109:10 111:8 114:12
116:14 117:10 119:2
128:2 133:16 134:5
134:14 135:1 136:1
137:22 139:3,22
141:21 145:1,9
146:17 147:21 148:9
149:3 150:9 152:7
154:21 155:8 157:5
159:12 161:17 164:12
167:3,21 168:13
169:14 174:2 176:7
178:8,15 182:15
combination 174:17
come 32:20 36:22 46:4
57:10 58:5 69:1 100:3
126:6 137:12 140:7
141:16 144:18 174:6
176:9,15,17,17 180:8
181:17 184:4 186:1
comes 24:2 40:13 89:1
119:16 134:6 158:16
177:3 178:22
comfort-in- 56:14
comfortable 16:8 69:13
coming 23:22 34:16
50:22 85:10 141:19
174:16
command 16:7 17:18
46:22 59:11 64:13,15
73:1 77:16 138:12
176:11 177:16,16
commander 3:8,10
16:4 19:15 46:11
64:12 70:15 104:6,14
109:13 110:9,10,12
110:22 111:13 112:21
113:13 118:5,13
124:1 125:5 126:14
133:18 134:15 140:16
144:14 151:4 152:10
154:11 158:10 161:2
161:15,17 163:14
164:15 166:8 168:18
175:21 181:19

- commanders** 15:12,15
15:20 47:16 54:21
55:4,8 170:7
- commands** 64:7
- comment** 34:17 54:12
80:3 129:21 132:14
138:21 161:2
- commented** 160:14
- comments** 27:1 91:19
102:22 124:11 178:15
183:13
- commission** 82:11
86:16
- committed** 51:9 127:17
141:13 164:2 177:14
- committee** 147:10
- common** 16:14 119:14
120:19 128:13
- communicated** 78:16
- communication** 2:4
110:6,16
- communications** 32:3
- community** 40:9 46:13
- companies** 31:18
- company** 50:20
- comparable** 155:6
- compare** 8:18 10:19
55:10 57:18 61:21,21
90:18 161:20
- compared** 21:14 55:22
105:13
- comparison** 6:12
- comparisons** 88:17
- compel** 150:17
- competency** 43:9 55:12
55:18 56:22 74:7
- competing** 53:21
121:13
- complain** 183:17
- complaint** 40:15 61:17
- complaints** 152:18
153:3 170:10,12,13
- complete** 146:19
147:19
- completed** 186:7
- completely** 34:7 91:10
- complex** 55:22 97:2
180:15 183:5
- complexity** 29:13
- compliant** 179:1
- computing** 31:15
- conceptual** 92:10
- concern** 14:2 29:2
50:18 76:22 83:20
125:8 177:13 178:6
- concerned** 72:19 74:17
- concerning** 158:6
- concerns** 35:17 72:1
73:19 77:21 78:11
90:2 94:11 95:2
115:13 127:18 137:19
169:11 172:10,14
- conclude** 98:22 123:10
186:10
- concluded** 99:17 132:3
- conclusion** 22:7 67:14
130:22 132:7
- conclusions** 95:7
- concrete** 92:10
- concur** 106:14 108:1
113:13,21 133:19
134:5,14 136:3
144:16 145:1 158:11
161:16 164:14 166:10
167:5 168:1 176:1
- concurs** 178:12
- conditional** 181:12
- confidential** 122:7,17
123:1,3,8
- confidentiality** 171:4
- confinement** 14:5 41:6
41:8 72:8 110:2
116:22 118:10 137:16
137:16 150:3,4
- confirmed** 99:9
- conflict** 29:1
- confused** 61:12 84:16
84:17,17 145:13
164:5
- confusion** 163:6
- Congress** 170:13
- congressional** 170:13
- conjunctive** 122:8,13
- conjunctive/disjuncti...**
122:18
- connect** 112:1
- connected** 109:10
- connection** 26:10,12
- consensus** 13:22
- consequence** 89:16
- consequences** 36:2
90:7
- consider** 70:9 79:6
117:2 133:13 141:18
153:21
- consideration** 71:7
75:8 77:6 131:15
- considerations** 90:8
- considering** 78:7 105:6
131:17,20
- consistent** 82:13
184:14
- consistently** 57:5
- constitute** 180:1
- constrained** 65:4
125:10 145:3
- consult** 115:18 151:14
171:2,6
- consultations** 170:19
- consulted** 154:6
- consults** 173:12
- consummated** 128:9
- contacted** 5:20
- contain** 103:12
- contained** 131:9 143:19
147:12
- content** 32:2 128:20
- CONTENTS** 3:1
- contest** 48:5
- contested** 32:11,12
45:6,22 46:8 47:6,10
52:15 73:12 74:15
82:18 116:19
- contesting** 44:19 46:8
- context** 142:7
- contingent** 120:14
- continuance** 151:12
152:11 153:10
- continue** 18:19 51:11
99:15,17 148:6
176:13
- continued** 63:4 76:6
- continues** 42:5
- contradistinction** 20:16
- contrarian** 16:11 18:8
- contribute** 52:5
- control** 76:1
- convening** 17:10 18:7
22:15 30:5 67:12
70:12 71:5 79:18,20
93:3 94:20 108:12
112:4,7,13 113:8
157:10
- conversation** 12:7 14:2
94:19 100:14
- conversations** 21:13
63:13 77:22
- convict** 137:13,14,15
156:11
- convicted** 71:20 125:16
126:21 147:5
- conviction** 20:20
- convinced** 74:4
- cooperation** 150:18
- coordinate** 152:20
- coordination** 150:18
- Corp's** 63:3
- Corps** 2:16 3:9 25:6
38:18 39:21 40:6
45:20 46:7 53:2 54:6
54:14,20 55:13 58:6
59:5 61:20 62:8,16
63:1,2 73:12 86:10
96:19 104:9 105:20
- 109:1 111:8 114:6,7
152:22 160:5 165:11
178:11,17 179:8,21
180:6,12
- correct** 57:22 100:21
102:17 145:22 146:2
- correctional** 79:4,9
- cost** 73:17
- counsel** 3:7 8:6 15:18
19:3,7 20:2 22:9,11
22:17 23:14 25:12
36:6,12,14 40:18 41:1
41:10 44:4,15 45:6
46:2,3 47:11,13 48:1
52:1 58:16,17,22 59:8
59:14 62:1,2 63:7,14
64:6,6,12,14,18 65:9
68:15 69:3 73:19 74:7
76:20 77:12 95:21
102:22 103:1,1,8
104:2,5,8,11,12,15
107:16 108:2,11,11
111:15 112:7,14
114:4 115:18 116:1
117:16,20 119:12,17
121:12 125:1 133:22
133:22 140:19 143:4
149:21,22,22 152:17
152:19 153:1,5
156:22 160:17 161:5
164:7,22 165:8,14,20
169:1 170:6,7 171:3
171:17 176:11,22
179:3,5,10,19
- counsel-** 112:3
- counter** 144:22
- counterbalance** 16:3
30:18
- counterparts** 40:20
133:10
- country** 54:8
- counts** 129:6
- county** 78:22 79:2
- couple** 4:7 8:8 14:12,12
30:22 40:8 61:15 66:5
74:20 76:5 80:9 82:1
101:19 115:12 119:4
148:1,13 160:3 174:4
- courage** 72:21 86:21
- course** 21:3 167:14
- court** 17:3 56:4 68:19
69:5 74:2 93:5 125:21
127:18 136:8 139:18
144:10 145:2 164:21
165:11
- court-** 88:7 95:4 177:3
184:19
- court-martial** 23:4

37:15 39:4 51:21 78:9
 88:4,6 89:18,21 177:9
 178:4 181:16 184:8
courtroom 20:7 50:2,16
 168:4 183:7
courtrooms 49:22
courts 37:11 44:5,12
 129:4 133:2 169:8,12
courts- 10:17 97:5
courts-martial 10:18
 62:10,16 63:1 65:9
 92:13 96:21 97:3
cover 63:15 100:9,10
 176:2
covered 61:1 156:16,19
 171:3
covering 100:16
crafted 125:13
create 122:5
created 59:10 108:12
creates 55:6 152:15
creating 67:4
credentials 8:12
crime 28:2,3 134:13
 138:9 139:6,7 141:13
 182:6
crimes 15:19 16:19
 126:22 127:4,14,16
 134:17 147:5 164:2
criminal 165:12 182:20
 183:2,7
criteria 156:17,21
critical 29:15
criticism 36:14 42:9
cross 133:22
cross- 45:15 142:12
cross-examination
 142:11
Crowe 2:14 3:10 104:14
 109:13,15,19 110:9
 110:10,12,14,22
 112:21 113:2 124:1,2
 125:5,6 126:19
 127:21 134:15 144:14
 144:15 146:2 154:11
 154:12 161:15,16
 163:14,16 164:15
 168:18 181:20,21
culminate 64:11
cultivated 160:3
curious 16:9 138:7,22
 148:21
current 11:2,3 12:11
 25:1,20 26:5 27:18
 31:7 68:8 93:13
 105:12 106:17 108:1
 108:16,17 114:18
 115:6 121:15 130:16

currently 9:7 25:9
 27:21 117:6,16
 179:22
custody 171:20
cut 59:20
cycles 52:7

D

D 2:10,14,16 3:9,10
D.C 7:22
DA's 56:19 57:17
DAC-IPAD 129:7
 130:14 132:1,2,7
 143:13 146:21 147:7
danger 67:4
dangerous 92:6
data 18:3 27:19 29:13
 32:14 51:13 68:5
 69:19 83:9 84:1 157:1
 157:9 160:9 173:15
date 71:21
day 4:6 6:1 37:2,18
 54:19 57:2 144:10,10
 145:2 186:10
days 44:12 52:3 93:2
 149:11
DCAPs 42:21
de 2:15 3:8 104:7
 107:22 111:13,20
 113:13 118:5,6,13,16
 133:18,19 140:16,17
 151:4,5 152:11
 158:10,11 161:2,17
 166:9,10 175:22
 176:1
de-conflicting 34:2
deal 19:9 107:9 108:11
 108:13,20 110:18
 112:6,12,17 163:20
dealing 50:14 56:10
dealt 88:19
Dean 101:15
decades 48:14 160:4
deceased 119:19
decide 134:18 143:21
deciding 31:18
decision 21:22 36:14
 67:15,15,16 69:17
 77:13 89:16 90:6
 120:15
decisionmaking 159:22
 160:12
decisions 20:4 64:9
 91:6 97:8 121:5
 139:13
decline 42:13
declined 43:1 177:15
decreased 46:18

dedicated 60:9
dedication 46:4
deems 141:7
deep 78:20
deeply 150:13
defender 40:19
defense 8:6,10 17:13
 19:3,7,20 20:2,13
 22:9,11,17 23:16
 25:12 27:9 28:8 29:16
 29:17 30:1,9,10,14,20
 31:2 34:18 36:6,9,16
 40:15,18 41:2,4 42:21
 46:3 52:1 58:17 64:6
 64:11 67:19 74:13
 76:10 108:11 112:7
 112:13 125:16 130:18
 133:22 164:6 170:6
defenses 63:15
defensible 72:10,11
deficiencies 78:17
 79:15
deficient 40:2,4
define 16:1 88:13 123:7
defined 123:1,4
definitely 74:6 150:15
definitional 123:19
definitions 122:3
degraded 43:9
degree 47:1
delays 116:21
deliberate 115:22
deliberation 159:22
deliberations 99:16
delicate 50:12
delivered 14:22
delivery 128:20
demanding 76:7
demonstration 51:14
denied 79:21
depart 69:9 133:6 154:1
 169:21
departing 73:2
Department 25:5
 169:21
departure 69:12 73:6
departures 72:19
depend 28:13 114:2
dependent 112:4
 113:14
Dependents 163:21
depending 151:8 159:9
depends 175:17
depth 97:20
Deputy 2:5 104:1
derived 88:13
describing 124:13
designated 2:1 39:3
 59:14

designee 119:19
detailed 27:6 49:14
 74:5
detained 74:3
determination 16:5
 37:14 50:7
determinations 47:16
 86:7
determine 107:13
 182:10
determined 177:17
determines 131:1
determining 14:17
 143:8
devastating 108:21
develop 58:6 74:7
developed 77:1
developing 53:15
 107:19
development 52:21
 53:13
deviate 86:21
devices 31:11 32:4
dictated 72:4
difference 22:3 52:22
 89:22 106:17
differences 155:3 158:2
 158:3
different 8:3 9:14 33:5
 38:22 39:2 40:12
 67:12 70:16 83:14
 84:21 92:3,4 143:3
 148:14 155:1,16,17
 155:19,21 156:9,10
 156:11 157:16,22
 158:12,14,16 159:5
 159:17,17,17,18
 161:12 162:8 174:4,9
 174:9,18
differently 82:9 83:17
 156:9
difficult 18:18 45:4 46:1
 76:14 88:16 107:2
 158:20 160:14 161:19
difficulty 5:19 38:17
 42:2 72:22
dig 12:9
digging 68:16
dignity 185:10
direct 45:16 125:13
 127:9
direction 16:10 116:18
 138:3
directive 115:15
directives 91:4
directly 40:21 45:2
 87:20 89:3 105:5
 113:7 132:17 165:16

Director 2:2,5
disadvantage 26:5
 29:18 34:13
disagree 135:3
disagreement 165:18
discern 88:22
discharge 14:7 72:7
 90:11 130:2
discipline 74:14
disclosures 41:11
disconnect 122:19
discovery 39:15 117:3
 167:1
discrepancies 90:22
discrepancy 91:1
discretion 15:15 25:22
 76:20 141:15
discuss 130:20
discussed 11:7 25:15
 145:16
discussion 9:19 150:1
dishonorable 130:2
disjunctive 122:15
dismissal 130:2
disparate 89:9,13
 160:10
disparities 81:4,8,10
disparity 158:7
dispatch 105:10
disposal 75:2
disposed 179:3
disposition 35:15
 178:21 181:5 184:8
 184:14
disqualifying 33:12
disregard 141:15,15
dissatisfied 126:5
distinction 15:3 34:13
distinctions 89:22 90:1
distinguished 48:13
distracted 50:8
district 9:8 55:11 133:2
dive 78:20
diversion 76:18 78:19
 78:21 79:1
dividends 63:22 73:16
Division 104:2
divorce 171:20
docket 74:3
docketing 33:16
documents 94:1
doing 6:14 14:16 20:9
 34:15 43:8 51:10
 59:12 65:2 73:4,20
 76:4 84:14 85:2 101:1
 123:9 139:10 161:12
domestic 10:22 126:22
 137:19 171:15 172:13

173:18 175:12 179:11
double 53:7 114:14
doubt 88:11
downstream 37:15
dozen 96:20
dozens 36:10
Dr 1:10,12 61:9 148:12
draft 37:3
drafted 10:12
dramatically 43:1
 157:16
drastically 128:12
draw 88:16 123:10
drawn 21:6 89:2
drill 87:9
drive 150:17
driven 90:7,7
drop 44:22 129:17
drop-off 62:17
drug 89:18
Drum 9:7,16
druthers 50:19
due 93:22 141:6
duties 94:10
duty 25:3 28:19 49:2
Dwight 2:1

E

E 1:15
earlier 4:19 13:8 33:12
 34:8 36:15 89:9 96:13
 96:18 122:14 163:8
 164:19 167:2
early 28:8 29:3 32:8
 51:9 54:17 62:20
 114:4 116:20 156:19
 160:15 161:10
easiest 51:5,7
easily 143:19
easy 35:5 51:6
eat 100:4
echo 22:6 109:19 110:5
 157:6 183:13
echoing 184:11
edification 24:22
effect 15:18 23:7 24:2
 43:5 55:5,6
effective 8:1 32:7 64:16
 79:10 105:15 108:6
 125:3
effects 27:11 139:17
efficiency 72:2
efficient 30:13 47:17
 64:16 97:6
effort 42:13 63:21
efforts 64:8 185:22
eight 51:19
either 36:13,15 44:19

71:5 76:9 77:21
 121:20 131:19 157:10
 158:7 159:7 169:21
elaborate 16:19
Eleanor 2:12
elected 91:8
elects 142:10
element 8:14 109:22
elements 16:17 79:19
eligible 169:20
Elizabeth 1:10,12
ellipses 147:1
else's 87:15
emceed 103:2
emotion 18:3 172:17
emotional 134:3 141:5
 141:6,8
emotions 67:6,21
emphasis 23:12,19
 49:18 174:21
emphasize 135:5
emphasized 86:1
empirical 115:5 160:9
employment 68:14
enable 119:15
encouraging 13:18
ended 53:4
energy 43:13
enforce 148:16 152:4
 170:4
enforceable 150:14
 153:8
enforcement 29:21
 165:16
engage 95:20
engaged 37:13
enhanced 74:13
enhancing 87:10
enlisted 64:1
ensure 42:6,7 110:17
 113:16 149:19 151:14
 154:14 167:12 172:6
ensuring 14:19,21
 151:19
enter 107:3
entering 95:6
enterprise 179:22
enthusiasm 46:5
entirely 39:5 49:11
 71:12
entitled 165:19 166:5
 171:1 182:7
entitlement 179:2,5,18
 180:21
entrenched 163:10
entry 70:18 71:6
enumerated 152:14
 182:13

environment 45:14,18
 79:4
equal 30:14 130:12
era 39:15
erosion 62:18 63:4
error 90:2
escapes 93:19
especially 69:15 85:6
 106:8 112:10 137:18
 144:5 166:22 167:11
 178:14 185:9
essence 116:20
essential 27:18 135:8
essentially 95:22
EST 1:10
establish 64:20,21
established 86:16
 164:16,17
establishing 91:5
establishment 83:18
estimate 179:20
estranged 127:1
et 116:22
ethics 54:22 101:10,12
ETP 180:9
Evah 2:15 3:7 104:3
event 141:9
events 149:22
everybody 4:4,8 6:5,14
 7:21 9:1 13:15 65:11
 87:13,15 96:1 99:21
 105:4 168:13 173:20
evidence 17:16 27:20
 28:10 32:9,17 36:21
 42:14 50:1 56:18 79:9
 123:5 140:20,22
 141:2 144:20 159:1
 178:1
evidentiary 56:20 168:4
 170:4
evolutions 45:11
Ewer's 63:6 64:17
Ewers 1:14 5:6 7:1,1
 60:18 61:8,11,11 62:4
 62:7,12 65:16,17
 80:16 98:20 102:13
 102:14,20 148:12,13
 149:1 152:9
Ewers' 149:5
exacting 63:13
exactly 53:8 94:18,22
 95:16 120:1 126:9
 136:13 140:10
examination 45:16
 142:13
example 30:19 35:5
 120:5,21 125:19
 126:16 128:5,9 130:3

140:2 181:1
excellent 77:4
exception 70:4 174:15
 180:18 182:14 183:11
exceptions 163:22
 180:1,7
excuse 35:19 50:21
 52:14 55:7 119:8
 121:22 123:12 145:10
executive 2:2,5 99:15
 101:2 186:2,8
executives 40:8
exercise 77:16 93:11
exercising 91:16
expanded 10:15
expanding 30:20
expansion 27:11
expansive 37:19
expect 43:4 64:19
expectation 14:15
 108:16
expectations 108:3
 110:3 177:22
expected 20:17 42:2
expedited 170:9
expended 42:13
experience 8:17 9:17
 13:3 19:7,11 20:2
 21:3 25:10,11 33:3
 44:5 45:5,12,19 46:1
 46:11,17 48:2 49:1,11
 49:22 50:14 51:12,15
 52:17 54:6 56:17
 57:10 65:1,12 73:19
 75:11 77:22 81:5 86:8
 88:11 89:11 90:3,13
 97:21,22 107:17
 113:2,5 115:1 116:12
 117:12 131:12 141:12
 145:6 155:7,10
 184:12 185:7
experienced 18:15 42:4
 136:9 144:3
experiences 70:16
 90:11
experiential 48:16 57:1
expert 4:14 18:1
expertise 56:15 69:2,3
 185:20
experts 58:14,17 60:20
explain 162:15
explaining 69:20
explication 69:11
exploring 76:12
exposure 164:3
express 78:11 139:6,16
 181:10,14 185:18
expressed 78:17

extending 29:7 31:16
extent 11:8 31:22
 153:18
extra 77:11 94:10 97:15
 173:21
extraordinary 39:17
 171:9
extrapolating 62:21

F

F 2:17 3:5
Facebook 30:15
fact 33:13 69:16 77:6
 92:4 95:6 131:6,6
 136:12
fact-finding 76:1
factor 17:5 22:21 57:1
 112:5 154:6 182:16
factors 68:14 141:18
 162:1,2,3 174:18
 182:14
facts 18:3 67:6,21 74:8
 83:16 150:3 155:16
 156:9 159:20 160:22
 165:3
factual 66:6,7 67:2
failed 40:17
failure 152:20
fair 14:21 50:6 128:22
fairly 41:22 51:16
 109:22 125:9 126:21
 183:14
faith 20:14
faithfully 160:7
Falk 2:3
fall 45:15 69:13 171:20
falling 97:13
falls 172:2
false 67:5
familiar 163:11,11
family 17:16 68:1,16
fan 91:2,21
far 46:20 58:9 62:22
 68:4 70:9 79:3,13
 80:3 106:5 110:1
 113:17 120:8,19
 136:4 148:20 150:10
 151:1 158:5 167:6
 171:15
far-flung 71:21
favor 180:17
favorable 135:16
fears 86:14
feasible 73:10,14
February 25:3 147:2,7
federal 2:1 11:4 40:17
 40:19 77:2 121:18
 129:4 133:2

feeble 114:17
feedback 96:22
feel 76:8 134:11 145:4
 147:18
feeling 126:5,7,10
feelings 159:18
feels 14:12 34:19
fellow 133:20
felt 14:8 127:15
FEMALE 109:11
fewer 45:21
fictitious 67:5
field 117:2 155:11
fighting 78:10
figure 45:16 63:14 65:1
file 166:4
filings 96:1
fill 33:18 68:2
final 22:7 36:2 56:5
finally 11:2
find 16:2 31:7 95:17
 130:12 154:7 165:22
finder 33:13
finding 13:21 21:14
 72:22 106:4 117:1
 166:22
findings 15:17 32:14
 56:6 87:8 95:6 136:19
 136:22 137:7
fine 7:2 16:22 79:21
 85:21 93:10
fingertips 17:11
first 4:6 9:6 12:17 13:6
 24:19 32:5 35:11,21
 36:1 38:16 49:5,9
 53:16 60:17 69:10
 90:9 95:13 96:12
 106:1 114:15 116:7
 142:4 156:3 157:9
 164:5 166:11 168:21
 174:5 181:22
first-time 77:14
fiscal 62:15
fit 78:10
five 8:3 14:17 47:5
 52:10 61:19 98:17
 149:11
flavor 65:2
fleshed 164:8
flexibility 54:2 103:10
 106:6
flipping 101:4
floor 14:6 17:1 21:1,5
 53:8 106:22 107:2
flow 36:2
flowing 132:17
flows 142:19
flaying 93:15

focus 8:16 94:10 107:7
focused 8:8 58:2 69:15
focusing 44:18
folks 6:16 7:8 47:10
 60:17 61:6 132:2
 163:11 164:3 166:19
 185:9
follow 60:16 80:12
 99:10 126:13,15
 131:14 138:5 146:13
 146:14
follow-up 35:8 48:9
 65:16,21 84:4 112:20
following 49:15 95:5
foot 175:4,4
footing 130:12
footnote 147:6
force 2:14,17 3:6,9 8:1
 8:7 33:3,11 34:15
 36:17 49:12 51:15
 52:20 66:18 78:7,10
 84:5 85:14 95:9
 103:22 105:20 106:15
 113:20 119:5 137:9
 157:7 164:19 167:2
 169:22 170:18 174:4
 175:2 176:2
Force's 38:20
forced 126:8
Forces 164:21
forefront 15:2
forgive 120:7
forgot 146:20
form 33:16 71:1 129:12
 129:15 130:1,4
 155:20,21 181:3
formal 10:19
former 3:3 4:14 6:7
 7:10 8:21 13:12 85:3
 103:18 106:17 132:9
 147:8
forms 97:5
Fort 9:7,16
forth 9:13 17:18 31:2,15
 31:18 32:4 35:8 49:13
 55:1 58:18 59:9 68:17
forty-five 11:18
forum 23:3 88:2 93:4
 97:3,10 184:10 185:2
 185:2
forward 9:19 15:13
 21:18 36:18 55:15
 77:9 99:5 115:4 116:4
 116:5 118:18 138:20
 140:21 145:2
found 15:19 16:9 25:18
 32:17 95:16 106:19
 117:21 184:10

four 4:11 5:12 8:5 59:6
60:19 99:8 179:21
fraction 45:22
Franklin 2:4
frankly 23:17 31:21
43:2 73:4 74:1 91:13
freely 132:12
frequently 174:8
friendly 123:20
front 21:22 56:6,10
fronts 64:20
frustrated 14:8
frustration 34:14
full 23:22 134:12
161:21 169:22 170:2
183:21
fuller 134:16
fully 46:8 141:12
151:15,19 184:13
function 37:15 39:13
73:9
further 16:19 67:8
70:14 80:6 88:13
101:20 111:11
future 65:13
FY 100:16

G

gained 45:11
gal 53:7
Gallagher 2:6 103:3,6
105:19 109:6
game 92:6
gap 49:1
gatekeepers 166:20
gathering 17:15 115:5
116:5
general 5:6 23:4 44:14
59:20 60:18 62:4,7,10
63:6 64:17 65:15 80:6
80:16 82:5 88:4 95:4
102:3,13 106:4,14
147:10 148:22 149:5
152:9 153:3 163:3
173:11 184:19
General's 59:5
generally 29:11 106:19
109:21 114:19 123:18
156:13 160:16 163:17
164:14,15 167:8
169:20 171:12,15
180:17
generating 96:12
gentleman 12:19
gentlemen 10:2,10
106:13
geo-fencing 32:2
germane 132:17

getting 7:4 30:2 34:19
35:20 50:16 75:12
76:2,8,13,15 83:5,14
90:19 95:5 107:8
109:5 120:8
give 5:21 15:11 35:6
50:5 53:18 70:20 85:7
93:16 100:10 108:1
126:16 132:14 134:11
139:5,19 168:13
172:2
given 8:11 21:11,11,16
23:12 27:18 43:10
46:6 65:10 73:10
84:14 85:2,6 86:15
87:6 88:1 98:6 113:6
113:22 178:20
gives 28:9 63:8 137:2
giving 15:20 40:18 51:2
51:3 69:11 94:9 150:5
glove 175:2
go 4:16,17 5:14 7:7,16
10:6 11:21 12:17 13:7
16:18 20:12 21:22
22:4 23:8,20 26:15
34:6 37:7 41:16 44:1
44:8 49:5,6,8 53:6
61:10 66:18 71:4 77:9
81:1 85:14 91:18
92:20 96:1,2 98:9
99:4 102:6 105:18
107:19 109:17 110:12
114:11 120:11 125:4
136:21 138:2,11,12
138:20,20 145:20
168:11 172:10 177:10
178:4 186:1,5,8
goal 104:16
goes 22:8 23:9 24:1
51:4 67:7 70:9 93:7
135:19
going 7:8 12:2 17:12
20:20,22 21:5,6,8,8
21:18,21 23:18 31:9
31:12,20 38:15 44:1
46:21 53:18 57:15
60:11 62:2 63:21
65:18,19 67:2,17
69:16 70:12,17 73:4
80:22 85:8 86:9 89:8
92:9 93:1 95:11 96:2
96:2,13 98:8 99:4
100:13 101:12 102:21
103:2,19 104:20
105:8 108:3 111:7,10
112:9 123:6 137:16
139:8 140:14 149:7
149:11 155:21 156:8

156:11,16 168:11
177:17 178:1 182:22
183:5,18
good 4:13 6:20,22
24:11,13,14 42:17,19
65:6 73:6 74:14 82:11
98:5 103:6 106:14
108:12 109:17 110:16
112:12,17 113:17,18
115:10 137:11 153:10
154:16 162:6,9
175:19 185:14
Google 31:14 40:8
Google's 31:8
government 19:8 20:18
21:21 23:17 39:11
41:11 44:20 76:9
110:16 111:21 119:7
119:10 120:21 121:11
121:12 130:18 138:10
142:22 143:3 151:12
151:14
government's 29:19
74:14 120:15 142:9
grant 183:11
granted 41:8
granting 180:17
grateful 25:18
gravitate 123:7
great 6:6 7:3 9:9 12:8
12:13 19:22 23:7 31:3
58:10 59:16 64:19
68:3,7 77:4 86:18
93:10 109:19 110:11
130:21 160:4 167:7
185:19
greater 24:2 30:11 58:1
88:5 107:7 138:15
142:5 144:17
greatest 55:17
greatly 139:18
Groot 2:15 3:8 104:7
107:22 111:14,20
118:5,6,13,16 133:18
133:19 140:16,17
151:4,5 152:11
158:10,11 161:17
166:9,10 175:22
176:1
Groot's 113:14 161:2
ground 89:15
guaranteed 20:20
Guard 2:14 3:10 99:10
104:13 105:21 109:9
124:7 130:9 164:4
184:20
guess 16:12 23:13 42:9
48:17 49:5,8 61:13

87:2 92:20 103:2
145:13,19 148:20
149:8
guidance 167:15
175:10
guideline 73:3
guidelines 64:22 77:1,2
83:8,19 84:11,12 85:6
86:22 87:21
guilt 22:21
guilty 20:7 108:3
132:18
Gunn 1:14 5:3,7 60:18
61:4,6 80:16,20 98:19
102:8,9,20
Gupta 2:5 99:4
guy 53:7

H

Hagy 2:6
hamper 31:20
hand 51:18,20 52:3,18
53:3 175:2
handed 131:3
handful 41:6
handheld 31:11
handle 28:20
handling 10:8,21
handoff 172:3
handoffs 172:5
hands 37:10 121:11,12
hang 110:8,8
hanging 97:15
happen 48:20 112:9
152:1
happened 127:5 134:12
139:17 140:8 151:7
151:22 177:5
happening 62:18
112:19 151:7 177:21
happens 168:20
happy 8:11 11:9 13:15
41:19 177:6
harassing 170:22
harassment 11:1 169:4
170:18,21 174:13
176:5,7,12,18 179:17
182:18,19 183:12,17
hard 94:22 95:17
113:16 157:9 159:8
hardest 14:16
harm 125:14 127:10,13
142:19 146:9 180:14
harms 159:18
HASC 100:11
hate 84:12
haunt 58:5
head 14:11 109:8

154:20
headed 6:12 177:11
heading 122:15
health 31:17 68:13,13
 173:2,5
hear 5:2,5,10 6:7,10 7:1
 9:1 12:21 24:17,18
 25:14 38:5,11 40:15
 48:17 56:20 75:11,12
 75:19 84:5 97:20
 105:5 114:10 131:18
 141:16
heard 7:15 18:13 28:8
 71:1 121:7 124:22
 138:19 142:1
hearing 6:16 33:20
 110:1 130:14 132:1
 151:20
hearings 56:13 118:7
 170:16
heavier 173:8,10
heavily 117:15
heightened 172:10
held 108:4
Hello 81:2 111:13
help 58:18 108:2
 116:19,20 178:5
helpful 20:12 26:22
 34:5 69:20 74:4 90:14
 110:2 140:15 153:17
 175:13,19
helping 48:13 52:19
 172:5 185:11
helps 39:12
Hey 6:20 153:15
Hi 19:2 60:21 100:18
high 47:20,20 95:4
higher 47:1 138:20
 143:7
highlights 184:2
highly 55:22 144:2
Hill 120:18 173:20
Hillman 1:10,12 4:3 5:3
 6:4,20 7:3,12,16 8:20
 9:3,20 12:1,6,8,20
 15:5 18:10 24:4,14
 25:17 26:7,13,21
 32:21 37:20 38:4,13
 41:13,16 43:21 48:7
 54:9 60:10 61:2,5,9
 61:10 62:4 65:15,18
 69:6 72:15 74:19
 75:20 77:18 78:13
 80:8,21 81:7 84:3
 85:12 87:13 90:15
 92:7 94:13 96:15
 97:14 98:14 99:2,20
 102:2 103:7 105:1,3

106:10 107:20 108:22
 109:4,8,13,17 110:8
 110:21 111:6 114:5
 114:11 116:9 117:9
 118:4,12,20 120:11
 123:22 124:10 126:12
 128:2 133:16 134:22
 135:22 137:22 139:3
 139:21 140:16 141:20
 144:13 145:8 146:11
 146:16 147:21 148:9
 148:12,22 150:8
 151:3 152:6 154:10
 154:19 156:6 157:2
 158:9 159:11 161:14
 162:19 163:13 164:11
 166:8 167:3,21 168:8
 171:13 175:21 178:8
 181:19 185:4
hires 50:21
hiring 57:13
historically 47:2
histories 68:16
history 68:1 172:16
hit 60:12
hold 32:19
holding 27:20
holistically 174:11
 176:9 178:16 184:3
Holloman 51:15 52:2
honest 85:5
Honor 128:4 142:1
hope 30:1 57:9 120:8
 158:3 159:19
hopes 65:3
hoping 156:18 184:18
horizon 20:21
host 70:16 78:2
hot 168:6
hour 11:17
hours 50:13 136:22
 173:9
huge 97:19 105:5
human 157:19
humbly 53:9
hundreds 46:21

I

Iain 2:16 3:9 104:10
IC 170:8
idea 68:7 72:2 177:20
 178:1
ideal 73:9,18
identical 157:19
identified 4:19
identify 11:21
identifying 18:1 58:11
 67:19 68:19 94:8

IG 170:10
ignored 50:9
illuminating 67:1
immediately 137:17
 178:19
immigration 25:10 74:2
impact 25:21 43:17
 67:21 125:11,14
 127:13 128:11,20
 132:12 134:17 141:2
 141:6,13 147:4,11
impacted 127:16
 134:13 136:11
impactful 32:15 137:20
impartial 67:16 68:18
impartially 34:11
imperil 183:8
implement 40:10
implementation 119:21
 163:9
implementing 38:17
 42:3
implication 118:22
importance 184:2
important 26:1 32:10
 32:11 133:5,11 144:1
 144:4,5 159:15 161:4
 185:12
impose 72:13 94:5
imposed 136:5
imposition 159:22
impositions 92:1
impression 140:8
impressions 140:10
impressive 103:12
improper 116:21
 131:15 139:13
improve 63:9
improved 105:16
improvement 114:21
 115:4
inability 15:16,18
inadmissible 125:22
 144:19 147:13
inbound 95:12
incentive 42:16 74:10
incentives 60:4
incentivized 74:15
inception 179:11
incident 172:20
inclined 96:11
include 98:14,19
 102:22 129:14 150:2
 170:11 186:3,9
included 52:14 132:4
includes 170:20,21
including 10:15,20 54:1
 62:10 119:21 132:15

inconsistencies 156:15
incorporating 68:21
increase 20:22 31:2
 51:8 54:16 57:21 59:1
increasing 39:19 58:9
incredible 8:12 26:16
incredibly 86:16 88:16
independence 28:14
 72:20 77:12 91:6
independent 34:8
 37:11 66:12 67:15
 68:4,22
indicated 94:16 143:6
indicating 37:9
individual 12:5 14:19
 21:17 31:3,11 57:16
 58:5 69:4 71:17 84:20
 84:22 111:3 157:14
 157:15,19 160:22
 167:16 174:21 175:17
 175:18 180:10
individualize 84:15
individualized 85:7,18
 86:19 90:20
individually- 36:19
individuals 13:18 51:9
 59:2 68:20
inescapably 90:10
influence 67:8 73:1
 80:4
influential 80:1
inform 149:10 159:21
 160:11
information 17:11,18
 19:16 28:11 29:13
 30:11 31:6,9,17,22
 32:15 35:6 41:12
 43:18 72:10 75:13
 76:7,10 79:1 115:5
 116:5 118:11 119:8
 119:13 121:8 122:7
 122:17 123:13 143:19
 143:22 147:9,12,20
 157:12 160:20 161:3
 162:12 166:6,20
 178:5 185:19
informative 159:20
informed 30:13 67:15
 110:17 119:12 148:17
 151:19
informs 88:11
infrastructure 73:15
infrequently 157:17
initial 56:11 86:14
 103:15 184:6
initially 97:11 143:9
 182:3 183:17
initiation 47:9

input 99:11 112:6,15
113:7,9 116:2 150:6
153:16,19
inquired 129:8
inquiring 153:11
inquiry 153:13,14
inside 36:21 89:5 183:6
insight 26:16 60:13
97:17 98:6
Inspector 153:3
instance 14:6 35:11
72:7 88:19 95:13
96:12 144:22 172:3
instruction 121:4
169:22
insult 143:14
integrated 52:22
intelligence 143:15
intended 11:7
intensive 173:16
intent 92:5
interactions 165:6
interest 10:14 15:8
interested 138:18
interesting 15:20 31:13
interests 53:22 118:1
121:13
interference 8:6 26:11
111:15,19 120:7
147:1
interim 10:6
internal 152:22
interpersonal 170:20
interrupt 145:11
interviews 170:5
intimate 173:4
introduce 4:17 7:9
24:20 103:19
introduced 105:9
introducing 10:2 68:21
introductions 7:6,8
invested 43:13 44:21
investigated 183:20
investigation 31:3 68:9
161:22 183:2,7
investigative 30:3
investigators 31:2
36:16 170:6
investigatory 32:8
investment 46:4
invite 123:6
involve 155:1 171:19
involved 33:21 172:17
173:7 182:21
involving 89:17 119:13
179:6
IPV 170:19
irregular 34:21 35:2

issue 29:1 34:18 40:4
40:20 45:1 46:6 54:14
55:12 57:20 58:19
61:13 94:8 117:7
129:8 130:8 135:5
143:11 174:17
issues 11:11 18:17
54:21,22 60:13 69:10
97:2 105:6 116:19
117:3 142:18 144:18
165:6 168:7 171:20
174:9 175:6,11
180:19,20 183:22
iteration 95:11

J

JAG 53:2 54:6,14,20
55:13 70:13,14
JAGs 53:13
James 1:17 2:13 3:3
Janelle 2:9
JANUARY 1:7
Jasmine 2:14 3:8 104:1
106:1
Jennifer 2:3
Jeri 1:18 101:9
Jim 8:22 12:16 48:11
126:14
job 31:7 54:3,5 68:15
73:6 82:11 185:13
John 1:14 7:1 61:11
148:12
join 12:19 25:18 99:10
joined 103:9 104:9
joining 4:15 6:14,21
7:21 10:4 60:17 98:18
105:4 148:3
judge 1:13,15,17,18
4:22 5:5,7,7,8,9,9
6:17,19,22 7:11 8:3
8:10,21 9:6,12,15
14:4,13 16:2,3,4,7
17:9,11,22 18:4 19:4
19:11 22:1,4,9,12,15
24:3 25:4,7,8,10 28:9
28:21 30:4 33:8,9,14
33:19,20,21 34:1,9,11
39:1,6 40:9 42:7
46:13,14 48:9,10
52:10 56:1,10 59:4
60:18,19,21,21 62:20
65:7 67:11 68:6,10
69:17,21 70:8,11 71:1
72:6 78:6 79:15 80:16
80:16,18 81:15 89:8
91:10 94:22 100:18
100:22 101:6 102:3,7
102:11,12,17 113:8

119:18 126:13,14,19
127:19,19,21 128:1,4
128:15,16 130:20
131:1 132:10 134:18
136:15 138:5,7
139:10 140:18 141:7
141:14 142:1 143:19
145:10,14,16,17
146:12,13,14 147:2
151:17 153:11,14,21
154:1,7 156:4 158:18
158:18 159:8,9
judge's 20:14 159:21
judge-alone 10:17 20:6
43:6 82:15
judges 3:3 4:15 6:7,10
7:9,10 18:15,18 25:6
28:13 39:2,3,4 40:5
42:11 70:3 72:17 73:3
75:1,12,22 76:5 78:1
78:16 80:2 82:18 84:2
84:14 85:2,3 86:20
87:8 90:18 91:22
93:11,14 96:9 98:1
103:18 116:19 131:13
132:4,9,14 139:12
141:10 143:17 144:18
147:9 159:6 160:4,7
161:11 164:7
judges' 42:4
judging 78:1
judgment 70:18 71:6
judicial 25:9,22 27:4,10
27:15 30:9 33:7 38:7
94:1 116:11 141:15
judiciary 33:11 37:4
40:6,7 66:22 80:7
91:4,12 123:7 125:12
144:3
jump 27:1 58:18 103:20
junior 167:11
jurisdiction 68:8
jurisdictions 28:18
77:7
jury 56:6,20
justice 1:1,9 8:9,13
11:10 14:14 27:13,21
42:8 48:13 54:5 55:3
55:4 59:11 93:7
100:17 103:7 107:12
133:6,12 139:9
149:17 152:2,19
155:20 163:7,12
175:4 183:1,6 184:15
185:9,16
justifications 72:18
justify 85:8

K

K 1:18
Kasold 1:15 4:21,22 5:5
5:7,9,9 6:17 7:11
60:19 80:16 98:19
102:7,17 138:5,7
142:1
Kate 2:11
keeping 54:18
keeps 148:16
Kenny 1:15 98:15 102:3
key 106:16 182:16
kick 105:22
kicks 35:16
kind 13:4,15,16 19:11
28:14 32:14 36:13
37:8 45:18 50:1,2,12
51:21 52:19 58:18
63:5 70:20 81:4 84:1
90:2,10 95:19 101:4
104:18 145:11,21
146:3 163:19 182:18
183:13 184:1,11
kinds 36:22 78:7 95:1
168:22 169:11
king 37:2,17 48:18 57:2
Kirsten 1:13
knew 20:19 136:12
166:13 177:20
know 5:1 7:20 8:4 14:1
14:10 19:13 20:8,8
23:11 24:21 25:13
26:20 28:17 32:1 33:4
38:9 45:13 47:13
50:11 53:8,21 54:4
56:18 58:12,21 59:17
59:19 60:1,5 62:20
64:5 65:10 67:21 70:8
72:5 73:8,10,13,16
74:12 75:1,8,22 76:16
76:19 77:5 81:15,17
82:7,14 83:3,8 86:2,9
87:7 88:19 89:13 91:7
97:4,16,22 108:4
112:2 114:3 126:5
136:6 137:13 139:7
139:15 140:1 150:3
152:2,3 163:8,20
164:15 165:22 166:15
166:15 167:10 168:5
173:1,4,9,15 178:22
181:4 182:4,5,5,10,20
183:8 184:4,5,12,13
184:17,18,22 185:10
knowing 22:8,12 24:2
32:19 161:21
knowledge 33:8 112:16
131:12 181:2

knowledgeable 112:9
known 107:18 159:21
 160:6

L

L 2:6,9
labor 173:15
lack 119:6 122:3 152:14
 161:6
lacks 120:2
Ladies 106:13
laid 157:7
language 70:17 71:2
 119:7 121:14,22
 129:9 154:3
large 29:20 31:19 82:10
 134:1
largely 181:13
larger 172:19
last-minute 17:15
lastly 122:22
late 115:20
lateral 50:21
latitude 125:17 131:17
law 14:20 29:20 54:22
 71:10 95:5 125:12
 131:14,21 153:8
 160:8,11 165:15
 171:19 181:2
Lawrence 1:16
lawyers 86:5
lead 51:21 100:13
leaders 52:18 54:20
 57:16 58:6 64:8
leadership 9:12 55:7
 91:12
leading 110:3
learn 52:5 143:9
learning 107:18 115:1
leave 13:15 120:21
 126:4 145:5 147:19
leaves 129:11
led 89:18 90:9
left 60:13 61:20 80:9
 126:5
legal 15:21 64:12 90:2
 95:1 102:22 104:8,10
 104:12 108:2 131:13
 133:21 135:9 149:22
 153:1 161:5 167:15
 171:5 172:6 175:3,5,8
 175:9 176:22 179:3,5
 179:9,18
legally 72:10,11
lends 123:15
length 14:5 39:19
lengths 130:22
lengthy 49:14

lessen 49:1
lesser 128:8 138:11,12
 138:21 142:21
let's 12:9,20 27:8 66:17
 81:7 84:3 105:17
 125:4 138:2 163:13
 185:22
letting 26:20
level 15:8 48:3,16 59:11
 65:1 69:18 79:2 88:20
 95:9
levels 46:1,17 93:22
Libretto 2:7 5:15,17 6:3
 9:22 24:6,8,13 26:18
 38:2 120:1 128:18
lieu 99:13
lieutenant 3:5,8 46:10
 46:10 104:1 106:1
 116:14 149:3 154:20
 155:8 168:12 169:13
life 158:1
lift 173:8,10
light 120:17 131:5,11
 144:5
liked 75:2
likelihood 180:15
 182:22
limit 11:7
limitations 136:5
limited 31:12 88:6,8
 117:13 134:10 147:11
limiting 16:3 88:22
limits 14:9 16:6 121:15
 150:4
line 4:22 5:22 24:10
 54:13
lines 75:6 133:5
lineup 66:1
link 172:11
list 12:10 102:6
literally 56:9 57:16
 93:15 133:22
litigants 36:5 37:5,12
litigate 60:5
litigated 27:12 61:16
 97:1 180:22
litigating 36:13 59:22
litigation 29:7 30:12
 46:14 52:21 56:5,9,15
 58:2 59:14,18 60:9
 65:4 172:22 180:16
litigations 60:4
litigator 47:8
litigators 47:5 48:3 51:4
 55:13
little 9:14 15:8 16:2,11
 18:8 20:19 22:6 24:20
 30:7 44:1 52:13 56:14

61:12 65:20 78:20
 82:8 111:6 115:6
 120:2 123:19 129:12
 129:15 130:13 136:17
 143:18 145:18 160:17
 164:3,5 167:10 168:3
 173:4 180:1
live 101:15
lived 20:1 86:7
lives 185:10
living 71:20
local 79:2 114:2
located 63:16
location 83:15
locations 32:3
long 144:9
long-term 57:9
longer 18:16 132:19
longevity 58:1
look 9:18 21:16 22:22
 34:7,8 53:11 89:12
 90:4 115:4 116:4
 145:2 157:18 162:7
 180:13 182:21
looking 18:13 20:21
 52:18 80:21 81:15
 89:15 121:19 123:11
 170:17 178:20
looks 12:18 26:13
 162:13,17
lose 26:8
losing 73:19
lost 19:20 26:13 38:8
 145:21
lot 20:6 23:3 42:2 57:10
 59:7,12 63:12 74:1
 88:21 93:2 97:5,7,11
 130:3 134:3 137:11
 143:9 156:22 169:16
 172:14 173:5,17,17
 181:2
lots 144:19
love 24:17 27:5 38:5
low 65:10
lower 45:4 67:9
LtCol 2:14,17 7:15,18
 12:16,22 19:22 33:2
 49:5,8 69:8 77:20
 87:19 94:15 106:3
 113:20 116:16 136:2
 139:4 149:6 155:9
 156:7 168:1 169:15
 171:14
lunch 100:1,3,5 101:18

M

ma'am 7:19 9:22 24:8
 26:18 38:2,12 65:17

66:21 106:3 110:14
 114:10,13 116:16
 119:3 125:6 128:3
 141:22 146:3 152:8
 155:9 156:5 157:1
 159:13 163:16 164:13
 169:15 171:14 178:10
macro 15:8
Madam 48:18
Magers 2:12
maintain 28:13 46:1
maintaining 135:6
major 22:21 26:5 46:10
 76:22 102:3,13 152:9
majority 43:15 97:12
 129:11
making 78:9 86:7 91:6
 135:20 136:16 153:2
manage 27:2 108:2,15
 169:5 177:21
management 2:8 54:14
 55:7 57:7
Manager 104:4
managing 9:7 55:10
 97:16 110:2
mandates 84:12,18
manner 30:8 50:5
manslaughter 82:3
manual 78:3 87:22
 129:13
March 132:6 143:13
margins 63:5
Marguerite 2:8
Marine 2:16 3:9 25:5
 38:18 39:21 40:6
 45:20 46:7 61:20 62:8
 62:16 63:1,2,3 73:12
 86:10 96:19 104:9
 105:20 109:1 111:8
 114:6,7 152:22 160:5
 178:11,17 179:8,21
 180:6,12
Mark 2:17 3:5 7:19
marshaled 50:3
martial 10:17 88:8 95:5
 97:6 177:4 184:20
Mason 2:7
material 117:3 131:19
materially 179:15
materials 103:11
matter 10:19 17:6 85:22
 101:21 107:4 130:21
 153:20 155:18 181:17
 186:12
matters 27:11 28:22
 43:6 56:9,16 117:17
 121:7 153:3 180:22
max 150:5 184:19

McGinley 2:15 3:7
104:4 106:13 113:12
117:10,11 135:1,2
139:22 140:1 150:9
150:10 157:5,6 167:4
167:5 174:2,3 176:7
McGinley's 178:15
McIlwain 14:11
McKinney 2:8
McLaughlin 2:9
mean 39:12 63:2 64:10
74:6 81:13,22 83:11
84:9 85:20 94:6 95:1
155:19 170:2
meaning 89:1 122:10
130:3
meaningful 14:3 89:22
112:22 113:3,19,22
115:21 133:13 149:20
150:1,5 153:16,19
154:15
meaningfully 169:10
means 172:21
mechanism 154:14
media 39:15,16
medical 31:17 117:8
173:6
meeting 1:3 4:5 11:20
100:5,7,11 102:17
147:3,8
meetings 4:10 163:5
Meghan 2:10
Mellette 123:15
member 5:16 55:16
126:21 127:20
members 5:12 6:13
17:16,17 18:20 33:14
52:14 60:14 65:22
80:11 82:14 83:14
86:3,8 98:13,14,17,19
100:6,8 102:5,20,20
103:4 127:22 132:21
148:3,14 162:21
186:3,10
mental 68:13 173:1,5
mention 35:22 147:1
mentioned 19:15 35:13
37:18 49:10 50:19
111:14 142:6 163:6
164:20 168:5 175:2
181:4 182:4,15
mere 14:14
merits 39:12
message 26:20
messages 30:15
met 1:9
methods 180:9
MEV 170:15

Mexico 51:16
MG 1:14,15 7:1 61:8,11
62:12 65:17 102:14
148:12
Michael 2:7,14 3:10 7:4
9:21 24:15 26:14
37:22 104:14
Mike 5:15 7:7
military 1:1,9 3:3 4:14
6:7,9 7:9,10 8:2,9,10
8:13 11:10 14:4,13,14
22:1 27:13,21 28:5
33:19,21,22 40:8
42:11 46:14 48:13
54:5 55:2,4 57:19
59:10 69:17,21 70:3,8
70:10,22 71:10 72:6
79:6 87:7 93:7 98:1
100:17 103:7,18
107:12 116:18 117:4
119:18 123:4 130:20
131:1,13 132:4,14
133:6,8,12 139:9
143:17,18 147:9
149:17 152:2,18
153:11,14,20 154:1,7
163:7,12 164:4 170:3
172:12 175:4 182:22
183:6 185:8,16
mind 13:9 15:2 54:18
119:16 148:19
mindful 11:12
minds 13:10 149:18
minimal 55:22 57:18
minimizing 55:6
minimum 21:8 82:4
106:22
minority 84:10
minute 6:2 7:12 186:1
minutes 5:21 11:18
60:13 80:9 87:14
101:19 104:21 162:20
173:21,22
misconduct 170:14
182:20
misheard 111:17
missed 50:1 101:1
misstate 165:2
mistreated 50:8
mistreatment 50:10
misunderstanding
146:1
misunderstandings
165:7
mitigation 141:2 156:12
mixed 87:11
mixture 174:9
MJA 15:13

MJRP 1:1 4:5,12
model 54:16 64:16
65:12
modify 15:16 135:21
mollify 91:14
moment 5:18 55:9
118:13
monolithic 159:16
months 14:18 56:19
morning 6:22 24:12,13
24:14 25:19 101:4,14
Morris 1:16 2:9 98:20
102:15,16 148:7,10
mother 127:1,12
motion 166:11,12,13
181:1
motions 30:12 56:8,12
92:18 165:1 166:5
motivating 17:5
motivation 42:16
mouth 145:5
move 11:14 18:22 27:3
64:4 96:6 98:6 101:16
105:9 116:10 118:18
162:22
moved 101:15
moving 15:13 16:10
34:17 36:17 100:19
116:5 137:6
MRE 121:4 123:7 181:1
multiple 120:20
multitude 90:21
mute 26:10,12,19
110:11 111:1,2,4
muted 109:2
myriad 144:17

N

N 2:4,14,16 3:4,8
naked 19:9,19 20:6
22:8 23:2,9,18,21
92:22
Nalini 2:5 7:6 99:1,3
name 120:16
named 120:5 121:5,10
127:8
narrow 17:8 19:14
narrower 16:6,7
narrowing 15:10
narrowly 126:8
nature 27:19 30:16
71:10 110:18 115:22
142:19 143:1 165:15
180:13,16
Naval 64:12
Navigating 185:8
Navy 2:15,16 3:5,8 25:5
25:5 38:18 39:21 40:6
45:20 46:7 62:8,15
63:1,2 64:12 66:19
73:11 96:19 104:6
105:20 107:21 108:9
124:5 182:17
Navy's 151:11
Navy-Marine 165:11
NDA 100:16
NDAA 15:14
near 8:16
nearly 53:3 79:10
necessarily 19:16 29:1
45:9 51:6 53:15 56:15
58:19 65:12 85:19
91:9,17 118:20
158:15 174:14 178:18
necessary 28:6 31:21
31:22 43:17 65:7 72:9
88:10 120:3
need 53:11 54:19 63:15
69:12 76:2 84:18 85:4
85:5 87:20 89:4 96:10
104:17 117:19 118:18
147:18 150:6 166:20
171:16 172:7
needed 63:17 75:13
76:9 80:7 144:21
needle 13:2
needs 65:8 96:5 138:12
negative 28:7 137:8
negatives 29:5
negotiate 129:18
negotiated 13:4
negotiating 13:14
16:16 17:19 44:20
negotiation 17:8 20:12
21:7 22:13 114:1
129:17,22 153:13
181:15
negotiation- 10:20
negotiations 115:9
149:12
negotiators 15:22
Neither 78:15
neutral 75:9
never 14:8 36:9,12 86:6
156:20 177:9,10
nevertheless 138:14
new 9:7 13:11,17 25:14
34:18,19 42:4 48:3
51:16 57:13,19 62:1
78:22 83:8 93:11
107:18 109:20 129:13
153:21 154:3 156:20
168:21 169:2,17
182:1 184:8 185:2
new-found 16:9
newness 124:12

nice 159:7
 nicer 159:7
 nine 100:20
 nodding 49:15
 non- 11:4
 non-BCD 89:19 96:20
 non-covered 64:7
 non-judicial 97:9
 non-penetrative 140:5
 nonpublic 186:2
 noon 101:13,16
 Norfolk 25:8
 normal 20:5 21:3 71:4
 normally 147:16 175:7
 176:9
 note 4:9 40:19 79:16
 115:12 117:22 128:19
 130:7 177:8 178:3,14
 noted 67:11 73:18
 129:8 130:8 157:2
 notes 4:7
 notice 115:20
 notified 112:8,18
 151:15
 noting 15:10
 notionally 88:18
 notions 184:15
 number 11:11 19:7
 40:15 43:11 61:16
 64:20 65:10 73:22
 77:8
 numbers 52:11 60:1
 61:14 62:22 63:3
 88:12,13
 numerous 124:6 151:6
 177:5
 NVA 170:15

O

o'clock 100:20
 object 134:1
 objected 126:3
 objection 50:1 56:20
 objections 130:19
 166:4
 objective 90:5
 observation 42:10
 119:6
 observations 105:14
 115:6 116:3
 observe 55:21
 observed 42:12 43:20
 158:6
 observer 34:6 90:6
 observing 21:12
 obtain 28:4 30:3,7
 45:10 74:12
 obtained 30:17

obtaining 31:21
 obviate 48:22
 obvious 27:17
 obviously 9:15 13:2
 15:17 22:22 28:12
 29:6,12 30:18 36:4
 69:1 81:13 86:10
 100:7 142:8 163:18
 164:8 181:15
 occasion 41:5
 occasions 76:6
 occurred 134:4
 occurrence 128:13
 occurs 70:2 72:3
 October 9:5
 offenders 77:15 133:8
 offense 71:19 88:1
 94:21 132:18 138:15
 138:20 140:3,5,13
 141:7 142:5,21
 176:15 179:17
 offenses 16:17 23:5
 64:7 77:15 81:16,21
 82:2,8 83:5 88:17
 128:8,8 155:2,6 162:4
 169:2,6,19 174:9
 179:6
 offer 8:15 19:8 57:13,15
 57:19 141:3 176:6
 offered 70:15 111:20
 153:19
 offering 59:1
 office 9:8 22:14 55:11
 56:19 57:14,17 62:2
 63:7 64:18 76:20
 77:12 78:21 143:3
 officer 33:20 38:21 73:9
 74:8 104:7,11
 officers 57:4,8 64:1
 Official 2:1
 oftentimes 97:2
 oh 12:18 49:6,22
 109:17 138:19
 okay 4:3 5:2 6:3,15 7:3
 7:12,18 26:21,22 61:2
 61:5,6 65:18 75:21
 80:8,21 83:22,22 84:2
 99:20 100:2,22 101:6
 101:18 102:10,19
 106:10,12 109:8
 111:6,10 117:9
 120:12 146:16 154:19
 168:8 169:16
 old 13:3 16:21 25:20
 59:6 108:17,18,20
 114:19 115:2
 omit 131:14
 once 20:18 36:5,9 89:1

100:3 156:7
 one's 83:7
 one-time 171:2
 online 100:6 102:5,7,8
 102:11,18,21
 onset 163:8
 open 1:5 4:9,12 148:2
 150:19 185:15
 Opening 3:2
 operate 89:5
 operating 20:3 27:15
 operational 9:11 86:6
 Operations 104:7
 opinion 85:5 160:3
 opportunities 41:3 45:7
 48:5 51:3 53:19 59:19
 60:7 73:22 93:17
 118:8 124:3
 opportunity 6:6 13:7
 17:13 19:19 22:4 24:1
 36:3,4 63:8 68:11
 69:9 78:5 79:16 82:21
 86:18 93:10 110:19
 111:18,21 112:22
 113:3,6,22 115:21
 129:21 139:5,6,19
 149:20 150:5 151:13
 153:15 161:1 184:21
 oppose 184:17
 opposed 66:14 140:11
 option 76:18 77:17
 153:6,7
 options 75:14 78:2
 171:4 175:20
 oral 166:16
 order 74:14 85:7 105:8
 105:18 125:4 128:16
 138:3 142:3 166:21
 ordered 100:2
 orders 170:8 172:11,12
 175:12
 organization 59:22
 69:4 104:12 153:1
 organizational 60:6
 organizations 29:21
 64:11
 organized 64:14
 oriented 36:20
 original 96:5 97:7
 131:10
 originally 134:7 140:3
 176:14 178:22
 Osborn 1:16 98:15
 100:13 102:3 145:9
 146:17,18 147:22
 OSJAs 94:4
 OSTC 100:12 114:3
 177:15

OSVP 70:12
 ought 146:22
 outcome 109:22 110:4
 181:12
 outside 34:6 57:16 66:8
 67:2,17 78:8 85:8
 90:5 152:18 162:17
 171:20 172:2 182:12
 overall 27:14 91:2
 97:18 109:20 125:7
 135:11 140:8,12
 167:20
 overlap 33:5
 overstatement 50:11
 overstating 49:17
 owners 46:15
 oyster 49:3

P

P-R-O-C-E-E-D-I-N-G-S
 4:1
 p.m 101:22 102:1
 186:13
 packet 103:15
 page 131:4,7 132:9
 panel 1:1,9 6:13 8:13
 11:22 13:8 16:16
 18:20 32:11,15 33:4
 55:16 60:14 65:22
 80:11 97:19 98:3,13
 98:14,17,19 100:6,8
 101:15 102:5 103:7
 105:5 132:3,21
 133:12 147:8 148:3
 148:14 162:21 163:4
 180:3 185:16 186:3,9
 Panel's 143:12
 panelists 4:14 11:9
 panels 83:16
 pans 83:21
 paper 39:5
 paradigm 143:4
 paralegal 2:2,6,9,9,10
 94:3
 parallel 129:3 133:1
 152:16
 parameters 66:8,21
 67:3,10,17 68:2 83:19
 91:3,21 156:16,21
 parole 73:9 74:2,8
 parse 139:12 140:10
 174:18
 part 23:2 57:5,6 67:18
 96:6 100:13 101:1
 112:18 114:1 124:16
 136:18,22 142:9
 164:16 177:4,7
 181:14

PARTICIPANT 5:6 6:18
9:2 49:6
participants 87:3
participate 113:22
169:10
participated 63:12
participation 154:15
particular 10:14 16:1
17:2,20 18:22 22:19
22:22 23:6,20 28:9
36:20,21 60:15 66:4
67:10 91:15 93:5,15
93:16 119:16 120:17
121:1 124:21 130:4
131:11 147:14 160:21
180:20 181:11 184:15
185:7
particularly 16:14
18:14 55:3 61:19
66:22 73:14 161:16
parties 17:6 27:20
31:20 36:5 42:14 67:7
129:18 130:20 166:19
partners 173:4
parts 126:6 132:16
party 30:17 67:13 75:9
party-presented 28:12
pass 35:21 36:1,2,12
42:18 118:11
path 52:19 53:17
patience 4:4
patient 6:6
pattern 92:4 158:6
patterns 157:10
Pause 109:3 111:5
pay 63:21
pays 73:17
Pedden 2:16 3:9 104:10
109:1,7,10 111:8
114:9,13 119:2,3
120:12 128:2,3
133:17 134:5,14
141:21,22 152:7,8
159:12,13 161:17
164:12,13 178:9,10
182:15
penetration 134:8
penetrative 140:3 141:6
people 8:12 13:14 20:4
20:8 36:19 50:19 51:2
51:22 76:3,17 100:5
101:20 104:19 111:1
122:20 147:17 159:17
163:10
percent 39:22 177:9
180:5,6
perception 83:13 86:1
perceptions 85:22

period 31:12 47:19
59:22
permissible 88:1
permitted 125:10,18
perseverance 6:5
persistence 24:16
person 4:21 48:19 54:3
57:17 90:10,12,18
99:6 121:16,20
122:10 125:16 131:8
personal 94:11 157:22
160:3
personally 133:21
184:9
personnel 65:2 94:8,9
persons 4:19
perspective 9:14 12:11
22:11 30:9,10 42:20
66:9 87:15 105:12
114:18 135:3 136:7
137:9 139:11 146:4,8
162:11
perspectives 11:3,10
18:17 25:19
pertinent 147:20
Pete 2:2 4:16 98:9
Peters 2:10
petition 119:18
phenomenon 61:14
philosophy 93:7
phone 5:22 10:5
phonetic 21:20
physically 98:13
PIA 92:16
pick 27:1 168:17
piece 44:22 135:14
pieces 124:14 174:19
174:20
pigeonholing 184:5
PII 92:17,19 93:18
95:13,19
pipeline 50:21 51:1
57:4
place 12:13 122:1 129:3
130:10 143:7
places 63:10 64:2 95:19
121:10
plainly 154:4,7
plan 52:21
plank 46:15
planned 20:17 99:18
play 23:5 92:6 121:14
124:19 143:10 174:7
182:10
plays 136:8
plea 10:18 12:9,12,14
13:5,11 15:3,9 17:20
18:21 19:19 20:10

22:8,21 23:9,18 24:19
25:1,14,20 26:2 38:5
38:9 41:21 42:6,8
43:7,16 44:20 72:4
73:21 76:14 80:5
88:21 92:22 105:11
105:12 106:5,18
107:3 108:3,17
109:20 111:15 112:18
113:6 114:18 115:9
115:14,22 128:14
129:17,21 130:6
134:6 140:20 142:21
149:12 150:2 151:15
151:18 153:13 154:1
155:5,12 156:1
157:11 158:8,17,19
159:9 177:4,10
184:22
plead 108:20
pleadings 92:19 166:6
pleas 20:7 23:1 56:12
76:13
please 26:10,12 49:7
102:6 109:18 111:4
pled 19:9 97:8 128:8
132:18 134:8
plenty 32:20 85:17
podium 166:16
point 12:2 14:1 36:8
47:8 58:22 65:6,6
70:10 71:18,20
113:14 122:2,22
125:17 131:22 137:14
139:9 140:18 150:16
152:13
pointed 59:7 89:7 90:20
130:15 132:7 146:9
pointing 124:11
points 51:13 68:5
policies 40:10 182:13
policy 8:9 35:16 160:11
163:22 174:15 180:1
180:7,18 182:14
183:11
ponder 150:13
pooled 58:13
pop 95:18
portion 32:14 122:14
131:1 140:11 143:16
portions 123:4 131:15
131:20 134:1
position 25:4 58:4
67:12 69:21 167:20
positions 8:8 58:7
positive 107:6 109:21
139:20
possessed 131:12

possession 31:5 117:4
119:9
possibility 76:12
possible 48:22 104:22
possibly 53:4 100:12
post-trial 71:4,8 93:21
94:3
posted 4:12
posts 30:16
potential 27:19 28:7
31:13,14 117:14
144:19 145:15 158:17
183:8
potentially 123:10
143:20 152:11
power 15:12,15 111:2
powers 16:9 96:10
practical 10:19 107:4
practicality 59:17
practice 7:22 35:1
55:20 95:10,16
118:19 124:4 133:7
146:6 152:16 153:4
177:7 180:2
practiced 156:20 160:7
practicing 108:19 115:2
pre- 28:21 33:6 35:19
41:4,18 56:8 68:8
83:10 119:12
pre-2019 12:12 16:22
25:21
pre-confinement 79:11
pre-drafted 11:6
pre-negotiated 18:6
pre-referral 10:16 27:4
27:10,14,17 28:4,15
29:9 32:18 35:7,18
37:16 38:6,17,22 41:7
116:11 119:17 120:13
pre-referrals 28:20
pre-trial 116:21 118:10
precedent 87:21
precisely 132:17
Predictability 106:16
preference 157:22
158:4
preferred 76:18
prejudice 138:16
142:14 143:11,18
144:16,22 145:15
prejudicial 143:21
preliminary 33:19 84:1
prep 170:8
preparation 23:19
prepare 55:21 167:17
167:18
prepared 10:11 44:15
103:13,16

preparedness 44:4,11
 55:12,19
prerogative 22:18
prescribes 87:21
present 1:12 2:1 29:21
 30:17 32:16 34:13
 42:14 98:13 125:18
 138:17 165:14
presented 34:20
presentencing 66:11
 66:13
presenters 2:13 103:8
 103:20
presenters' 103:12
presenting 23:19 32:9
preservation 35:14
 40:21
preside 39:1 92:21
presided 92:13 94:17
presiding 1:10 28:21
presume 131:21 142:12
presumption 131:13
pretrial 10:20 13:4,12
 15:4 20:3 41:6,8
pretty 4:13 51:22 53:16
 163:10 164:8
previous 35:12 129:9
 130:8 163:4,5
previously 129:7
 147:12 179:16
primarily 30:10 40:1
 58:1
primary 17:4
prime 56:21
principal 15:22
principle 18:9
prior 12:12 13:7 16:13
 30:11 57:22 91:20
 105:13 107:17 113:5
 116:1,13 129:12
priorities 44:18
privacy 123:20
private 7:22 121:8
 122:7,17 123:1,16
privileged 123:13
privileges 170:4
privy 118:7
probable 15:21
probably 40:14 43:16
 52:13 55:17 62:8
 73:11 84:10 163:8,9
 166:2
problem 49:20 50:20
 86:10 93:13,20 101:8
 117:1 122:3 148:14
problematic 121:17
 122:19 125:15 129:12
 130:13 131:5 152:15

165:5
problems 92:18 142:13
procedural 56:16
 128:19
procedurally 40:3
procedure 135:21
procedures 11:2 120:3
 124:4
proceed 143:8
proceeding 14:3 17:12
 18:4 33:7 95:3
proceedings 10:16
 11:5 27:10 33:22 76:7
 116:13 118:9 119:13
 123:18 160:15 170:3
process 11:3 14:21
 23:10 27:18 28:8 29:5
 30:2,12 34:3 36:6
 39:14,20 40:16 47:17
 55:5 57:13 64:2 65:3
 66:12,15 68:10 71:5
 76:1 87:3,4 93:21
 94:3,4,12 95:21
 111:16 114:1 119:17
 120:19 125:1,8
 128:21 129:2,17,22
 132:15,16 133:1,6
 135:8,14 136:6
 139:10 152:19 153:13
 159:20 160:12 161:10
 165:12 166:1 170:15
 176:16,21 181:7,15
 182:14 185:1,11
processes 31:4 66:4
 124:18,19 176:20
processing 10:21
production 121:7
professional 53:13
 153:2
professionals 68:15
proffer 130:17
proffered 131:20
program 2:8 36:17
 38:20 46:16 58:16,17
 59:1 71:14 78:22
 104:4,8 170:8 171:2,9
 171:22 172:4 173:14
 177:1 179:12
programs 57:11 58:15
 75:4 78:19 79:1
progressive 54:16
prohibiting 129:10
promise 64:19
prompt 104:18
proof 120:22 143:2
propensity 121:4
proper 139:12 181:17
properly 92:16,17 96:8

120:1 131:2 152:20
 166:21 183:20
proponent 66:21 68:3
 68:21
proposed 113:6
prosecute 77:13 177:15
prosecution 8:9 77:10
 114:3
prosecutor 8:4 25:11
 52:8 57:14 113:5
 133:21
prosecutor's 167:17
prosecutorial 64:22
 113:15 143:7 150:11
 167:8
prosecutors 16:15
 57:19 59:15 117:21
 124:6 151:1 164:7
 167:11
prosecutors' 118:1
protecting 123:20
protective 170:8 172:11
 172:12 175:11
prove 32:1 60:1 122:11
 138:11
provide 11:9 45:18 68:5
 69:4 72:18 73:15
 82:18 90:14 99:11
 113:7 115:20 128:5
 138:14 140:20 153:16
 167:15 172:8 173:14
 174:12,14 175:10
 181:5
provided 10:11 42:15
 74:6 147:9 169:1,1
 176:4 179:9
provident 42:6 76:14
providers 39:16
provides 54:7 116:18
providing 89:14 116:1
 142:8 170:19 185:19
proving 97:4
PTA 108:1,8,16,18,20
PTAs 12:12 105:13
 114:19 115:2 156:1
public 4:6 40:19 96:14
 98:9 100:7 147:3,8
publication 121:18
punished 88:18
punishment 72:12,13
 78:4 97:9 130:5 160:1
 161:8 184:19
punishments 79:8,8
 93:5
punitive 14:7 72:7
 90:11 168:21 169:17
 176:3 182:5
pure 176:6

purely 91:22 174:13
 176:18 182:19 183:3
Purnell 2:16 3:4 5:20
 7:5 10:3 24:7,11,18
 25:2 26:4,7,14 37:22
 38:4,11,14 41:14,15
 41:17 43:22 44:7,10
 44:13 48:8,10 62:5,6
 62:14 72:16,17 75:16
 75:17,18,21 77:18
 81:7,9,10,18,22 83:7
 85:12,15 96:16,17
purpose 71:10 145:14
 149:3
purposes 93:6 135:9
pursuing 36:20
push 21:15 28:14 72:1
put 19:10 20:17 21:18
 23:18 55:15 57:3 71:3
 74:22 79:15 96:7
 98:11 140:21 143:6
 144:21 145:17 146:6
 161:7 178:12 182:9
putting 20:13 23:14
 54:2
pyramid 54:18 64:10

Q

quality 42:22 44:3
 47:20
quantify 160:15 173:9
quantum 143:2
quash 122:6,10 123:12
 123:12
queen 48:18
query 153:12,12
question 20:1 25:15
 29:15 35:8 38:15
 50:18 53:10 54:13
 63:6,6 64:18 70:2
 74:22 81:9,11 82:21
 83:1 92:16 101:9
 106:1 111:12 112:21
 114:15 115:8 118:21
 119:22 128:18 132:21
 138:6 142:2,7,14
 145:11 146:17,18
 149:8 152:10 156:3
 160:8,10 163:4,18
 169:16 171:10 175:14
 181:22 184:8
questioned 165:13
questioning 105:2
questions 10:11,13
 11:6,14,19,21 12:2,4
 18:21 23:12 27:4,7
 41:20 45:2 60:20,22
 61:7 66:2 74:20 80:10

87:15,17 92:9 95:2
 103:13,16,21 104:17
 104:22 111:11 116:7
 120:9 133:5,12 148:1
 148:5 149:5 154:22
 162:21 174:1 181:9
queue 66:4,10 168:11
quick 29:18 90:17
 92:21
quickly 64:3 70:2 184:7
quite 23:17 31:20 91:13
 105:7 121:1
quote 132:5 143:16
quoting 132:8 146:21

R

R 1:13,14,14,15,16,16
 1:17 2:13,16,17 7:1
 7:15,18 8:22 9:4
 12:16,22 15:7 19:2,22
 22:5 24:11 25:2 26:4
 27:16 33:2 38:11,14
 41:15,17 44:13 49:5,8
 54:11 61:4,8,11 62:6
 62:12,14 65:17 66:20
 69:8 72:17 75:18,21
 77:20 78:15 80:20
 81:10,18,22 83:7 84:8
 85:15 87:19 90:17
 92:20 94:15 96:17
 102:9,14 148:12
R.C.M 70:9 106:5 117:2
 119:7,21 121:15
 122:16 129:9 131:2
 153:9 181:17
R.C.M.s 130:10
Raab 101:15
RADM 2:16 24:11 25:2
 26:4 38:11,14 41:15
 41:17 44:13 62:6,14
 72:17 75:18,21 81:10
 81:18,22 83:7 85:15
 96:17
raise 21:1 29:4 45:1
 97:2 162:22
raised 44:3 51:18 53:3
 65:5
raising 51:19 52:2,17
rampant 93:20
range 11:10 18:5 67:5,9
 72:5 82:19 87:22 88:5
 88:6,8 110:1
ranges 15:11 82:1,5,12
 82:14,17 85:16 86:17
rape 173:1
rapid 62:17
rare 28:1 119:12 183:15
rarely 121:17 174:16

rate 40:11
reach 13:18,20 27:2
 72:10
reaching 28:3 59:3
read 74:1 103:15
 143:15 147:16,17
ready 101:20
real 13:21 14:2 35:17
 50:20 115:21 173:15
reality 86:3
realized 86:15
really 8:16 14:8 15:2,22
 19:12,20 20:1 22:12
 31:4,12,20 32:15
 37:16 39:6 40:11
 41:18 42:16,17 43:5
 45:19,22 47:6,7 63:5
 63:7,15 68:1 71:9
 73:6,20 74:3 77:3
 82:6,17 83:9 84:16
 85:3,4 90:17 108:7
 110:6,15 112:6 114:2
 115:16 137:20 141:4
 142:20 145:2 150:6
 150:12 152:16 155:10
 155:11,15 160:14
 173:17 175:17 179:14
 183:18 185:12
Rear 3:4 5:19 10:3
reason 17:7 37:11 43:3
 83:11 91:3 132:11
 162:6
reasonable 19:9
reasonably 112:1,8
reasons 20:5 27:17
 42:17,19 72:12 89:6
 90:21 162:6
recall 19:4 36:13 49:3
 163:4
recap 100:10
receive 99:19 162:8
 171:2 172:6
received 21:20 50:6
receiving 169:22
recency 8:15 9:18
recepted 21:20
recite 131:4,7
reckoning 110:22
recognize 167:20
recognized 53:12
recognizes 168:2
recommend 93:3
 107:15 129:10,14
 130:1
recommendations
 79:18 133:14 135:20
 150:19 154:18
recommended 77:7

147:14
reconsidering 34:10
reconvene 101:19
record 35:9,10 43:19
 65:9 79:17 96:6,8,12
 98:11 101:22 130:21
 131:19 146:19 147:19
 186:13
recorded 4:10
records 31:17 117:8
 173:2
recruiting 51:1
recruits 47:21
rectify 63:20 91:14
redact 145:14
redacted 92:17,17 96:8
 131:3 136:11 141:10
 144:11 145:3,19
redactions 94:11
 145:20
Redford 1:17 48:9,10
 48:12 98:15 102:4
 126:13,14,14 127:19
 128:1,4
reduced 60:1,3 128:12
refer 143:12
referee 14:15 32:13
referral 28:22 30:11
 33:7 35:20 41:5,19
 89:16 90:6 116:13
 119:13
referred 29:10 61:14
 77:9 97:12 185:2
reforming 11:3
regard 106:9 114:20
 115:8 117:7 136:16
 148:5 155:4,22
 169:17 171:4 173:12
 181:22
regarding 92:19 157:10
 175:15
regardless 32:16
regards 118:9 158:18
Register 121:19
regret 22:10
regular 36:6
rehabilitative 75:3 79:7
reiteration 91:19
reject 35:2
rejected 35:7 40:13
rejecting 39:22
rejection 35:11 40:11
relate 147:4
related 18:21 25:1
 121:7 165:16
relates 124:4
relating 10:22 128:20
relationship 113:15,17

167:7
relationships 150:11
relative 105:10 124:11
relatively 29:11 78:22
 128:13 150:12 155:6
 163:1 175:6
relied 68:9
relief 89:14 120:6
 121:16 122:20
relies 110:6,15
reluctant 41:9
rely 20:1 67:8
remain 100:7,8
remains 131:4,7
remark 89:9
remedies 121:9 122:6,9
 152:14,16 153:8
 171:5
remedy 115:17 121:21
 121:22 123:11 148:19
 152:12
remember 151:5,20
 166:11
remorse 18:1
remote 10:8 31:15
remotely 39:8 60:18
removal 129:9
remove 31:19 55:3
 95:12
removed 70:14
renegotiate 151:18
repeating 174:4
repetition 51:8 55:16
 58:19
repetitions 54:17 57:21
 58:10 59:2
replace 101:1
report 132:6 143:13
 146:21,22 178:21
 184:6
reported 165:17 183:19
reports 74:2 77:3
 147:17,18
represent 164:1 170:3
 176:13 177:1
representation 171:21
 178:20 179:10,19
 181:6 183:21
representative 104:13
representatives 99:8
 104:17 127:10 132:22
 138:13
represented 112:2
 149:21 150:1
Representing 103:22
 104:3
reprimand 70:5,7,18
 71:2

reputations 159:6
request 29:22 35:14
 36:9 38:21 41:9,11
 121:16,21 171:9
requested 87:8
requests 38:19 40:1
 180:9,18
require 39:6 181:1
required 11:13 34:3
 66:7 95:12 130:16
 182:11
requirements 35:4
 115:14
requires 54:15
rescission 91:15
research 21:13
reserve 11:16 40:5,6,9
 49:2 104:20
resistance 150:22
resolution 13:15
 155:21 165:22 177:12
resolutions 175:16
resolve 116:19 144:12
resolved 166:15 176:19
resource 94:8
resources 58:14 63:9
 69:1 172:3
resourcing 23:10 28:22
 30:21
respect 6:15 15:3 36:15
 41:21 80:13 91:20
 95:8 119:7,8 120:9,13
 121:1 128:14,17
 130:11 142:13 143:11
 153:2 155:6 157:2
 160:19 164:22 178:14
 185:9
respected 12:3
respectfully 133:4
respective 10:12 11:22
respects 6:10
respond 45:17 103:14
 149:4
response 49:15 114:15
 141:8 152:9 178:11
responses 65:21
 104:18 116:6 134:3
 173:22
responsibility 23:16
 42:7 91:12 153:2
 167:17
rest 97:17 119:11 158:1
 167:18 173:22 185:22
restrained 144:7
restraint 160:18
restricted 80:4
result 62:22 135:16
 162:13 180:16

resulting 59:18
results 112:19 113:18
resumed 101:22
retain 45:4
retaliation 10:22 169:3
 170:11
retired 3:3,4,5 8:1 9:4,5
 10:3 49:2,2 62:7
return 26:15
returned 29:14 39:16
returns 29:6
reverse 125:4
review 1:1,9 8:13 16:13
 35:1 63:14 65:7 68:4
 69:19 71:4 93:22 94:1
 103:7 113:6 133:12
 185:16
reviewed 130:17
reviewing 28:9 38:21
 39:6 69:17
reviews 46:21 59:8,12
revisions 70:9
reward 70:21
RFI 99:5,13 100:19
RFIs 99:19
right 5:14 9:4 12:9,22
 21:5 25:2 26:15 35:20
 38:8,14 40:20 49:6,9
 54:2,3,3 61:4 62:6,11
 62:13 63:9,9 64:1,2
 66:11,14 69:14 88:3
 95:6 103:3 107:8
 110:11 116:17,19
 117:7 121:6 124:12
 124:19,22 136:20,20
 137:1,3,10,12,14
 139:8,11 148:7
 150:16 155:15,19
 156:12,14 157:1
 159:15 161:11 162:22
 164:21 165:12 168:3
 171:15,18 172:4,12
 173:3 177:13 181:21
rights 120:4,14 121:10
 133:9 166:22 170:4
 171:4 183:9
ripe 59:13
risk 37:8 143:18 144:16
road 52:4
roadblocks 31:13
Robert 1:15
robust 159:19
rocker 91:11
ROI 108:8 112:11
 158:22
role 32:13 33:13 42:4
 81:14 124:12,22
 163:6,11 164:5,8

166:22 167:14 169:8
 182:17 183:4,9
roles 6:9 55:8
room 4:20 6:15 22:7,20
 61:6 81:1 85:17 100:4
 114:8 131:8 136:12
 148:4
Rosenow 2:17 3:5 7:15
 7:18,19 9:10 12:16,20
 12:22 16:12 19:3,22
 33:1,2 37:21 44:9
 48:11 49:5,8 54:10
 55:15 57:3 69:7,8
 77:19,20 87:17,19
 94:14,15
Rosenow's 9:18 22:6
 54:12
roundabout 21:9
routine 153:3
routinely 43:8
Rozell 2:10
rub 167:10
rule 115:17 122:4,5,14
 123:2,17 129:11
 141:1 146:5,6 149:10
 149:16 152:14 153:21
 154:3
ruled 36:9 147:12
rules 14:22 35:1 37:3
 55:3 95:10 115:14
 123:4 125:13 130:16
 139:14 150:20
run 137:12 149:2
 163:14
running 14:9

S

sacrifice 58:3
safeguard 42:5 120:3
safeguards 93:21 94:5
safety 137:19 172:10
 172:14
sailed 84:9
sameness 159:14
Sara 2:15 3:8 104:6
SARC 170:7
SASC 100:11
sat 47:4
satisfied 110:3
Saunders 2:11
saw 13:17 14:8 19:3
 32:7,12 44:22 83:16
 86:3
saying 110:15
says 122:13,14 149:10
 151:18 176:8,11
schedule 99:1
Schroder 1:17 98:15

102:4
scooping 123:19
scope 10:15 117:17
 120:10 128:10 161:21
 164:18 165:7 171:21
 171:21 172:2
scoped 120:2
scoping 142:14
screen 7:20 80:22
script 44:1
se 47:15
sea 86:6 133:20
seal 96:7
search 39:10 116:21
seat 161:19
second 51:22 53:16
 66:10 70:1 92:15
 110:9 115:8 132:13
 159:14 169:7 184:7
seconding 119:5
secondly 115:16
section 122:9
sector 56:13
see 5:4 6:20 7:21 10:3
 18:20 19:11 20:6,9
 22:2 26:14 31:16
 40:12 44:6 45:13
 47:12 51:7 60:14 64:5
 66:1 76:19 77:6,11
 80:11 82:3 83:9,20
 85:3,5,10 87:4 97:6
 97:11 99:11 100:14
 105:17 108:5,10
 135:19 138:22 144:20
 157:17 158:3 162:20
 165:5 174:8,16 177:9
 177:10 183:9,16
seeing 19:4 29:10
 43:13 47:10 137:9
 140:6 155:11,12
 156:1,5,14
seek 36:7 40:21 41:11
 120:6 122:6 123:11
 171:7
seeking 121:9 122:10
 122:20
seeks 122:7 123:13
seen 44:4 46:5 76:16
 81:4,15 82:13 92:16
 92:18 107:12 133:20
 141:4 155:4 173:13
 175:15,16
sees 155:20
seize 116:21
select 47:4
send 95:15,19
sending 77:15
senior 2:2,6,10 8:4

104:14
sense 17:2 27:14 34:5
 35:8 63:18 94:21
 115:10 124:19 145:18
 146:4 162:16
sensitive 28:2
sent 26:19 33:17 120:1
 128:18 177:15
sentence 10:21 14:18
 15:11 16:1,6 17:9
 20:22 68:1,20 69:12
 73:3 74:10 75:4 76:15
 77:8 81:3,13,17 82:4
 83:5,6 84:10,18,19
 85:6,7 87:5,5 88:14
 89:1,13 92:1 107:8
 129:15,19 130:1
 141:17 143:22 147:14
 153:22 157:11 158:8
 162:5,14,16
sentenced 83:8 137:15
sentencer 159:8
sentences 15:16 17:2
 19:14 68:7 78:2 81:20
 83:14 86:19 87:22
 129:11 138:4 155:1
 158:7,17 162:8
sentencing 11:2 14:3
 17:12 18:4 23:10,14
 23:20 42:14 43:1,5,14
 44:16,22 65:19 66:3,7
 67:14 68:6,9,10 70:4
 70:11 73:20 74:18,20
 75:3,8,13,14 76:6
 80:13 81:4 82:11,19
 83:12 84:15,16 85:3
 86:16 87:21 90:19
 93:6 110:1 124:17,18
 125:8,18,22 127:11
 127:20 132:10 135:13
 135:21 136:6,19
 137:1,7,12 139:10,13
 140:19 141:19 148:2
 148:5 155:1,4 156:4
 156:16 159:20 160:10
sentencings 56:12
sentiment 16:14
separate 142:18 144:11
 152:15 163:19
separation 175:11
serious 28:3 49:19
 50:18 72:5 77:15 85:4
 95:3 97:2 185:2
seriously 53:11
serve 91:8
served 33:8,9,12,13,19
 42:11 86:6
service 48:12 54:1 57:9

64:13 83:15 86:8
 97:17 98:4 133:20
 135:4
servicemember 164:2
services 31:10,15
 43:12 47:21 54:7
 58:12 63:11,20 86:11
 99:9 113:10 124:5
 160:5 168:22 169:21
 170:1,2 171:8 174:14
 175:7,8 176:4,6
 181:22 182:7,11
servicing 25:9
session 1:5 3:3,7 4:6
 4:20 5:14 98:9,18
 99:5,13,15 100:10
 101:2,17 102:21
 166:11 185:15 186:2
 186:8
session's 100:19
sessions 4:12 13:8
 99:18
set 13:12 27:3 28:18
 37:12 53:22 66:2
 129:16 143:19 157:3
setting 79:10
settings 45:10
seven 4:19 98:12
severity 180:14
sexual 11:1 120:20
 128:7 134:8 142:20
 165:17 169:3 170:17
 170:21 172:15 173:19
 174:13 176:5,7,10,11
 176:15,18 179:1,17
 182:18,19 183:12,17
shared 38:8 78:1 115:9
sheer 61:13 76:10
sheet 120:22 161:21
 178:21
shield 173:1
shift 65:19 66:14
shifted 44:18 46:20
ship 84:9
short 59:21 80:10
 128:16 163:1
shortly 10:5
shrinks 73:22
shy 73:4 76:4
side 22:16 28:15 32:16
 37:7 74:13,15 80:15
 113:13 150:21
significant 13:21 21:1
 25:11 29:11 33:4
 42:12 49:20 50:17
 53:22 54:15 63:21
 77:21 138:9 180:19
significantly 14:4 39:14

46:18 128:21
signing 60:8
similar 11:4 13:10
 38:20 40:17 41:2 83:3
 83:4,5,6,16 119:6
 124:5 131:17 155:2,5
 155:12,13,15 156:1,1
 156:5,14 157:18
 161:12 162:7 178:11
 182:14,17
similarly 83:13 84:20
 121:14 158:21 159:4
 161:18
simply 44:17 45:6
Simultaneous 7:14
 109:16 110:7,20
single 51:20 64:7
 172:19
sir 5:17 9:3 24:10,13
 41:16 62:11 66:18
 152:10
sister 135:4
sit 18:19 166:14,15
sitting 18:16 51:22
 57:17
situated 83:13 84:20
 158:21 159:4 161:18
situation 91:14 138:17
situations 82:3 115:17
six 14:18 47:5 56:19
SJA 18:7 19:15 67:13
 93:1 94:19 115:18
SJA's 152:19
SJAs 15:21
skill 53:12
skills 23:13 56:5,15
 93:11 114:17
skip 168:16
slight 34:12
slightly 69:9 70:1
slowing 39:14
small 30:19 43:10
snag 46:3 149:18
snar 167:19
snow 6:1
so-called 85:6
social 39:15,16 68:12
societal 47:18
sole 47:11,13 70:3
solely 60:8 68:9
solid 150:12
solidify 166:3
solve 142:13
somebody 60:7 111:2
someone's 54:17
Somers 1:18 5:8 6:19
 6:22 60:19,21,22
 80:17,18 98:19

100:18,22 101:6
 102:11,12,20 145:10
 146:12,13,14
somewhat 29:17 116:4
 117:13 135:12
soon 53:17 101:19
 143:5
sooner 35:16 137:1
sorry 61:8,8 62:12
 75:18 90:7 99:4
 108:17 110:8 127:22
 145:11 158:13
sort 11:21 43:9 64:20
 82:13 106:21,22
 107:9 150:17 152:15
 155:12 175:4
sorting 4:8
sorts 64:9
sound 6:15 62:11
sounds 62:13
sour 145:5
source 70:3
sources 180:9
spaces 101:5
speak 18:18 36:18
 108:14,15 125:10
 127:11,13 131:9
 132:12 140:12,13
 141:12 142:5,17
 158:12 159:3,4 165:3
 168:15
speaker 35:12 109:11
 163:5
speakers 57:22 61:15
 96:18 145:12
speaking 6:16 7:14
 26:12 49:14 106:20
 109:16 110:7,20
 114:20,22 127:7
 156:13 164:14,15
 171:12,15
special 10:18 15:18,19
 23:4 28:19 39:4 51:21
 58:22 62:1,10 67:20
 87:8 88:5,7 89:18,21
 92:13 95:20 96:20
 103:1 104:4,14 143:4
 149:22 169:8 177:3
Specialist 2:4
specialized 53:14
specific 19:14 94:10
 129:10,14 130:1
 135:20 140:13 151:8
 154:13
specifically 148:19
 169:18 179:7
specification 120:6,16
 121:10 134:7

- specificity** 120:2
 170:17
specified 10:21 129:18
 153:22
specifying 71:2
speed 149:3
speedier 97:5
spending 18:13
spent 11:13 56:4
splitting 71:16 136:20
sponsor 46:14
sponte 34:9
spouse 127:1
Stacy 2:2
staff 2:3,6,7,7,10,11,11
 2:12 5:16 8:8 9:12
 16:4,7 17:9 22:14
 30:4 63:16 100:6,8
 103:4 113:8 186:4
stage 32:8 55:6 56:6
 160:15
stake 95:22
stakeholders 14:22
stakes 95:4
stance 135:13
stand 6:11
standalone 182:19
 183:12
standard 96:11 143:7
standing 164:18 165:1
 165:19
standpoint 113:21
standpoints 108:7
stands 179:22
start 7:5,7 12:6,13 15:7
 15:9 27:8 31:18 38:15
 44:7 53:15 66:11,17
 75:16 81:8 100:15
 105:1,11,17 116:14
 118:18 119:5 125:5
 153:10 163:13 168:12
 169:13
started 9:15 10:7
 170:18 173:13
state 9:9 11:4 115:14
 129:4 131:19 133:2
 151:8
stated 122:8 135:4
 147:10 181:14
statement 17:14 126:9
 128:10,11 130:17
 131:3,16 136:11
 142:10 143:20 144:7
 147:4,11,13
statements 125:11,14
 125:19 128:21 130:10
 130:12 131:18 132:4
 132:12 134:2,20
 142:16 145:19 170:12
states 49:12 120:18
 123:14 151:21
status 114:7
statute 153:4 169:21
statutes 151:9
statutorily 182:13
statutory 60:6 91:8,16
stay 87:14 92:8 118:12
 138:2 173:21
Stayce 2:10
STCs/VLCs 110:17
step 116:17
stepped 98:1
steps 65:3
stick 105:8
stickler 56:18
stipulation 16:18
stipulations 150:2
stood 82:6
stop 18:9
storage 31:19
storing 31:9
story 92:3
stovepiped 34:4
STR 71:3 79:17
straight 103:20
strange 32:5
stretching 65:11
strictly 175:7
stripping 15:14
strong 121:2 159:14
 160:17
strongly 127:15 132:13
 152:21
struck 82:16
structure 54:19 93:13
structures 64:15
stuck 168:18
stuff 28:14
sua 34:9
subject 132:1 142:11
submission 131:10
submit 53:9 130:16
 133:4 142:10 166:13
submitted 132:21 181:9
submitting 35:19
subpoena 28:16 120:6
 122:6,11,21 123:12
 123:13
subpoenaed 121:16,20
subpoenas 30:3 40:20
 120:13
subsequent 97:22
substance 56:21
 129:16
substantive 56:16
 128:19
substantively 40:2
substitute 45:19 96:3,4
successful 35:15 79:3
successfully 24:6 42:1
succinct 106:11
suffer 30:6
suffered 180:14
sufficient 72:9 94:5
suggest 44:16
suggested 69:18
suggesting 44:14
suggestion 33:10
suggestions 150:19
 151:11,11
suggests 35:6
suicide 177:14
suited 65:2
Sullivan 2:1
support 63:16 68:1
 95:7 114:16,17
 171:17 184:13 185:11
supposed 84:15,19
sure 7:16 9:3 11:8
 21:12 27:16 63:22
 64:15 75:20 78:9 80:1
 81:11 82:22 95:10
 101:8 113:12 118:21
 135:13 149:9,15
 150:7 161:20
surface 157:18 162:7
surprise 55:15
survivor 171:7
suspect 165:13
suspected 165:16
suspension 75:4
suspensions 79:19
sustainability 46:6
sustained 126:3
SVC 136:10,10 162:11
 163:6,12 167:12
 174:14 175:7 185:18
SVCs 117:15,22 118:3
 124:2 140:7 151:2
 176:2
SVCs' 117:11
swing 138:3
switching 99:5
sworn 142:10
sympathize 150:15
system 6:8 13:12,13,17
 14:14 16:21 20:3,10
 21:15 25:1,21,21 26:5
 27:13,21,22 34:22
 38:10 40:17,22 42:5
 45:3,6 48:22 66:22
 79:6 85:20 86:13
 88:12 107:12,17,18
 108:16,18,20 109:21
 110:5,15 124:16
 125:3 126:6 136:16
 136:17 149:17 152:2
 163:7,12,19 164:6,10
 167:19 168:2
systems 28:5 152:5
-
- T**
- Tab** 103:11,15
table 22:12,17 23:15
tactical 120:15 121:5
tactics 22:13
Tagert 2:11
tailored 126:8
take 6:1 12:17 55:9 58:8
 85:13 87:14 99:22
 135:12 142:7 173:21
 179:21 182:2,8
 183:12 185:14,22
 186:7
taken 77:6 78:8 124:8
takes 29:6 129:3 148:20
talk 12:11 18:15 99:18
 100:12 101:20 134:16
 138:8 141:7 182:3,8
talked 62:19 80:14
 148:14
talking 16:16 24:18
 25:13 31:4 60:3 73:11
 136:13
talks 122:16
Tara 1:16
tasks 94:10
taste 145:5
TCAPs 42:21
team 66:2 111:2 113:15
 114:3 167:8 169:1
teams 10:13 11:22 12:3
 12:3 99:18 150:11
 169:5
tech 97:16
technical 2:3 4:8 181:2
technology 114:16
tell 12:14 36:8 49:3
 69:22 76:19 126:1
 143:5 153:6 156:19
 159:1
tempered 20:18
ten 53:6 185:22
ten-minute 186:11
ten-year 82:4
tend 55:3 71:11 95:18
 106:20 172:18 173:4
tended 20:4,6
tenure 9:14 29:3 30:1
tenures 91:8
term 28:5 42:15
terms 8:17 13:3,21

14:20 15:11 22:16
 35:1 40:12 49:22
 50:11 54:6 69:10,20
 70:16 71:11 72:6
 75:13 76:10 78:3,9
 81:3,12 83:2 88:22
 89:14 95:5 117:17
 123:1 130:5 155:12
 161:7 181:3
Terri 2:11
terribly 74:17
Terry 103:3,5 105:3,9
 105:18
testified 16:15 179:16
testify 132:2 140:4
testimony 50:5 130:8
 132:3,4,8 138:15
 142:6,8
text 30:15
thank 4:4 5:11,13 6:3,4
 6:19,21 7:18 8:19,20
 8:20 9:20,22 12:8,22
 15:5 18:10,12 24:4,15
 33:2 41:13 48:7,12
 54:8,9 60:10 61:2,5
 65:14,15,17 69:8
 72:14,15 74:18,19
 75:20 77:17 78:12,13
 80:8,18,20 84:8 87:12
 87:19 90:15 94:13,15
 96:15 97:13,14 98:4,7
 99:20 101:6 103:9
 105:3,4 106:10
 107:20,22 108:22
 110:12,14,21 113:11
 114:5,13 116:8,9
 117:9 118:4 119:1,3
 120:12 123:21,22
 124:10 125:6 126:12
 128:1,3 133:15,16
 134:22 135:22 137:22
 139:2,21 141:20,22
 144:12,13,15 145:8
 146:11,11,14,16
 147:21 148:22 150:8
 151:3 152:6,8 154:9
 154:10,12,19 157:4
 158:9 159:11,13
 161:13,14 162:19
 163:16 164:11,13
 166:7,8 167:3,21
 168:8 169:15 173:20
 175:21 178:8,10
 181:18,19 185:4,5,14
 185:17,21 186:11
thanks 6:5 7:2 32:21
 37:20 43:21 62:3,4
 69:6 92:7 148:8,9

185:18
theme 107:10
theory 59:16
therefrom 36:3
Theresa 2:6
they'd 52:22
thin 65:11
thing 14:16 33:12 34:21
 37:1 49:9 59:4 76:11
 77:5 78:18 80:2 84:11
 130:7 131:22 154:16
 162:9 175:1
things 4:9 6:11 8:16
 10:9 15:1 16:18 31:16
 34:10,16 35:16 36:11
 37:5,6 44:21 49:21
 66:16 71:17 75:7 76:2
 79:12 107:14,14
 115:11 119:4,16
 122:8,12 124:6 126:2
 129:1 130:15 132:6
 137:11 141:9 151:6
 151:20,21 152:1,4
 153:5 158:15,16
 161:12 164:17 165:20
 165:21 168:4 172:7
 173:6 174:5 178:1
 180:13,16
think 5:22 13:9,20
 14:10 16:21 17:7,20
 18:2,7 19:6,18 20:11
 21:10 22:3,8,20 23:2
 23:15 24:1 26:1,4,6
 27:3,11,16 29:1,15,17
 30:6,8,10,20 32:7
 38:16 39:9,12,13,19
 40:14,22 41:22 42:1,2
 42:3,6,17,18 43:2,8
 43:12,15,20 44:10,13
 44:17 45:1,3,9 46:5,9
 47:1,3,18,22 48:2
 49:19 50:17,20 51:5,6
 52:8 53:10 54:12
 55:11,14,15 56:1,13
 56:22 57:3,11,20
 59:16,20,21 62:1,5,7
 62:14 63:5,7,19,20
 64:18 65:5,7 66:9,12
 67:4,11 68:7,18 69:10
 70:22 72:17,20 73:2,5
 73:6,8,17 74:9 75:7
 75:21 76:2,3,11,13,17
 76:19 77:3 78:4 79:14
 82:1,10,12,18 83:9,11
 83:18 84:9,11,12
 85:16,17,21,22 86:3,9
 86:13,14,17,20 87:9
 87:11 88:9 89:4,10

91:3,17,18 92:6 93:9
 93:10 94:4,16,18 96:5
 96:9,19 100:12
 102:16 107:11 111:10
 111:14 114:19 115:3
 115:9 116:17 117:13
 122:2,16,19 123:6,15
 123:17 124:5 125:7
 132:8,20 133:11
 137:7 139:4,20 140:6
 140:9,15,17 141:2
 142:1 143:9 144:1,16
 146:2,3,8,21 149:11
 149:14 150:21 153:18
 154:3,4 156:13,15
 160:8,13 161:10
 162:9 163:2,17 164:6
 164:7,10,14,19
 165:20 167:11 180:4
 181:8 182:18 183:14
 184:1
thinking 61:1 66:3
 81:16 148:20
third 7:4 27:20 30:17
 52:13,14
third-party 30:11 31:5
thorough 44:15
thought 29:3 139:17
 149:6,7
thoughts 6:11 19:13
 24:17 27:5,9 38:7
 92:14
thousands 50:13
thread 13:2
three 48:17 59:6 94:16
 102:19
throw 31:13 98:22
 103:5
throws 151:17
tie 54:11
tied 125:13
tightly 89:2
time 8:7 10:7 11:13,16
 17:8,19 18:13 19:17
 21:11,11,16 29:6,8,12
 33:6,17 34:10 36:10
 43:13 46:22 47:7
 48:18 51:18,20,21
 52:3 54:3 55:21 56:4
 60:2 71:17,22 72:8
 73:5 76:19 79:20
 91:20 94:7 97:15 98:4
 99:14 100:15 137:6
 137:15 144:9 149:13
 162:9,10 163:15,21
 163:22 164:9,9 171:6
 172:19 173:9,10,12
 180:3,4 185:5,21

timely 30:8
times 19:8 36:21 41:6
 126:4 150:3 167:7
timing 61:13 71:9 90:8
tippling 37:10
TJAG 54:1 91:13
today 4:15 9:19 103:10
 103:11 105:4 158:13
 185:19
told 165:13
tomorrow 99:6 100:19
 101:4,13,14,16
tool 28:6 32:7 93:9
 117:14
tools 75:2 78:17 79:13
 80:7
top 12:10 14:11 88:2
 154:20
topic 11:14 18:22
 116:10
topics 10:14 11:7,12
 12:5 60:12 74:21
 100:9 103:13,17
 105:7 163:1
total 52:9 180:6
touch 50:12 78:18
touches 117:7
touching 5:19 134:9
 141:9 142:20
track 46:15 47:9
trade-off 43:19
train 45:9
trained 144:2
training 36:4 42:19,20
 45:10,14 55:18 57:11
 57:15 94:9 101:10,12
 131:12
trainings 151:6
transcribed 4:11
transcript 4:11
transcription 98:12
transcripts 13:8 16:13
transfers 170:9
transition 41:22
transitioning 59:13
transparency 87:10
 106:6
transparent 87:3
transpire 29:9
traveled 53:3
traveling 52:3
treat 37:4 174:10 176:8
 181:4
treated 84:22
treating 178:16 184:3
treatment 89:9
tremendous 39:9 86:4
trepidation 47:4

trial 9:15 15:18 25:6,7
32:10 33:9,11 35:10
36:12,14 37:17 39:1
41:1,10 42:20 46:2
50:3 56:7,7 58:16,22
59:14 62:1,1 63:7,14
64:6,14,18 69:18
76:20 77:12 81:14
108:11 112:3 115:18
140:19 143:4 144:3
144:18,20 165:2
166:19 167:13,17,18
170:6 176:10

trials 56:21

tried 31:1 42:18 43:11
47:5 63:20 118:14,14
118:17

trigger 179:2,4,18
180:21

triggered 178:19

true 49:11 57:5 79:8
141:17

truly 107:13 112:5
126:7 139:6

trust 19:10 125:21
139:11 168:16

trusting 144:2

truth 39:11

truth-finding 37:14
39:13

truthful 50:5 92:2

try 8:15 9:13 21:4 30:3
39:2 66:20 67:8
104:18 109:6 140:10
142:2

trying 8:10 45:21 46:7
52:4

TUESDAY 1:7

turn 12:1 23:17 74:21
124:18

turns 23:15 183:21

tweak 107:14

two 7:6 8:3,6 10:10 15:1
51:18,20 52:2,7 66:15
74:21 76:17 82:8
91:20 92:8 94:16
116:7 145:12 154:22
163:1 168:9

two-hour 11:17

two-part 142:2

type 18:5 28:4,18
181:11

types 23:5 64:1 79:7
169:12 172:15 180:15

typically 38:22 47:12

U

U.S 2:13,14,14,15,15,16

2:16,17 3:4,5,6,7,8,9
3:9,10 8:21 40:7,12

UCMJ 139:14 174:6

ultimately 35:10 52:8
64:13 70:18 88:12
90:9 157:12

un-mutes 27:2

unaffiliated 164:1

uncharged 138:15

unclear 112:10

uncommon 95:14

underestimate 48:1

underneath 21:6

understand 6:8 26:2
86:12 87:4 95:12
137:4

understanding 34:1
40:10

Understood 25:17

unduly 143:20

unfair 136:7,7,7 145:4

unfairness 144:11

unfortunately 10:7
58:20 99:9

unhappy 177:6

uniform 35:1 95:9

unilateral 29:19

unique 142:19 160:21
161:22 162:1,3 176:5

United 49:12 120:17
123:14

units 86:7

unity 63:21

universally 53:12
184:20

universe 48:19

unlawful 73:1

unlitigated 52:16

unnamed 121:11

unprepared 44:17

unreasonable 154:4,8

unsuccessful 118:15

unsworn 17:14 125:19
130:11 131:15,17
134:1 142:16 144:7

unwanted 142:20

up-tick 173:13

update 98:12 99:1

upper 67:9

upset 13:16

upstream 163:14

use 10:15,16 19:19 30:2
39:2 49:16 78:21
89:18 93:3 94:4
116:12 117:12 119:12
124:3 141:14 155:14

useful 8:14 51:13
117:13,21

uses 32:3 76:21

usually 174:17

utility 117:12

utmost 178:6

V

v 120:18 123:15

vaguely 151:5

value 13:10,21

vantage 70:10

varied 9:10

variety 180:8

various 65:3 93:22

VC 136:9 156:20

VCs 117:1

verbal 170:12

verbatim 4:11

version 96:5 126:17

versus 12:12 25:20
114:19

viable 65:12

vice 108:16,18

victim 67:22 102:22,22
103:1,8 106:9 112:1,8
115:19 117:2 119:13
120:16,20 121:1,17
121:21 123:20 125:11
127:12 128:20 129:20
130:16 131:4,6,7
134:10,11 139:16
140:2 141:5,12 142:4
142:8,11,17 144:8
148:15,17 149:10,20
151:13,13,19 152:20
153:1,11,15,19
154:15 155:18,19
162:2 165:8,13
167:12,16 171:7
176:14 177:2,22
180:14

victim's 30:15 95:21
108:15 114:4 120:14
121:6 128:10,11
135:6 147:4,11
149:21 154:5 158:4
164:22 165:14 171:3
171:17 179:2,5,9,18

victim-driven 71:19

victims 71:18 92:5
104:4,7,15 108:2
118:2 119:19 120:5
120:22 121:9,11,13
122:20 124:7,21
125:2,9,14 126:1,4,17
127:3,8 129:10
130:11 131:18 132:11
132:14 133:8 134:15
136:5,21 139:5 141:1

141:3 144:4 145:2
152:17 158:12,14
159:16 164:1 169:2
170:19,20 171:1
176:6,8,22 179:10
181:10

victims' 3:7 104:2,10,11
108:7 112:5 120:3
121:5 124:4 133:21
134:1 138:13 151:8
161:5

Videoconference 1:10

view 68:18 120:13
160:21

viewed 82:8 90:22

views 181:11,14

violations 116:22

violence 11:1 137:19
170:20,22 171:16
172:13,18 173:18
175:12 179:11

violence-related
126:22

violent 126:22

virtual 80:15,22

virtually 2:19 4:22 6:14
26:10 98:18 102:21
103:8 148:4

virtue 135:17

vision 57:8

visits 173:6,6

vitality 161:3

VLC 108:19 112:1,2
132:22 162:11 163:7
163:12 166:11 177:14
177:20 178:6 180:22
185:18

VLCO 180:6

VLCs 114:20 115:2
118:6 176:2 179:21

vocal 154:5

voice 132:15,15 134:12
134:16 135:7 144:6

volume 8:17 34:14
39:15 180:2

Vuono 2:12

W

waiting 10:2 109:9
144:9

waive 182:15

waiver 176:16,21 177:1

walk 166:16

walking 17:3

want 4:17 12:14,16,17
18:15 19:12 60:14,15
85:4 97:14 98:22
100:11 107:14,15

112:14 124:17 125:20
 138:8 142:7 143:15
 143:16 146:19 149:4
 157:15,21 162:20,22
 165:2,4 178:3 185:4
 185:17
wanted 38:9 66:4 75:15
 98:21 118:21 168:9
wanting 158:14,16
wants 80:12 171:7
warfighting 54:8
warm 172:2,5
warrant 28:16 29:10
warranted 73:7
Washington 7:22
wasn't 21:5 33:15 41:2
 44:16 85:21 136:13
 166:12
wave 7:20
way 10:9 14:8,9 20:11
 21:9 25:18 37:10 41:1
 50:9 51:5,7 61:22
 76:22 88:18 89:12
 97:12 99:11 106:15
 108:5 113:19 115:13
 127:17 145:4 146:5,6
 146:7 148:16 150:17
 161:6 165:10,21
 178:2
ways 70:13 152:3,3
we'll 5:14 6:1 10:6,8
 12:5 23:13 27:3 44:7
 44:8 66:18 74:20
 75:16 76:19 77:11
 79:7 83:9,20 84:5
 85:13 96:6 98:5 99:22
 100:9,14 101:3,18,19
 105:11,17,17 109:8
 116:10,14 135:5
 138:2 154:20 163:14
 168:12 169:13 173:21
 185:15 186:1,5,7
we're 6:8,10,12 13:9
 16:10 25:18 28:3 31:4
 38:18 43:12 45:20
 53:18 57:13,15 59:21
 63:22 65:18 69:15
 73:11 80:22,22 84:15
 91:7,17 92:9 96:1
 98:8 99:4 101:4 104:9
 104:20 105:6 106:4
 107:18 109:4,9 111:7
 112:12 113:16 121:9
 135:13,14 137:8
 138:19 140:6 155:11
 156:4,14 161:10
 166:5 180:5 183:4
 186:6

we've 5:12 28:15 44:5
 96:19 101:15 102:2
 102:19 141:4 143:9
 167:6 175:3,15,16
 179:9
website 4:12
weed 125:21
week 99:19
weigh 110:19 112:22
 113:3 138:16 161:1
 162:5 180:9 184:21
weighed 75:9 156:9
weight 130:3
Welcome 3:2 4:3
well-being 135:10
 185:10
well-equipped 72:18
wending 165:10
went 34:2 49:13 51:15
 52:7 63:13 88:12
 89:20 101:22 186:13
weren't 81:20 127:8
 183:20
wheeling 56:10
wholly 34:8 95:14
wide 11:10 125:17
 158:7
wide-ranging 78:4
Wisconsin 9:9
wisdom 20:14 86:4,15
withdrawn 185:1
withering 45:15,16
witness 50:4 167:13,18
witnessed 127:6
witnesses 50:3,15 90:8
wondered 49:16 82:2,2
wonderful 68:15
wondering 61:18
 148:13
word 103:3 155:14
words 131:9
work 20:19 34:11,14
 46:19 68:12 74:3 77:4
 165:21 166:2,18
 168:3 170:7 175:2
worked 40:5,9 175:6
working 6:8 26:3 27:22
 32:6 35:13 46:19
 100:5 109:12 113:16
 118:18 151:1
workload 59:7 169:4,5
 171:11 179:15
workplace 170:22
works 125:8
world 51:17 93:16
 137:4 151:7
world's 49:3
worry 71:9,16 86:5

worth 19:12 64:21
 73:17 76:12 160:2
 161:7
wouldn't 22:2 43:4 77:9
 77:9 95:17 174:14
 175:7 179:4 181:16
wrap 104:21 185:15
write 79:17 149:15
 166:13
Writer-Editor 2:3
writing 66:6,7 69:11
 99:12
written 35:9 69:11 70:7
 141:1 146:5 149:10
 160:11 170:12
wrong 63:19

X

Y

yeah 54:11 62:12,12
 84:3,8
year 8:2 25:3 38:19
 41:7 45:21 46:9 62:9
 62:15,15 73:13 96:20
year's 62:22
years 8:4,5,6 14:12
 31:1 36:11 46:16 48:4
 51:19,20 52:2,10 53:2
 53:6 58:4 59:6 61:19
 61:19 72:22 120:18
yielded 113:18
Yob 2:2 4:18 5:11 6:1
 26:9 98:10 99:3,22
 100:21 101:2,8,12
 102:2,10,13,15 111:3
 185:17
York 9:7
young 57:4,14 127:6

Z

Z 1:13
zealous 37:13
Zoom 6:16

0

1

1 169:19
10 39:22 48:4 60:8
 162:20
10:00 1:10
10:10 4:2
100% 94:6
1001 129:9 131:2
 181:17
1003 70:10
101 52:10

103 3:7
11:58 101:22
117a 169:3,18
12:49 102:1
128b 169:3,18 171:15
130 169:3,19
132 62:22 169:3,20
134 169:3
14 132:9
140a 92:15 93:18 94:12
 95:9
15 60:8
15-minute 101:17
16 1:7
16(c) 175:15
16(c)(2)(A) 10:17 88:7
 89:19 92:12,21 94:17
 169:8
165 62:16
180 52:3
185 62:17
1st 9:5 25:3

2

2:10 186:13
20 47:10 48:4 61:18
20-year 60:8
200 45:21 53:5
2000 47:19 159:8
2005 61:17
2008 53:2
2010 61:17
2016 15:13
2018 47:19
2019 47:20
2020 147:7
2021 170:18 173:14
2023 8:2 53:2 62:15
 132:6 147:3
2024 1:7 62:21 100:16
 129:13
22 147:3
24 136:22
250 62:9
27(b)-certified 65:8

3

3 103:11
30 41:18 46:8 47:10
 60:12 132:6 143:13
300 62:9
301 111:4
309 33:6,21 117:2 119:7
30a 10:16 27:12 116:13
 116:17 117:13 119:11
 119:20 120:9 123:18
 124:3

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Before: DOHA DAC-IPAD

Date: 01-16-24

Place: teleconference

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Court Reporter

NEAL R. GROSS

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