

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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HEARING

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FRIDAY
SEPTEMBER 23, 2016

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The Panel met in the Bobby Junker Executive Conference Center, One Liberty Center, 875 N. Randolph Street, Arlington, Virginia, 22203, at 9:06 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman
Victor Stone
Tom Taylor
VADM(R) Patricia Tracey

PRESENTERS

Judge James Baker, Former Chief Judge,
US Court of Appeals for the Armed Forces
Rear Admiral Christian Reismeier (Ret),
Former Chief Judge, U.S. Navy-Marine Corps
Court of Criminal Appeals
Colonel William Orr Jr. (Ret), Former Chief
Judge, U.S. Air Force Court of Criminal
Appeals
Colonel Denise Lind (Ret), Former Senior
Judge, U.S. Army Court of Criminal Appeals
Lieutenant Colonel Christopher Carrier, U.S.
Army, Chief, Capital and Complex Litigation
Branch

Mr. Brian Mizer, U.S. Air Force, Appellate
Defense Division, Senior Appellate Defense
Counsel

Major Lauren Shure, U.S. Air Force, Appellate
Defense Counsel

Captain Andrew House, U.S. Navy, Director, Navy-
Marine Corps Appellate Defense Division

Lieutenant Commander Michael Meyer, U.S. Coast
Guard, Chief, Defense Services Division

Major Anne Hsieh, U.S. Army, Senior Appellate
Attorney and Branch Chief

Mr. Roger Bruce, U.S. Air Force, Associate
Division Chief, Senior Appellate Government
Counsel (by phone)

Major Meredith Steer, U.S. Air Force, Appellate
Government Counsel

Mr. Brian Keller, U.S. Navy-Marine Corps,
Appellate Government Division, Supervisory
Appellate Counsel

Lieutenant Robert Miller, U.S. Navy, Appellate
Government Counsel

Lieutenant Tereza Ohley, U.S. Coast Guard,
Appellate Government Counsel

STAFF:

Captain Tammy Tideswell, U.S. Navy - Staff
Director

Mr. Dale L. Trexler, Chief of Staff

Lieutenant Colonel Glen Hines, U.S. Marine Corps,
Judge Advocate

Ms. Julie Carson, Legislative Liaison and Staff
Attorney

Ms. Nalini Gupta, Staff Attorney

Ms. Stayce Rozell, Senior Paralegal and Meeting
Recorder

OTHER PARTICIPATES:

Ms. Maria Fried, Designated Federal Officer (DFO)

C-O-N-T-E-N-T-S

Welcome and Introduction	
Maria Fried, DFO	4
Elizabeth Holtzman, Chair.	5
Military Judges' Perspectives on Victims' Appellate Rights	
Judge James Baker.	9
Rear Admiral (Ret) Christian Reismeier	25
Colonel (Ret) William Orr, Jr.	35
Colonel (Ret) Denise Lind.	44
Questions and Comments	57
Service Defense Appellate Divisions' Perspectives on Victims' Appellate Rights	
Lt. Col. Christopher Carrier	160
Mr. Brian Mizer.	179
Captain Andrew House	191
Lt. Commander Michael Meyer.	205
Questions and Comments	213
Service Government Appellate Divisions' Perspectives on Victims' Appellate Rights	
Major Anne Hsieh	276
Mr. Roger Bruce.	289
Major Meredith Steer	300
Mr. Brian Keller	301
Lieutenant Robert Miller	310
Lieutenant Tereza Ohley.	323
Questions and Comments	327
Adjourn	
Maria Fried.	352

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

(9:07 a.m.)

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2
3 MS. FRIED: Good morning and welcome
4 to the Judicial Proceedings Panel Public Meeting.
5 My name is Maria Fried and I am the Designated
6 Federal Official to the JPP.

7 The JPP is a congressionally mandated
8 federal advisory committee. Publicly available
9 information provided through the JPP is posted on
10 the JPP website and that website is jpp.whs.mil.

11 Reports issued by the JPP are also
12 posted on the website as are other materials, to
13 include transcripts of past public meetings.

14 The Department has appointed the
15 following distinguished members to the Panel, The
16 Honorable Elizabeth Holtzman who serves as a
17 Chair to the JPP, The Honorable Barbara Jones,
18 Vice Admiral Retired Patricia Tracey, Professor
19 Tom Taylor, and Mr. Victor Stone. The members'
20 biographies are also available on the JPP
21 website.

22 Before we get started I would like

1 take this opportunity to welcome and introduce
2 Captain Tammy Tideswell who is the new Staff
3 Director to the JPP.

4 Captain Tideswell brings a wealth of
5 experience to her position. Before joining the
6 Staff of the JPP, Captain Tideswell was the
7 Acting Assistant Judge Advocate General of the
8 Navy for Operations Management, the Chief of
9 Staff of Region Legal Services Offices, and the
10 Chief Prosecutor of the Navy.

11 We also have a new Deputy Director,
12 Lieutenant Colonel Patricia Lewis from the
13 Department of Army. Welcome. Madam Chair?

14 CHAIR HOLTZMAN: Thank you. Thank you
15 very much, Ms. Fried, and good morning everyone.
16 Before we begin I would like to welcome
17 personally the new Staff Director for the JPP,
18 Navy Captain Tammy Tideswell, and the new Deputy
19 Staff Director, Army Lieutenant Colonel Patricia
20 Lewis. We are very pleased to have the benefit
21 of your expertise and wisdom.

22 I would also like to welcome the

1 participants and everyone in attendance today to
2 the 22nd meeting of the Judicial Proceedings
3 Panel. Is that all we've had? It seems like a
4 lot more.

5 Four of the five Panel members are
6 present here today, Judge Barbara Jones could not
7 attend the meeting, unfortunately. Today's
8 meeting is being transcribed and the transcript
9 will be posted on the JPP website.

10 The Judicial Proceedings Panel was
11 created by the National Defense Authorization Act
12 in Fiscal Year of 2013, as amended by the
13 National Defense Authorization Acts for Fiscal
14 Years 2014 and '15.

15 Our mandate is to conduct an
16 independent review and assessment of judicial
17 proceedings conducted under the Uniform Code of
18 Military Justice involving adult sexual assault
19 and related offenses since the most recent
20 amendments to Article 120 of the Uniform Code of
21 Military Justice in 2012.

22 Today's session will address victims'

1 appellate rights under the UCMJ. This is the
2 first of two meetings on this issue. The second
3 meeting will occur on October 14, 2016.

4 At the April 2016 Public Meeting the
5 Panel heard from the Special Victims' Counsel and
6 Victims' Legal Counsel Program Managers from each
7 of the Services.

8 During that meeting the program
9 managers raised concerns about victims' appellate
10 rights. Their specific concerns include a
11 victim's lack of notice of appellate proceedings
12 and lack of standing on direct appeal.

13 Additionally, the program managers
14 expressed concerns that victim privacy rights are
15 violated when appellate counsel reviews sealed
16 mental health records.

17 To begin today the Panel is pleased to
18 hear from former appellate judges, four of them,
19 The Honorable James Baker, Former Chief Judge of
20 the Court of Appeals for the Armed Forces,
21 Retired Rear Admiral Chris, I hope I am
22 pronouncing this correctly, Reismeier, is that

1 correct?

2 RADM REISMEIER: Yes, ma'am.

3 CHAIR HOLTZMAN: Thank you. Former
4 Chief Judge of the Navy, Retired Colonel William
5 Orr, Former Chief Judge of the Air Force Court of
6 Criminal Appeals, and Retired Colonel Denise
7 Lind, Former Senior Judge of the Army Court of
8 Criminal Appeals.

9 The remainder of the meeting will
10 include two Panels of appellate practitioners
11 from the Services' Defense and Government
12 Appellate Divisions.

13 Thank you for joining us today and we
14 look forward to hearing from and speaking with
15 each of you.

16 Each public meeting of the Judicial
17 Proceedings Panel includes comments to receive
18 input from the public. We have received no
19 requests for public comment at today's meeting.

20 Since our meeting in April 2016, we
21 have received a total of six public submissions
22 in the form of letters on victims' appellate

1 rights.

2 All written materials received by
3 Panel members for today's meeting and previous
4 meetings are available on the JPP's website at
5 jpp.whs.mil.

6 Thank you very much for joining us
7 today. We are ready to begin the meeting. Our
8 first presenter is The Honorable James Baker.
9 Mr. Baker?

10 JUDGE BAKER: Okay. Thank you very
11 much, Madam Chair. I thank you for the
12 opportunity to appear. Like a good lawyer and
13 judge I will start with my disclaimers.

14 I am retired. I do not speak for the
15 U.S. Court of Appeals for the Armed Forces. I am
16 not even an army of one because I have no
17 authority other than the authority of persuasion,
18 but I bring that to the table I hope.

19 CHAIR HOLTZMAN: Well, very
20 impressive.

21 JUDGE BAKER: Thank you. As you know
22 I served for 15 years on the U.S. Court of

1 Appeals for the Armed Forces, 11 as an Associate
2 Judge, four as Chief Judge.

3 I was formerly an Infantry Officer in
4 the Marine Corps and I am also currently the
5 Chair of the ABA Standing Committee on Law and
6 National Security.

7 During my time on the court I reviewed
8 approximately 1000 petitions per year. The court
9 does not track this statistic but I would
10 estimate with great confidence that a majority of
11 the petitions I reviewed involved sexual assault
12 or child pornography.

13 Keeping in mind that we were a court
14 of discretionary review, and thus we are not
15 seeing the whole playing field, my guess is that
16 much more than 50 percent of our petitions
17 involved either sexual assault or child
18 pornography. That means I have reviewed
19 thousands of petitions involving sexual assault.

20 With that background I would also note
21 that you are the first Panel, official Panel,
22 and/or the first officials to ever ask me if

1 there is anything I learned during the 15 years I
2 spent reviewing sexual assault cases, so I would
3 like to thank you for that opportunity.

4 I also haven't been asked if there is
5 anything I have learned about prevention of
6 sexual assault, so I would like to thank you for
7 that opportunity as well.

8 And I also would like to ask your
9 forgiveness for taking just a moment to step back
10 from Article 6b and tell you a couple things I am
11 sure you already know, but I think it would be
12 odd for someone like me who has seen as much as I
13 have seen in 15 years not to report on what I
14 have seen and I will do so very briefly.

15 I have just four points here. One,
16 sexual assault is a, if not the, defining event
17 in a victim's life. Judges understand that. It
18 raises important questions of long-term health
19 and well-being as well as justice.

20 Sexual assault in the military is also
21 a national security issue and a leadership
22 challenge. It is a national security issue

1 because it impacts recruiting, undermines unit
2 cohesion, kills unit morale, and prevents mission
3 accomplishment. That's a national security
4 issue.

5 It is a leadership challenge because
6 if the goal is to prevent sexual assault and not
7 just to prosecute it, this is a task for
8 Commanders and it is a task for small unit
9 leaders. It is also a task for friends and
10 roommates.

11 That is because of the petitions I
12 reviewed, and, again, to be clear, we did not
13 keep statistics, a vast majority of them, in the
14 high 90s, involved excessive alcohol use in some
15 manner, which means there is ample space and
16 opportunity for a leader or a friend to prevent
17 something from happening.

18 I often found myself asking where were
19 the Sergeants, where were the Lieutenants? There
20 is also the role of power differentials that
21 occurs in the military which also makes it a
22 leadership challenge and opportunity.

1 And so with that brief introduction I
2 want to conclude on that and say I sure hope as
3 much effort is being spent on the leadership
4 challenge as on amending, reforming, and
5 discussing the law, not by you, but by the system
6 as a whole.

7 With respect to the amendments to the
8 Code and in particular Article 6b, after
9 *Martinez*, which is the recent decision by my
10 former court which determined that the 6b
11 mandamus provision is a remedy that is
12 exclusively one for the CCAs.

13 I would be a little bit -- I'm not
14 sure what the right word, but I think I would be
15 presumptuous to be here today telling you I have
16 everything to say about Article 6b.

17 So I thought what might be most
18 helpful is to make a few observations in three
19 areas, the due process concerns that might arise
20 at the appellate level in light of the proposed
21 text, the legal policy concerns the text might
22 present, and the nature of military appellate

1 practice at the United States Court of Appeals
2 for the Armed Forces, which might inform how the
3 JPP looks at 6b.

4 But please note that I am spotting
5 issues here not presenting outcomes and for the
6 purpose of brevity my focus is on macro issues
7 rather than micro issues of drafting.

8 I will also not repeat matters that
9 have already been addressed in the letters you
10 have received, so my silence neither should be
11 assumed as endorsing or disagreeing with anything
12 that is in the letters.

13 So of the three sections, the first is
14 due process concerns. Not everyone will agree on
15 the precise contours of criminal due process but
16 most lawyers and judges do agree that due process
17 requires a fair adversarial process that protects
18 the rights of the accused and minimizes the risk
19 of erroneous conviction.

20 Excepting that as a start point I
21 imagine that specific due process concerns might
22 arise in the following areas. One, as recognized

1 in *LMR*, a case that I authored, due process
2 applies to other actors at trial, including, of
3 course, victims, as well as holders of privileges
4 and/or protection such as those recognized by MRE
5 513 and 412.

6 A question that *LMR* did not answer is
7 what other matters at trial or on appeal also
8 give rise to a due process right to be heard.

9 A second due process concern, of
10 course, is the impact on the rights of the
11 accused in at least four areas, the right to put
12 on a defense, the right to call witnesses, cross
13 examine, and impeach, the right to a speedy trial
14 as well as a, not speedy, but appropriate
15 appellate process, and then a fourth more
16 amorphous sense of due process which is one of
17 general fairness and the perception of fairness.

18 One premise of the adversarial system
19 is that the State and the defendant will have an
20 equal opportunity to make their case. With
21 additional argument from victims, there may be a
22 sense, correctly or not, that the Government is

1 getting two bites at the trial or appellate
2 apple, more time to argue and the strategic value
3 of having additional counsel to identify and
4 shape arguments.

5 For this reason some judges may take
6 the view that *amicus* briefs should be disfavored.
7 There are ways to address this concern, for
8 example, by providing extra time to the accused
9 or the appellant and then, of course, the real
10 safeguard, and I am looking at my colleagues
11 here, the real safeguard is having judges who are
12 not persuaded by the number of arguments but by
13 the strength of argument. I will return to that
14 theme at the end.

15 This fairness concern may also arise
16 in the perception, correct or not, that there is
17 so much pressure to address sexual assault in the
18 military today that it may unfairly affect
19 decisions to prosecute and seep into the fairness
20 of trials in a way that falls short of UCI.

21 Hereto, the safeguard is military
22 judges with the integrity to call it as they see

1 it. As you well know, not every person charged
2 with an offense is guilty, not every charge can
3 be proven beyond a reasonable doubt, and not
4 every charge or conviction reflects the legally
5 or factually correct degree of culpability, hence
6 the doctrine of LIOs.

7 A law's purpose cannot be to convict
8 but to have a fair, adjudicative process that
9 protects the interest and rights of both the
10 accused and the victims, as well as state and
11 society.

12 On the policy questions that might be
13 addressed here are three that I have spotted.
14 First, there is a tension in the law as presently
15 drafted and as contemplated.

16 It appears to apply to all victims and
17 yet the clear intention and focus is on victims
18 of sexual assault. The question is which victims
19 should be covered and whether there should be
20 victim parity.

21 To the extent it is intended to apply
22 just to sexual assault victims, the question

1 arises why some victims and not others, why not
2 the victims of child pornography, the survivors
3 of people who have been murdered, victims of hate
4 crimes, for example, might also come to mind.

5 To the extent the law is intended to
6 just apply to sexual assault victims, it is
7 drafted in a way that would seem to apply to all
8 and one would ask then the question, why aren't
9 there also SVC for these other victims?

10 Regardless of who the victims are that
11 are covered, the DoD letter does identify some
12 scope issues and identification issues and there
13 are also questions of how you would go about
14 notifying appropriate victims, and that has been
15 a problem at our court and I suspect at some of
16 the other courts as well after people have gotten
17 out of the military and so on.

18 A second policy consideration is
19 uniformity. *LMR* identified this as an important
20 reason for the CAAF to have written its decision
21 and with a process that has mandamus going just
22 to the CCAs you run the risk that you are going

1 to have a different standard and process or
2 outcome in different Services losing the uniform
3 nature of whatever it is that is occurring.

4 And related to uniformity I would
5 note, in my view, that without CAAF review a
6 civilian court, the federal civilian court
7 designated to hear military justice appeals, you
8 not only lose the benefit of uniform case
9 application but you also lose the important
10 element of civilian participation.

11 And I think in an area where the
12 credibility of the military is at stake and the
13 concerns about sexual assault are so well founded
14 in civilian society I think it would be important
15 to consider the role of the civilian court in the
16 military justice system.

17 My third and last segment has to do
18 with appellate practice at the United States
19 Court of Appeals for the Armed Forces, and here,
20 to be perfectly honest, I have bullets.

21 So my first bullet is the Peter and
22 Paul problem. Whenever you give priority to one

1 type of case at an appellate court you
2 necessarily are pushing somebody else's case,
3 hopefully just to the side rather than back, but
4 it is important to know that there is concern, I
5 would have concern that if everybody has priority
6 then someone is going to end up getting pushed to
7 the back.

8 And as the *Moreno* case indicated a
9 while ago appellate due process delay has been a
10 problem in the military, so I would be cognizant
11 of that in anything I was drafting.

12 I would also note, and you may have
13 read most our court's case law, but in the off
14 chance you haven't there is a tendency in recent
15 years to read jurisdictional grants quite
16 literally.

17 And this is neither here nor there, I
18 have my own views, but the court does read the
19 law very literally and, therefore, if you want
20 jurisdiction to rest with a court, in this court,
21 the law must be quite expressed in that regard.

22 If you are asking the question, could

1 this get appealed to the Court of Appeals for the
2 Armed Forces, that probably answers the question.
3 It's not expressed enough if that's the intent.

4 My goal here is not to comment on how
5 one should interpret the law just to encourage
6 people that if you have an intent, make it
7 expressed so that it can be followed through and
8 addressed.

9 My next comment has to do with the
10 importance of catching your appellate breath,
11 your legal breath.

12 We found, and I don't -- You may be
13 able to comment on this since you sometimes were
14 the recipients of this, but we found that when
15 we, there are often times when the field, the
16 counsel in the field and the lower courts just
17 could not catch up with the case law and there
18 was benefit to letting the field and the law
19 develop through the common law system rather than
20 us release a bunch of opinions on August 31st and
21 then wonder why appellate counsel and the CCAs
22 weren't correctly applying the law on September

1 2nd.

2 And I think that there are certain
3 aspects of this, on the SVC side of things, that
4 development of the law would be helpful. For
5 example, in the case of *LMR* I think it was very
6 helpful for everybody to finally see a case and
7 pivot off that case rather than operate without
8 binding case law. So there is something to be
9 said for catching your appellate breath.

10 Timelines, I mentioned the importance
11 of speedy trial as well as appellate due process,
12 delay, and speed. Justice, there is the phrase
13 "Justice delayed is justice denied." That is
14 true for the victims, as well as the accused.

15 Careful of the law of unintended
16 consequences, where there is opportunity to
17 appeal there is also opportunity to delay,
18 especially in a system of adversarial
19 representation and zealous representation.

20 One remedy to avoid delay is to be
21 clear that the process of review is abbreviated
22 in some form. Mandamus is a very high standard

1 to overcome.

2 If these cases, if folks wants these
3 cases to be heard in an interlocutory manner,
4 perhaps the answer is to limit page numbers and
5 limit times to file and times to decide, but I
6 would be conscious of that.

7 In conclusion and in light of this
8 background what would I recommend? First, and I
9 know this is your -- Well, I don't want to put
10 words in your mouth, but I haven't met anybody
11 who does not take this view, my focus would be
12 always first on prevention and then prosecution,
13 right, because if you prevent something from
14 happening then there is no need for prosecution.

15 I don't want the victim -- As for the
16 law I think the most important thing that the
17 military can do, the UCMJ can do, that Congress
18 can do, is to provide for tenured judges in the
19 military.

20 These, as the *Ducksworth* case
21 indicated, and I saw it time and time again, it
22 takes time, and I have yet to meet a judge who

1 does not say that it took them at least three
2 years to learn to become a judge.

3 And it turns out that's about the
4 tenure of a military judge, trial judge, or a CCA
5 judge, and in my view -- I have two rules of
6 inversion.

7 One rule of inversion is that it's
8 much harder to be a trial judge than an appellate
9 judge and it's much harder to be a CCA judge
10 dealing with direct appeal than it is a CAAF
11 judge.

12 As a CAAF judge I had more time, I had
13 the smartest people I could find called clerks
14 who could help me address the issues. Trial
15 judges do not have the luxury.

16 My other rule of inversion is likely
17 that the less prestigious a court is perceived it
18 may be more important, and I can't imagine a more
19 important trial court than a court-martial and a
20 trial judge in the military in light of the types
21 of cases they are dealing with and the fact that
22 they are dealing with so many sexual assault

1 cases, which as I indicated at the outset were
2 matters of justice, matters of well-being, and
3 matters of national security.

4 So to emphasize, if it were up to me
5 I would do what other military justice systems
6 have done around the world, provide for real
7 tenure for military judges, not because I don't
8 think they are independent and impartial without
9 it, but because I don't think it provides for the
10 amount of time to learn the skills and judgment
11 and experience that it takes to be a master trial
12 judge in the first instance.

13 That takes time and that's what I
14 would like to give the military. Thank you very
15 much, Madam Chairman.

16 CHAIR HOLTZMAN: Thank you very much,
17 sir. Rear Admiral Reismeier?

18 RADM REISMEIER: Yes, ma'am. Thank
19 you, I appreciate the opportunity to address the
20 Panel today.

21 I also take some great joy of being
22 able to speak after Judge Baker because while I

1 was on active duty he, of course, would have been
2 reviewing my work and always got the chance to
3 speak after me, so now it's finally my chance to
4 be able to say I agree with everything he has
5 said or thought in his entire life.

6 I should give the same disclaimer. I
7 am now retired, so I am not even sure that I have
8 the power of persuasion. I speak only for myself
9 in any of these matters.

10 I would like to start out with a
11 slightly different global observation with regard
12 to not necessarily sexual assault in particular,
13 but what I would say are the persistent attempts
14 to alter the UCMJ in order to achieve whatever
15 the goals are that whoever it is who is working
16 on the project is trying to reach.

17 You know, the UCMJ was designed to be,
18 you know, portable. Try a case anywhere,
19 anytime, do it rapidly, and move on.

20 For years we have operated in
21 something of a garrison sort of mentality with
22 the understanding that we've got reachback, we

1 can move people anywhere in the world, we can get
2 there on a dime, we've got instant
3 communications.

4 I think that it's worth it for anyone
5 who is thinking about altering either the rules
6 for courts-martial or the statute to consider
7 what the world might look like at some point in
8 the future and whether what we are creating is
9 something that would be wholly unsustainable and
10 inoperable in a global war.

11 Now it's easy to say, you know, we're
12 never going to fight the kind of war that we
13 fought during World War II, but that's what they
14 would have said after World War I.

15 And to the extent that we now have the
16 political reality of people talking about having
17 women have to sign up for a potential draft in
18 the future as well, now let's face it the
19 political structure is attempting to create a
20 system where we have got a fallback position
21 should the worst happen.

22 Okay, we can start drafting again and

1 we can say all day long that's never going to
2 happen, but for whatever reason in the wisdom of
3 Congress we maintain the infrastructure for a
4 draft yet we do not maintain the infrastructure
5 for a UCMJ that could respond to the sorts of
6 tensions that we saw during World War II.

7 You know, if you are in the field some
8 place and you don't even have enough gasoline to
9 move your tanks, the idea that you are going to
10 be able to move a lawyer in the middle of that
11 battle space and/or provide victim counsel and
12 your statute has absolutely no contingency for a
13 national emergency seems a little shortsighted to
14 me.

15 So I would say as we look at any of
16 these amendments, as we look at things that we
17 think would be better, somebody needs to
18 contemplate whether that "better" is going to
19 work in all places at all times.

20 That's my sort of global observation
21 about the changes that we have seen in recent
22 years.

1 Focusing in a little on the issue of,
2 okay, what's happening at the CCAs right now. By
3 way of background, and I hope that I don't make
4 this seem like your 62nd meeting instead of your
5 22nd, but I'd like to take a brief detour and
6 talk about how we got here.

7 You know, in 1998 Congress altered MRE
8 412 to include provisions that required protected
9 privacy information, if that's the right term for
10 it, to be sealed.

11 And then in 1999 MRE 513 was added to
12 provide protection for the psychotherapist-
13 patient record. The inclusion of the records
14 sealed by law required some action to address who
15 could access those records after trial since the
16 trial courts are not standing courts in the
17 military.

18 The extent to which trial courts
19 orders protect and sealed exhibits post-trial,
20 the duration of the trial courts orders sealing
21 those exhibits, and the mechanics of getting
22 access lawfully post-trial all created

1 uncertainty in handling records of trial with
2 sealed exhibits. So the President promulgated
3 RCM 1103A to address those sealed exhibits.

4 Now taking another brief detour here,
5 I can recall that when I served as an appellate
6 government counsel in 1996 through 1998 before
7 there were legal requirements to seal exhibits,
8 trial judges were sealing exhibits.

9 The language used varied greatly.
10 Some simply sealed the record by order of the
11 court, some sealed it to all but some named
12 exceptions, including the convening authority,
13 the staff judge advocate, appellate courts, those
14 sorts of things.

15 Some sealed the records noting that
16 they would remain sealed absent further order of
17 a competent court. So on appeal no one knew what
18 to expect until you actually opened the record
19 and saw what the sealing order said.

20 Sometimes as appellate counsel you
21 literally could just go into the file room and
22 gain access to the exhibits. Sometimes you

1 needed to request access from the clerk of court
2 and sometimes you had to request the access from
3 the panel judge, sometimes you had to file a
4 motion.

5 So in 1998 when sealing became
6 statutorily required the default appeared to be
7 that counsel would require a court order to open
8 the seals.

9 So the amendments to the MCM clarified
10 all of that with one rule that defined what the
11 access would be and as the comments to the MCM
12 note the President's rule relies on the
13 professionalism of the judges, judge advocates,
14 and civilian attorneys who may require access to
15 sealed records post-trial in carrying out their
16 duties.

17 It was thought that a careful balance
18 was created that would protect a victim's privacy
19 rights afforded at trial by allowing a very
20 limited degree of access to the records post-
21 trial so the reviewing courts could assess if the
22 trial court erred in matters surrounding the

1 sealed exhibits.

2 So RCM 1103A provides that reviewing
3 authorities will have access to sealed exhibits
4 and then the rule defines reviewing authorities
5 to include appellate counsel as well as appellate
6 courts.

7 The President prescribed that access.
8 What that means is that military courts are not
9 generally authorized to limit the access that
10 Congress or the President have prescribed.

11 So NMCCA promulgated a rule longer ago
12 than any of us are able to remember. It's likely
13 that the rule was drafted shortly after RCM 1103A
14 became operable. I know that it's been in effect
15 for at least ten years, but our best guess is
16 that it's been operable for longer than that.

17 So the rule of court provides that a
18 request by appellate counsel to examine
19 unclassified, original records of trial and other
20 official documents that are unprotected by
21 judicial privilege shall be made to the
22 responsible panel secretary.

1 So, in other words, the appellate
2 counsel walks into the court, goes to the
3 secretary of the panel and says, "May I see the
4 exhibit?"

5 The rule states that examination shall
6 be done in the reception area or in a space that
7 is designated by the court staff. Removal of
8 records of trial from the court's chambers is
9 discouraged.

10 If counsel wants to remove the sealed
11 exhibit for some reason the approval of the
12 senior judge of the panel to which the case is
13 assigned or his or her designee is required.

14 Records of trial should be logged out
15 for no more than one work day. So the court
16 tries to maintain positive control of all of
17 these.

18 If counsel wanted to make copies of
19 any of these documents it requires a motion and
20 then the court may issue an order limiting what
21 they can do with the material.

22 When counsel are permitted to make

1 copies they are ordered to destroy the copies
2 upon completion of appellate review and the
3 counsel are directed to certify via affidavit
4 that the records were destroyed.

5 Now, in recent years the clerk of the
6 court has taken a rather active role in
7 monitoring the destruction of the orders
8 following up with counsel on completion of
9 appellate review and if they haven't already
10 filed an affidavit directing them to file the
11 affidavit with the court indicating that
12 destruction has actually occurred.

13 I am told the compliance has actually
14 been very good, that the attorneys, if they
15 haven't already filed the affidavit with the
16 court, follow-up in short order complying, you
17 know, indicating that the items have been
18 destroyed.

19 That's the sum total of the process at
20 NMCCA to date. I will say that at least, you
21 know, anecdotally I know of at least one case
22 during my tenure when I was on the court where we

1 wanted to limit the access because of the
2 material that was there.

3 We found ourselves somewhat
4 constrained because of the President's rule and
5 when there is tension between what CCA wants to
6 do in terms of limiting access and the broader
7 access that the President has granted, the
8 President wins.

9 So that's where we are, well that's
10 where they are, I should say, now at NMCCA.
11 Thank you for the chance to participate today. I
12 look forward to further discussions.

13 CHAIR HOLTZMAN: Thank you. Colonel
14 Orr?

15 COL ORR: Thank you.

16 CHAIR HOLTZMAN: You're welcome.

17 COL ORR: Good morning. To The
18 Honorable Elizabeth Holtzman and members of the
19 Panel, thank you for the opportunity to speak to
20 you today.

21 Although I currently serve as a Policy
22 Advisor to the Air Force Leadership on Military

1 Justice Matters, this morning I am here to
2 provide one retired military appellate judge's
3 perspective regarding sexual assault victims'
4 appellate rights.

5 Now let me begin by addressing both
6 the positive changes called for in the proposed
7 legislation as well as some of the challenges
8 implementation will bring.

9 Since 2007 the Uniform Code of
10 Military Justice and the Manual for Courts-
11 Martial have seen great change, both through
12 congressional and executive action.

13 Many of these changes have brought
14 improvements in the way we prosecute cases and
15 protect the rights of those who have come in
16 contact with the military justice process.

17 However, as many of these changes over
18 the past decade have been incremental in nature,
19 they have left residual effects on the UCMJ which
20 have required many subsequent modifications to
21 rectify.

22 One such positive change is the

1 addition of Article 6b to the UCMJ. The intended
2 purpose of Article 6b was the incorporation of
3 victims' rights found in the Crime Victims'
4 Rights Act into the UCMJ.

5 Since the National Defense
6 Authorization Act of 2014 courts and military
7 justice practitioners have come to a consensus as
8 to the definition of a victim in Article 6b and
9 acceptance of the special victims' counsel who
10 may appear on their behalf in the court.

11 Nevertheless, UCMJ Article 6 is
12 written coupled with two key decisions rendered
13 by the Court of Appeals for the Armed Forces has
14 left appellate rights of an alleged uncertain.

15 Article 6b provides access to courts
16 of criminal appeals by submitting a writ of
17 mandamus on rulings related to victims' rights,
18 ordered appearance at preliminary hearings or to
19 submit a deposition, Military Rule of Evidence
20 412 relating to the admission of evidence
21 regarding a victim's sexual background, Military
22 Rule of Evidence 513 relating to the

1 psychotherapist/patient privilege, Military Rule
2 of Evidence 514 relating the victim advocate
3 privilege, and Military Rule of Evidence 615
4 relating to the exclusion of witnesses.

5 In *LRM v. Kastenber*g the CAAF held
6 that a victim's position as a non-party to the
7 court-martial does not preclude standing. There
8 is a longstanding precedent that a holder of a
9 privilege has a right to contest and protect that
10 privilege.

11 Therefore, *LMR* has limited standing to
12 be heard on issues relating to MRE 413, 412, and
13 513. In a second case, *EV v. Martinez* in 2016,
14 CAAF ruled that they lacked jurisdiction to
15 entertain a petition from a victim appealing a
16 decision of a court of criminal appeals under
17 Article 6b(e)(1).

18 Given the uncertainty of appellate
19 jurisdiction on 8 April 2016, the special
20 victims' counsel from the Services provided your
21 Panel with suggested changes to Article 6b
22 regarding victim appellate rights.

1 They also proposed language requiring
2 the Judge Advocate General of each Service to
3 detail at least one commissioned officer as
4 appellate victims' counsel.

5 Additionally, they provided
6 legislation requiring appellate counsel and
7 courts to recognize victims as a party in
8 interest for the purposes of appellate litigation
9 relating to the protections afforded by Military
10 Rules of Evidence 412, 513, and 514, and I will
11 address these issues in turn.

12 In my opinion, victims should have the
13 ability to enforce their limited rights in an
14 appellate court. However, as long as victims are
15 provided access to appellate courts consistent
16 with the Victim Crimes Right, status as a real
17 party in interest is neither appropriate nor
18 necessary.

19 First, as previously stated, CAAF has
20 recognized that the holder of a privilege has a
21 right to contest and protect that privilege
22 because representation of a victim in the

1 military justice process is limited by status, in
2 other words, you must be eligible for legal
3 assistance under 10 USC 1044(e), with some minor
4 exceptions, and subject matter, which is 412,
5 513, 514, the majority of a victim's concerns are
6 already addressed at the trial level, or
7 interlocutory appeal.

8 Conversely, the issues that normally
9 arise post-conviction after they are docketed
10 with the CCA are normally aligned with one of the
11 parties thereby eliminating the need for granting
12 new statuses or real party in interest.

13 In Air Force appellate practice a
14 victim or witness of an offense in a case before
15 a court may request to appear before a court-
16 martial through counsel by seeking leave to file
17 as an *amicus*.

18 If the court grants that motion the
19 parties would require, that motion would be
20 required to be served upon all victims.

21 A real party in interest is normally
22 defined as a person or entity whose rights are

1 involved and stands to gain from a lawsuit or
2 petition even though the plaintiff who filed the
3 lawsuit is someone else, also called a nominal
4 plaintiff.

5 Now although the Air Force Court of
6 Criminal Appeals has not defined a real party in
7 interest in their rulings, the government and
8 defense generally agree that the victim is not a
9 party to the pleadings.

10 The current practice is to follow
11 CAAF's guidance in *LMR* which ruled that a victim
12 is not a party.

13 Consistent with the current Air Force
14 Rules of Practice and Procedures the parties
15 would be required to serve any and all pleadings
16 in the case without regard to whether the victim
17 had an interest in the pleading if they were
18 given a real party in interest status.

19 Air Force appellate practitioners have
20 systems in place to address the notice of
21 appellate matters. First, a victims' counsel
22 serves notice of representation upon the parties

1 and petitions the court to examine unclassified
2 original records of trial and other official
3 documents that are not protected by judicial
4 privilege.

5 For sealed portions of the record,
6 counsel must include in their petition the
7 specific legal authority that authorizes their
8 access to that portion of the record of trial.

9 Even though such requests are
10 routinely granted victims' counsel has expressed
11 concern about the lack of protection of sealed
12 materials on appellate review.

13 Specifically, a victim's right to
14 absolute privacy is in direct conflict with RCM
15 1103A. Consistent with the Crimes Victims'
16 Rights' Act, government counsel has a duty to
17 provide notice of assignments of errors to
18 appellate victims' counsel upon notice of
19 representation.

20 Many victims expressed concern about
21 appellate counsel reviewing sealed portions of
22 the record containing private matters that the

1 military judge did not provide to the litigants
2 during the trial.

3 However, 1103A states reviewing and
4 appellate authorities may examine sealed matters
5 when those authorities determine that such action
6 is reasonably necessary to the proper fulfillment
7 of the responsibilities under the UCMJ, the
8 Manual for Courts-Martial, governing directives,
9 instructors, regulations, applicable rules of
10 practice and procedure, or governing directors.

11 As a general rule, the Air Force Court
12 of Criminal Appeals provides access to sealed
13 materials to appellate counsel upon request.
14 However, such access is limited to portions of
15 the record concerning the offenses of which their
16 client was found guilty.

17 Many of the changes intended to
18 provide victims' meaningful rights, such as a
19 voice and notice, were a much needed improvement
20 to the military justice process.

21 I sincerely appreciate your invitation
22 to hear from appellate practitioners as you

1 conduct your thoughtful review before submitting
2 additional legislative proposals.

3 As we examine our system for
4 improvement it is important that we critically
5 look at every change to ensure that we are
6 bringing about meaningful change that will
7 preserve the rights of the accused, the rights of
8 the victims, and the needs of commanders.

9 I wholeheartedly believe that after
10 this process we will have a military justice
11 system that is more efficient and robust than
12 ever.

13 Thank you for the opportunity to
14 appear before you today and I look forward to
15 answering your questions.

16 CHAIR HOLTZMAN: Thank you, Colonel.
17 I appreciate your contribution. We will next
18 hear from Colonel Denise Lind. Colonel, welcome.

19 COL LIND: I see you saved the best
20 for last. I am joking. Madam Chair Holtzman,
21 Members of the Judicial Proceedings Panel, thank
22 you for inviting me to speak today.

1 By way of background I spent just shy
2 of 30 years in the Army Judge Advocate General's
3 Corps and retired in 2015. Six of those years
4 were as a military trial judge and two of those
5 years I was a senior judge on one of the panels
6 on the Army Court of Criminal Appeals.

7 I would like to focus my remarks by
8 advising you of current practices at the U.S.
9 Army Court of Criminal Appeals, which I am going
10 to refer to as the Army Court, regarding victim
11 notice of appellate matters, victim privacy
12 interests during appellate counsel review of
13 records at trial, and victim participation in
14 appellate proceedings. I have copies for you of
15 all of the documents that I will be talking
16 about.

17 With respect to victim notice of
18 appellate matters, at the trial level the
19 Department of Defense uses DD Form 2703 entitled
20 Post-Trial Information for Victims and Witnesses
21 of Crimes, that form is dated March of 2016 to
22 advise victims.

1 With respect to appellate review this
2 form advises victims, "All court-martial
3 convictions are either reviewed by judge advocate
4 or subject to some form of appellate review. An
5 appeal is when a higher court reviews the
6 decisions made by lower courts to determine if a
7 legal error was made. The post-trial appeal
8 process can take a long time. Depending on the
9 offense an accused can choose to waive appellate
10 review. A victim has the right to be notified in
11 advance of the date and time of any appellate
12 courtroom hearings and to be notified of the
13 final decision of any appellate court or judge
14 advocate review."

15 The pre-2016 version of the DD Form
16 2703 did not contain any advisement of the
17 appellate review process.

18 If an accused is sentenced to
19 confinement the victim and witnesses, if
20 applicable, are requested to fill out DD Form
21 2704, that form is dated March of 2013, entitled
22 Victim Witness Certification and Election

1 Concerning Prisoner Status.

2 The trial counsel or designee notifies
3 victims and witnesses of information regarding
4 their post-trial rights and any changes in the
5 accused's confinement status.

6 The form requests victims and
7 witnesses to place their name, address, and
8 telephone number on the form to be notified of
9 changes with the prisoner.

10 The form has a yes/no election for the
11 victim or witness to elect whether they want to
12 be notified of changes in status of the prisoner.
13 The form puts the notice on the victim or witness
14 to notify the Military Central Repository with an
15 accurate address and telephone number to continue
16 receiving notifications.

17 At the appellate level approximately
18 seven years ago the Army created an
19 appellate/victim liaison position within the
20 Clerk of Courts Office. I am going to refer to
21 this position as the AVL.

22 The AVL carries an average of 500

1 active cases with one or more victims. This
2 includes all individual victims of crimes, not
3 just victims of sexual assault.

4 When a record of trial arrives at the
5 court records, with one or more individual
6 victims, it is referred to the AVL. The AVL
7 obtains victim information from the DD Form 2704
8 if the accused was sentenced to confinement.

9 If the accused was not sentenced to
10 confinement the AVL looks through the record of
11 trial to find information where the victim can be
12 located.

13 The AVL contacts the victim directly,
14 unless the DD Form 2704 or other information
15 indicates the victim is represented by special
16 victims' counsel or other counsel. In such cases
17 the AVL contacts the counsel.

18 The AVL has standard form letters she
19 tailors to each individual case regarding
20 appellate procedures relevant to the victim that
21 occur at both the Army Court and the Court of
22 Appeals for the Armed Forces, the CAAF.

1 Each of these letters I am about to
2 describe has the AVL's phone number and email
3 address with an invitation for the victim to
4 contact the AVL with follow-up questions.

5 When the case is initially submitted
6 to the Army Court the AVL sends a letter to one
7 or more of the victims telling them the case has
8 arrived at the court and explains the appellate
9 process at the Court of Criminal Appeals level.

10 The letter asks the victim if he or
11 she wishes to continue receiving notifications in
12 the case. The AVL sends letters to the victims
13 advising when an oral argument on the case is
14 scheduled and when the Army Court has completed
15 appellate review.

16 The letters are tailored to explain
17 what the Army Court did with the case. For
18 example, affirming the findings of guilt and
19 sentence, modifying the conviction with or
20 without granting sentence relief, or modifying
21 the sentence, et cetera.

22 The opinion of the court is attached

1 to the letter. Each of the letters goes on to
2 describe what happens next in the process, for
3 example, if the appellant petitioned the CAAF and
4 the petition was granted or denied, the AVL
5 notifies the victim of scheduled oral arguments
6 on the case before the CAAF and the final
7 decision of that court.

8 Some victims have varying levels of
9 interest in the case at the appellate stage.

10 Some are very interested and have repeated
11 telephone calls or emails with the AVL, others
12 have moved on with their lives and don't want to
13 be notified at all.

14 Funding and resourcing to link
15 databases used by the Army Court with confinement
16 facility databases and creation of databases
17 enabling appellate courts to upload documents and
18 allow victims potentially to log in to obtain
19 court filings involving their cases would
20 facilitate the victim/witness liaison at the
21 appellate level.

22 Before I turn to current procedures at

1 the Army Court regarding victim privacy interests
2 during appellate counsel review of records of
3 trial I would like to address some nuance between
4 victim privacy interest with respect to Military
5 Rule of Evidence 412 as distinguished from
6 Military Rule of Evidence 513 and 514.

7 Military Rule of Evidence 412 is not
8 a privilege of the victim. The privacy interest
9 of the victim in Military Rule of Evidence 412 is
10 not to prevent disclosure of records being
11 produced for *in camera* review or disclosed to the
12 defense.

13 The defense counsel is usually the one
14 raising the motion to admit other sexual conduct
15 of the victim. Trial counsel, defense counsel,
16 and the accused know what the evidence is and all
17 participated in the closed hearing.

18 The information is sealed to protect
19 the other sexual conduct of the victim the judge
20 has ruled inadmissible or was not admitted at
21 trial from the public.

22 In contrast, Military Rule of Evidence

1 513 and 514 are privileges. The privacy interest
2 of the victim under these rules is to prevent the
3 production or disclosure of information
4 privileged under these rules basically to anyone.

5 Prior to June 2015, Military Rule of
6 Evidence 513 authorized military judges to
7 conduct an *in camera* review, if the review was
8 necessary to rule on a motion for production or
9 admission of records privileged under that rule.

10 Necessarily, records have to be
11 produced for a judge to do an *in camera* review.
12 Case law at the time encouraged such *in camera*
13 reviews by military judges, and I am referring to
14 the *United States v. Briggs*, 48 MJ 143, Court of
15 Appeals for the Armed Forces (1998), and I do
16 note that was one year before Military Rule of
17 Evidence 513 was enacted.

18 The June 2015 change to Military Rule
19 of Evidence 513 removing the constitutionally
20 required exception and requiring the military
21 judge to make specific findings prior to ordering
22 the production of records for *in camera* review

1 will likely result in reduced orders to produce
2 privileged records, and accordingly a reduction
3 of privileged records under Military Rule of
4 Evidence 513 or 514 in records of trial going on
5 appeal.

6 Addressing privacy interests of the
7 victim at the Army Court, as we discussed earlier
8 Rule for Court-Martial 1103A governs the sealing
9 process and appellate reviewing authority access
10 to sealed material.

11 The rule authorizes appellate
12 government and defense counsel to review but not
13 disclose sealed information. Military Rules of
14 Evidence 412, 513, and 514 each require "the
15 motion, related papers, and the record of the
16 hearing to remain under seal."

17 There may be other sealed materials in
18 the record of trial as well, for example, images
19 of child pornography or classified information.

20 When the military judge orders records
21 produced for in camera review under Military Rule
22 of Evidence 513 or 514 those records are normally

1 appended to the record of trial.

2 This includes records upon which the
3 judge has ordered production, conducted an in
4 camera review, and declined to order disclosed to
5 counsel at all. If the military judge does not
6 order records produced they will not accompany
7 the record of trial.

8 Sealed material goes into the original
9 record of trial only. The original record of
10 trial is maintained by the Army Court during
11 appellate review at the court.

12 Rule 30.4 of the Army Court Internal
13 Rules of Practice and Procedure provides
14 "Attorneys of record in appellate cases may
15 access the sealed records of an original record
16 of trial. Attorneys will request permission from
17 the clerk and coordinate review of sealed records
18 with Office of the Clerk of Court. Attorneys of
19 record are responsible for returning the sealed
20 matters completely and without alternation to the
21 Clerk of Court's possession. Photo copies of
22 sealed records are prohibited."

1 Such permission is routinely granted
2 for all sealed records with the understanding
3 that sealed classified material and child
4 pornography images require additional protocols
5 not relevant to this discussion.

6 Normally sealed matters as a practical
7 matter are in a sealed envelope in the record of
8 trial. Counsel breaks the seal and reviews the
9 sealed records in the Clerk of Court's Office.

10 Counsel initials the envelope that
11 they have reviewed and reseals the sealed matter
12 in the envelope prior to returning it to the
13 Clerk of Court personnel.

14 Documents disclosed to counsel in
15 discovery but not admitted into evidence at trial
16 would not normally be in the record of trial
17 unless they were attachments to motions or
18 appellate exhibits were included within the
19 allied papers that accompany a record of trial.

20 Turning to victim participation at the
21 appellate stage, direct appeal. The 2013 and
22 2015 changes to 10 USC 806, or Article 6b(e), now

1 allow victims at the trial level to file an
2 extraordinary writ of mandamus with the Military
3 Courts of Criminal Appeals when the victim
4 believes that a trial level ruling violates his
5 or her rights under Military Rule of Evidence
6 412, 513, 514, or 615.

7 The Manual for Courts-Martial
8 recognizes two parties on appeal, the United
9 States and the accused. There is limited
10 standing for third parties to intervene.

11 Rule 15.4 of the Army Internal Rules
12 of Practice and Procedure allow *amicus curiae* to
13 file a pleading by invitation of the court or by
14 motion for leave to file granted by the court.

15 Rule 16.2 allows oral argument by
16 counsel for *amicus curiae* upon motion granted by
17 the court. The victim may also consult with
18 government or defense counsel depending on the
19 interest in the case.

20 While not of participation as a party
21 on appeal, the victim may participate in
22 appellate proceedings by consulting with

1 government appellate counsel or defense appellate
2 counsel if the victim is aligned with the
3 accused.

4 Attending oral argument and requesting
5 appellate filings from the AVL, the AVL sends
6 Army Court notification of relevant actions by
7 the Army Court regarding her case, his or her
8 case, and attaches court decisions on the case.

9 Thank you for allowing me to converse
10 with you today. I look forward to our
11 discussion.

12 CHAIR HOLTZMAN: Thank you very much.
13 Thanks to all the members of the Panel for your
14 very thoughtful presentations. Thank you,
15 Colonel, and thank all the members of the Panel
16 for the thoughtful presentations. We will begin
17 with Professor Taylor.

18 PROFESSOR TAYLOR: Thank you, Madam
19 Chair, and thanks to all the members of the
20 Panel.

21 I have never been an appellate
22 practitioner so I may have some questions that

1 seem rather simplistic as I have tried to follow
2 the arguments and the discussions, so bear with
3 me if you will, please.

4 Chief Judge I would like to start with
5 you, if I may, and ask you to comment as you
6 started talking about the leadership challenge
7 and how that ties in with the kind of culture
8 that the UCMJ can help create, the kind of
9 environment that the very subjects we are talking
10 about here today can help create as you think
11 about not only what you said about working with
12 the leadership and changing the leadership
13 culture.

14 I think that's part of what you were
15 saying, so it's not just the leaders but everyone
16 right down to the lowest enlisted person who
17 embraces all the changes and tie that together
18 maybe with what the Admiral was saying about the
19 portability of the system so that you are
20 creating a system that is not only flexible but
21 also portable.

22 JUDGE BAKER: Thank you for the

1 question and the opportunity to return to
2 prevention, which is the ultimate goal here.

3 The UCMJ, obviously, serves as a
4 deterrent effect. It reminds Commanders of their
5 responsibility to lead in this area, but it does
6 not absolve, and this is a critical point, it
7 does not absolve members of the military and
8 members of the military community from their
9 responsibility as leaders and requires team
10 members to do all they can do to prevent
11 misconduct.

12 And if you need the UCMJ to back that
13 up through the Article 134 or perhaps
14 maltreatment provision -- Which is the
15 maltreatment -- Yes, I don't want to --

16 RADM REISMEIER: Ninety-three.

17 JUDGE BAKER: Ninety-three, thank you
18 very much. I am out of training. You can do
19 that, but I don't think, I'm not sure how much
20 further I need to -- if you are turning it into a
21 military justice problem you are probably past
22 the point where your leadership could have been

1 most effective.

2 And I think back to the times when,
3 you know, my first Sergeant put his arm around me
4 when I was a young and really innocent 22-year-
5 old and I actually thought my Marines were going
6 home on Friday night and studying tactics and
7 training and he kindly explained to me that that
8 was not what they were doing and that I should
9 probably talk to them about excessive alcohol use
10 and driving, and so I did.

11 And to this day I still find
12 commanders at every level who are not including
13 excessive alcohol use, sexual assault, and child
14 pornography part of their, so-called, platoon
15 leader's brief on Friday nights, Saturday nights,
16 and every other day of the week.

17 So my hope, and this may or may not
18 respond, Mr. Taylor, to what you were asking, my
19 hope is that your work in the spotlight that
20 Congress's concern has brought to this issue will
21 remind leaders at all levels of what they can do
22 and how they can do it.

1 I am happy to -- come back at me,
2 because I'm not sure I --

3 PROFESSOR TAYLOR: Well, yes, thank
4 you. That's a good start, but I would like to
5 follow-up with I guess the context of that
6 question which is from the public policy point of
7 view, unless it's violating some secret judge's
8 handshake that you have on the CAAF, when you sit
9 and deliberate with your colleagues when you did
10 as chief judge and as one of the regular members
11 of the panel, did you take into account as you
12 come up with the decisions that you do on these
13 somewhat technical issues what the impact is from
14 a philosophical sense on the larger issues that
15 you started your conversation with?

16 So I guess I am asking about judicial
17 philosophies --

18 JUDGE BAKER: Well, that's
19 interesting, how judges act. I mean I think the
20 book of judging would say that, one, we are bound
21 by the record of trial and I think one of the
22 strengths of an adversarial process, and people

1 would ask, and let's see if this answers the
2 question in its own special way, people would ask
3 do you need to have military experience to serve
4 on the Court of Appeals for the Armed Forces,
5 and, of course, the legal answer is you don't.

6 But my further response to that is
7 while it is helpful, judges don't decide cases
8 based on their own experience or whether they
9 served in the Marine Corps or the Air Force.

10 They decide cases based on the four
11 corners of the record of trial and that's where
12 the CCAs come in because they have fact-finding
13 power, as well as legal review power.

14 And, secondly, in an adversarial
15 system it is the job and duty of the counsel to
16 tell the judge all that they need to know about
17 military culture or the impact of the decision
18 they are about to take.

19 So sort of the confines of what we
20 would consider or what we should consider are,
21 one, the facts from the record at trial and the
22 arguments from counsel about the implications of

1 what we might decide.

2 But our job ultimately is to say, were
3 the elements of the offense met and was the First
4 Amendment, Fourth Amendment, Fifth Amendment, and
5 Sixth Amendment adhered to, not to say, gee, it
6 would be better.

7 That's "legal" policy or "policy"
8 policy, it would be better if we did this. That
9 would, I think, be outside a normative judge's
10 views of what their role was.

11 One of the frustrations of being an
12 appellate judge is you are having a conversation
13 with the field and with society, but the
14 conversation takes place over eight years and it
15 is interrupted by 100 other cases or 450 other
16 cases and you are bound by the issues presented
17 to you rather than the issues you've spotted and
18 would like to address.

19 And I don't know if you felt that way,
20 I was trying to have a conversation with you, but
21 it was over years.

22 RADM REISMEIER: No, I think that's

1 true. I think, you know, everybody recognizes
2 that there is some either overt or understood
3 message in the case law that you are trying to
4 look through and trying to respond to and trying
5 to go hey, I think this is where they are going.

6 Obviously, there is the holding and
7 then there is all of the dicta in there that you
8 try and sift through and sometimes you get it
9 right as the inferior court and sometimes you
10 don't.

11 JUDGE BAKER: Are we at least in the
12 ballpark of responding?

13 PROFESSOR TAYLOR: Well, yes, but I
14 would like to now pull that back to -- I guess
15 the last question I will ask for you on this
16 round, and that is when you said earlier toward
17 the end of your comments on appellate practice
18 that there was a tendency to read jurisdiction
19 literally, if I understood what you said
20 correctly.

21 JUDGE BAKER: That's correct. I'm
22 sparing you the necessity of reading all our case

1 law.

2 PROF. TAYLOR: Right.

3 JUDGE BAKER: But it's joyful of
4 course, but it is dense. And there are a number
5 of cases that were three-to-two splits that,
6 where the issue was -- and I think first, just a
7 side point, judges speak with their opinions, not
8 with what they say about their opinions
9 elsewhere.

10 PROF. TAYLOR: Right.

11 JUDGE BAKER: So I think it's --
12 there's nothing improper about it, but a judge
13 shouldn't go around supplementing their opinion
14 by saying, this what I really meant and this is
15 what you should have gotten out of it. *LMR* is my
16 statement on that. Period.

17 But the tension you'll see in some of
18 these jurisdictional cases is between a judge who
19 might look to the legislative history and purpose
20 of the law, let's say to provide a uniform
21 standard, to provide civilian oversight in the
22 military, that sort of thing, and a judge who

1 would look to just the words of Article 66. And
2 it doesn't say review in this case, so therefore
3 there's no jurisdiction.

4 Those are both proper ways to look at
5 the law. But what I'm signaling is, the majority
6 of my court tends to look at the law, if it
7 doesn't say at 6 o'clock on Tuesdays we have
8 jurisdiction, then we don't have it.

9 Which is fine. You now know that, if
10 you wish to provide jurisdiction or you think
11 that's the right result or if you're a counsel
12 arguing before the court, you need to be prepared
13 to address that.

14 So my goal here is not to say, oh you
15 know, the two judges in that case got it right,
16 not the three. Or the three got it right not the
17 two.

18 Mine is, I don't care who got it
19 right, I want you to do what -- if you intend to
20 do something as a panel or Congress intends to do
21 something as a Congress, be clear, in light of
22 what I'm telling you, so there's no doubt. So

1 that the victims understand exactly what their
2 rights are or not. The CCAs understand what
3 their law is or not and so on.

4 It's clarity, is what I'm seeking
5 through that comment.

6 PROF. TAYLOR: Thank you very much,
7 Judge Baker. And actually, you made the point I
8 was trying to make better than I ever did and
9 that is, there are instances where one's view
10 about what this is all about does impact how they
11 interpret these various statutes.

12 JUDGE BAKER: Without question. And
13 I'd say, I'll poke fun at myself, and you can, no
14 doubt, find plenty of people in this room to do
15 it as well. That I would fall into the camp that
16 would look to the, first the law itself. If the
17 law is clear, you don't go beyond the law.

18 But where the law was not clear, and
19 you'd have to say that much in the UCMJ is not
20 and nor was it intended to answer every question,
21 you look to the purpose in legislative history.
22 And that's entirely appropriate. That's part of

1 what you do.

2 What you don't do is say, and in my
3 view, because when I did this in the Marine
4 Corps, this was, that's not in the record of
5 trial, is it. And nor did counsel have the
6 opportunity to comment on that.

7 PROF. TAYLOR: So, assuming that we've
8 sketched out some broad framework here, would
9 each of you like to comment on this in terms of
10 the extent to which you, as senior appellant
11 judges, felt that you had some room to move
12 within the rules in order to do better or worse,
13 if you will, by protecting appellate victims'
14 rights?

15 If you feel really constrained as you
16 lead your panels and as you worked through these
17 decisions yourself?

18 RADM REISMEIER: If I may, before
19 answering that, if I could back up and pull in a
20 thread from your original question.

21 And the question is, okay,
22 paraphrasing a little, is the UCMJ a tool for

1 commanders, in order to address the things that
2 Judge Baker is talking about, that is, that now
3 sort of messaging the prevention is a far better
4 approach then trying to come at it through
5 prosecution?

6 The Article 137 of the Code actually
7 requires that every enlisted member, at the time
8 of enlistment, actually be briefed on the
9 contents of the UCMJ. Now, the UCMJ was designed
10 to be a teaching tool.

11 But the value of that teaching tool
12 and the value of that knowledge really depends on
13 the clarity with which the message is conveyed.
14 The more complex the law gets, and the more
15 lawyers you need in order to come in and explain
16 it, the less value it has to a commander to be
17 able to say, "Look, these are the requirements."

18 Everybody in uniform understands the
19 simple message of, you smoke dope, you're going
20 home. Try to message Article 120, in simplicity
21 like that, and you can understand how it is that
22 the UCMJ does not do what Article 137 envisions

1 when you get to this issue of prevention.

2 So while I would agree with all of the
3 comments that are made, I would say, I think
4 there is opportunity to make the law way more
5 clear, if that's what people want to do. I just
6 have to say that, and it's a comment I made when
7 I testified before this panel, whatever it was,
8 15 months ago or something, there are now three
9 versions of Article 120 in effect.

10 Going back in again, so that there are
11 now four versions in effect, depending on the
12 time of the crime, is help the practitioners
13 probably don't need. But if somebody is going to
14 go back in and alter the law further, I would say
15 look at Article 137 and ask yourself, can you
16 message this in a way that an 18-year-old kid is
17 going to go, okay, I understand what the rule is
18 supposed to be.

19 I would say that most 30 something
20 year old trial practitioner lawyers, who've got
21 way more schooling than those guys have, could
22 simplify Article 120 in a way that would make

1 sense.

2 JUDGE BAKER: And just to be clear, we
3 were talking about the criminal articles of, if
4 you're talking about Article 15 as well.

5 RADM REISMEIER: Right.

6 JUDGE BAKER: There are commander's
7 tools in there to do all that we're talking
8 about.

9 RADM REISMEIER: Right.

10 JUDGE BAKER: But that was not the
11 focus of our presentation.

12 COL ORR: Yes, you had mentioned,
13 Judge Baker had mentioned the eight-year
14 conversation. Ours is a little shorter.

15 But going to and from the appellate
16 bench and back to the trial bench, and back and
17 forth over a 12-year period, it was frustrating
18 as an appellate judge to have a case where you
19 have multiple sexual assaults for this event,
20 this is the rule of the case. For this event,
21 this is the rule of the case, and for this event,
22 this is the third rule of the case.

1 And panels, jury panels, look at you
2 like, "Well, if you have to do all this, how is
3 this kid supposed to figure this out?". As an
4 appellate judge, it's frustrating sometimes to
5 know that you have to go by the law of the case
6 at the time, realizing that if you were in that
7 third iteration, this would be a crime, but you
8 have to let the other two go. And it's all the
9 same type of event.

10 So those are the things where you know
11 where the policy is going, but you have to stick
12 to the law at the time of the event.

13 COL LIND: I want to make sure I
14 understood your question correctly.

15 PROF. TAYLOR: It's changed several
16 times during the course of --

17 (Laughter.)

18 COL LIND: I initially thought that
19 you were asking, sort of to the extent that an
20 appellate judge can sort of send a message on
21 leadership and climate.

22 I think to a certain extent an

1 appellate judge can, an appellate judge is
2 probably not going to say this is a poor
3 leadership climate in the appeal, but the
4 appellate judge can lay out the fact of what
5 occurred in the record of trial in a certain way
6 that when people read them, they might come to
7 the conclusion that that wasn't the best command
8 climate there. And I think that's possible to do
9 that without coming out with an advisory opinion
10 or something like that.

11 So that said I will also say,
12 remember, by the time the case gets on appeal,
13 that command is long gone, people have moved. So
14 at least with respect to the command at issue in
15 the trial, that message I don't think is going to
16 get to that group, if you will.

17 I will say, from my experience as a
18 trial judge, what you did see a lot of times were
19 units who were trying to implement preventative
20 measures, would frequently send a lot of their
21 platoons or companies to the trial. To watch the
22 trial. And see these things play out.

1 So that's some of the things I saw at
2 the trial level.

3 JUDGE BAKER: Can I pick up on that?
4 One of the things that Chief Judge Robbie Everett
5 started in 1986 was our outreach program. And
6 that was the process, and is the process, where
7 our court would hear appeals around the country.
8 On military bases and at law schools.

9 The intention was initially to
10 obviously show a larger audience the nature of
11 and the practice of the *Military justice system,
12 but also to show that it operated under a
13 civilian review.

14 And one of the opportunities that
15 those programs have now is to also show a larger
16 audience, both in the civilian world and in the
17 military audiences, often volunteer military
18 audience where the commander has brought the
19 entire battalion or regime along to watch. It is
20 a great opportunity.

21 And that's worth every, you know, 100
22 of my speeches is equivalent to two minutes of an

1 outreach case that a command is watching. That
2 is an area where I don't know the answer for you.

3 You have direct review at the CCA and
4 therefore a compelling motion of cases that
5 doesn't allow you to travel as much. But
6 occasionally people debate whether we should do
7 away with outreach. And I think it's one of the
8 most important things we do as a public, in our
9 public service roles.

10 COL LIND: I would just add that the
11 Army Court does it as well. When I was on the
12 Army Court we did an outreach at Baylor. And
13 that same, the very next day we did one at Fort
14 Hood, Texas. And we do it like twice a year.

15 PROF. TAYLOR: Madam Chair, I'll yield
16 at this point. Thank you.

17 CHAIR HOLTZMAN: Admiral Tracey.

18 VADM TRACEY: I'm neither a lawyer or
19 a judge so forgive my questions if you'll forgive
20 Mr. Taylor's questions.

21 Judge Baker, you talked about the fact
22 that the way that the language is framed in the

1 proposed legislation would apply to all victims
2 and that that seems unwieldy. But to focus on
3 the sexual assault victim would open questions as
4 to whether there are, why only those victims?

5 Is it inappropriate, given your view
6 that the UCMJ is partly intended as a
7 preventative measure, is it inappropriate for a
8 crime that has the sort of corrosive effect that
9 you've attributed to sexual assault, and the
10 special kind of corrosive effect, would it be
11 inappropriate to single out sexual assault for
12 some special treatment under 6b?

13 JUDGE BAKER: Well, one answer is it's
14 never appropriate for Congress to legislate as it
15 sees fit. I think, one, my first message is
16 clarity.

17 And, oh by the way, you need not
18 apologize for not being a lawyer or a judge or
19 whatever --

20 VADM TRACEY: I only do that in this
21 room.

22 (Laughter.)

1 JUDGE BAKER: Okay. Our job is to
2 communicate the law in plain English, if
3 possible, and with clarity, so it reinforces the
4 message.

5 If we're not doing so, then we have
6 not performed our role successfully. We may have
7 performed our role, but not successfully.

8 So my first comment is, be clear what
9 is intended, in the entire discussion. And it's
10 inappropriate discussion is all about sexual
11 assault victims.

12 But the word "all", lawyers, I always
13 caution my students, never say "always" and never
14 say "all." Because there are exceptions to every
15 rule. And "all" means "all". All pleadings.
16 Every filing to extend a deadline to submit a
17 brief. That's all.

18 So I guess my point is, it's not
19 inappropriate to focus on a particular victim, or
20 a class of victim, particularly where that
21 particular victim or class of victims is so
22 closely tied to one, issues of justice and well-

1 being, but also national security and the health
2 of the national security mission.

3 I think all victims though deserve --
4 if you're a child pornography victim, I would be
5 careful, in my own, if I were a policy maker, I
6 would want to say, what's the line between a
7 child victim of child pornography and a sexual
8 assault victim? And why should one be treated
9 one way versus the other? They both should be
10 treated with great care.

11 So I'm not sure if that's where I
12 would draw the line. I don't think it's
13 inappropriate to draw the line there. But where
14 does it become complicated?

15 Hate crimes, for example. What about
16 a hate crime? So I think I would be asking
17 myself, where should the line be and why? And I
18 don't sense that's happening.

19 And then I think working back from the
20 other direction, a violation of the Espionage
21 Act, who's the victim? You know, in some sense
22 all members of society might be the victim there

1 because our security, if properly charged, our
2 security is all diminished. We all suffer.

3 That person is clearly, is probably
4 too diffuse, right? So I would not have those
5 victims come forward.

6 Is that clear? So this is a line
7 drawing exercise. My point is this, the line in
8 here is not the line people are talking about.
9 They think they've drawn one line in this, in
10 plain English --

11 VADM TRACEY: Has not.

12 JUDGE BAKER: -- is a different line.
13 And if I'm a counsel, and I have a child porn
14 victim, I'm thinking, what are my duties now in
15 light of this law. And it's confusing.

16 So has that been clear in response?

17 VADM TRACEY: That's good, thank you.

18 JUDGE BAKER: Yes.

19 VADM TRACEY: Thank you. Colonel you
20 described an Army victim liaison position and
21 then a set of actions that that position fulfills
22 in the Army's Court cases. Do the other Services

1 perform those functions, these notifications?

2 And just don't have someone whose identified with
3 the full set of responsibilities or --

4 COL ORR: In the Air Force, those
5 functions are somewhat being performed but
6 they're not being performed by the court per say.
7 We have a legal service there that performs some
8 of that.

9 VADM TRACEY: And that is connected to
10 the court in what way?

11 COL ORR: It actually is not connected
12 to the court. It's a separate division that we
13 have. Services Legal Counsel.

14 VADM TRACEY: So is the Services Legal
15 Counsel responsibility to track what's happening
16 in the court so they can communicate with the
17 victim or is it the courts responsibility to
18 inform the service liaison --

19 COL ORR: It's the court's
20 responsibility to notify the victim, the legal
21 counsel. And then --

22 VADM TRACEY: Okay.

1 COL ORR: Yes, right.

2 RADM REISMEIER: Somewhat similar to
3 the Air Force response, that really is a
4 government function, it's not a court function.
5 The court is generally not in the business of,
6 you know, the court takes cases in, the court
7 decides issues based on the record, the court
8 issues opinions.

9 If somebody has an equity involved in
10 that, that's a government function to actually
11 say, okay, you need to know if this has actually
12 come up. So that's going to be, to the extent
13 that it's done, it's done with within the offices
14 of the established programs for VWAP, victim
15 advocates, those sort of things.

16 The court does not, that's not the
17 court's job. At least that's the institutional
18 way that the court would look at it.

19 I mean I get that the issue is, at
20 that point, becomes decentralized. I get the
21 issue you're raising, but, no, that's not the way
22 the Navy approaches it at this point.

1 VADM TRACEY: And is the process
2 that's somewhat equivalent to the Air Force's, is
3 it the same between the Navy and the Marine Corps
4 or are there two different --

5 RADM REISMEIER: It's about the same.
6 It's largely driven by the departmental
7 structure. So the Department of the Navy.

8 VADM TRACEY: Okay. Thank you.

9 COL LIND: If I might, I would just
10 want to clarify. I said this earlier, but in the
11 Army it's not the court and the judges --

12 VADM TRACEY: Got it.

13 COL LIND: -- that notify the victim,
14 it's the court administration --

15 VADM TRACEY: But you have a person
16 assigned that, who sits --

17 COL LIND: Yes.

18 VADM TRACEY: -- in that venue and
19 there's not the air gap. Yes

20 COL ORR: Right. And the Air Force
21 does not have a person assigned for the court to
22 do that.

1 VADM TRACEY: Yes.

2 RADM REISMEIER: Can I, if I may, back
3 up and address this issue of, okay, is the basket
4 of people too big, too small, is it all victims,
5 is it some victims?

6 One thing that may be worth
7 considering is that to some extent your victim
8 really is not the right identifier. If what
9 you're really trying to talk about is somebody
10 who's the holder of privilege that is 513
11 material. Whatever the privilege is.

12 If you're trying to protect that
13 information from being disclosed, whether the
14 person is this type of victim, that type of
15 victim, an essential witness, it almost doesn't
16 matter. If what you're trying to do is protect
17 the information, then you can just simply key in
18 the information and have it say, look, the holder
19 of the privilege.

20 Now, you're going to have to do some
21 drafting to figure out how exactly you identify
22 who the holder of the privilege is. But to some

1 extent, the language sweeps too broadly.

2 That is, that you're sweeping in
3 victims of all sorts. To some extent it sweeps
4 too narrowly because you're not getting the
5 people who may have some information that needs
6 to be protected, but they don't fall under the
7 rubric of the victim. Or they're not a victim in
8 this particular case.

9 JUDGE BAKER: But to be clear, they
10 would still be in a position, without this
11 legislation, to have standing --

12 RADM REISMEIER: That's right.

13 JUDGE BAKER: -- to protect their
14 privilege. So you need not be -- and we are in
15 agreement on this, you need not be listed in 6b
16 in order to protect your 513 privilege. *LMR*
17 makes that clear.

18 Although *LMR* is addressed specifically
19 to a victim, the language says, "There's
20 longstanding precedent that a holder of a
21 privilege has a right to contest and protect the
22 privilege."

1 So the legislative question is, if the
2 law is clear on that, and we'll stipulate that
3 the law is clear as four judges can agree it is,
4 what additional, and the Rear Admiral is quite
5 right to raise this, what additional are you
6 trying to capture in those all pleadings, all
7 briefs.

8 So that's another way to get at it.
9 Which is, is the class of person, privilege
10 holders as you've indicated, is the class of
11 person a victim. And if the class of person is a
12 victim, what kind of victim?

13 But if it's really about 412, 513,
14 514, and no more, you can draft a very clear
15 statute. In fact, you don't even really need one
16 in light of the case law.

17 VADM TRACEY: Can I ask a question?
18 It's your opinion that there's not a requirement
19 for any change in order to make the right to
20 protect the privilege clear. Is the "By what
21 means" clear?

22 JUDGE BAKER: Is the what?

1 VADM TRACEY: By what means clear.

2 JUDGE BAKER: It's as clear as case
3 law is clear. And I would note that *LMR* was a
4 three-to-two decision. And therefore, you know,
5 there's nothing as clear as statute or there's
6 nothing that could be as clear as statute, right?
7 And case law can change a lot quicker and more
8 easily than statute can.

9 But there is longstanding precedent,
10 in multiple courts, that the holder of a
11 privilege has the right to protect it.

12 One of the issues in *LMR* was not just,
13 is that a proper statement of the law, but how do
14 you protect it? And you get to have the counsel
15 come in.

16 And one of the subordinate issues was,
17 do you get to make legal arguments, or merely
18 factual agreements, that you're the holder of the
19 privilege. And *LMR* said, you get the full kit.

20 You get to have a counsel. Being
21 heard means, having a counsel. And because of
22 the legal question, as to whether the privilege

1 exists at all, it most necessarily includes the
2 right to argue the law as well as fact.

3 Now you can't go in there and start
4 arguing the elements of the effects, right? I
5 mean you're bound by the issue presented by 513
6 or 412. I think we're in alignment.

7 So the question is not, does the law
8 today make that clear, will this law change with
9 case law.

10 CHAIR HOLTZMAN: You get a five-minute
11 break now. If you have more questions we can --

12 JUDGE BAKER: Okay.

13 CHAIR HOLTZMAN: Okay, thanks. We'll
14 take a five-minute break.

15 (Whereupon, the above-entitled matter
16 went off the record at 10:32 a.m. and resumed at
17 10:42 a.m.)

18 CHAIR HOLTZMAN: Admiral Tracey, do
19 you have additional questions?

20 VADM TRACEY: I think just one more
21 question. Do you, in your view, do these
22 communications that you shared with us, do they

1 include enough information for victims on how
2 they can exercise their rights as the privilege
3 holders around the 412, et cetera?

4 COL LIND: Again, on appeal right now,
5 the only way that I'm aware of that a victim can
6 do that is as an *amicus*. The parties currently
7 recognized are the United States and the accused.
8 To my knowledge, a victim has not tried to do
9 that.

10 VADM TRACEY: At the Army Court of
11 Criminal Appeals?

12 COL LIND: At the appellate level.

13 VADM TRACEY: But do the documents
14 explain how to -- what is an *amicus*, how do you
15 become an *amicus*, what does it mean to be an
16 *amicus*?

17 Is there anything in here that allows
18 a victim to weigh in if they see the possibility
19 that information they were successful at having
20 withheld from the court might become public?
21 That's what started us down this path, right?

22 COL LIND: No.

1 VADM TRACEY: Okay. They don't make
2 it clear.

3 COL LIND: No.

4 VADM TRACEY: Okay. I think that's my
5 last question.

6 CHAIR HOLTZMAN: Okay. I know Mr.
7 Stone is the next speaker, but I just wanted to
8 ask a quick question.

9 Because I think one of the focuses of
10 the response of the Panel has been to say that
11 the law protects the rights of the privilege
12 holders. But as we understand -- or it was
13 raised by -- I think Colonel Orr -- 413 -- 412 is
14 not a privilege. So how do we deal -- if this is
15 your suggestion for how the legislation should
16 deal with the concerns of victims, how does 412
17 fit within this rubric? Anyone.

18 JUDGE BAKER: Well I'd like to -- I'm
19 not sure we're proposing legislation, we are just
20 --

21 CHAIR HOLTZMAN: Well you're not
22 proposing, you're commenting on them. I don't

1 mean to put words in your mouth, but we have to -
2 -

3 JUDGE BAKER: Right.

4 CHAIR HOLTZMAN: -- we've been
5 proposing, and people have been proposed -- have
6 suggested that legislation be proposed. And the
7 Senate, at this moment, is interested,
8 apparently, in adopting some legislations.

9 So the concern -- the suggestion that
10 this problem be resolved under the rubric of
11 enforcing rights, or enforcing privileges -- if
12 412 doesn't articulate a privilege, how do you
13 enforce the rights under 412 on appeal. That's
14 my question.

15 JUDGE BAKER: This is -- in my opening
16 statement I referred to privileges and
17 protections. And the real issue is one of
18 standing.

19 Do you have standing to be heard
20 before the court, whatever the matter is. And
21 our court has gone back and forth on interpreting
22 412.

1 The original lead case was *Banker* .
2 Which I authored. And I'm sorry to report it was
3 then overruled about eight years later, in
4 *Ellerbrock* .

5 But in *Banker* we took -- and these I
6 think were both three-two cases. *Banker* was a
7 three-two and I think *Ellerbrock* was as well.
8 Which is a way of saying, whatever 412 said, a
9 court made up of five rational judges couldn't
10 agree on what it said, so it probably needs to
11 say it with greater clarity.

12 But 412 itself built in a right to be
13 heard on the question of privacy and protection
14 of the privacy right without it being called a
15 privilege. And the question is, how clear and
16 which courts would uphold that right and in what
17 manner?

18 So that's clearly an area that -- in
19 my view, if you accept my rubric, that clarity in
20 the law is always helpful. That is an area where
21 you could deal with greater clarity. Exactly
22 what it means to be heard on that matter.

1 And I would -- without question, that
2 protection of privacy is critical. That being
3 said, it is also right at the -- can be right at
4 the focal point of the due process right to put
5 on a trial and have a fair adversarial
6 proceeding.

7 So that's a place where judges will be
8 busy and will have to do work. There's a lot of
9 412 cases.

10 I might make one comment too. We tend
11 to focus on the legal aspects of this, which is
12 the privilege that gives you standing and so on.
13 We talk in the law about substantive justice, the
14 outcome. There's also the concept of procedural
15 justice.

16 And the opportunity for a victim --
17 however defined -- to be heard, is a part of
18 procedural justice. Whether they're trying to be
19 heard on a particular privilege or a particular
20 protection or in some other manner, there are
21 reasons why one might want to legislate the
22 opportunity to be heard beyond privilege.

1 Which have to do with the opportunity
2 of the victim to be heard at all. As part of the
3 sense of procedural justice.

4 So that's something -- apropos of our
5 conversation with Mr. Taylor, that's not
6 something judges -- judges apply the law, not
7 concepts of procedural justice, unless it's due
8 process. But that certainly is an area where a
9 legislative body or a policy-making body might
10 say, no, we want more than protection of
11 privilege. Or protection.

12 CHAIR HOLTZMAN: Did you have
13 something --

14 COL LIND: Chair, it might be worth
15 the Panel's -- the cases that Judge Baker was
16 talking about are *United States versus Gaddis*,
17 which is at 70 M.J. 248, the Court of Appeals for
18 the Armed Forces 2011. And *Ellerbrock*, which is
19 at 70 M.J. 314, Court of Appeals for 2011.

20 And both of those cases discuss the
21 contrasting and competing interests on the
22 constitutionally required evidence for the

1 accused's and victim's privacy.

2 CHAIR HOLTZMAN: I get that. I get
3 that. I'm concerned about how we get -- whether
4 we should have an appellate right, for a victim,
5 to raise that issue on appeal. Not the trial
6 counsel.

7 Is this victim going to have a right
8 to have his or her voice heard on appeal on this
9 point?

10 COL LIND: On -- I guess I'm confused
11 on a couple of things. Is the voice to be heard
12 on whether appellate counsel have access to the
13 sealed records --

14 CHAIR HOLTZMAN: No.

15 COL LIND: -- or is the voice to be
16 heard on the merits of the 412?

17 CHAIR HOLTZMAN: Merits of 412. And
18 possibly sealed records. That's what the focus
19 point is of the -- I think of the legislation
20 that was presented to us by -- or at least one of
21 the focus points of the legislation that was
22 proposed to us by the representatives of the

1 special services on special victims' counsel,
2 legal -- victims' legal counsel. And also of the
3 Senate -- proposed legislature --

4 RADM REISMEIER: It may depend on what
5 exactly one is trying to achieve. I mean if for
6 the first instance what you're trying to do is
7 identify the sort of class of information you're
8 talking about, then the rubric that Judge Baker
9 is talking about is something to, I guess, start
10 with. That is, privilege holders or protected
11 privacy information.

12 I mean it's easy enough to come up
13 with some plain language that identifies the
14 group of information bins that you're trying to
15 reach.

16 I think the more difficult thing to
17 address is, when we talk about this right of
18 appeal, what are we talking about. If what we're
19 saying is that the privilege holder or the person
20 who holds the protected information at the trial
21 level should be able to access an appellate court
22 if that trial court has reached an adverse

1 decision, well, okay. And there's precedent for
2 that that Judge Baker has already talked about.

3 That's not all that extraordinary to
4 have the ability to go, okay, my right is about
5 to be extinguished, I get to take a writ to the
6 appellate court. And you can change that so it's
7 not by writ, you can change it so it's by direct
8 appeal, then that raises a whole host of priority
9 problems and everything else that Judge Baker has
10 mentioned.

11 But that's sort of different than
12 saying, okay, when the trial is all over and done
13 with, the record has now gone up to the Court of
14 Appeals and the first instance -- or the Service
15 Courts of Criminal Appeals -- now what's the
16 status of the victim?

17 Because now you're no longer talking
18 about extinguishing a right of some sort. That's
19 over and done with at the trial level, with or
20 without the writ, with or without a direct
21 appeal. Now you're talking about trying to
22 manage something that inherently is bound by the

1 record.

2 When that case comes up to the Court
3 of Criminal Appeals, the Service Court of
4 Criminal Appeals, there is a record of trial.
5 Whatever it is that I'm reviewing as a CCA judge
6 is in that record.

7 The necessity of someone being heard
8 at that point is a bit different than the
9 necessity of being heard in the first instance
10 when the decision is being made. Because the
11 decision, ultimately, is not going to be based on
12 a bunch of extraneous information that someone
13 wants to offer me. The decision is going to be
14 based on what's in the record in front of me.
15 The equities are a bit different.

16 Now, I get that victims and victim
17 advocates would like the opportunity to present
18 their argument. I guess the point I'm making is
19 that the need for it, at that level, is vastly
20 different than the need to be heard in the first
21 instance, before the decision has been made. Or
22 to appeal it because the rights are about to be

1 extinguished.

2 Said differently, I don't know how
3 much help it is to an appellate court to have yet
4 another party coming in and briefing something
5 that I can already read in the record. I know
6 what the law is, I know what the positions of the
7 parties are. I'm not sure what benefit it is to
8 the system, to the resolution of a legal issue in
9 front of me, to have another lawyer talking.

10 Now that said, I get it. I'm not the
11 smartest guy in the room. I'm sure there's a
12 lawyer who can come up with something I'm not
13 seeing in the record.

14 But the intrusion into the system,
15 with all the things that we've talked about, it's
16 the briefing schedule, it's the access to the
17 information, it's the notice of all these
18 ancillary pleadings, it's trying to define what
19 those pleadings are. All those other things.

20 That gets more and more complicated
21 for what I think is a smaller and smaller
22 diminishing return.

1 So we've got to sort of separate
2 those, this right of appeal out. Are you talking
3 about before the rights extinguished or are you
4 talking about, I want to review the stuff after
5 it's all said and done with?

6 CHAIR HOLTZMAN: Okay, I'm going to --
7 Mr. Stone, I didn't expect --

8 MR. STONE: I have to pick that right
9 out, if you don't mind.

10 RADM REISMEIER: Okay.

11 MR. STONE: Because I really think
12 that it sounds like, and I recognize you're
13 retired judges, of you looking backwards and
14 frankly not contemporaneously or forward, when a
15 defendant says that he wants to appeal the
16 privilege that was upheld and he moves for those
17 records from the court. It sounds to me like
18 you're doing it in an *ex parte* fashion.

19 Because the holder of the records, you
20 don't want to give them a chance to show up. You
21 don't want to give that lawyer a chance to come
22 in and brief it.

1 Now, I'm not telling you how long you
2 have to spend reading his pleadings, but I
3 frankly don't think that the rest of the legal
4 community, outside of the military, in the
5 civilian courts, ever does that.

6 JUDGE BAKER: As a spectator of this
7 exchange, I'm not sure you're talking about the
8 same thing.

9 RADM REISMEIER: No.

10 JUDGE BAKER: I think you were talking
11 about a direct appeal after a conviction.

12 RADM REISMEIER: That's right.

13 JUDGE BAKER: Where there's been a
14 trial court ruling and the CCA is now bound by
15 the facts in the record at the trial court
16 ruling. I'm going to offer just a slightly
17 different perspective.

18 Let's say the thing comes up, the case
19 comes up on direct. So the ruling has been had.
20 The ruling on MRE 9. I'm making it up.

21 And as part of the appellant's appeal,
22 he's appealing a Fourth Amendment search issue, a

1 412 issue and eight other things.

2 RADM REISMEIER: Right.

3 JUDGE BAKER: So the question you're
4 posing is, why not let the person who was the
5 protected party in the 412 ruling, participate at
6 the appellate level. I'll give you my view on
7 that, which is not necessarily, it's solely mine.

8 My view is, why not get a brief. I
9 love reading. I want more. And it's my piece.

10 So here's the concern on the one end
11 and here's the concern on the other hand. On the
12 one hand you don't want it to impact the due
13 process rights of the now appellant, right?

14 And I raised a couple of concerns
15 about that. But as a professor I can come up
16 with some scenarios where it might, but I don't
17 think it inherently does so. Unless it affects
18 oral argument in some way.

19 But in my view, why not hear it. Why
20 not have a brief. The more the merrier, right?
21 I want to hear from everybody.

22 By the way, not all judges agree with

1 this, but I don't mind. The more I read the
2 better, the more informed I am.

3 And so I'm not sure what the push
4 back, what the reason not to get at least a brief
5 is. I think there are concerns if everybody at
6 oral argument, at the direct appeal level, if
7 you're having multiple people argue, now it looks
8 like it's uneven and not fair.

9 Because the government side has two or
10 three people arguing and the defendant, now
11 appellant, only has this. So you have to worry
12 about the due process perception.

13 RADM REISMEIER: Right.

14 JUDGE BAKER: And I'd have no problem
15 reading a brief and the argument from someone,
16 just as I'd have no problem reading an *amicus*
17 brief.

18 MR. STONE: Once again, I think you're
19 making an assumption. And I've heard it
20 consistently from the Panel that I don't think
21 it's to the future.

22 The assumption is, when you spoke

1 about due process, that the government is getting
2 two bites at the apple or twice as much time.
3 First of all, I've never seen a civilian court
4 rule that way, second of all, it can be dealt
5 with by extending the time of the defendant. But
6 third of all --

7 JUDGE BAKER: Exactly as I said.

8 That's --

9 MR. STONE: But third of all --

10 JUDGE BAKER: -- the perception.

11 MR. STONE: Just respond to this
12 argument.

13 JUDGE BAKER: All right.

14 MR. STONE: Because this is the common
15 situation. A prosecutor comes in, there's an
16 objection to a privileged document, which may
17 have been on a closed issue, and the prosecution
18 says, on appeal, well, we don't need to defend
19 that particular privilege ruling. If that's what
20 the court wants a reverse on, be my guest and
21 reverse and we'll try the case again.

22 Where the prosecutor does not defend

1 the victim's privilege, they're willing to go
2 back, either because they have a plea offer in
3 the works or because they're going to get
4 cooperation or whatever, but they are not going
5 to defend the victim's privilege. And the
6 victim's privilege has no one to defend it.

7 That's the situation where afterwards
8 the victims come to victim's counsel, if they can
9 find them, and they say, what happened there? I
10 won before and now, based on some other
11 negotiations between the defense counsel and the
12 government, they're giving up my privilege and no
13 one is defending it on appeal. That's the
14 circumstance. And --

15 JUDGE BAKER: I'm not pushing back on
16 that.

17 MR. STONE: -- this comes up.

18 JUDGE BAKER: I'm not pushing back on
19 that. I was spotting issues, not reaching
20 conclusions.

21 MR. STONE: No, I understand that.

22 JUDGE BAKER: Yes.

1 MR. STONE: But Rear Admiral Reismeier
2 doesn't want to give the victim a chance to
3 defend on the 412, or whatever the privilege is,
4 because presumably this is going to interfere
5 with the procedures of the court.

6 Well no civilian court has ever made
7 that kind of a ruling, nor have they spoken about
8 the difficulties of giving notice to victims or
9 having an extra brief be filed or any kind of due
10 process motion because the parties all get their
11 chances to argue. So I don't really understand -

12 -

13 RADM REISMEIER: I would push back on
14 the hypothetical and say that to my knowledge I
15 have never seen a CCA reverse a conviction
16 because the government has conceded on an issue
17 where the government frankly was wrong. If in
18 fact the privilege was appropriately upheld, a
19 CCA, I would be shocked to find that a Court of
20 Criminal Appeals would reverse the conviction.

21 If the law, if the judge was right on
22 the law, the judge doesn't become wrong because

1 the government conceded. The CCA isn't going to
2 reverse.

3 I get the hypothetical, I'm just
4 saying, I'm not aware of that ever occurring.
5 The CCAs disagree with the position that the
6 government takes all the time. That said, they
7 disagree with the position the defense takes all
8 the time. That's just not the way that it would
9 work.

10 But my point, perhaps my point is a
11 little untethered to the rest of what I think
12 probably needs to be done.

13 Right now you have this weird
14 inversion of process under the privileges. Put
15 412 aside for a second, that really is different.

16 Right now at the trial level, if the
17 judge looks at some of this privileged material
18 *in camera* and says, you're not getting it, well,
19 the defense never sees anything. For whatever
20 reason on appeal, because of the way that Rule
21 for Courts-Martial is written, well now everybody
22 gets to see it.

1 So to some extent, the people who
2 would have been in the best position to be able
3 to articulate why this is or is not relevant,
4 never see it. Those are the trial practitioners.

5 And yet on appeal, because of the way
6 the rule is written, well now they get to see it
7 and the CCAs have no option to say, I'm not going
8 to give you access to it. To the extent that
9 you're considered that somebody is going to
10 concede to something, that can all be resolved by
11 simply saying, RCM.

12 Assuming you can get over any
13 potential due process issues, back to that in a
14 second, that can all be resolved by altering RCM
15 1103 Alpha and say, no, it's going to be reviewed
16 in camera by the CCA judges. And then if they
17 decide, the trial judge will say, well then you
18 can address these other issues as to whether
19 anybody is going to be, it needs to be heard.

20 But right now you can't even get to
21 that dialogue because of the way the RCM is
22 written.

1 With regard to whether their due
2 process concerns are there, I would just simply,
3 I guess, ask this question. If it does not
4 violate due process for an accused not to get
5 access at the trial level, how can it violate due
6 process by not having access at the appellate
7 level if now instead of one judge reviewing a
8 trial, you have three judges reviewing it on
9 appeal, how does that violate due process?

10 I'm not going to answer that, you can
11 probably divine my supposed response from the
12 question. But you can get at these issues by
13 simply altering that process.

14 But I stand on the point which the
15 right to be heard should exist at the trial level
16 where the decision is being made. The right to
17 be heard on appeal, when you're talking about now
18 reviewing the way that it was all developed at
19 the trial level, I'm just not sure that you gain
20 very much.

21 And I agree, you're right. Would I be
22 smarter if I got to read an extra pleading? Yes.

1 But unlike CAAF, the Service Courts aren't
2 reviewing 55 pages a year. They're reviewing
3 hundreds and hundreds of cases a year.

4 Those are hundreds and hundreds of
5 additional pleadings and hundreds and hundreds of
6 additional attorney's schedules that have to be
7 managed. There are additional times for
8 enlargements because they can't meet the filing
9 deadline.

10 It's really easy to say that sure, I'd
11 love to be made smart about everybody coming in
12 and spending an hour talking to me. There is not
13 the time in the day to do it.

14 And again, speaking of, the *Moreno* was
15 a Navy-Marine Corps case. We spent years trying
16 to dig out an appellate backlog to get to the
17 point where frankly the CCAs have pretty good
18 processing times. You just have to be mindful
19 that the last time we were taken to the woodshed
20 it was because it took too long.

21 I don't -- you just have to be mindful
22 of every time you insert an additional process,

1 you're inserting additional time. It comes with
2 a cost.

3 My push back is saying, I'm not sure
4 how much you gain by giving somebody else the
5 right to talk about something that's already in
6 the record.

7 MR. STONE: But the gain is not for
8 the judges, the gain is to the victims. And if
9 the Marine Corps case you mentioned caused such a
10 problem, then why do you think it is that the
11 Marine Corps decided to extend victims' counsel
12 to all victims. Unlike the other Services.

13 RADM REISMEIER: That's a different
14 question. Extending the counsel to them is not
15 the same as extending the right to now file on
16 appeal and get access to substantive pleadings
17 and have a right of direct appeal and all these
18 other things that are now under discovery.

19 MR. STONE: So the burden on the trial
20 judges doesn't bother you, just the burden on the
21 appellate judges?

22 RADM REISMEIER: No.

1 MR. STONE: That's not been the
2 rational in any civilian court anywhere in the
3 country. And that, actually, leads me to the
4 second area that I wanted to talk about.

5 Which was what Judge Baker opened
6 with, that there are certain structural problems.
7 He was mentioning the structural problem of the
8 fact that the judges may need more time to handle
9 these cases because they only have limited tours
10 of duty and they don't gather that much expertise
11 before they moved around.

12 But another structural problem, in the
13 second structural problem he mentioned, that
14 originally the military cases weren't meant to be
15 portable and these aren't so easily portable
16 anymore when you have to go move and find a
17 victims' counsel and other people who --

18 JUDGE BAKER: I actually didn't
19 mention that, that was the Rear Admiral.

20 MR. STONE: Oh, you didn't mention the
21 portable -- oh, that's true. That's true.

22 But then there was also the issue that

1 you did mention. You said a vast majority, I
2 think you said in excess of 90 percent of the
3 cases that you saw, involve sexual assault and
4 child pornography. Thousands of cases you
5 mentioned.

6 JUDGE BAKER: Yes, I did.

7 MR. STONE: And what that makes me
8 wonder --

9 JUDGE BAKER: The only other thing I'd
10 say, 90 would be a guestimate since we don't --

11 MR. STONE: Yes.

12 JUDGE BAKER: -- practice statistics.

13 MR. STONE: Okay.

14 JUDGE BAKER: But a large, a majority
15 of the cases.

16 MR. STONE: I mean, when you --

17 JUDGE BAKER: We didn't want you to
18 pocket the 90 because it's hard to get stuff back
19 like that. Go ahead. Go ahead.

20 MR. STONE: When you tell me that you
21 see a practical problem in extending victims
22 their appellate rights, and they might get them

1 at the trial level, but tough luck if there's
2 been a wrong ruling, they don't get to have those
3 same rights on appeal.

4 And as an aside let me just say,
5 *amicus* does not cut it because it's discretionary
6 by the courts. The courts of military appeals
7 have denied *amicus* status in various cases. And
8 even when they grant it and there is argument,
9 they do not extend the argument right to the
10 *amicus* party.

11 But assuming that what you're telling
12 me is that you have a practical problem and it's
13 this overwhelming majority, the sexual assault
14 and child pornography cases, that pushes me in
15 the direction of saying that maybe the people out
16 there who say that sexual assaults in the
17 military ought to be transferred to civilian
18 authorities, along with the child pornography
19 cases. That your original mandate was to look at
20 questions of insubordination, crimes of treason,
21 espionage, maybe theft.

22 And I understand those in the field as

1 having implications that might need to be handled
2 in the field and might need to be handled by the
3 military. But I don't think when the UCMJ was
4 originally promulgated, anybody thought that an
5 overwhelming majority of the cases that found
6 their way up were going to deal with sexual
7 assaults and child pornography.

8 And if that is the case, you're making
9 me wondering whether the proponents of moving at
10 least those two categories of crime to the civil
11 authorities aren't correct. And I wonder if
12 you'll comment on that.

13 COL LIND: If I might speak in on
14 that. Going back historically, if you're
15 familiar with the Supreme Court's case in
16 *Solorio*, which basically said that service
17 connection is what gave the military
18 jurisdiction, prior to *Solorio* cases had to have
19 a military connection for the military to take
20 the case.

21 *Solorio* was a child molestation case
22 and it went on for years. When the person moved

1 from Alaska to San Antonio to move somewhere
2 else. So you have a venue problem.

3 So if you're at the somewhere else,
4 you're not going to be able to capture the ones
5 that occurred earlier. And I think that was some
6 of the foundation for why *Solorio* ruled the way
7 it did.

8 So with military people moving around
9 like that, that would pose a challenge should
10 these things go civilian.

11 MR. STONE: Well, we had bank robbers
12 who move around between different districts. You
13 may know, I've been an assistant U.S. Attorney
14 and we had bank robbers who would move between
15 states because they figured they wouldn't be
16 caught. But we still managed to successfully
17 prosecute them.

18 And I don't know if anybody else wants
19 to comment on how the military judges, why
20 wouldn't they be benefitted if this huge number
21 of cases that's troubling them was moved out so
22 that they had time for the ones that did seem to

1 relate to the military's mission. Primary
2 mission.

3 RADM REISMEIER: I guess I'm too sure
4 where it is that you, maybe it's just simply I'm
5 not being clear. At the trial level, where the
6 decisions are being made in the first instance,
7 the funnel should be fairly broad. You should be
8 sucking in as much input as you can in order to
9 make sure that the decision is informed.

10 I don't think anybody is pushing back
11 with the idea of a victim or a victim's counsel
12 having the right to be heard when there is a
13 privilege or a privacy interest at issue. That's
14 the law.

15 I mean no matter how much one agrees
16 or disagrees with it, that's the law. The narrow
17 question here is, what happens after that
18 decision has been made.

19 And again, I think it's important to
20 separate out whether you're talking about the
21 right to appeal that an adverse decision at the
22 trial level before the right is extinguished. So

1 whether that's an extraordinary writ or a right
2 of direct appeal, that's to go forward and do it
3 prior to the completion of the trial.

4 That's a separate issue from what I'm
5 trying to focus on. Which is, okay, once the
6 conviction is final and the case is now at the
7 trial level, and it's going up and it's being
8 reviewed by the CCA, what should the right of
9 access be to victim, and Victim Legal Counsel at
10 that point?

11 The point that I'm trying to make is,
12 that the importance of having that additional
13 voice at that level is very different than having
14 it at the point when the decision is being made
15 up front.

16 CCAs, perhaps the reason why there is
17 not a good analog to what's happening in the
18 civilian jurisdictions, is the civilian
19 jurisdictions aren't like CCAs. The CCAs have
20 factual review authority.

21 The CCAs make their own factual
22 determination. They are reading the entire

1 record. Not just simply a little excerpt that
2 attaches to the issue that's being directly
3 appealed, they are reading the whole thing. They
4 will specify issues that the parties haven't
5 raised. They will make a decision based on the
6 entire record.

7 So what it is that they're doing, the
8 amount of time that goes into it and everything,
9 it's not like in the civilian world.

10 So trying to import what happens in
11 the civilian world to what's happening in the
12 military courts, can you do it? Sure, you've
13 just got to recognize if you're importing an
14 overlay into something that is just radically
15 different.

16 MR. STONE: So are you suggesting we
17 should change the CCAs jurisdiction? That they
18 don't need to read the whole record because
19 there's been a trial judge?

20 RADM REISMEIER: Not at all. What I'm
21 suggesting is that when the court is already
22 reviewing the entire record, that the importance

1 of having input from another party, in my own
2 personal view, is far less than having that input
3 before the full record is developed.

4 MR. STONE: I don't know why that
5 analysis doesn't extend to the prosecutor. I
6 don't think you need the prosecution's brief
7 then. You've got the prosecution's brief below,
8 you've got the whole record and you've got the
9 ruling. Why are you letting the prosecutor file
10 the brief, that's killing more of your time.

11 I really don't see how excluding the
12 victim from that preceding on appeal makes any
13 sense at all. It certainly doesn't show
14 enforcement of their rights if, for example, the
15 trial judge only granted part of the privilege
16 that they wanted.

17 And let me go beyond that for a
18 minute. And this, again, relates to my not
19 understanding why I think the comments we've
20 heard look backward and not forward.

21 6b is not limited to privilege. If
22 you look at 6b rights today, the rights include a

1 public hearing concerning the continuation of
2 confinement by the trial of accused. And one of
3 the rights that the victim has is that there
4 should be a public hearing concerning
5 confinement.

6 Well, it may be that that bail status
7 is a question that's up. A second issue is, it
8 talks about the right to be reasonably heard at a
9 sentencing hearing.

10 But we heard the people who came to
11 our last meeting say, now, for some reason they
12 don't understand sentencing reassessment in
13 accordance with review under Article 66 of UCMJ,
14 is not included and the victim doesn't get to be
15 heard in their sentence reassessment. And they
16 find out after the fact that their sentence,
17 which they thought was harsh, has been completely
18 suspended. As has been the forfeiture of pay.
19 And the person is allowed to just leave the
20 military.

21 There's more than the privilege at
22 stake. And that's why, to the extent your

1 discussion talks about a person whose privilege
2 is at issue, does not cover the full spectrum of
3 victims' rights. The crime victim is not
4 necessarily a person whose privilege is the only
5 issue about which they're concerned.

6 And as to the interlocutory appeals
7 we're talking about, there are also two comments
8 that I don't understand, and maybe Judge Baker
9 and Colonel Lind can explain those to me.

10 Judge Baker said that, he talked about
11 mandamus being a very, he said narrow remedy
12 here, and --

13 JUDGE BAKER: It's a high standard --

14 MR. STONE: -- high standard. And
15 Colonel Lind talked about being an extraordinary
16 remedy.

17 When 6b was enacted, it's quite clear
18 from its legislative history, was meant to
19 reflect the 2004 Civilian Victims' Rights Act.
20 That language includes the word mandamus.

21 And there was a dispute there after
22 about whether mandamus was used to indicate that

1 this was a swift interlocutory appeal, under
2 normal appellate standards, or whether this was
3 truly a mandamus, like any other mandamus, where
4 there was an extraordinary high degree of
5 necessity before a court would grant it.

6 And there was a split in the circuits.
7 Despite the legislative history that said that
8 that was taking the place of an ordinary appeal.

9 That language has since been changed
10 by the U.S. Congress. It now says that that
11 mandamus is under standard appellate standards.
12 That this is a normal appeal. The only thing
13 that makes it a mandamus is that it happens very
14 quickly.

15 And so I think the fact that the
16 military courts continue, both in the *E.V.* case
17 you talked about and *Martinez*, where the Military
18 Court of Appeals denied even hearing the mandamus
19 and the CAAF decided it wouldn't hear, not only
20 this but any mandamus, gives short shrift to the
21 fact that Congress is trying to make it clear
22 that victims ought to have rights to argue before

1 their various rights. Whether their privilege or
2 not privilege, are invaded.

3 And I think they give short shrift to
4 this notion that, oh, it's going to take up more
5 judicial time. If that's the problem, then
6 propose to us how many more judges you need or
7 ask to change the procedure where you have to
8 review the entire record.

9 But I don't think the practicalities
10 of what the judges would like, and apparently
11 that's been denying *amicus* status and denying
12 mandamus petitions on a regular basis in the
13 Military Courts of Appeals. Because very few
14 mandamuses have been granted.

15 And I know, from the last panel we
16 had, that there's been multiple applications for
17 mandamus, by victims. Then I think you should be
18 asking us to change the rules that cause you to
19 be overburdened. Do you have any feelings about
20 that?

21 RADM REISMEIER: If I could just
22 return to this issue. Look, I'm not saying the

1 courts are overburdened, what I'm, as my
2 grandmother used to say, I'm not sure that the
3 game is worth the candle. All I'm saying is, the
4 added benefit of inserting some of these rights
5 on appeal may not necessarily be worth everything
6 that goes with it. That's a judgment call. If
7 the answer is, hey, it's worth it, that's fine.

8 But I'd like to talk about the
9 sentence rehearing thing or sentence reassessment
10 thing, because I think that this all stems from
11 something, or a misunderstanding, of what a CCA
12 actually does on sentence reassessment.

13 I mean you have to recognize that in
14 many instances the government doesn't even get
15 heard on sentence reassessment. Because under
16 the statute, the CCA is required to approve the
17 findings and sentence, which it finds is
18 appropriate, based on the entire record.

19 If the CCA goes through and finds some
20 reason to reassess, whether it's because -- and
21 remember, they can reassess even without setting
22 aside a finding. They can reassess even if they

1 don't find an error. If their only judgment is
2 that they think that the sentence is not
3 appropriate.

4 There are many cases where the CCAs
5 actually grant some sort of sentence relief where
6 the government doesn't even know that that's
7 under consideration until the opinion is actually
8 issued.

9 So I recognize that there's the issue
10 of, okay, should the victim be heard. Just
11 recognize that in order for the victim to be
12 heard, if nobody has raised that for some reason,
13 you now are going to require the court to go,
14 okay, I need to notify all the parties that I'm
15 going to be considering sentence reassessment.

16 So you are now releasing, during the
17 midst of your judicial deliberations, what it is
18 that the court is contemplating and specifying
19 the issue to get people the right to comment.

20 It's somewhat problematic for a court
21 to do that. Because you haven't made a decision
22 and you're telling the parties you want to be

1 heard on sentence reassessment, you're sort of
2 communicating that you're reassessing the
3 sentence.

4 If that's what you want to do, I
5 supposed you do it. Courts specify issues all
6 the time. CCAs specify issues all the time.

7 But there's nothing extraordinary
8 about nobody getting the opportunity to be heard
9 on reassessment because that's the way the
10 statute reads. The statute charges the CCA with
11 that authority, not the parties of some, when I
12 say parties I mean the victim, the accused, the
13 government. They're not granted some right to be
14 able to raise that issue because it's the courts
15 obligation to consider that regard.

16 MR. STONE: I guess I disagree.
17 6b(4)(b) currently says they have a right to be
18 heard at a sentencing hearing. And you're just
19 telling me now that a CCA sentencing hearing is
20 somehow a different sentencing hearing.

21 RADM REISMEIER: That's right.

22 MR. STONE: And I know that in the

1 U.S. Courts of Appeals, and in courts all the
2 time, judges, including the Supreme Court, when
3 the court sees an issue that it believes the
4 parties have a right to say something about it
5 says, well, we'll allow further briefing on that
6 issue by the parties, by such and such date,
7 before we rule. And I don't think that that's
8 either extraordinary and I don't think it's that
9 difficult.

10 RADM REISMEIER: So with due respect,
11 Article 6b is only one of the statutes that
12 somebody has to consider. You also have to
13 consider Article 66. And Article 66 does not
14 treat sentence reassessment as a sentence
15 hearing.

16 Now, if somebody wants to then I
17 supposed you'd have to, you know, somehow address
18 the statutes. But that's not how it works and
19 it's not what the statute says.

20 MR. STONE: Today. That --

21 RADM REISMEIER: Yes, sir.

22 (Simultaneous speaking.)

1 RADM REISMEIER: Absolutely.

2 MR. STONE: That's what we're trying
3 to figure out.

4 RADM REISMEIER: That's correct.

5 MR. STONE: How the victims can feel
6 like they have input and so that you won't lose
7 qualified, typically woman in the service, when
8 they find out that even after that was a
9 conviction for sexual assault and a heavy
10 sentence, that a CCA turned it into a light
11 sentence.

12 RADM REISMEIER: And recognize that
13 under the amendments that are being proposed, all
14 of this changes under the amendments that are
15 being proposed to the UCMJ. These concepts all
16 change.

17 Where you start getting segmented
18 sentencing, you remove the authority of the CCAs
19 to do factual sufficiency's, except in narrow
20 situations, sentence reassessment goes away. I
21 mean this all, if you want to talk about looking
22 forward with the statute changes, all of this

1 obviously changes.

2 MR. STONE: Maybe the last question I
3 had for this round.

4 CHAIR HOLTZMAN: Yes. I want, first
5 of all, to explore the issue that you raised,
6 Admiral, about why, and does it make sense, to
7 have the material under 513 revealed on appeal
8 for the first time when it hasn't been revealed
9 beforehand. And to allow access to everybody.
10 The trial counsel and defense counsel.

11 I mean, is there any reason that any
12 of you sitting here can think of, to permit that
13 disclosure at the appellate level when it hasn't
14 happened at the trial level? I mean disclosure
15 to counsel.

16 And wouldn't it be sufficient simply
17 to have the appellate court review the substance
18 of the document, or the substance of the records,
19 and then decide whether an error was made?

20 COL LIND: Ma'am, I certainly -- as I
21 said earlier, with the findings required now at
22 the trial level, a lot of the records aren't even

1 going to come up with a record of trial because
2 they weren't produced in the first place.

3 CHAIR HOLTZMAN: Right.

4 COL LIND: So the issue you're talking
5 about is going to be with MRE 513 and 514. And
6 it's going to be where the judge has done an in
7 camera review --

8 CHAIR HOLTZMAN: Correct.

9 COL LIND: -- and given either none or
10 some of the records to the defense --

11 CHAIR HOLTZMAN: Correct.

12 COL LIND: -- and kept the rest
13 sealed.

14 It could certainly be a way, and I'm
15 not sure having people file pleadings as to
16 access is the most efficient way of doing that.
17 There could certainly be statutory authority in
18 there for something you suggest.

19 Like maybe just the court itself does
20 the in camera review of those sealed records that
21 were not disclosed. And unless there was some
22 reason to order them disclosed, that's it, nobody

1 else looks at the record.

2 I think that's certainly something
3 feasible that can be done.

4 CHAIR HOLTZMAN: Right. Okay,
5 feasible is good, but what about desirable?

6 COL LIND: This is where I'm a little
7 concerned, as a retired judge opining, but I
8 think it could certainly be done.

9 CHAIR HOLTZMAN: Okay. Anybody else
10 have any --

11 COL ORR: Well, I mean, it could be
12 done. The real question is the cost to the
13 person who now has a conviction or is in
14 confinement. And if you want to make that
15 balance, it could be done.

16 But the President and the Congress
17 have already kind of looked at it and said
18 weighing those two interests together, we're
19 going to go and give the benefit of the doubt to
20 the person on trial and not the victim. They can
21 change it, but that's where we are right now.

22 CHAIR HOLTZMAN: Right, I understand

1 that. And the suggestion has been to change that
2 because actually it would make a lot more sense
3 to have that kind of disclosure at trial level.

4 But in any case, my question to you is
5 is there a reason, well I guess the obvious
6 reason is that the defense doesn't have an
7 opportunity to challenge, doesn't have the
8 opportunity to file papers and to challenge the
9 court below, and to explain to the judges why
10 that information is so important.

11 COL ORR: Correct.

12 CHAIR HOLTZMAN: Can the judges figure
13 that out themselves?

14 COL ORR: You mean at the trial level
15 or at another level?

16 CHAIR HOLTZMAN: At the appellate
17 level. You got three, I mean, what the present
18 structure is is that it assumes that the trial
19 judge can figure out for himself or herself the
20 significance of the records, the medical records.

21 But the law now says that the three
22 appellate judges can't figure it out for

1 themselves. So it's a little bit of a logical
2 inconsistency here.

3 And so I'm just asking you, you know,
4 whether the present system makes sense and
5 whether it should be changed. You don't have to
6 get to the present system to make sense. You
7 just get to the issue to be changed.

8 COL ORR: Well, my concern is if the
9 judges on appeal, the three, the Board judges say
10 the judge below is correct, if the whole idea is
11 to satisfy the victim or the appellant, how do
12 they know? I mean, you still haven't given them
13 that insight to contest it.

14 CHAIR HOLTZMAN: We have the due
15 process issue here if the defense is not or the
16 trial counsel's not allowed to see the medical
17 records on appeal?

18 COL ORR: You may. But we're not
19 talking about the -- now you actually have to
20 make a standard to get those records. Before it
21 was pretty much a counsel would come to you and
22 say it's constitutionally required that I look at

1 this.

2 As a trial judge I would sit there and
3 go I don't know if it is or not, and you don't
4 know if it is. I guess I got to look at it. Now
5 we're in a situation where there's things you
6 must assert and know before it even gets to the
7 point.

8 So you have more leeway as a judge to
9 say this doesn't even meet the standards of me
10 opening it up and looking at it. That was an
11 option I didn't feel like I had until the law
12 just recently changed.

13 Now we're in a situation where if it
14 comes in and I get a chance to look at it, I'm
15 not bothered by three appellate judges coming to
16 the same conclusion as before. But it still
17 doesn't get rid of that lingering doubt for
18 counsel for either side or the victim.

19 CHAIR HOLTZMAN: Okay. The other
20 question I want to ask has to do with some
21 drafting issues which probably, you know, maybe
22 not of such great import to this panel.

1 But Judge Baker, when you talked about
2 your concern that the use of the word all, or
3 something that bothers me is somebody who's been
4 responsible in the past for drafting legislation,
5 and I think that removing that language with that
6 add of where it says all in the various places
7 here, is that something that would set your heart
8 at ease a little bit?

9 JUDGE BAKER: Setting my heart at
10 ease? Well first, this gets to Mr. Taylor's
11 question about the role of judges. Judges, of
12 course, their role is to interpret and apply the
13 law as it comes, not to apply the law they wish
14 they had. And they're very dedicated to doing
15 so.

16 So it's really up to Congress to
17 decide how to frame it. I would work back from
18 the goal rather than forward from the text. And
19 yes, without question, eliminating all helps, but
20 you're still going to have litigation and doubt
21 over well then what's meant by pleadings and
22 what's meant by blank and blank.

1 So yes, does that help, yes. Does it
2 solve the problem, no. I think you still have
3 to, if you're a legislator and I know you know
4 what that feels like, you still need to decide
5 who's going to be encompassed within the class of
6 victim and how are they going to be defined.

7 And then I would be as express as
8 possible as to which pleadings. Otherwise, there
9 will just be litigation about this was one of
10 those pleadings or this wasn't. Now I understand
11 that's probably why they put all in because --
12 but we --

13 CHAIR HOLTZMAN: It's a lazy solution.

14 JUDGE BAKER: Yes, exactly. We can
15 come up with pleadings that I think, or at least
16 I would agree should be included. And then I can
17 come up with some that clearly people would say I
18 don't want the burden of even having notice on
19 that because now I have to deal with that.

20 What's an example that all the filings
21 about time extensions for filing a brief or
22 something whereas a hearing on the applicability

1 of the rule and whether the privilege applies
2 would certainly be in the other category.

3 So personally if it were me, I would
4 work back from the overall intent and then give
5 it to my best legislative drafter.

6 COL LIND: I would like to make a
7 suggestion. The letters that I gave you I think
8 outline some of the important proceedings and
9 pleadings and things that take place while the
10 case is on appeal. It might be a place to start.

11 CHAIR HOLTZMAN: Thank you for that.
12 I appreciate that.

13 JUDGE BAKER: And then you could
14 qualify it with adjectives, you know, fundamental
15 or significant. There is still going to be
16 litigation there, but it might be possible to
17 pick up a line of cases.

18 The word fundamental right for
19 example, there is a definition to that. It's a
20 moving definition because it's in case law, but
21 it is possible to find some substantive
22 qualifier. But it will be litigated. It's best

1 to just lay it out in the following seven
2 circumstances, in the following two
3 circumstances.

4 CHAIR HOLTZMAN: Well, yes. I mean,
5 let's put it this way, this draft was done in
6 about two hours, am I correct?

7 JUDGE BAKER: It's serving its purpose
8 in having people have something to respond to.

9 CHAIR HOLTZMAN: It could have some,
10 yes. It's a beginning. I didn't mean to be
11 derogatory when I said lazy out. It just was in
12 two hours how much can you, how much nuance can
13 you include?

14 With regard to the issue of victims
15 and how broad the right should be on appeal, I
16 mean, in a way the Defense Department has taken a
17 kind of first stab at this by, except for the
18 Marine Corps, restricting the right of Special
19 Victims' Counsel or Victims' Legal Counsel to
20 cases of sexual assault.

21 I mean, that might be a legitimate
22 place to begin ultimately. Maybe the question,

1 you could expand the rights to other victims.
2 But it could be where you have a Special Victims'
3 Counsel. Maybe the appellate right goes to the
4 victim where that Special Victims' Counsel has
5 been appointed.

6 I just throw that out as a way of
7 drawing a distinction here among victims. I'm
8 not saying one is better than the other, but the
9 military has already made this decision.

10 COL LIND: But what you do have with
11 respect to this is then you'll have, say you have
12 a sexual assault case with two victims on an
13 evening. One of them is entitled to the Special
14 Victims' Counsel and the other one is say a
15 college student across town that has nothing to
16 do with the military and doesn't get one, there's
17 a bit of an inequity there.

18 You know, whether that should be, and
19 the other thing I will throw out is any time we
20 expand duties and expand things without funding,
21 without resources, that causes challenges.

22 CHAIR HOLTZMAN: Okay, anybody have

1 any other questions? Professor Taylor?

2 PROF. TAYLOR: I would just like to
3 come back to just a couple of points that I
4 raised at the beginning and that both the Chair
5 and Mr. Stone raised.

6 And that is that in the aftermath of
7 the *Martinez* case which appears to say that if a
8 court of criminal appeals denies the petition for
9 a writ of mandamus, it's over, no appeal to the
10 CAAF, is that correct? Is that basically what
11 *Martinez* said?

12 JUDGE BAKER: Yes, sir.

13 PROF. TAYLOR: And back to you,
14 Colonel Orr, you said earlier as long as victims
15 can file writs, it's not necessary to make them
16 real parties in interest.

17 COL ORR: Correct.

18 PROF. TAYLOR: So what is the comfort
19 level that the victim really has had a chance to
20 have his or her rights vindicated if it stops at
21 the Court of Criminal Appeals if one of the
22 things we're trying to do here is to increase the

1 trust in victims to come forward knowing that
2 their interests are going to be protected to the
3 highest degree possible.

4 It just seems to me that we're not
5 building a culture of trust when we have rulings
6 that move the ball in that direction,
7 particularly when you have a Senate proposal now
8 that's of course in the course of markup and
9 that's Section 547 which I'm sure you're familiar
10 with which talks about making victims real
11 parties in interest in this very area that we're
12 talking about.

13 I just can't wrap my brain around how
14 those two fit together. So if you could help --

15 COL ORR: I think they fit together
16 very well. By stopping at the Service Courts, I
17 wasn't saying that that's what had to happen, I'm
18 just saying that's what it is now.

19 The real party in interest is where I
20 have concern because that brings with it certain
21 obligations and duties of all the parties. And
22 what that may do is when you have multiple

1 victims, and this is where we have cases in the
2 Air Force Court where you have multiple victims
3 and the appellant was convicted of one of them.

4 But within that record of trial, there
5 were sealed exhibits relating to the privacy of
6 multiple victims. If you're a real party in
7 interest, the court has no mechanism to say you
8 can't have the private information of these
9 victims in which your client was not convicted
10 of.

11 Nor should the other victims' counsel
12 get all of that as well. So you have access, you
13 can file, but as far as the sealed portions of
14 the records, there should be, it's almost like an
15 on/off switch.

16 If you are a real party in interest,
17 you get it all and that takes away the court's
18 discretion in terms of doing what's right to
19 protect those victims whose information was not
20 put in the record of trial and the person was not
21 convicted of.

22 (Simultaneous speaking.)

1 PROF. TAYLOR: That's a drafting
2 question --

3 COL ORR: That's the concern, right.

4 PROF. TAYLOR: -- to be sure that you
5 limit the access to that which pertains to the
6 victim who is asserting the real party in
7 interest in that case. That would be a drafting
8 issue.

9 But would anyone else like to comment
10 on 547?

11 JUDGE BAKER: Well, I would comment on
12 two things. First, and I know you know this but
13 the Court is not making a policy choice here.
14 It's in good faith trying to interpret 6B.

15 I didn't sit on it, and so I'm just
16 reading it. And it says when examined, this
17 statute is quite straightforward. It is a clear
18 and unambiguous grant of limited jurisdiction of
19 the Courts of Criminal Appeals.

20 Now the debate might be whether it's
21 a clear and unambiguous grant of jurisdiction to
22 the Court of Criminal Appeals. Whether it's

1 limited to the Court of Criminal Appeals, that
2 someone can debate.

3 PROF. TAYLOR: Precisely.

4 JUDGE BAKER: But the Court having
5 decided *Martinez*, the answer is well, this goes
6 back to my comment about literal which is if the
7 Congress wishes the US Court of Appeals for the
8 Armed Forces to play a role, then say so. That's
9 the way to do it, not by inference but by direct
10 language.

11 And as I indicated in my policy
12 points, there's the issue about how victims are
13 treated and where the line might be drawn between
14 them, the importance of uniformity in the
15 military, and that I think comes from going up to
16 the CAAF, and the importance of civilian review
17 in terms of a confidence establishing mechanism.

18 And so I believe that. But that's not
19 the law or expressly in the law. I would be
20 careful about real party in interest as the
21 standard because to be perfectly honest, and I
22 speak only for myself as I have all day, I

1 haven't a clue what that means.

2 And I kind of get that the United
3 States is a party in interest, and I kind of get
4 that the defendant is a party in interest. But
5 what I'm looking for after that is who is
6 standing in jurisdiction to be heard.

7 And those are terms that courts
8 understand, real party in interest, if we did a
9 closed book exam right now, we would all guess
10 the answer and come up with different answers.

11 And that's a place where some clarity,
12 there's clear doctrine on standing and
13 jurisdiction can be clear if written clearly. So
14 I would encourage movement away from that and
15 towards saying what you mean or else deferring to
16 the traditional concept of standing.

17 COL LIND: May I bring up a couple of
18 points as well after you've finished writing?

19 CHAIR HOLTZMAN: Is it in response to
20 Mr. Taylor's question? Please.

21 COL LIND: One of the other concerns
22 that you might want to consider is right now the

1 Court of Appeals for the Armed Forces has ruled
2 it doesn't have jurisdiction to consider these
3 writs that come up.

4 *E.V.* has filed in Federal District
5 Court. And the Federal District Court in DC has
6 transferred venue over to California. It's *E.V.*
7 v. Robinson 2016 US District Lexis 100866. So
8 one of the other considerations you might have is
9 is this how you wish this to play out.

10 The other concern on the other side is
11 delay, particularly when you have accused of pre-
12 trial confinement. So you have a case that is
13 now taking its time going to the CCA District
14 Court or the Court of Appeals for the Armed
15 Forces, each of those scenarios is going to add
16 extra steps, extra delay to impact potentially
17 the speedy trial rights of the accused.

18 So just, that's another consideration
19 that you might want to keep in mind.

20 PROF. TAYLOR: I would just like to
21 thank you all for your service and as well as
22 your testimony here today, but I have no other

1 questions.

2 VADM TRACEY: I have no other
3 questions, thank you.

4 MR. STONE: I want to go if we can on
5 the comment about speedy trial. Article 6B as it
6 currently stands specifically gives a victim the
7 right to proceedings free from unreasonable
8 delay.

9 And it seems to me that impacts on
10 this question that Judge Baker mentioned about
11 whether victims have an interest when motions are
12 filed routinely on timeliness matters.

13 And the timeliness matters come up
14 quite often in civilian victims' rights cases.
15 And the example I would give in the military is
16 if you have a case where the defense counsel has
17 moved repeatedly for delays and sometimes they
18 may be unavoidable.

19 Military judges get new assignments,
20 they can't be found when needed, courtrooms are
21 not available, people get transferred around, and
22 a case has been repeatedly delayed.

1 It's not uncommon for a victim to come
2 to the victims' counsel and say this is really
3 crazy. My right to be free from unreasonable
4 delay is being violated either because I'm about
5 to be transferred to a different assignment where
6 I can't be present, or I'm about to leave the
7 service and I would like to see some resolution
8 before I do, or I have an illness like AIDS. I'm
9 going to die in a few months and I would like to
10 see this resolved before I die.

11 So absolutely, victims have a right
12 and an interest, a legal interest in proceedings
13 free from unreasonable delay. And if you start
14 artificially limiting public pleadings and tell
15 victims they don't have a right to get them, then
16 victims lose the chance to figure out if they
17 need to respond, if they can be available at the
18 new trial date which the defense counsel or even
19 the prosecution is moving for.

20 And it's often true that the victim
21 and the victims' counsel will say well, the day
22 you want doesn't work for us, but could you

1 postpone it one more week and then everybody says
2 sure. But if you don't give the victims notice
3 of that, they find out when it's too late.

4 So there is a reason that it says all
5 pleadings filed by all parties, it's not simply a
6 lazy man solution, it's not simply a statement
7 with no necessity. And frankly, I would like you
8 to expound, if you would, on why you think, you
9 said this is the burden of noticing them.

10 In the military proceedings I have
11 been involved with, the notice was and the
12 pleadings were all done electronically as I think
13 Colonel Lind is now expressing, the pleadings are
14 on file and accessed electronically and we were
15 filing electronically and giving notice
16 electronically.

17 And adding more addresses to the
18 electronic distribution was definitely not
19 something that I would call much of a burden. So
20 I want to know what burden you think it adds to
21 give people notice of all pleadings and to avoid
22 all litigation, which by the way you don't get in

1 the civilian courts. When you get all pleadings,
2 you get all the pleadings. Why the military is
3 different again?

4 JUDGE BAKER: Well, if that's directed
5 at me, I hope you haven't misheard me. I did not
6 say it was a burden. I raised a number of
7 concerns, and by saying the word concern, a
8 factor to consider.

9 And one of the issues that came up
10 before our court, and this dealt with the
11 jurisdictional timeline for appealing. So
12 defendants had to appeal within a certain time
13 limit to our court to invoke its jurisdiction.

14 And what happened in a number of cases
15 is that they couldn't locate the appellant in a
16 timely way in order to invoke the jurisdiction.
17 And so the only thing I was trying to suggest is
18 that on issues of notice, in the military where
19 people do move around and get out of the military
20 and sometimes do or do not leave their home of
21 record and so on, it's something that the
22 Congress should take into account.

1 That doesn't mean don't do it. Figure
2 out how to do it. Perhaps when you check out,
3 you have to do it in a certain way. So I hope
4 you didn't get from me a sense that I didn't
5 believe in notice. I just said it was something
6 that has to be done in a particular way and with
7 great care in the military because in my
8 experience, I've seen endless litigation on
9 whether someone received notice and how.

10 On the question of whether all
11 pleadings should brief, all I was hoping to
12 suggest there is be express as to which
13 pleadings, and there may be some that all parties
14 can agree you don't need to have notice on. And
15 there may be some in which everybody agrees you
16 should have notice on.

17 MR. STONE: Well, I don't understand.
18 You just said all parties agree, but if a victim
19 is not a party, they're not even on notice when -

20 -

21 JUDGE BAKER: No, I meant, in the
22 context of that sentence I meant to include all

1 people with standing over the subject. That's
2 what I meant.

3 MR. STONE: Then let's take that last
4 comment because I think the last comment you just
5 made, standing over the subject goes to this
6 question of what is a real party in interest.

7 In Maryland law, for example, the
8 victim has standing over in any court where an
9 issue of the victim's rights is at issue and as
10 to that issue. And I think when they say real
11 party in interest, they're saying that a victim
12 is a real party where their interest, mainly
13 their rights, are at stake.

14 Would I rather have them, their
15 statute use language like Maryland uses, it's a
16 little clearer? Yes, I certainly would. But I
17 don't think it's a phrase that's that difficult
18 to comprehend that when a victim's right is being
19 litigated, they therefore have standing as to
20 that right.

21 Again, I don't understand why there
22 needs to be, maybe you could tell me, endless

1 litigation on receiving notice. If you get
2 notice electronically of every document, that's
3 easily resolved.

4 And states like Maryland simply have
5 a regulation that says if you want notice, victim
6 has to register either, in this case it would be
7 with the military or the military court where the
8 pleading, the proceeding is going on, the address
9 they wish to be contacted at. And if they don't
10 provide an address or if they say they don't want
11 notice, it's very easy, they don't get notice.

12 But in this electronic age, providing
13 notice is not only easy, it's easily documented.
14 So I don't understand what the difficulty is.

15 JUDGE BAKER: Then my proposal would
16 simply be the military should look very carefully
17 at adopting Maryland's law and see if it would
18 address the issues presented. No push back
19 there. We're really trying to help here, not
20 debate. If there's a law out there that will do
21 it better --

22 RADM REISMEIER: With one small caveat

1 and that is when the word all is used, you
2 necessarily are sweeping in *ex parte* pleadings
3 into it because now you've said all. So you just
4 have to recognize if you say all, then you're
5 going to get notice of *ex parte* filings as well,
6 even though that may not be what anybody wants.

7 MR. STONE: When you get notice of
8 them, whether the *ex parte* pleading is sealed
9 from the prosecutor, then it would say it's
10 sealed from the victim too. It's entirely
11 possible that the person filing the *ex parte*
12 pleading doesn't mind having the victim get it.

13 RADM REISMEIER: No, no, I understand.
14 I'm just saying, just recognize that there are *ex*
15 *parte* pleadings that are filed where nobody gets
16 notice other than the person who filed it. The
17 other side may not even get notice that there was
18 an *ex parte* --

19 MR. STONE: Well in fact, isn't that
20 what's going on with the privilege rulings now in
21 terms of access to the documents --

22 (Simultaneous speaking.)

1 RADM REISMEIER: Yes, I'm not pushing
2 back --

3 MR. STONE: -- appeals that the
4 victims are not getting notice, that the defense
5 counsel is getting access to documents which as
6 Chair Holtzman said, they didn't get access to
7 when this was litigated and they made the initial
8 record.

9 And a judge there felt perfectly
10 competent to rule on it, and now all of a sudden
11 without notice to the victims, those documents
12 are being distributed to defense counsel in
13 pursuant to a practice which is not followed in
14 any US Court of Appeals, I don't think any state
15 court anywhere in the country.

16 RADM REISMEIER: Yes, I'm not
17 disagreeing. I'm just saying that all is going
18 to include them.

19 CHAIR HOLTZMAN: Okay, just to follow
20 up, I just myself want to say that as a drafting
21 matter, we're not talking necessarily about
22 anything else, but generally speaking from a

1 drafting point of view you don't want to use
2 words like all. Okay? I'll just leave it at
3 that.

4 Secondly, I take your concern with the
5 term real party in interest very seriously
6 because we don't want to use language that the
7 courts are not familiar with, and that will lead
8 to endless litigation and results that are not
9 necessarily what we want.

10 And if the courts, and if what we're
11 really talking about here is the standing to have
12 your position heard, and the right to have that
13 position heard, I think it's a very important
14 point that you make because this could, you may
15 have to file pleadings to real party in interest.
16 Well, suppose they decide you're not a real party
17 in interest and you can't file the pleading. So
18 the whole --

19 JUDGE BAKER: You'll find that out
20 later.

21 CHAIR HOLTZMAN: Yes, you'll find that
22 later on. So the whole purpose of point four

1 could be completely vitiated. So I think that
2 it's a very useful point to try to structure
3 these rights in language and in ways that are
4 familiar to the courts and that use existing
5 language if we can do that.

6 And I don't know if there's time to do
7 that. But I take your point and I think that
8 that's a very useful point to us.

9 I just wanted to ask one other thing
10 in terms of rights. We don't generally have this
11 in our system, although maybe Maryland is way
12 ahead of everybody here. But I know in Europe
13 they do allow witnesses who are victims in
14 certain cases to have some standing, some
15 appearance in proceedings.

16 And I don't know whether any of you
17 are familiar with that, whether there's language
18 or concepts that could be drawn from that
19 experience.

20 MR. STONE: Do you mean attorneys?

21 CHAIR HOLTZMAN: No, I'm talking about

22 --

1 MR. STONE: You mean witnesses?

2 CHAIR HOLTZMAN: I'm talking about,
3 maybe not witnesses but victims, and it may be, I
4 know that victims, and I don't mean necessarily,
5 we're not talking about sexual assault cases,
6 have the right to call witnesses, I mean much
7 broader rights than being discussed here, and
8 they have the right to call witnesses for example
9 in trial.

10 And so I'm assuming that there may be
11 some appellate rights as well. And I just was
12 wondering if any of you knew about that and
13 whether that's a place that we could look to for
14 some enlightenment in terms of language and
15 approach, that's all.

16 JUDGE BAKER: And are these in common
17 law countries or civil law countries, do you
18 happen to know?

19 CHAIR HOLTZMAN: I don't --

20 MR. STONE: Civil law countries.

21 JUDGE BAKER: Okay.

22 CHAIR HOLTZMAN: Yes, right,

1 definitely. I mean, I'm thinking specifically of
2 Poland as an example. But if you knew, that
3 would have been helpful. But I guess we have to
4 do some research on that.

5 Okay, if we have no further questions,
6 let me thank you very much for your time, for
7 your willingness to share your expertise. This
8 is really very important to us.

9 I don't know whether the train is out
10 of the station on this legislation in the sense
11 that it could get adopted without our input. But
12 I hope that some of the suggestions you've made
13 and the thoughtful views you've given us can bear
14 some fruit in connection with whatever
15 legislation is adopted. So thank you for your
16 time again. Appreciate it very much.

17 I guess we'll take a ten minute break.
18 Well, we actually have a break for lunch.

19 (Whereupon, the above-entitled matter
20 went off the record at 11:52 a.m. and resumed at
21 1:04 p.m.)

22 CHAIR HOLTZMAN: Good afternoon.

1 We're going to resume our -- our public meeting.
2 We are very pleased to hear from Service Defense
3 Appellate Division's perspectives on victims'
4 appellate rights, and we have the following
5 presenters. I want to thank each of you for
6 coming here and sharing with us your expertise
7 and your thoughts and reflections.

8 First, we will have Lieutenant Colonel
9 Christopher Carrier, U.S. Army, Chief, Capital
10 and Complex Litigation Branch; then Mr. Brian
11 Mizer, U.S. Air Force, Appellate Defense
12 Division, Senior Appellate Defense Counsel; then
13 Major Lauren Shure, U.S. Air Force, Appellate
14 Defense Counsel; then Captain Andrew House, U.S.
15 Navy, Director, Navy Marine Corps Appellate
16 Defense Division; and finally, Lieutenant
17 Commander Michael Meyer, U.S. Coast Guard, Chief,
18 Defense Services Division.

19 Thank you again for being here, and we
20 will start with Lieutenant Colonel Carrier.

21 LTC CARRIER: Thank you, Madam Chair
22 and members of the Panel. Thank you for the

1 opportunity to address these important issues
2 today.

3 I am currently the Chief of the
4 Capital and Complex Litigation Branch at Army
5 Defense Appellate Division, but my comments are
6 my own and do not necessarily reflect the
7 positions of the Department of the Army or the
8 Army Judge Advocate General. They do reflect my
9 experience as a trial counsel, trial defense
10 counsel, appellate defense counsel, detainee
11 abuse prosecution team chief, Joint Service
12 Committee Working Group Executive Secretary, and
13 court-martial judge.

14 As the Army representative on the JSC
15 Working Group, I worked on the 2012 Revision to
16 Article 120 of the UCMJ and the 2013 Revision to
17 the Military Rules of Evidence. Then, as a
18 court-martial judge, I worked in the system
19 affected by those changes. To anyone who has
20 ever said that it would be poetic justice that
21 the people who make rules and regulations should
22 have to live with the results, I can confirm that

1 yes, that can be awkward.

2 That experience also makes me more
3 keenly aware that anyone in a position to
4 influence changes in law and policy should to the
5 maximum extent possible foresee and minimize
6 unintended effects when enacting improvements.
7 Closely identifying the problems to be solved and
8 the goals to be achieved is the burden that we
9 should take on now rather than making broad
10 changes and relying on the courts to sort out the
11 details.

12 There is famously in the military
13 culture some reluctance to change. The Duke of
14 Wellington, victor of Waterloo, of course, and
15 then later the Chief of Staff for the British
16 Army, famously said that he was not opposed to
17 change, but that change had to come at the right
18 time, and the right time for change was when it
19 could no longer be avoided. I'm not opposed to
20 changes in the military justice system in
21 principal or in the particular matter of
22 stressing or enhancing the participation of

1 victims' counsel.

2 As a court-martial judge, I use my
3 discretion over trial proceedings under Rule for
4 Courts-Martial 801 to ensure that victims'
5 counsel were treated as officers of the court in
6 matters such as access to pleadings,
7 participation in trial sessions and pre-trial
8 conferences, addressing the court from the
9 lectern, and reasonable consideration in
10 scheduling. As a matter of justice as well as
11 settled law, people who are not a party to a
12 criminal case often have rights that must be
13 recognized and protected.

14 I would also add, and this is a
15 departure just based on a question that came up
16 this morning, on the subject of the confidential
17 practice, I was an Army court-martial judge in
18 Bavaria and Italy, and before that, I was also
19 assigned in Belgium, and indeed, on the
20 Continent, in trials that I observed, there was a
21 victim's attorney who would make an opening
22 statement, question witnesses, and make a closing

1 statement, but now you would need an actual
2 expert in comparative law to talk about how that
3 works and how to implement that. I don't know
4 that. The only trial that I observed that I
5 understood for the most part was a trial in
6 Belgium. My German is not that great.

7 But it's not as an opponent of change
8 in general or as an opponent of victims' rights
9 in particular that I join in the specific
10 cautions that were raised by the other Services
11 and raised this morning. Bold and broad changes
12 to the law may seem more stirring, but that
13 approach increases the repercussions, and those
14 -- and by repercussions, I mean uncertainty,
15 inconsistency, and possibly the alienation of the
16 rights of trial participants, most of whom are
17 the men and women of the Armed Forces.

18 A lot of the points were made this
19 morning very well, and so I don't want to be
20 repetitious. My remarks were prepared last
21 night. But I would say that, to me, it was clear
22 from what was said this morning and looking at my

1 notes and hearing the response and the questions
2 from the Panel that a lot of the issues that are
3 raised are what might be called alarmism or
4 concerns based on certain provisions, or sort of
5 the generalities, that are not necessarily the
6 heart of the matter, or are not necessarily a
7 point of contention, and can be ironed out.

8 The Office of General Counsel and the
9 other Services have provided in writing and here
10 today sound articulation of many reasons that
11 particular portions of the proposed amendments
12 would undoubtedly have unintended consequences
13 harmful to the military justice system and to
14 accused Service members. I'd like to comment on
15 a few of these, but first I want to defend the
16 proposition that the alternative approach -- and
17 by alternative approach I mean specific changes,
18 changes that are specific to the rights of
19 victims -- is a viable alternative. It's not
20 just some kind of subterfuge or some kind of
21 attempt to stall or sabotage improved protection
22 of the rights of victims.

1 A lot of the concern this morning was
2 about whether alleged victims should be made to
3 be parties -- should be stated to be parties or
4 treated as parties. The importance of that to
5 trial practitioners is important because it
6 increases the likelihood of unintended broad
7 changes to the law, broad consequences, and
8 alleged victims should not and need not be made
9 party to the case or accorded all the rights of
10 parties in a criminal case.

11 And in defense of this proposition, I
12 have several paragraphs here on *Kastenberg*, and
13 my opening is -- of this section, in 2013, Chief
14 Judge Baker, who sat I believe in this chair this
15 morning. So I prepared this yesterday to cite
16 this, but I wanted to talk about *Kastenberg* and
17 point out that *LMR* was the alleged victim or the
18 victim in the case. *Kastenberg* is the military
19 judge. So we have a case here being heard by the
20 Court of Appeals for the Armed Forces called,
21 effectively, victim versus military judge, and in
22 this decision, in response to a prospective

1 motion from the victim's counsel asking to be
2 heard on any matter implicating the victim's
3 rights -- and this is important -- the request
4 was to be heard under rights arising under the
5 Military Rules of Evidence, so that's under an
6 executive order under the Rules of Evidence, or
7 the United States Constitution. That was also
8 mentioned in this initial motion.

9 The military judge, at that point --
10 this is before any specific motion has even been
11 filed -- found that *LMR* had no standing, and I am
12 quoting here, "through counsel or otherwise to
13 motion the Court for relief in the production of
14 documents, and the victim's counsel could not
15 argue evidentiary matters in *LMR's* interest."
16 And the court ruled that this was erroneous, and
17 at the time this decision came out, so this is
18 2013, this is when I was beginning my term as a
19 military judge, and so I can tell you that I saw
20 and heard the hand-wringing and teeth-gnashing
21 when this decision came out among military judges
22 who construed this as some kind of new craziness

1 that was allegedly created by the *Kastenberg*
2 decision.

3 The problem with that interpretation
4 of what was going on there is that the *Kastenberg*
5 decision itself made clear that it was not a
6 change. It may have been an unusual situation or
7 clarification of a point, but it was actually
8 pretty well-settled. And so probably Judge Baker
9 would not want to seem immodest and sit here and
10 quote himself, but I will quote his opinion, if
11 you'll allow me.

12 He said that -- this is the quote
13 here, omitting the internal citations: "*LMR's*
14 position as a non-party to the court-martial does
15 not preclude standing. There is a long-standing
16 precedent that the holder of a privilege has the
17 right to contest and protect privilege," and
18 there followed then a string of quotes, and
19 notice that these go beyond privilege: *United*
20 *States v. Wuterich*, that was standing for CBS
21 News, so that's under the -- they cited Rule for
22 Court-Martial 703, so that's an executive order,

1 but also freedom of the press; Center for
2 Constitutional Rights v. United States and Lind,
3 Colonel Lind sat at the other end of this table
4 this morning; United States v. Hardy, that was
5 standing for the victim's mental health provider
6 to assert the right, so that is a privileged
7 case; United States v. Johnson in 2000, finding
8 standing for a non-party to challenge a subpoena
9 during the pre-trial investigation; ABC v.
10 Powell, the famous Colin Powell, finding standing
11 under the First Amendment for ABC News, that was
12 in 1997; and Carson v. Smith, 1995.

13 These are military cases. Next he
14 goes on to cite limited -- pardon me, limited
15 participant standing has also been recognized by
16 the Supreme Court and other federal courts, and
17 here he cites other cases where standing did not
18 depend on being a party, but on the person having
19 rights under the Constitution, attorney-client
20 privilege, or an interest in preventing the
21 disclosure of material in criminal proceedings.
22 That is the -- that's what follows in the string

1 cite of specifically CAAF decisions going back 20
2 years.

3 So it is an established principle
4 long-protected by CAAF that people have a right
5 to be heard in the military justice system when
6 they have rights created by an executive order,
7 by a statute, or the Constitution. The rights of
8 alleged victims at trial and on appeal can
9 therefore be established by specific measures
10 targeted to the actual issues of importance to
11 them. It is not necessary to make sweeping
12 changes and incur unintended legal and logistical
13 consequences in order to protect these rights.

14 And an example of potential unintended
15 consequences: for technical reasons, I can
16 discuss further if desired, but I will give you
17 the thumbnail sketch here. The proposed addition
18 in Article 6b(A)(4)(e), a victim's right to be
19 heard in administrative proceedings, when read in
20 conjunction with the proposed Article 70(e)3,
21 could have the confusing and possibly absurd
22 consequence regarding military -- pardon me, the

1 jurisdiction of military appellate courts, and
2 hence, victim right protection in administrative
3 proceedings could instead be established in
4 separate legislation applicable to the Department
5 of Defense, that is to say, outside the Uniform
6 Code of Military Justice.

7 The current proposal could potentially
8 create a right for alleged victims to appeal
9 administrative decisions to military appellate
10 courts to which the real party and interest, by
11 which I mean the respondent, the person who is
12 adversely affected by the adverse administrative
13 action, would not have a right to appeal. And an
14 alternative reading would be an expansion of the
15 writ authority of the military courts, although
16 that was presumably not the drafters' intent, but
17 it does create a tension in the system.

18 There is no need to create confusion
19 about the jurisdiction of military appellate
20 courts by addressing administrative proceedings
21 in an article of the UCMJ rather than a separate
22 chapter of the United States Code. Moreover,

1 some of the problems identified by the
2 commenters, and in all likelihood, some
3 consequences that no one has yet identified,
4 would interfere with the rights of the parties.
5 To the extent that new practices enacted by
6 statute or executive order infringe on
7 constitutional rights of the accused, the
8 purported infringement, for example, barring ex
9 parte communications necessary for the
10 examination of a constitutional question at trial
11 or on appeal, should and presumably will
12 ultimately fail after much litigation and harm to
13 people's lives.

14 Another source of overbreadth is the
15 proposal -- pardon me, in the proposal as
16 initially drafted, is eliding the distinction
17 between the right to be heard and the provision
18 of counsel at public expense. Not only should
19 the proponents of a change to Article 70 consider
20 circumscribing the scope of representation
21 provided by counsel at public expense, they
22 should consider what class of persons should be

1 entitled to greater protection. Individuals,
2 especially Servicemembers who have been victims
3 of crimes against the person, such as sexual
4 offenses or domestic violence, surely have a
5 greater need for publicly provided counsel than
6 do large corporations with legal departments.

7 And there was discussion on this point
8 as well this morning. One of the questions was
9 what is the -- the scope? Judge Baker asked --
10 pointed out, why make a distinction between the
11 victims of a sexual assault as opposed to child
12 pornography? Other people -- I mentioned
13 domestic violence as a particular point. There
14 is the phrase "crimes against the person," which
15 is a historical term. There's also the question
16 of any offense -- and looking at Article 120 and
17 that revision and defining what the sex offenses
18 were, what we considered was sex offenses as
19 crimes against bodily integrity and the dignity
20 of the person, and if you look at crimes against
21 the person as a class of people who deserve
22 special protections, that would make sense.

1 Also, and I admit bias here, I am more
2 in favor of military members and their families
3 having protection as well as an incident of
4 service and something provided by the Services,
5 by the judge advocate generals. I respect the
6 legal rights of institutions with financial
7 resources and lawyers already on the payroll, but
8 I don't worry that their rights will be trampled
9 underfoot because they lack the means to
10 vindicate their rights.

11 And when I say "military," I don't
12 mean as much the officers as much as the enlisted
13 Soldiers, who are not as well-paid and would not
14 necessarily have access to legal representation
15 unless it is provided for them. And it is the
16 men and women of the Armed Forces and their
17 families that we should worry about in this
18 context more so than AAFES or Google or Walmart.

19 Also, a concern for those of us who
20 represent Servicemembers is the delay that would
21 result from the proposed amendments as currently
22 drafted, and again, I think this goes to the

1 question of the initial draft not necessarily
2 considering some of the matters that we would
3 deal with logistically. A criminal accused has a
4 constitutional right to a speedy trial, and
5 responsibility for delay caused by assertion of
6 victims' rights should be attributed to the
7 Government.

8 I mentioned that I do detainee abuse
9 prosecutions. Of the detainees who were abused
10 by Servicemembers, a couple of them are deceased.
11 One was in Guantanamo, which made him easy to
12 find. Others were unnamed. Others were in Iraq
13 or Afghanistan. The logistical difficulties
14 potentially are -- are considerable, and as for
15 crimes against the person, that's even if anyone
16 listens to my recommendation of narrowing the
17 scope. If it goes to all offenses, then any time
18 there is credit card fraud or a bad check is
19 written or anything like that, you could have
20 many victims. You could have victims who could
21 be hard to find, or you could certainly have
22 victims who do not actually need to have counsel

1 provided by the Services to protect their rights.

2 And appellants themselves, or their
3 counsel, should not be required to find and serve
4 pleadings on alleged victims, as would be
5 required under the proposed amendment to Article
6 6b(e)4. Rather, it should be expressly the
7 government's responsibility to conduct
8 administrative duties necessary to the
9 enforcement of the victim's rights because to do
10 otherwise would prejudice appellant's
11 constitutional rights by requiring them to devote
12 resources to a matter not germane to their
13 defense or appeal.

14 Finally, I would note concerns about
15 the possible effect of the proposed Article
16 6b(a)2 amendments in the context of capital
17 litigation. The current very broad language
18 would require disclosure of appellant's *ex parte*
19 request to victim's appellate counsel. When
20 requesting expert assistance to determine the
21 competency of a client, such *ex parte* requests
22 would be available to victim's counsel. This

1 practice would effectively disclose the kind of
2 personal information about the appellant that the
3 amendment seeks to protect on behalf of victims.

4 In four capital cases arising in the
5 *Army, Loving, Murphy, Kreutzer, and Akbar*, all
6 these appellants requested and received appellate
7 sanity boards as well as mental health expert
8 assistance on appeal. For *Akbar*, the request was
9 made *ex parte*. Similar *ex parte* requests have
10 been pursued in *United States v. Hennis*.

11 The bases of these requests often
12 include mental health and medical records. Thus,
13 requiring such an *ex parte* motion to be served on
14 victim's counsel would sacrifice the appellant's
15 privacy and privileged communications in favor of
16 alleging a broad right to receive all filings,
17 even though such motions have no bearing on the
18 victim's privacy or other cognizable right.

19 This may violate appellant's
20 constitutional right to due process and privacy.
21 In *United States v. Garries*, this was a 1986
22 case, so it's the Court of Appeals for the Armed

1 Forces, the former name of the higher court,
2 CAAF, that court found that, and I'm quoting
3 here, "Although Appellate provided no authority
4 for the use of *ex parte* proceedings in the
5 military, we recognize inherent authority in the
6 military judge to permit such procedure in the
7 unusual circumstances where it is necessary to
8 ensure a fair trial."

9 In other words, where no provision is
10 made in statutes or executive orders, sometimes
11 it is necessary to find one in the power of the
12 court because it protects a constitutional right,
13 but that is the kind of problem that if it can be
14 identified up front, then people who have what
15 are construed as less important cases, the cases
16 that don't make the headlines, the cases that
17 don't get all the way to the higher courts, they
18 may have been settled wrongly and according to
19 the wrong rule until it gets to the point of an
20 issue like that being decided by the highest
21 court.

22 Even -- so in this and similar

1 circumstances, the due process rights of the
2 criminal accused will necessarily invalidate
3 overly broad statutes and executive orders, and
4 finding these boundaries through litigation will
5 cause unnecessary confusion.

6 In summary, although it is more
7 difficult and less exciting to make changes to
8 the law that are narrow and carefully targeted,
9 we should remember that the matters we rather
10 clinically refer to as cases, are landmark events
11 in the lives of the accusers and the accused.
12 The more carefully the changes are made, the less
13 there will be unintended, unnecessary, and
14 undesirable effects on the trial participants.
15 Thank you.

16 CHAIR HOLTZMAN: Thank you very much,
17 Colonel. We'll hear next from Mr. Brian Mizer.

18 MR. MIZER: Good afternoon, Madam
19 Chair, honorable members of the Panel. I am
20 Brian Mizer, Senior Appellate Defense Counsel
21 with the Air Force Appellate Defense Division,
22 and along with Major Lauren Shure, we'd like to

1 thank the Panel for this opportunity.

2 I know the Panel has our biographies,
3 but I will briefly state that I have been doing
4 appellate-specific work for the U.S. Navy as both
5 an active duty and Reserve judge advocate since
6 2004. I served as an assistant federal public
7 defender here in the Eastern District of Virginia
8 for five years, and I spent the last two years as
9 a civilian with the Air Force Appellate Defense
10 Division.

11 Major Shure is also an experienced
12 defense counsel. She served as a trial defense
13 counsel and served the last two-and-a-half years
14 at the Air Force Appellate Defense Division
15 defending Airmen.

16 And that is where I would like to
17 begin my brief comments, with Airmen. Major
18 Shure and I are here today for one simple reason:
19 to speak on behalf of the Airmen who are our
20 clients. We are here on their behalf. As you
21 know, the Air Force has been the vanguard of a
22 concerted effort to acknowledge and help victims

1 of sexual assault while always remaining faithful
2 to our nation's founding charter.

3 Now those efforts have continued on
4 appeal. Just this week, I was informed the Air
5 Force Trial and Appellate Government Division has
6 established a program to provide timely appellate
7 notice to special victims' counsel of filings
8 made on direct appeal. As my counterpart in that
9 division, Mr. Gerald R. Bruce, is scheduled to
10 testify before this Panel later this afternoon, I
11 will let him discuss that matter with you.

12 As for my comments, I believe I can
13 best address apparent misconceptions about
14 military appellate practice by accurately
15 describing our military appellate practice
16 before, then turning to reasons that the Panel
17 should continue on its deliberate and measured
18 approach to balancing the equities of all
19 involved in the appellate process.

20
21 On this, I want to talk to you about
22 two things: access and timeliness. Along the

1 way, I will also explain what happens on appeal,
2 what appellate defense counsel do, and I will
3 also clarify the process for handling records
4 that have been ordered sealed by the court-
5 martial.

6 First, I want to talk about access.
7 By access, I mean access to the entire appellate
8 record. Appellate defense counsel require full
9 access to the appellate record to fulfill our
10 constitutional, as well as statutory and ethical
11 responsibilities. This naturally brings up the
12 issue of sealed records. With respect to sealed
13 materials, the practice before the Air Force
14 Court of Criminal Appeals closely parallels the
15 handling of classified materials familiar to me
16 and my former appellate defender colleagues here
17 in the Eastern District of Virginia.

18 As we currently practice in the Air
19 Force, the defense files a motion to view sealed
20 exhibits and motions pursuant to Rule 23.3f,
21 which is granted approximately a month later.
22 The court then issues what amounts to a

1 protective order prohibiting appellate counsel
2 from disclosing the contents of those records.
3 Counsel then schedules an appointment with the
4 clerk of court to examine the materials. This
5 takes place in a windowless court space that is
6 indistinguishable from any classified SCIF in
7 which I have worked.

8 After reviewing the materials, counsel
9 is required to reseal with labels bearing
10 counsel's name and the date of access and return
11 the materials to the court. You actually just
12 call the clerk in the court, the clerk comes and
13 retrieves them from that space.

14 Additionally, I want to add, while
15 appellate counsel must fulfill our professional
16 and ethical duties to our client, this does not
17 involve disclosing any of the sealed material to
18 our clients except where it is both reasonably
19 necessary to advise our clients and expressly
20 authorized by the court. This is what the Rules
21 say, and this is what we must do.

22 This brings out an important

1 distinction between military and trial -- trial
2 appellate -- and trial practice, where the
3 accused is physically with his attorneys in the
4 courtroom, and military appellate practice, where
5 the accused and counsel will likely never meet,
6 and the accused never appears before a court.

7 To the extent sealed materials become
8 the subject of litigation on direct appeal, which
9 occurs in a minority of cases with sealed
10 material, the pleadings are filed under seal, and
11 the appeal often ends with an unpublished
12 decision in which the court does not discuss
13 sealed material. Oral argument is statistically
14 rare before the Air Force Court of Criminal
15 Appeals, and to the extent sealed material would
16 need to be discussed, the court would issue an
17 additional protective order, as the Court of
18 Appeals for the Armed Forces did this last term
19 in United States v. Martin last April, and the
20 hearing could also potentially be sealed.

21 While the handling of sealed materials
22 by appellate defense counsel mirrors the handling

1 of classified materials pursuant to the national
2 security privilege in federal district court, our
3 responsibilities are broader than our
4 counterparts' in the federal public defender's
5 offices in light of our obligation to raise
6 ineffective assistance of counsel claims on
7 direct appeal, unlike in the federal system, and
8 safeguards rooted in the historical distrust of
9 military tribunals.

10 As Justice Black said in *Toth v.*
11 *Quarles*, there are dangers lurking in military
12 trials which were sought to be avoided by the
13 Bill of Rights and Article 3 of our Constitution.
14 Among these safeguards is the requirement that
15 both appellate defense counsel and the Court of
16 Criminal Appeals review the entire record of
17 trial, and let me emphasize, the entire record of
18 trial.

19 Post-conviction, an appellate defender
20 steps in to grade the homework, and when we do,
21 we are there to grade everyone's work. The
22 standard that we use is the Constitution, the

1 Uniform Code of Military Justice, the Manual for
2 Courts-Martial, as well as 66 years of military
3 justice jurisprudence.

4 To make this a bit clearer, military
5 appellate counsel scrutinizes the evidentiary
6 rulings of the military judge and assesses
7 whether counsel, both trial and defense,
8 fulfilled their respective constitutional
9 obligations. This is our job, and there is no
10 substitute for an appellate defense counsel
11 acting in this role.

12 As the Court of Appeals for the Armed
13 Forces said in *United States v. May*, which is at
14 47 M.J. 478, a military appellant is entitled to
15 "a champion on appeal." It's a language taken
16 from the *Douglas* case out of the Supreme Court.
17 While these words may sound like hyperbole, I
18 assure you, they're not. They're not to an
19 Airman who has had constitutional legal errors in
20 his case, an Airman whose guilt is in a lesser
21 degree than found, or an Airman who has received
22 an unjust sentence.

1 To be sure, after reviewing the entire
2 record, the appellate defender may have knowledge
3 of the case that the military judge, trial or
4 appellate, does not. This may make certain
5 information in the records important, relevant,
6 or even exculpatory.

7 With this in mind, there is Rule for
8 Court-Martial 1103A, which you heard discussed
9 this morning. This rule permits access to
10 defense counsel and other appellate reviewing
11 authorities, but not disclosure of sealed
12 records, in order to ensure that there were no
13 Brady violations, no abuses of discretion by the
14 military judge, and no ineffective assistance of
15 counsel.

16 The point that I am making is that the
17 Rules for Courts-Martial strike the necessary
18 balance between protecting the rights of victims
19 and assuring appellants' due process rights are
20 protected. For the victim, it protects their
21 rights by limiting access to a very limited
22 number of authorized parties, and then limiting

1 disclosure thereafter to the military courts of
2 appeals.

3 As for the appellant, this leads me to
4 my second point, and that is timeliness. For the
5 appellant, his or her rights include the due
6 process right to timely appellate review. The
7 court has held that that must occur within 18
8 months of docketing before the presumption of
9 unreasonable delay set forth in United States v.
10 Moreno, which is at 63 M.J. 129, is triggered.

11 The Air Force Court of Criminal
12 Appeals has exceeded this time frame in at least
13 three cases this year, which may in fact result
14 in the outright dismissal of the charges and
15 specifications at the Court of Appeals for the
16 Armed Forces. In recent months, there has been
17 significant litigation in the Air Force Court of
18 Criminal Appeals regarding the proper application
19 of RCM 1103A, and this litigation has resulted in
20 delay.

21 For example, in a recent case, between
22 the filing of the motion to view the sealed

1 materials and the court's order permitting me to
2 actually see them, there was a 31-day delay. As
3 drafted, RCM 1103A firmly protects the disclosure
4 of sealed materials, but it does not prohibit
5 access to those materials. The current procedure
6 protects victims' privacy rights while also
7 balancing appellant's right to competent
8 appellate representation.

9 One potential change that may
10 alleviate some concerns with regard to sealed
11 records is this: RCM 1103A could be amended so
12 that the appellate court could limit access to
13 only appellate defense counsel. That is because
14 at the early stages of review, the government has
15 no obligation to review that record of trial, and
16 it could be triggered by a situation where the
17 court -- if the appellant was able to convince
18 the court that it was an issue, then the records
19 could be further disclosed.

20 By doing this, we eliminate
21 potentially two, possibly more, government
22 counsels reviewing those privileged records.

1 Ultimately, this is a reasonable balance between
2 the rights of the accused and the need to ensure
3 the victim's continuing privacy rights.

4 In summary, I submit that the
5 appellate procedures set forth in the Manual for
6 Courts-Martial currently strike the proper
7 balance between the due process and rights to
8 counsel of military appellants and the victim's
9 privacy interests. I urge the members of the
10 Panel to move deliberately and cautiously as it
11 considers changes to a system of appellate review
12 that already deprives Airmen of many rights
13 afforded to their civilian counterparts, such as
14 you heard this morning, the right to tenured
15 trial and appellate judges and an independent
16 judiciary, and which has thus far survived due
17 process challenges at the Supreme Court in both
18 *Weiss* and *Edmond*.

19 Thank you for letting us speak on
20 behalf of our clients. Major Shure and I stand
21 ready to answer any questions that the Panel may
22 have.

1 CHAIR HOLTZMAN: Thank you very much,
2 Mr. Mizer. Major Shure, welcome. Do you have a
3 separate statement that you want to make?

4 MAJ SHURE: No ma'am, no additional
5 element.

6 CHAIR HOLTZMAN: Okay. Thank you very
7 much.

8 Our next presenter will be Captain
9 Andrew House, Navy.

10 CAPT HOUSE: Thank you, ma'am, thank
11 you.

12 Good afternoon, ladies and gentlemen.
13 It is an honor and privilege to speak before this
14 Panel today, and I sincerely appreciate this
15 opportunity to render my thoughts on the
16 potential expansion of victims' rights practice
17 into the appellate phase of military justice.

18 I should begin by noting that my
19 comments and thoughts today are my own and do not
20 reflect the official policy of the Navy or Marine
21 Corps or their respective judge advocate
22 divisions.

1 As I provide these comments and answer
2 any questions you may have, I think it is also
3 fair to advise you that I've served in my current
4 position as Director of Navy and Marine Corps
5 Appellate Division -- the Appellate Defense
6 Division for the Navy-Marine Corps for a little
7 over three very interesting weeks, and I am by no
8 means an expert in the mechanics of military
9 appellate work.

10 That said, I have discussed this issue
11 with my appellate defense team. I have served
12 three tours as an active duty Navy defense
13 counsel and believe the issues being discussed
14 here today transcend in some ways the nuts and
15 bolts of practice and instead touch on bedrock
16 principles, expectations, and aspirations of our
17 military justice system. At end, our system must
18 provide, is expected to provide, and must be seen
19 to provide a fair and honorable disposition of
20 justice.

21 As you may have noticed in my
22 assignment history, I had the pleasure of serving

1 as one of the inaugural planners and managers of
2 the Navy Victims' Legal Counsel Program. While
3 that might seem odd perhaps to those VLC or some
4 of the VLC in this audience or to the appellate
5 defense attorneys I discussed this with this
6 morning that I am now working at a division that
7 may be tasked with trying to limit those victim
8 rights, as I thought about it, it is really not
9 odd to me at all.

10 I can say for myself that as we've
11 built the Navy victims' rights practice in the
12 Victims' Legal Counsel Program, we were always
13 aware and understood that our policies and
14 efforts could not undermine the fundamental due
15 process and constitutional rights of the
16 defendant, for to do so would risk curtailing the
17 very victims' rights we sought to advance. We
18 knew that to place a victim's rights in direct
19 conflict with the essential rights of a defendant
20 would invite a trial or appellate court to scale
21 back that victim's rights consistent with our
22 loss.

1 We thus focused our efforts and
2 practice in areas where we believed a meaningful
3 victim interest was clear, to include a victim's
4 interest in personal privacy; protection from
5 unnecessary, humiliating, or degrading practices;
6 rights of support from caregivers and counselors;
7 the right to weigh in on the disposition of his
8 or her case. Accordingly, in regard to the
9 execution of court-martial proceedings, that
10 intent largely focused on Military Rules of
11 Evidence 412, 513, and 514. It is from that
12 perspective that I would like to address you
13 today, and specifically, I'd like to share my
14 thoughts on the appropriate limits of victim
15 appellate practice.

16 In reviewing the Senate version of
17 Section 547 of the Fiscal Year 2017 National
18 Defense Authorization Act provided to us, I
19 believe the most important statement I can make
20 is that the extension of victim appellate rights
21 should be as carefully and concretely linked to
22 meaningful victim interests as now acknowledged

1 and accepted in our trial courts. In other
2 words, victim appellate rights should be placed
3 and targeted on issues where the victim in fact
4 has a lawful interest that can be effectively
5 explained and legally defended. As established
6 in this version of Section 547, I think that goal
7 is met by clearly limiting victim appellate
8 practice to matters implicating MRE 412, 513, or
9 514.

10 In considering the practical
11 application of victim appellate activity with
12 regard to those enumerated interests, I do
13 believe that advocacy on matters involving MRE
14 513 and the psychotherapist-patient privilege may
15 prove the most challenging. MREs 412 and 514
16 seem to me to be less controversial.

17 Regarding MRE 412, years of practice
18 have established expectations on all sides. The
19 protections of MRE 412 that forestall any
20 irrelevant discussions or disclosure of the
21 sexual behavior or predisposition of a victim are
22 no doubt critical to a victim, but over the

1 years, trial courts have become adept at
2 appropriately closing our courts and limiting
3 disclosure only to individuals with a lawful need
4 to know. This relatively consistent application
5 of MRE 412 provides significant steps to mitigate
6 the fears of a victim without undercutting the
7 rights of a defendant to a zealous and effective
8 defense.

9 I would anticipate this stability to
10 carry over to appellate practice, allowing for
11 the fine-tuning of MRE 412 without dragging out
12 appellate review or eroding a defendant's due
13 process rights. Additionally, in my experience,
14 significant challenges to a victim's interest in
15 confidential communications with his or her
16 victim advocate per MRE 514 may be emerging but
17 are not prevalent in our current practice.

18 On the other hand, regarding MRE 513,
19 a defendant's access to portions of a victim's
20 mental health medical records, where that access
21 is necessary to mount an effective defense, is a
22 matter of great concern and may constitute a

1 significant portion of victim-related appellate
2 activity. Here, appellate VLC and appellate
3 defense counsel may be -- may be able to better
4 shape the law, but that effort will require
5 recognition that appellate defenders must have
6 access to the relevant matters in order to press
7 and counter appeals.

8 In the appellate phase, where the most
9 likely scenarios for review are a defense appeal
10 to access records or a victim appeal to halt it,
11 it is impossible to see how an appellate defense
12 counsel could mount effective representation of
13 the defendant's due process and fair trial rights
14 without access to the records in question. This
15 would be akin to asking appellate defense counsel
16 to pilot a ship without a rudder.

17 If seeking record access for
18 defendants, the appellate defense counsel has to
19 review those records to know how and why they
20 might be relevant. This is the cardinal purpose
21 for access rights codified in RCM 1103A.
22 Further, to effectively oppose a victim appeal to

1 halt that disclosure, the same direct analysis
2 would be required.

3 An *ex parte* proceeding whereby only
4 the appellate VLC and appellate judge view the
5 records renders a potentially critical issue for
6 the defendant moot and his or her appellate
7 representation pointless. Neither of those
8 authorities represents the defendant or has his
9 or her interests at stake. Only by viewing the
10 records at issue can appellate defense counsel
11 determine whether the records are arguably
12 necessary to the defense and make that claim for
13 the defendant to the appellate authority.

14 If we can agree that basic access is
15 at least necessary, then we can discuss what
16 procedures can be in place to limit disclosure or
17 exposure to only those necessary. In the current
18 Navy and Marine Corps appellate practice, when
19 questions are raised in the trial record as to
20 whether the trial judge improperly withheld
21 important mental health records from the
22 defendant and his defense, appellate defense

1 counsel contact the clerk of court to review
2 those records. If they wish to copy those
3 records, they must file a motion to do so. They
4 must also destroy any copies of those records
5 when case processing is completed, and file a
6 motion with the court confirming that they have
7 done so.

8 The same procedure would apply to
9 access to records to effectively oppose a VLC
10 appeal to halt that disclosure. In either
11 instance, appellate defense counsel access is not
12 unchecked or at whim. Rather, the counsel must
13 explain to the clerk why they need access, can
14 only make copies of sealed records by affirmative
15 motion, and must make clear any copies of the
16 records have been destroyed when no longer
17 needed. Thus, the exposure of the victim is
18 limited to authorities having an official need to
19 know with an official purpose for access. The
20 victim's privacy interest is protected to the
21 greatest extent possible without infringing on
22 the defendant's right to a fair and meaningful

1 defense.

2 This -- it is at this point that I'd
3 like to suggest that victims can and should be
4 reminded by their counsel that any mental health
5 record access by the defense was according to
6 law, determined to be necessary, and was required
7 to execute a fair trial. Victim counsel and
8 victims themselves may disagree with those
9 findings, but victims should not be left to
10 presume or suppose that access was easy,
11 improper, malicious, or aimed solely to harm or
12 embarrass the victim.

13 Just as military victims' counsel,
14 military prosecutors, military judges are bound
15 by the rules of professional conduct, so are Navy
16 and Marine Corps appellate defense counsel and
17 their trial defense brethren. They are not
18 authorized to share, distribute, or discuss
19 sealed materials with any party without an
20 official reason to know, nor may they retain
21 those materials. This is an issue where better
22 awareness of the professional responsibilities

1 and expectations placed on military defense
2 counsel as both attorneys and military officers
3 might help diminish victim concerns on privacy
4 exposure.

5 In considering related questions, I
6 would reiterate that I believe that victim rights
7 must be tied closely to established and
8 consequential victim interests. While a victim
9 certainly deserves notice of appellate actions
10 that might impact those interests, including
11 matters involving MRE 412, 513, or 514, requiring
12 notice of all other appellate matters where the
13 victim has no legal interests seems unnecessary
14 and might prove counterproductive to victims.

15 Navy and Marine Corps trials often
16 include allegations involving multiple victims.
17 Shall all matters related to one victim be
18 provided to all victims if those matters become
19 an issue in appellate matters? Additionally, if
20 a victim has the right to appeal any decision or
21 action taken in the trial court, the defendant
22 will face a potentially unending deluge of legal

1 challenges and delays. While the victim or his
2 or her advocate may not like a military judge's
3 ruling on a piece of evidence, inclusion or
4 exclusion of a member, findings in regard to a
5 claim of unlawful command influence, or any other
6 matter at issue, the victim has no clear personal
7 privacy interest that has been established in law
8 in any of those decisions. As that has been the
9 basis for expansion of victim's rights in our
10 court, absence of that interest should preclude
11 an appellate right to engage.

12 If this Panel recommends that notice
13 be provided regardless of the issues raised on
14 appeal, perhaps to further a victim's general
15 case awareness, I believe that notice must be
16 provided by the government and should be a simple
17 notice right rather than an opportunity for
18 appellate litigation by the VLC or a victim's
19 counsel. The victim should not be an equal party
20 to the government in matters unrelated to
21 concrete victim rights.

22 As to another specific question, I

1 would note that Section 547's expansive
2 definition of a victim for Part 3 for the
3 purposes of representation by counsel would be
4 problematic for the Navy, at least in our current
5 system, as Navy victims' counsel are only
6 detailed to alleged victims of sexual assault. I
7 would hate to inadvertently create an expectation
8 of representation where no right currently
9 exists, and it is not in my authority to explain
10 how the Navy might meet such a mandate.

11 I can say that I believe it would be
12 impossible to justify any system where a victim
13 has a right to representation by counsel and a
14 right to be heard at certain proceedings where
15 the defendant has no such rights. It is
16 interesting and timely that we attended a joint
17 appellate -- all of us attended a joint appellate
18 advocacy training event last week with both
19 appellate, government, and victims' counsel. One
20 of the presenters was Mr. Russell Butler, the
21 Executive Director of the Maryland Crime Victims'
22 Resource Center, who has been a long-term leading

1 light in victims' rights establishment in the
2 State of Maryland.

3 His presentation focused on the
4 development of those rights in Maryland via its
5 courts and legislation. What became obvious was
6 that victims' rights has been repeatedly
7 interpreted as those established in Maryland
8 statutes and that any appellate activity by
9 victim counsel must be linked to those
10 established rights.

11 He even noted that in his opinion,
12 victims have an interest in appellate matters
13 related to those rights by standing as a party,
14 and that if they are to be considered a party, it
15 is only in the context of those specific rights.
16 As Maryland has lawfully advanced the rights of
17 victims without apparently undercutting
18 defendants, I would propose his guidance is well-
19 founded.

20 In closing, I'd just like to thank you
21 for this opportunity to discuss a careful and
22 thoughtful expansion of victims' rights into the

1 appellate arena. These matters are important and
2 challenging, and their successful execution will
3 impact the primary due process and constitutional
4 rights of our defendants; the place and status of
5 victims; and the associated faith, confidence,
6 and reliability we, our Servicemembers, and the
7 American people have in our system. Thank you.

8 CHAIR HOLTZMAN: Thank you, Captain.
9 We'll next hear from Lieutenant Commander Michael
10 Meyer --

11 LCDR MEYER: Madam Chair --

12 CHAIR HOLTZMAN: -- from the Coast
13 Guard. Thank you.

14 LCDR MEYER: -- distinguished members
15 of the Panel, thank you.

16 Thank you for inviting me to speak
17 here with you today. My name is Lieutenant
18 Commander Michael Meyer. I am the Chief of
19 Defense for the Coast Guard, and I need to start
20 with the disclaimer that my remarks are mine and
21 not those of the Coast Guard or the Judge
22 Advocate General.

1 I'd like to structure my remarks
2 today, which are brief, into four areas: first, a
3 discussion of privacy interests during the
4 appellate counsel's review of the record of
5 trial; second, victim participation in direct
6 appeal by the government or defense counsel; and
7 third, victims' appeals to CAAF from
8 interlocutory rulings by the Service courts; and
9 fourth, victims' notice of appellate proceedings.

10 To begin then with the victim's
11 privacy interests during appellate counsel's
12 review of the record of trial: I echo the concern
13 of my DoD colleagues, and I wish to point out
14 that to preserve the public perception of a fair
15 system of justice, trial judges' decisions must
16 be open to higher-level review. And in our
17 military system, that is frequently done by an
18 appellate defense counsel who reads through the
19 record of trial carefully, looking for legal
20 errors, and brings them to the attention of the
21 -- the higher court.

22 Any attempt to truncate, then, or

1 restrict the appellate defense counsel's ability
2 to review the entire record of trial, that would
3 denude the appellate review over those areas, and
4 it would risk erosion of public confidence in due
5 process in our proceeding.

6 I believe that victim concerns in this
7 regard can be mitigated using existing tools and
8 practices. I know first that the Coast Guard
9 appellate practitioners that seek to review these
10 files must first coordinate that review with
11 court authorities, and in my limited experience
12 doing so, the Chief Trial Judge of the Coast
13 Guard Court of Criminal Appeals was physically
14 present.

15 Further, Rule for Court-Martial
16 1103A(b)4(D) empowers each appellate court to
17 fashion appropriate limitations on further
18 disclosure. Breach of any of these requirements
19 exposes appellate defense counsel to sanctions
20 and professional responsibility review.
21 Therefore, victims should be assured that wide
22 dissemination of their private information is

1 both prohibited and unlikely.

2 Nevertheless, I do not object to
3 recognizing that victims can have standing at the
4 appellate courts to request that their private
5 information not be disseminated beyond the
6 counsel for the parties and the court itself.
7 However, in light of the already-existing
8 protections of information under seal, the need
9 to so intervene is likely to be infrequent.

10 The second main issue I'd like to
11 discuss is the concern of the special victims'
12 counsel that when the appellate defense counsel
13 appeals an adverse ruling under 412, 513, or 514,
14 the victims do not have standing to file
15 pleadings in response. I don't object to victims
16 having standing to file such responsive documents
17 as real party in interest. A real party in
18 interest is one who actually possesses the
19 substantive right being asserted, and in matters
20 arising under 412, 513, and 514, those privacy
21 interests belong to the victim. But because
22 their standing is necessarily founded in the

1 possession of one of these three enumerated
2 privacy interests, an expansion of victim
3 appellate standing beyond those interests should
4 be avoided as a serious risk to clogging the
5 judicial system and harming the due process
6 rights of the accused thereby.

7 The due process rights of the accused
8 can be further protected by creating a
9 requirement that appellate victims' counsel file
10 only those claims that they believe to be
11 meritorious, which is in contrast to the right of
12 the accused to file any claim, meritorious or
13 otherwise.

14 I would also like to mention that
15 permitting victims to participate as real party
16 in interest is preferable over other forms of
17 communication with the court, such as *amicus*
18 briefs or motions to intervene. *Amicus* briefs
19 are better suited for bringing broader policy
20 considerations to the attention of the court, not
21 necessarily for arguing case-specific
22 determinations of a privacy interest. And

1 because victims' standing should be limited to
2 those three areas I have mentioned, requiring a
3 motion to intervene on those three areas would be
4 an unnecessary burden for the litigants and for
5 the court. They would become boilerplate and
6 granted pro forma.

7 Finally, on this point, I'd mention
8 that the privacy interests under Rules 412, 513,
9 and 514 are appropriately given equal weight when
10 it comes to victim standing, as each confers the
11 sort of justiciable privacy interests
12 contemplated on appeal, and as such, either
13 standing exists, or it does not.

14 Third, I'd like to address the
15 victim's access to the Court of Appeals for the
16 Armed Forces after interlocutory writ petitions
17 are denied at the Service courts. While Article
18 6b presently permits victims to seek
19 interlocutory writs at the Service courts, I
20 understand that case law presently does not
21 permit this appeal to CAAF. Again, consistent
22 with my view that broad judicial review increases

1 public confidence in our system, I believe that
2 victims should be granted this standing at CAAF.
3 This also presents disparities in the treatment
4 of victims among the Services.

5 However, my brief review of Section
6 547 did not reveal language that expressly
7 overturns the case law precluding such standing
8 at CAAF. Section 547 instead appears only to
9 modify Article 70 of the UCMJ to authorize
10 appellate victims' counsel to represent the
11 victim on CAAF -- at CAAF, but does not expressly
12 confer to the victim standing to petition CAAF in
13 the first place. If it is the intent of Congress
14 to confer the standing, that should be clarified.

15 Fourth, and finally, I would like to
16 address briefly the concerns about notice to
17 victims of appellate proceedings. It is my
18 notice that -- or it is my position that victims
19 should be provided notice of any appellate
20 proceeding that reasonably could implicate the
21 victims' rights as recognized under Rules 412,
22 513, and 514, but to require additional notice

1 beyond that would become unduly burdensome and
2 unnecessary.

3 This notice can be accomplished by the
4 adoption of a court rule that requires any
5 counsel filing appellate pleadings that
6 reasonably could be expected to implicate those
7 enumerated victim rights to provide a certificate
8 of service on the victim or the victim's counsel,
9 if known.

10 I recognize the concern that, when the
11 victim has not elected counsel, appellate defense
12 counsel might have to search high and low for a
13 victim who, in the end, may not wish to be found,
14 simply to comply with this requirement. I
15 suggest that the victims be provided an opt-in
16 mechanism for receiving notice and for announcing
17 his or her preferences on the manner of such
18 notice.

19 I note that these concerns could also
20 be mitigated by the eventual transition to an
21 electronic court filing system that automatically
22 provides email notice to those who appropriately

1 receive it.

2 In closing, I'd like to thank you
3 again for this opportunity to discuss the
4 expansion of victims' rights into our military
5 appellate practice, and I'm happy to answer any
6 questions that you have.

7 CHAIR HOLTZMAN: Thank you very much,
8 Commander Meyer. We'll start with you, Mr.
9 Stone.

10 MR. STONE: Thank you. Commander
11 Meyer, I was very happy to hear your comments
12 because I think that they do reflect what I think
13 is a way for us to move forward with victim
14 rights.

15 I do have one question, though. There
16 is a difference between 547, which talks about
17 victim rights in relation to 412, 513, and 514,
18 and the proposal which was drafted by this
19 committee. If you look back, page 2 of it, the
20 first paragraph of what's now five, actually -- I
21 am sorry, it's in the current 6b. The current 6b
22 says with respect to victims' rights, protection

1 is afforded to the following, and it starts with
2 (a), this section, before it starts enumerating.

3 What that means is -- and I'll give
4 you an example, and -- and then I'd like your
5 opinion on it -- my example is suppose the victim
6 said under the circumstances "I am entitled to
7 restitution under 6b(a)(6)," and the military
8 judge had decided for reasons that didn't make a
9 whole lot of sense at the time, well, there was a
10 loss, but I just decided I don't like this idea
11 of restitution, I'm not giving it to you.

12 And so the victim would like to
13 participate only on that question of restitution,
14 which is in 6b, okay? The current 547 language
15 does not cover that, and they don't get standing,
16 and they don't get notice of anything. So my
17 question is why shouldn't the current 547
18 language, instead of articulating three things
19 there, have the same language, exactly the same
20 language that's currently in 6b, and just simply
21 repeat it, that it has to do with any victim
22 rights that relate to 6b, and then it lists 832,

1 412, 513, 514, and 615, so that it covers the
2 same landscape as 6b, but limited to those? Does
3 that make some sense to you?

4 LCDR MEYER: It does, sir, and I think
5 that the victim's right to appeal a ruling of a
6 trial court should be coexistent with any right
7 that that victim has. And I'm not sure of the
8 current status of our restitution authority in
9 the military. To the extent that we have it or
10 develop it greater, it should be part of the
11 standing that a victim has to appeal.

12 MR. STONE: Great. Now just to take
13 that one step further, I know the current 6b
14 that's enacted does not talk about sentence
15 reassessment in accordance with Article 66 of
16 UCMJ. We mentioned it earlier to the last panel.
17 That goes a little further. That goes to the
18 court of appeals' desire to change the sentence
19 without notice, as they pointed out, to any of
20 the counsel in the case.

21 I wonder if you have some thoughts
22 about whether, before a military court of appeals

1 decides to change the sentence, they ought to
2 give notice to all the counsel and the
3 possibility of filing a supplemental brief of
4 some kind on that before a sentence reassessment
5 occurs, including victim's counsel, because they
6 have that right to know.

7 LCDR MEYER: Sir, I need to be a
8 little more circumspect in this regard because my
9 understanding is that the manner in which
10 sentence reassessments occur is changing, and I
11 think I would prefer to see what the end result
12 of that is before it becomes ripe for a
13 determination of what kind of standing would be
14 appropriate.

15 MR. STONE: I presume, though, as
16 defense counsel, you'd like a chance to comment
17 before the -- the appellate court changes the
18 sentence on your defendant, wouldn't you?

19 LCDR MEYER: In my experience, it
20 usually reduces the sentence, so --

21 (Laughter.)

22 LCDR MEYER: -- yes sir.

1 MR. STONE: I guess -- oh, the other
2 question that I had was -- and I'll stay with
3 you, if I may, because you did talk about that
4 notice as to some of the other appellate filings.
5 You did use the term "unduly burdensome," and do
6 you mean unduly burdensome because you might have
7 trouble finding who to serve? I presume you
8 don't mean serving them electronically is unduly
9 burdensome because I think that, as long as the
10 proposal specified that the SVC got service, that
11 that would be easy.

12 In other words, you don't have to go
13 looking for an individual victim. You just have
14 to go looking for the victim's representative,
15 SVC, VLC who represented them, that that would
16 not present that unduly burdensome problem, am I
17 right?

18 LCDR MEYER: That is correct, sir. So
19 I break it into two categories, one in which the
20 SVC has filed a notice of appearance, and then
21 filing notices are easy. You simply, as you
22 mentioned this morning, you add an email address

1 and serve.

2 It is the other category of cases
3 where the victim has not elected to be
4 represented by any counsel and has not otherwise
5 made known to the court or parties how they wish
6 to receive notice, if they wish to receive notice
7 --

8 MR. STONE: Right.

9 LCDR MEYER: -- in that circumstance,
10 I think that they should be given an opt-in
11 mechanism, filing something with the court so
12 that any party can access it and determine how it
13 is supposed to -- notice is supposed to occur.

14 MR. STONE: Sure. So as long as the
15 appellate court provided a place for the victim
16 or the victim's representative, an email address
17 to be notified, that would relieve the burdensome
18 problem?

19 LCDR MEYER: It would, and to the
20 extent that we move towards a system much like
21 the federal courts use with ECF or PACER, that
22 automatically generates that notice, simply

1 uploading the document generates notice, it would
2 become much easier. So it is something that can
3 be remedied.

4 MR. STONE: And -- and now that you
5 mention PACER, let me just ask, you know, on
6 PACER, every non-sealed document is available to
7 anybody in the world, and I presume if that was
8 the case in the military, that would be fine with
9 you too. As long as it's a non-sealed document,
10 you don't have -- and in fact, if one -- if a
11 sealed document is filed, it will typically just
12 say sealed document filed, but you get notice a
13 document was filed, you just can't get the
14 document without permission. I presume that a
15 system like that wouldn't trouble you either?

16 LCDR MEYER: No, that is correct, sir,
17 and so an open system of justice I think is
18 healthy, as I would welcome all of our documents
19 being open for public observation. I think
20 probably though that the manner in which victims
21 give notice should be filed in a sealed manner
22 because my guess is they are not going to want

1 their address, phone number, that sort of thing

2 --

3 MR. STONE: Right.

4 LCDR MEYER: -- broadly made public.

5 MR. STONE: I don't know if anybody
6 else on the Panel has any comments. I think many
7 of your comments were consistent with those
8 answers, but if you have other thoughts you want
9 to say, I'll be happy to hear them. Yes.

10 LCDR CARRIER: Sir, one note on -- on
11 restitution, which I think is connected
12 structurally to the idea of continuing
13 jurisdiction. Historically and at present,
14 court-martial do not have authority to provide
15 restitution to the victims.

16 And so you have -- in Article 6b, we
17 now have a right that is afforded to the -- to
18 the victim of a crime that is in parallel with
19 the federal civilian statute, but the UCMJ
20 structure does not, to my knowledge, have a way
21 that that is being enforced through the military
22 courts. The court-martial comes into existence

1 and goes out of existence, and it is gone, and
2 there is no restitution.

3 MR. STONE: And I guess my -- my
4 question that follows on that is, just like the
5 last question, we know the system is in flux.
6 One of the suggestions of this Panel was that
7 restitution should be tied with compensation so
8 there might be a compensation system, and if the
9 system changes so that that military judge has
10 the right to order compensation to the victim,
11 but then chooses -- says I think this is a
12 compensation/restitution system, but I just
13 decided I don't want to order it, I don't like
14 ordering compensation, should the victim then --

15 LCDR CARRIER: Right.

16 MR. STONE: -- have -- in other words
17 --

18 LCDR CARRIER: I understand.

19 MR. STONE: -- that's not articulated
20 in these others, but if it's a victim's right,
21 then --

22 LCDR CARRIER: Right.

1 MR. STONE: -- then that narrow issue,
2 they have standing and a right to go up on, I
3 presume that would be okay with you?

4 LCDR CARRIER: Well absolutely, sir,
5 and in fact, I would hate to be on the other side
6 of someone standing in court with *Kastenberg* and
7 the string cites from *Kastenberg* trying to argue
8 that a person who had court-ordered restitution
9 did not have standing. I think that is -- I
10 think that is clear, but it's an example of how
11 the interplay can be tricky.

12 And this morning, there was I think
13 some -- I don't know if confusion is the right
14 word, but some uncertainty about how reassessment
15 would work since it is not actually done in a
16 hearing. So if you have in one place in the
17 code, it says that they have to have notice of
18 public hearings, opportunity to be present, and
19 then in another part of the code, you have --
20 they're both at the statutory level of authority,
21 so which one trumps which, or how do you possibly
22 read them together when in one case there is no

1 hearing -- it's a deliberation of a court that is
2 generally closed -- and in another place, it says
3 hearing. How does that even work?

4 And the point I wanted to make about
5 it, it's at Article 6b(a)4(e) about
6 administrative boards and other adverse
7 administrative proceedings. Courts-martial don't
8 have any -- at federal courts, we don't have
9 federal district court, we don't have like a
10 court of common jurisdiction that you can come
11 in, common pleas court and raise some issue. If
12 someone has an administrative board in the
13 location where I was a court-martial judge, that
14 was none of my business. I had no authority
15 there.

16 But now, and how would that get to the
17 appellate court? Arguably, that could be enacted
18 in some other way to provide that protection of
19 that right, but how to work that into the system
20 is -- is a bit tricky.

21 MR. STONE: Well, I might add in the
22 civilian system, courts of appeals don't always

1 have oral arguments either, so therefore, if
2 there is no hearing, your right to appeal is in
3 writing, and that would be the same thing here.
4 If there's an administrative proceeding and there
5 is no appeal, then there is no worry about being
6 represented there, and if there's an appeal but
7 there's no oral argument on it, then there is no
8 denial of the opportunity to be present at an
9 oral hearing.

10 LCDR CARRIER: Well right, exactly.

11 CHAIR HOLTZMAN: I think what he's
12 saying is that there is no appeal to the --
13 because there is no court-martial, there is no
14 appeal --

15 LCDR CARRIER: There's no appeal, yes
16 ma'am.

17 CHAIR HOLTZMAN: -- there's no appeal
18 here, so --

19 LCDR CARRIER: Right.

20 (Simultaneous speaking.)

21 CHAIR HOLTZMAN: There is no system-
22 wide.

1 LCDR CARRIER: But I don't know how
2 that would work. I don't know what the
3 triggering mechanism would be or how that would
4 work, so --

5 MR. STONE: Well, the way the Statute
6 currently reads, the right to be heard at any of
7 the following, and the reason the administrative
8 boards, as we heard from at an earlier meeting,
9 and other adverse proceedings is in there is so
10 that if a prosecutor decides to downgrade the
11 proceeding from a court-martial to an Article 15
12 or something else, the victim wouldn't
13 automatically be excluded after the charge is
14 downgraded. That was the idea, not necessarily
15 that they're creating a new appeal mechanism or
16 new hearings or things that aren't there.

17 LCDR CARRIER: Right, sir.

18 MR. STONE: And I think that -- I
19 don't know how you feel about it, that makes some
20 sense to me, that it may be appropriately
21 downgraded, but the victim still gets some notice
22 there's a proceeding going on, and if there's a

1 proceeding that's in person, they have the right
2 to show up unless there is that decision that it
3 would unduly affect their testimony.

4 LCDR CARRIER: Yes sir.

5 CHAIR HOLTZMAN: Major?

6 MAJ SHURE: Yes, two brief add-ons to
7 sort of answer your question, Mr. Stone.

8 In the Air Force Court of Criminal
9 Appeals -- and frankly, we at the Appellate
10 Defense Division have long said these are public
11 filings, but I can't get them anywhere. I have
12 them because they are on our drive, but if a
13 member of the public or civilian counsel wants
14 access to those, they are not available anywhere
15 at the Court of Appeals for the Armed Forces.
16 When there is oral argument, those pleadings go
17 up on their website.

18 However, with the Air Force Court
19 rules, we have recently moved to there are no
20 names, no emails, no addresses, no phone numbers
21 in any of our pleadings, so making any of them
22 public would not be problematic with regard to

1 privacy rights or privacy interests.

2 Everyone, regardless of whether they
3 are a victim or just a plain witness, is referred
4 to by initials. All email addresses are blacked
5 out except for one or two characters. Those
6 kinds of protections are all written into the Air
7 Force Court rules, and that is how we currently
8 practice.

9 I would just add on, and I believe
10 this was mentioned in the DoD General Counsel's
11 motion, looking forward with sentence
12 reassessment, it may no longer function as we see
13 it today, and so until that occurs, and until we
14 know how that is going to happen, I would caution
15 or -- or be wary of making any changes until
16 we're aware how that is going to work, because it
17 may no longer be an issue once those changes go
18 into effect.

19 MR. STONE: Is the Air Force moving to
20 the same kind of system that we heard in the last
21 panel that the Army is moving to, where there is
22 an electronic system where -- where pleadings are

1 --

2 MAJ SHURE: We --

3 MR. STONE: -- accessed --

4 MAJ SHURE: -- we currently file
5 everything electronically, sir. The only thing
6 we file hand-delivered, actually, is sealed
7 documents, and so if you have a sealed pleading
8 that you physically walk it over to the --

9 MR. STONE: Right.

10 MAJ SHURE: -- court, walk it to the
11 government, but yeah, we -- we do everything
12 electronically. The problem is once it goes to
13 the court, that is it. So we have our copy, and
14 then the government serves us with a copy --

15 MR. STONE: Yes.

16 MAJ SHURE: -- but there is no public
17 access to be able to get to those pleadings by
18 somebody who is not served with the documents.

19 MR. STONE: Right, but if you had the
20 name of a special victims' counsel, it wouldn't
21 be any problem to see that they were routinely
22 copied, right?

1 MAJ SHURE: I don't see it as being a
2 problem from our perspective, sir. I would be
3 concerned about the burden on the special
4 victims' counsel.

5 (Laughter.)

6 MR. STONE: Well, we'll let them worry
7 about that.

8 MAJ SHURE: Yes sir, yes sir.

9 CHAIR HOLTZMAN: Captain, did you have
10 something you wanted to add to this? You were --

11 CAPT HOUSE: I guess I just wanted to
12 chime in on the -- particularly the issue of
13 restitution. I think personally -- and again,
14 this is in flux, and we'll see whether any kind
15 of sentencing recommendations and changes come
16 forward -- but if we look at this from the sense
17 of we have tried to develop and expand victim
18 rights where there's a legitimate victim
19 interest, in the area of a potential punishment,
20 it is restitution that is really the primary
21 interest.

22 I mean, certainly the victim has an

1 interest in the overall punishment, but we send
2 someone to the brig, that's the United States
3 sending them to the brig, and if there's a fine
4 imposed, the fine is paid to the United States.
5 And if they're reduced in rank -- I mean, so it
6 is restitution that is really particularly
7 focused on that victim, trying to make that
8 victim whole again.

9 So I guess philosophically, if we were
10 to maintain that line, if restitution were at
11 some point to be placed as a potential court-
12 martial punishment, then the victim would have a
13 legally arguable and defensible position in
14 perhaps having standing to make a claim regarding
15 that restitution decision.

16 I do think, on the practical level and
17 on the philosophical level, though, we are
18 potentially talking about a scenario where we are
19 increasing the punishment on a defendant that
20 they did not receive in a lower court, and we are
21 -- we're potentially doing so in a scenario where
22 the victim is not able to add any new evidence or

1 any new facts, but is simply asking to have the
2 decision of the military judge to not grant
3 restitution be reconsidered. And without --
4 without being able to add more facts or being
5 able to find some qualification with a change of
6 law to do that, I don't know what the basis for
7 that change would be.

8 So bottom line, I guess I just would
9 say I think this falls philosophically in that
10 realm of identifiable victim interest, if we get
11 there, but I still think the practical
12 application of this will prove difficult the way
13 we currently process in appellate practice.

14 MR. STONE: Well, I guess the -- the
15 response to that is that at least the way this
16 Panel recommended it, and I -- I believe our
17 recommendation for a compensation/restitution
18 scheme would be that the military itself would
19 make the payment of up to like \$2,000 in an
20 appropriate case, and the victim says he smashed
21 my cell phone for a \$500 cell phone, and I never
22 got it back again, and I would at least like that

1 replaced, and there may be other mechanisms to do
2 it, but at least this is one way to avoid some of
3 that other -- some of those other mechanisms.

4 You're right that the record may be no
5 different, but if a military judge should say --
6 and I'll tell you, I don't expect they will, I am
7 talking about the one case in, I don't know,
8 1,000, because it's only in one case in a
9 thousand that civilian judges don't do what they
10 should in restitution, but we do have the one
11 case in 1,000 where a judge says, I don't like
12 cell phones, I'm not giving it to you. If the
13 victim cannot raise that restitution issue on
14 appeal, the restitution isn't going to the
15 government.

16 It may not be raised, so it may be
17 that the victim's brief is three pages long. The
18 record shows that I showed my cell phone was
19 broken. The judge should have ordered
20 restitution. The judge chose not to. It is
21 wrong, and it ought to be reversed. I mean, that
22 may be all the victim needs to say, but they

1 still should have a right to be able to say it.

2 CAPT HOUSE: Understood.

3 MR. STONE: Do you have any -- does
4 that sound right?

5 CAPT HOUSE: I think if we can
6 establish that a restitution becomes a potential
7 court-martial punishment, which gets you in the
8 door, then I think you could argue that there is
9 certainly a victim interest in that restitution
10 because that's what that provision is solely
11 focused on accomplishing.

12 MR. STONE: Right.

13 CHAIR HOLTZMAN: Okay. Admiral
14 Tracey?

15 VADM TRACEY: Let me just calibrate
16 myself here. I think that does materially change
17 the role of the appellate court. You've now
18 changed it from a review of whether the accused
19 was given a fair trial and an appropriate
20 sentence to whether the victim got appropriate
21 restitution, and I agree there may need to be an
22 appeal process, but it doesn't seem to me it

1 ought to be via that mechanism. That -- you --
2 that does materially change what the focus of
3 this process is, doesn't it?

4 PARTICIPANT: Yes ma'am.

5 MR. STONE: Well, it's for the Panel
6 to answer, but in the federal courts, because the
7 restitution is a part of the judgment, and it is
8 the judgment on appeal that is getting reviewed,
9 that is why it is up there and not a separate,
10 independent suit.

11 CHAIR HOLTZMAN: I am not sure we made
12 a recommendation that courts-martial issue
13 restitution.

14 PROF. TAYLOR: I don't think we did.

15 CHAIR HOLTZMAN: I don't think we did.

16 PROF. TAYLOR: I mean, my recollection
17 of that is that we ultimately, even though we
18 discussed that at length, we ultimately
19 determined that we felt it would be in the best
20 interest to have a uniform compensation system
21 that would be administered by the Department of
22 Defense --

1 CHAIR HOLTZMAN: Right.

2 PROF. TAYLOR: -- across the board.

3 MR. STONE: Right.

4 CHAIR HOLTZMAN: Separate from the
5 court-martial --

6 PROF. TAYLOR: Correct.

7 CHAIR HOLTZMAN: -- system.

8 MR. STONE: Right.

9 CHAIR HOLTZMAN: So this wouldn't be
10 part of it.

11 MR. STONE: Right. My only point in
12 raising that before was to make the point that
13 the scope of the victims' rights on appeal ought
14 to be Article 6b, whatever is in 6b, because the
15 6b rights can change, as we say, under our feet
16 as we're talking. The Congress may or may not
17 decide to do it our way or may make it part of
18 the judgment, but numbering, as they do, Articles
19 412, 513, and 514 is -- doesn't -- doesn't line
20 up with 6b's requirements right now, what the
21 victim gets in the trial court. That's all I am
22 saying, it ought to be the same as the trial

1 court, whatever that is.

2 VADM TRACEY: But for me, the focus of
3 what we've been trying to do here is to be sure
4 that nothing in the appeals process abridges the
5 rights of the victim, and that that -- it seems
6 to be a different -- an important, but different
7 vector than whether the evidence that was
8 excluded at trial suddenly is allowed to be
9 considered, and the disposition a victim assumed
10 they got at the end of the court-martial gets
11 turned around in some material way that will
12 undermine the victim's confidence in the system
13 in a way that upends everything that we've been
14 trying to do here in the last several years.

15 Can I just ask the Panel across the
16 board, do -- is there general agreement that the
17 victim should have an ability by some means to
18 present counterargument to something that will
19 materially change the outcome at the trial? The
20 defense advocate is -- is doing that, is making
21 the case that something was not done right at
22 trial. Should the victim have a voice by some

1 means to lodge counterarguments when that is
2 about to become a factor in the appeals court?

3 We've gotten hung up on the language
4 in the various proposals, and so it is really
5 hard for me to determine whether you have a
6 fundamental objection to the notion that the
7 victim should be able to reassert the arguments
8 that weighed in at trial, or strengthen them by
9 some means, whether represented by counsel or
10 some other means. I am trying to sort out what
11 you actually think here.

12 MAJ SHURE: Ma'am, I will try to give
13 not so much anecdotal as just, in my personal
14 practical experience in the last two-and-a-half
15 years, when I have had a victim intervene, it has
16 delayed the process so significantly that there
17 is a chance of upsetting the very sentence the
18 victim sought at trial, and that is my
19 overarching concern with any victim intervention.

20 Is there a place in the world where
21 possibly this may work? I can't rule it out.
22 But in my practical personal experience, me,

1 Major Lauren Shure, I have seen such significant
2 delays that it causes me concern that the overall
3 sentence and the outcome sought by the victim at
4 the very beginning may be upset by arguing and
5 intervening on these positions at appeal.

6 VADM TRACEY: But do you disagree with
7 the principle that if a victim exited a court-
8 martial assuming something had been determined,
9 and the appeals process is going to overturn
10 that, or is likely to overturn that, by changing
11 some of the ground rules under which it was
12 decided -- admitting evidence that was excluded
13 and what have you -- do you disagree with the
14 principle that if we could figure out how to do
15 that practically, that that is consistent with
16 the rights of victims we've been trying to
17 assert?

18 MAJ SHURE: Not necessarily, no, and
19 I will, as we all are lawyers sitting here -- it
20 depends.

21 (Laughter.)

22 MAJ SHURE: And so I would say,

1 though, that the -- the caveat, or the
2 distinction I would make with your hypothetical
3 situation, would be that it is not my opinion
4 that the appellate court is changing the rules.
5 They are simply looking at it and saying either
6 the judge or the government got it wrong.

7 And the particular circumstance where
8 I find the biggest problem is with the mental
9 health records and Brady, and so when we assert
10 that a military judge got it wrong, that is not
11 even frankly what I argue. I am arguing that
12 there was a Brady violation. The government
13 failed to review those records and find
14 exculpatory information and provide that to the
15 defense counsel.

16 In this world that we have started to
17 live in, the government is very cautious of
18 looking at those records, understandably so.
19 However, when they fail in their Brady
20 obligations, that is that constitutional concern
21 that we have, and so the question we pose to the
22 appellate courts is not change the rules, allow

1 this evidence in. The question is was there some
2 constitutional violation that needs corrected?
3 And whether they can correct it on the appellate
4 level or whether they have to send it back for
5 more trial work, generally, they're sending it
6 back for more trial work.

7 In a most recent opinion, the court
8 said, in this very issue, we can't opine at this
9 point whether or not this was a Brady violation,
10 but Brady is our biggest concern in these cases,
11 those discovery violations and those discovery
12 issues. So, while no, I don't necessarily
13 disagree with the basic notion, I would change
14 the hypothetical and say I don't think that the
15 -- the rules are changing on appeal.

16 I think that provided the SVC is doing
17 their job at the very beginning, the victim is
18 aware of what their rights are from day one
19 through the appellate level, and they have the
20 option to opt-in or say no, I don't want to go
21 through this. And so no one should be blindsided
22 when it comes to the appeal that we are taking a

1 look at this and we are addressing any
2 constitutional questions.

3 VADM TRACEY: To define my question a
4 little bit more clearly, because my language may
5 be imprecise because I am not a lawyer, I know it
6 depends, but -- and I'm not a lawyer -- is the --
7 what I'm trying to argue is that the victim --
8 special victims' counsel made a case that ends up
9 with the evidence being excluded at trial. On
10 review, a different attorney, the defense
11 appellate review, suggests that that was an
12 error. Is there a window for which the arguments
13 should be reinforced, revisited, the arguments in
14 favor of excluding the evidence are revisited?

15 MAJ SHURE: Well, they are there.
16 They are already in the record of trial, and that
17 is exactly the point that the -- that is
18 different about the military appellate system
19 than the civilian appellate system, is we look --
20 they have to look at everything.

21 The difference on appeal is the
22 defense counsel stepping in and having the

1 opportunity to articulate why those records are
2 relevant, why it was a Brady violation, or why it
3 was an abuse of discretion. That's my opinion.
4 I will let my colleagues weigh in.

5 CAPT HOUSE: If I take your question,
6 ma'am, as where we've established standing in our
7 lower courts that the victim has an interest,
8 should they have the same similar standing in
9 appellate courts if those issues come under
10 question, I think they should. I think they
11 should. I think we need to be consistent. I
12 think if we're going to allow victims -- and that
13 has been the Navy practice regarding to these
14 privacy interests that have been established in
15 513, 412, and 514, because there's a clear
16 victim.

17 That's the reason we have those rules,
18 that in order to be consistent and fair, that
19 victims should have some opportunity -- again,
20 the mechanism, the way we will practically work
21 that to make sure that there is little delay and
22 that information passes and that the people get

1 the information they need to do their jobs,
2 that's the hard part of this, but the philosophy
3 itself, I think we have to concede that they
4 should have that right.

5 VADM TRACEY: Okay.

6 LCDR CARRIER: Well, I agree with
7 Captain House, and I believe that not only do I
8 not have some philosophical quarrel with that, I
9 believe it is the current state of the law. And
10 I think -- and that's what I was trying to get
11 across, and I think that is what Judge Baker was
12 trying to say this morning, is that under --
13 under *Kastenberg*, and even under -- *Martinez* was
14 cited on very technical, specific grounds about
15 jurisdiction, but under *Kastenberg*, and citing
16 those cases going back 20 years, when there is --
17 and this question of who is a real party in
18 interest is when there is someone who has a right
19 created by executive order or statute or a
20 constitutional right, that person has the right
21 to be heard in the military justice system. No
22 offence, but this is not -- you're not creating

1 one here. You are perhaps adding to it or giving
2 it structure or codification. It already exists.

3 And again, I remember, in 2013, a lot
4 of military -- but it's not -- it's not -- it's
5 unusual. It's unusual, and in 2013, there were a
6 lot of military judges who said what is this?
7 This is crazy. We don't do this. This is not
8 normal. But it was just unusual. It was not new
9 at the time that *Kastenberg* was announced, and --
10 and Judge Baker proved it by having a -- a set of
11 citations going back 20 years.

12 So it -- that is exactly right. That
13 is -- I think the concern in looking at this is
14 that if you statutorily broaden beyond what has
15 traditionally -- what has traditionally existed
16 is the real party in interest analysis of what is
17 the basis in executive order, statute, or
18 constitutional right that creates this right to
19 be heard at trial or creates this right to -- to
20 send a petition to the appellate court?

21 This language as -- and I am gesturing
22 here toward the proposal -- is potentially

1 broader than that, and so we're war-gaming this
2 and thinking, well, what is this -- how does it
3 -- what is this actually -- how does this play
4 out? Does this mean that -- like at trial, we
5 would generally not allow the victim's counsel to
6 jump up and object on hearsay grounds to
7 something a witness says. We don't let the
8 victim's counsel, you know, jump up and say we --
9 we think that's hearsay and you shouldn't allow
10 it.

11 What exactly are we talking about on
12 appeal? The -- the parties on the appeal, the --
13 the defense counsel frames up the issue, and I
14 think what counsel are concerned about creating
15 is a situation where the appellate defense
16 counsel is arguing that 412 is wrongly decided,
17 is arguing that a question of privilege is
18 wrongly decided, and now in order to make that
19 argument, there will be further hurdles, further
20 obstacles, there's like a showing that it's not
21 enough just to say well we have this record and
22 we want to review the sealed exhibits of the 412

1 and see what's in there so we can challenge it.

2 No, we've got to like ask for special
3 permission and make some threshold showing just
4 to get access to the trial record, which is
5 inherently sort of crazy because in order for
6 there to be something included in the record as a
7 sealed exhibit, there's a reason it's in there.
8 There is a threshold showing under 513 for the
9 judge to do the in camera review. I think it's
10 513e requires that there is the hearing, and
11 there's the recent adding of what we call the
12 clinic factors, where the military borrowed from
13 Wisconsin court the question of when do you
14 actually order production of something that is
15 privileged just for the in camera review?

16 In like 412, 412 is not an *ex parte*
17 secret hearing. It is closed to the public, but
18 the trial participants are there, and if you are
19 going to evaluate whether the trial judge messed
20 up the 412, you have got to be able to look at
21 it.

22 So that's what we're all paranoid

1 about, so what you're hearing from the defense
2 bar here at the table is the concern that someone
3 will try to say, based on these things, that
4 there is like an additional hurdle at the
5 threshold or additional fights just to -- just to
6 look at the record, to review it on behalf of our
7 clients and see if there is a basis for a
8 challenge.

9 But there already exists -- exactly,
10 I think your initial question hit exactly what
11 exists already as a matter of law, it is just not
12 very commonly enacted, which brings up the other
13 point, then. With the Article 70 change, if you
14 create a statutory entitlement to government-
15 provided counsel, then of course it is much more
16 likely people will actually try -- you know, show
17 up with this. And my question is who actually
18 should get this, right? Who should -- what class
19 of people should be protected?

20 If someone shoplifts at Walmart, I
21 don't approve of that and I think that Walmart
22 has a right to protect their property, but I am

1 not really that worried about Walmart getting the
2 victims' counsel, to be blunt. I am not picking
3 on Walmart, just pick a large institution of some
4 kind. So it's not the corporate victims that
5 concern me. I think if we're dealing with the
6 victims of crimes against the person, if they
7 have appointed counsel, maybe we serve them
8 notice in certain cases of the pleadings. It's
9 not logistically difficult, but it would be tied
10 to these -- what are actually traditional,
11 longstanding rights that -- that exist for
12 reasons of justice. We're just concerned about
13 casting that net so broadly that it has
14 unintended consequences.

15 CHAIR HOLTZMAN: Professor Taylor.

16 PROF. TAYLOR: So first of all, we're
17 close to the end of this Panel, so I'll just have
18 a couple of quick questions, but thank you all
19 for your service. This is a very important
20 function that you are performing, and we deeply
21 appreciate what you're doing.

22 We have heard different formulations

1 on how to deal with this 1103A issue regarding
2 access to information, and my question is would
3 it impact the ability that you now have to
4 represent your clients if there were some minor
5 restrictions imposed along the lines that you've
6 already heard described this morning and some of
7 you have already adopted? In other words, can
8 there be a way to provide greater protection,
9 greater -- fewer access without impairing your
10 ability to protect your clients?

11 MR. MIZER: I don't believe so, sir.
12 I think 1103A strikes the appropriate balance. As
13 I've described, that process is very much like a
14 CICA process. We have to be able to --

15 CHAIR HOLTZMAN: Why don't you just
16 identify what 1103A is.

17 MR. MIZER: 1103A, my apologies,
18 ma'am, is RCM 1103A, and it is a rule for court-
19 martial that was enacted by President Bush in
20 2005, and it governs access and disclosure of
21 sealed materials. 1103A --

22 (Simultaneous speaking.)

1 CHAIR HOLTZMAN: -- the -- the medical
2 records on appeal.

3 MR. MIZER: That is right --

4 CHAIR HOLTZMAN: Okay.

5 MR. MIZER: -- ma'am.

6 CHAIR HOLTZMAN: Right --

7 MR. MIZER: So --

8 CHAIR HOLTZMAN: -- okay, that is
9 fine.

10 MR. MIZER: -- 1103A gets -- gets us
11 the access to the documents, which then can
12 trigger standing so we can litigate the
13 substantive issues, and I think that Colonel
14 Carrier is absolutely right that *LMR* says that
15 there is standing, but we have to be able to have
16 access to those records to argue that there is an
17 issue that the military judge abused his
18 discretion in not allowing the 412 questioning,
19 not releasing the 513 records.

20 I don't know how you do this without
21 the defense counsel having access and satisfy due
22 process. That is my concern, sir.

1 PROF. TAYLOR: Did anyone else have
2 any thoughts on that?

3 LCDR CARRIER: Sir, just to agree, I
4 think 1103 is actually quite strict. I think
5 it's strict as it is. Maybe I'm just not aware
6 of the news, but I didn't know that there's a
7 problem with spillage in the Services. I am not
8 aware of a problem in the Army with the spillage
9 --

10 PROF. TAYLOR: Well, I mean, I say
11 that because it is clear that every Service has
12 figured out some way within your own rules on how
13 to deal with it in terms of you go into a room,
14 someone has described it as a room that looks
15 like a SCIF, secure information, you know, you
16 can't make copies. I mean, there clearly is a
17 lot of care and attention being paid to this, and
18 so my question is is it about right, or do we
19 need to do something different?

20 CAPT HOUSE: Sir, looking a little bit
21 at this from the VLC side a couple years ago, I
22 think there's just a -- there's always going to

1 be a fundamental conflict with a victim's basic
2 desire not to have people know this stuff,
3 conflicted with the -- particularly at the
4 appellate level, and even at the trial level --
5 whether or not that information is critical to a
6 zealous and effective defense for our Sailor or
7 Marine.

8 So I don't know that we will ever come
9 up with measures that will solve that very
10 personal, intense, very natural desire not to
11 have people know something that that victim
12 doesn't want them to know. I feel that we do as
13 good as we can to try to -- I mean, we treat this
14 like classified information, really, and this
15 information is personally identifiable and
16 generally very private healthcare information, so
17 we already have all of those restrictions and
18 requirements that go along with that information.

19 And I think we -- I would agree with
20 my colleagues that forcing us to go through some
21 type of other hearing or other proceeding to even
22 look at this information, the military judge --

1 excuse me, the appellate judge is going to see
2 the information. That information is still going
3 to be discussed and viewed by people, so we can
4 never -- unless we just want to eliminate a
5 defendant's right to appeal matters under 513,
6 which I think you may as well -- we can start
7 shutting down courts-martial, I don't think we
8 will ever scratch -- and that's a bad -- we will
9 never satisfy victims' basic personal violation
10 sense, perhaps, unless -- unless we just do a
11 better job of explaining to victims how we do
12 this.

13 You know, they are aware -- I mean, I
14 get the sense -- and I have seen it from the
15 defense, I am from the victim side -- there is
16 this sense I think sometimes that this is like a
17 coffee book that's sitting out on a table,
18 everybody can take a look at it. That's not the
19 way it is. It's like it is child pornography. I
20 mean, we -- we don't look at it unless we need to
21 look at it. We look at it under a controlled
22 circumstance, and we don't keep our hands on it

1 either. We get rid of it as soon as this case is
2 no longer being processed.

3 So I think we're doing the best we can
4 under the circumstances, and I am not sure we can
5 come up with a provision where we can satisfy
6 that concern for a victim without undermining the
7 defense.

8 PROF. TAYLOR: Okay. So a second
9 question goes back to something Admiral Tracey
10 asked, and it also came up this morning: there
11 sometimes is a sense in this issue of fundamental
12 fairness that if you give the victim -- the
13 victims' legal counsel more rights, then it is
14 like two against one. It tilts the system in
15 favor of the prosecution and the victim in a way
16 that is not good for your clients. And my
17 question is, how do you feel about that? We hear
18 this question about the fundamental fairness, you
19 know, it's not fair, they've got two against one.
20 What do you think about that?

21 MAJ SHURE: Sir, I would say -- and
22 this is just an observation -- the Air Force

1 tends to -- a lot of times government has
2 sometimes five, upwards of ten attorneys on a
3 particular appeal, whereas it is just one of us,
4 and then in the filings from the special victims'
5 counsels that we've seen, there are upwards of
6 five attorneys on those appeals, and so it is
7 sometimes a feeling of, there's 15 people over
8 here arguing one point, and then just me.

9 Obviously, I have the backing of my
10 office, but I am it, I am the client's
11 representation, and so there is that perception.
12 Now, I feel very confident that I can take that
13 on, and I -- you know, I think that the -- the
14 Air Force has put that trust in me, but I would
15 say that even -- even for my clients, I -- I hear
16 that, that they have all these attorneys, and it
17 is just you.

18 Sometimes I am combating that, you
19 know. I have to build myself up in order for
20 them to convince me.

21 (Laughter.)

22 CHAIR HOLTZMAN: But you still win

1 those cases 10 to 1, huh?

2 (Laughter.)

3 MAJ SHURE: I wouldn't go that far.

4 (Laughter.)

5 CHAIR HOLTZMAN: Okay. Well, that --
6 that -- I mean, I think that that is an important
7 question that was just asked. I mean, how do we
8 mitigate the -- the appearance here, because I
9 think there is an issue of respect for the
10 criminal justice -- the military justice system
11 that is really important. It is important for
12 morale, it is important for discipline people
13 don't think that the system is stacked against
14 the ordinary enlisted person. It's a problem, so
15 I think there is a -- there is an importance in
16 having the perception clear that the whole system
17 isn't stacked against defendants.

18 So I don't know if you have any
19 thoughts about what can be done in terms of the
20 appellate issues that we're discussing here,
21 because if the legislation gets through, it will
22 be perceived as a new right, okay, a new,

1 important, enhanced right for victims. So how
2 does one still establish that this is not going
3 to undermine basic fairness in defendants'
4 rights? Do you have any thoughts about that? I
5 mean, I -- it's a kind of PR issue, but it's a
6 substance issue, so Commander?

7 LCDR MEYER: If I may, having been a
8 prosecutor of military sex assault and now a
9 defense lawyer of military sex assault and tried
10 these cases, I can say without hesitation that it
11 is more than a perception. There really is more
12 resources dedicated to prosecuting than to
13 defending.

14 And the solace that I get now is that
15 I have a fair system with an impartial judge to
16 whom I can make my arguments, and a system that
17 recognizes the limits of the ever-expanding field
18 of victim involvement. As long as the victim
19 appellate rights are narrowly tailored to their
20 real interests, that is, that they not become
21 parties, but they remain parties in interest when
22 there's an identified interest, I think that goes

1 a long way to rebalancing the scales. Thank you.

2 CHAIR HOLTZMAN: Anyone else?

3 MAJ SHURE: I'm coming up to five
4 years in defense work, which in the Air Force is
5 a long time, and I will say that I sometimes feel
6 that perception or reality, frankly, that it is
7 -- the system is stacked against me. I -- I
8 gracefully, you know, say all the time I really
9 appreciate the government paying me to fight
10 them, but I --

11 (Laughter.)

12 MAJ SHURE: -- it is -- it is that --
13 that -- it does feel that way at times. However,
14 I have felt much more at the appellate level an
15 even playing field, so I would say I think, to
16 echo Mr. Mizer's comments, there is a balance at
17 the appellate level that I think may not exist at
18 the trial level, or may not feel or be perceived
19 to exist.

20 CHAIR HOLTZMAN: Okay. Let me just
21 ask one other question, just playing devil's
22 advocate here, and in part because I myself am

1 not fully reconciled to the -- to this outcome,
2 and that goes to the 513 question on appeal: so
3 why is it so important to have access to the
4 actual health records on appeal -- on appeal,
5 when that is not in existence at the trial level?

6 How do you tell the -- let's say
7 someone says, well, why -- if it's so important
8 to have actual -- have the defense counsel look
9 at these records, why isn't it important at the
10 trial level? So if it's not important at the
11 trial level, why is it important at the appellate
12 level, when particularly, you've got three
13 impartial judges looking at it? So what's the
14 answer to that?

15 MR. MIZER: And ma'am, I think that
16 the answer is this, and you heard some of this --

17 CHAIR HOLTZMAN: And I'm just asking
18 because I am trying to grope for an answer here,
19 and I think I want to understand what the
20 rationale is.

21 MR. MIZER: You've heard a little bit
22 more this morning with respect to the military

1 judges about the level of experience of these
2 judges --

3 CHAIR HOLTZMAN: Right.

4 MR. MIZER: -- so you're talking about
5 judges that are judges for two or three years.
6 Admiral Reismeier actually helped robe me at the
7 58th Military Judges' Course two years ago, so I
8 mean all respect to military judges, but they
9 don't have tenure.

10 The Supreme Court in *Weiss v. United*
11 *States* has held that they are essentially at-will
12 employees of the Judge Advocates General, so they
13 have this -- this two- or three-year term at the
14 trial level, and at the appellate level, maybe
15 you have more senior appellate judges doing that
16 on -- on -- for the exact same period.

17 You already have, by the very nature
18 of this system, given away many rights that
19 civilians have: the right to grand jury
20 indictment, the right to a jury selected at
21 random, the prosecutor or the individual that is
22 exercising prosecutorial discretion in this

1 system handpicks the members. You can be
2 convicted by a panel as little as five members
3 and by a non-unanimous verdict.

4 And so dealing with perception,
5 larding in now pure *ex parte* proceedings where
6 the rules haven't changed. The rules have been
7 the same since 2005, where every SVC should be
8 saying that you're going to go in, and if we beat
9 this and keep this out of the trial level, that's
10 not the end of the fight. There's going to be a
11 very narrow piercing of those records at the
12 appellate level by very senior attorneys and
13 judges, and they're going to determine whether
14 the judge got it wrong in that sealing, and so
15 that's what I think we're up against is due
16 process. That is why I think 1103A, ma'am,
17 strikes the balance of protecting the privacy and
18 also the defendant's due process rights.

19 CHAIR HOLTZMAN: Anybody else want to
20 add anything?

21 CAPT HOUSE: It matters, ma'am,
22 because being able to discuss and potentially

1 provide the information in those records to the
2 members may impact whether or not the defendant
3 is actually acquitted or found guilty or what
4 type of punishment that Sailor or Marine gets, so
5 if we have an issue in a case and it has come up
6 on appeal and there are sealed records, this has
7 clearly been an issue that has been at court:
8 should the defense be able, not only to see these
9 records, but to be able to use those records in
10 court to effectively defend a Sailor or Marine or
11 an Airman or a Solider?

12 So if we can't access those rights to
13 determine whether or not a military judge who may
14 not have a lot of experience made the right call,
15 then we've effectively taken away what might have
16 been a very important fact for the defense
17 counsel and the defendant for the members to hear
18 or to consider as to whether or not the person is
19 actually guilty or what type of punishment they
20 might get.

21 MAJ SHURE: I would add, ma'am, that
22 Mr. Mizer said this recently in our training. We

1 had a large turnover in our office this summer,
2 and so we spent a few days talking to the new
3 counsel about the difference between our trial
4 and appellate practice.

5 At trial, the judge, all the counsel,
6 they are rapid fire. They don't have time to
7 make -- to think through decisions at a large
8 scope. I have seen more times than I can count
9 developments throughout the trial that initially,
10 when the judge made their ruling, maybe the
11 records weren't relevant, but subsequently, in
12 statements that came out, if the judge forgets or
13 the counsel forgets or something else happens and
14 nobody revisits the issue, then it becomes
15 relevant, and me, the appellate defense, I have
16 all the time in the world to take a look at this
17 from a large-scale perspective.

18 So I see the whole trial. I see
19 everything that is relevant to my client,
20 everything that is relevant to the defense, to
21 the trial strategies, to those decisions, and we
22 are there, and that's exactly what Mr. Mizer

1 said, we are grading that homework from a much
2 larger level than you have when you are rapid
3 fire at the trial.

4 CHAIR HOLTZMAN: What -- I am sorry,
5 just sort of one final question. I appreciate
6 that answer. I just want to look at the language
7 of the Statute for one second, the proposed 547.

8 I guess what all of you are saying,
9 and I don't mean to put words in your mouth, but
10 if I understand what you're saying, all of you
11 are agreeing that right now, under existing law,
12 victims have certain appellate rights to protect
13 their specific interests such as in 412, 514,
14 513, and you're not opposed to that. Okay. It's
15 the law anyway, so --

16 (Laughter.)

17 CHAIR HOLTZMAN: -- all right. But my
18 question is you have concerns about 547 as
19 drafted because you think it may go beyond that.
20 Captain, you're shaking your head. You don't
21 have concerns about --

22 CAPT HOUSE: Well, I may have the

1 wrong version. The version I have only cites
2 412, 513, and 514.

3 CHAIR HOLTZMAN: So you have no other
4 problem with this -- you don't have a problem
5 with the language of that?

6 CAPT HOUSE: Not with subparagraph 2
7 ma'am, no.

8 CHAIR HOLTZMAN: Oh, I know, but I am
9 talking about the whole kit and caboodle.

10 CAPT HOUSE: Well, I think, you know,
11 it goes -- paragraph 3 talking about who is a
12 victim is going to be -- that a lot of discussion
13 will have to go into that, and who is going to
14 get this --

15 CHAIR HOLTZMAN: So --

16 CAPT HOUSE: -- counsel --

17 CHAIR HOLTZMAN: -- are you satisfied
18 with 3? Are you satisfied with point (f),
19 subparagraph (f)? Are you satisfied with (a)? I
20 mean, maybe we don't have time to discuss this
21 now, but I would really appreciate if you have
22 specific statutory recommendations --

1 CAPT HOUSE: Okay.

2 CHAIR HOLTZMAN: -- okay, to let us
3 know what they are.

4 VADM TRACEY: On the Senate version.

5 CHAIR HOLTZMAN: On the Senate
6 version, yes, because that is what could become
7 law.

8 CAPT HOUSE: Yes ma'am.

9 CHAIR HOLTZMAN: So we would
10 appreciate that, and with an explanation as to
11 why you think this language needs to be changed.
12 That would be very helpful.

13 CAPT HOUSE: Yes ma'am.

14 CHAIR HOLTZMAN: And probably sooner
15 rather than later is better because, you know,
16 sometimes it's a moving train, and I have no idea
17 when it's going to get into the station, so I
18 just want to say unless anybody has --

19 MR. STONE: I have a question, yes.

20 CHAIR HOLTZMAN: Okay.

21 MR. STONE: I have a few questions.

22 I want to stay with 1103A --

1 CHAIR HOLTZMAN: Well, you can't
2 because we're supposed to be finished already, so
3 just --

4 MR. STONE: Well --

5 CHAIR HOLTZMAN: -- take one.

6 MR. STONE: We'll make them quick.
7 With 1103A right now, the way it functions, the
8 victim doesn't get to -- to see your motion to
9 see the access records. Maybe they will get to
10 argue after you've seen them and you file a
11 pleading.

12 The issue is whether they should be
13 served notice before you get those records and
14 have a chance to tell the Court it shouldn't give
15 you the records, and I'll give you an example
16 from my practice that's a real example, that the
17 judge at the trial level said to the defense
18 counsel, no, you don't get the psychological
19 records of three years before when this person
20 who is now an adult was a young teenager, and the
21 judge didn't go on, but the teenager did crazy
22 stuff like had suicidal thoughts back then.

1 And the teenager, the person now an
2 adult, was very embarrassed by that, didn't want
3 that to come out because they had left that all
4 behind, had a regular job, had a normal life now,
5 and it's even possible that that happened when
6 they were on drugs. I have no idea. But -- but
7 they were totally embarrassed that way back, they
8 had suicidal inclinations.

9 Judge said, it doesn't have anything
10 to do with the crime three years later, I'm not
11 giving you the records. Now on appeal, you would
12 want to say, wait, we want access to that. And
13 what I am suggesting is 1103A is deficient
14 because the victim should at least be able to say
15 to the appellate panel, unless they have some
16 plausible connection that they proffer to you
17 between mental health records three years before
18 the crime that are of an entirely different
19 nature, unless they could connect even the time
20 of it in some way, we don't see that they should
21 get access or they should be opened up.

22 Now, the court could disagree and give

1 you the records, but at least the victim would
2 have the chance to see your motion and have a
3 chance to respond in the cases where they think
4 you might not get them. Now, you get the
5 records, and the victim still gets to say if they
6 want on appeal, and I think you will agree with
7 that, oh, on this issue, they shouldn't get the
8 records, okay?

9 Now just to play this out, why I don't
10 think it's doubling up and -- and helping the
11 prosecution, it is my experience, and it was in
12 that case, the prosecution was not -- did not
13 care about those records because the prosecution
14 said, you know, if this goes back on those
15 records, I am going to argue to the judge this
16 was totally irrelevant, it doesn't come in, it
17 makes no difference at all.

18 So the prosecution was not standing
19 firm because the prosecution's view was you want
20 to send this back, those records, the judge to
21 consider them, fine, I'm going to be arguing
22 they're irrelevant, but the victim cared very

1 much because the victim said I will be so
2 embarrassed when this comes out that frankly, I
3 will want nothing to do -- I am not going to show
4 up for that trial.

5 So the victim's interest does not
6 always align with the -- the prosecution, and
7 that is -- and so that is why I think 1103
8 doesn't go far enough now, not that it gives you
9 the -- if it stays that way, it would give you
10 access, but that it doesn't give the victim
11 notice to say if they have a good reason why you
12 shouldn't get access that there is no possible
13 way it's relevant. Does that trouble any of you?

14 LCDR CARRIER: Well, so the way 513 is
15 currently written -- I am sorry, Military Rule of
16 Evidence 513, now requires the military judge
17 before ordering production and therefore
18 receiving these records, examining them in
19 camera, and making them part of the record, there
20 has to be a showing of potential relevance.
21 Something like you described where the -- where
22 there is obviously no relevance, the school

1 solution, sort of the -- the -- what we'd hope in
2 the world properly happening is that those
3 irrelevant records never become part of the
4 record anyway.

5 So what becomes part of the record is
6 something that at least there was that threshold
7 showing, judge reviewed it in camera, and now we
8 want to question whether that --

9 MR. STONE: I know, but --

10 LCDR CARRIER: -- ruling is correct.

11 MR. STONE: -- lawyers disagree about
12 what's relevant all the time. That's what
13 lawyers disagree about.

14 LCDR CARRIER: But sir --

15 MR. STONE: And all I am saying is
16 they should have a right to be heard. They don't
17 have to be right, they don't have to -- the
18 ruling doesn't have to go that way, but they
19 simply have the right to know about the pleading
20 and file it. That is all I am saying.

21 LCDR CARRIER: Well, the more extreme
22 the -- the example, or the hypo, the less likely

1 it is it would be part of the record and actually
2 be part of our appellate --

3 MR. STONE: Oh --

4 LCDR CARRIER: -- access.

5 MR. STONE: Right, you don't think --
6 you think my hypo is extreme, but the judge
7 ordered those records to be turned over, and we
8 had to go to the Maryland high court, who had to
9 issue a mandamus to the judge on the day of trial
10 that said before you turn those over, you better
11 write a reason and send it to us, and then he
12 backed out because he knew there was no reason he
13 could do it. All I'm saying is that that is the
14 one out of 1,000. I'm not saying we face it all
15 the time, but the victims would like that
16 situation.

17 And in terms of the burden that was
18 mentioned before about the practical burden, I
19 presume your concerns would be met if it would --
20 there was a clear schedule so that after you
21 filed your opening defense brief, the victim had
22 to file his brief at the same time as the

1 government so it didn't delay the processing of
2 it, and that you would be entitled in your reply
3 brief to have as many pages of a reply to respond
4 to the victim if you wanted on their issues
5 separately than the government so you didn't feel
6 like you were denied. Would that meet your
7 concerns?

8 MAJ SHURE: I'll -- potentially yes,
9 sir.

10 MR. STONE: Okay. That's what I
11 wanted to know.

12 CHAIR HOLTZMAN: It depends.

13 MAJ SHURE: Yes ma'am.

14 (Laughter.)

15 CHAIR HOLTZMAN: Okay. Thank you very
16 much, again, for your testimony, and we would
17 really welcome any thoughts you have about the
18 specific language. Thank you very much, again.
19 We'll adjourn for about a five-minute break.

20 CAPT TIDESWELL: Ma'am, next is lunch.

21 CHAIR HOLTZMAN: Then we have our last
22 panel.

1 (Whereupon, the meeting went off the
2 record at 2:48 p.m. and resumed at 3:01 p.m.)

3 CHAIR HOLTZMAN: I guess -- are our
4 other panelists here? We have the wrong names up
5 there.

6 CAPT TIDESWELL: Yes, ma'am. Mr.
7 Bruce is coming in telephonically.

8 CHAIR HOLTZMAN: Yes, I know but we
9 don't have Lieutenant Colonel Carrier. We had
10 him once. I don't think so.

11 All right, well, we will begin with
12 what we have. That's it. If somebody's missing,
13 we will get to them later.

14 Okay, the next panel will begin -- I'm
15 sorry it is a little late -- dealing with the
16 Government Appellate Division's perspective on
17 victims' appellate rights. We have Major Anne
18 Hsieh -- okay, thank you -- U.S. Army Senior
19 Appellate Attorney and Branch Chief.

20 Is Mr. Roger Bruce here?

21 Maj STEER: He's on the phone, ma'am.

22 CHAIR HOLTZMAN: Okay, do we have a

1 name tag for you, sir? Okay.

2 We have Major Meredith Steer, U.S. Air
3 Force Appellate Government Counsel, Mr. Brian
4 Keller, U.S. Navy-Marine Corps Appellate
5 Government Division, Supervisory Appellate
6 Counsel, Lieutenant Commander Tereza Ohley, U.S.
7 Coast Guard Appellate Government Counsel.

8 LT OHLEY: I'm a lieutenant now.

9 CHAIR HOLTZMAN: Lieutenant Commander,
10 I apologize. Oh, just a lieutenant.

11 LT OHLEY: Yes, ma'am.

12 CHAIR HOLTZMAN: Okay, sorry. Well,
13 I guess you should be sorry.

14 And this gentleman who is sitting here
15 is?

16 LT MILLER: Lieutenant Robert Miller.
17 I work with Mr. Keller at the Navy-Marine Corps
18 Appellate Review.

19 CHAIR HOLTZMAN: Okay. So, we will
20 begin with Major Anne Hsieh. Welcome.

21 Let me just say I welcome all the
22 Panel Members and really appreciate your

1 willingness to spend some time with us and to
2 educate us and give us the benefit of your
3 thoughts and advice.

4 Major.

5 MAJ HSIEH: Thank you.

6 CHAIR HOLTZMAN: Oh, I didn't say
7 that. He's not here in person? Oh, I thought
8 when you said he was on the phone that he was
9 outside on the phone having a conversation.

10 Where is the phone mechanism for him?
11 Do you know where it is?

12 CAPT TIDESWELL: The controls are
13 behind you, ma'am.

14 CHAIR HOLTZMAN: Okay, Major Hsieh.

15 MAJ HSIEH: So, my name is Major Anne
16 Hsieh. I currently serve as a Branch Chief at
17 the U.S. Army Government Appellate Division.

18 First, I just want to preface that my
19 comments are my own personal opinion. They are
20 not intended to express the official view of the
21 Judge Advocate General or the U.S. Army.

22 Now, I have reviewed Section 547 in

1 the proposed changes to certain articles in the
2 UCMJ, as well as the concerns from the concerns
3 from the SVCs that prompted this proposal. I am
4 prepared to answer your questions today as well
5 as I can.

6 I do want to say that because there is
7 very little legal precedent for these proposed
8 changes, our office has not historically dealt
9 with many victim appellate pleadings. My
10 comments are going to focus more on our current
11 practice and how we address the victim concerns,
12 as well as the potential implications of this
13 proposal that we can foresee at this time.

14 CHAIR HOLTZMAN: If you wouldn't mind
15 focusing mostly on the proposals, that would be
16 really helpful to us because -- but okay.
17 Continue with the testimony as you had prepared
18 it. That's fine.

19 MAJ HSIEH: So, I think the first
20 topic was the victims' privacy concerns regarding
21 appellate review. I wasn't here for most of the
22 hearing today but I did catch some of it.

1 And so Article 66 appeals require
2 review of the entire record. I'm sure you have
3 already seen that. So, currently, if they are
4 part of the record, we are authorized to review
5 those. There is generally a presumption that if
6 they are attached to the record, that those
7 materials were already subject to the relevant
8 evidentiary rules and that process that is
9 involved and so, properly admitted.

10 And so once they become part of the
11 record, if they are sealed materials, they are
12 protected from the public view, even though on
13 the appellate level, they are kept with the
14 original record of the court and there is a
15 process, I am sure you have already heard
16 discussed, that we go through in order to view
17 them, if we need to in the course of our work.

18 Now, in some cases, we have had
19 appellants move to attach privileged materials
20 that were not attached to the record. And so
21 this is a different issue where I think I heard
22 one of the last panel members talk about Brady

1 violations, for example, being alleged. And so
2 sometimes, you will see appellants try to file a
3 motion to attach and somehow they have acquired
4 these privileged records. I have only seen it in
5 a couple instances, not very often. But usually
6 when that happens, we make a motion to seal those
7 items immediately, if the court doesn't do it sua
8 sponte. And also, typically, we also oppose
9 their attachment under the relevant appellate
10 discovery rules.

11 CHAIR HOLTZMAN: What kinds of
12 privileged material would be attached, for
13 example? I'm not following you.

14 MAJ HSIEH: I have seen in one case
15 where a defense counsel moved to attach mental
16 health records of a victim and that was very
17 problematic.

18 CHAIR HOLTZMAN: Okay, so this is
19 Brady material that was excluded?

20 MAJ HSIEH: Yes. I think it was
21 actually -- I forget what the error alleged was.
22 I think it may have been the sensing evidence or

1 something. But they said that this was necessary
2 and they somehow acquired it I think through
3 maybe basic -- I'm actually not sure how they
4 acquired it but they moved to attach and we
5 opposed it.

6 In my experience, the court, ACCA, is
7 very sensitive to victim privacy concerns. And
8 so it takes care to follow our own internal rules
9 in sealing those materials. And usually these
10 motions to attach are denied or motions to
11 disclose. Sometimes they ask for appellate
12 discovery. They want us to go and seek out more
13 things on appeal and we will usually oppose those
14 sort of motions, too.

15 And so in my experience, the court
16 understands the case law and the rules that are
17 in place and usually they are not appropriate or
18 necessary on appeal.

19 However, in regards to what is already
20 in the record, our perspective is that they have
21 been -- they have gone through -- they have been
22 vetted through a process and they are properly in

1 the record for a certain reason. And so that
2 balancing test that the rules, when you look at
3 513 or 412 and these other rules and the way that
4 they are crafted to strike at that balance
5 between victim privacy and due process and so
6 forth, it has already gone through that process.
7 And so when they are in the record, they are
8 appropriate for, I would say, both the Government
9 for the review of these parties who are trying to
10 litigate an issue on appeal.

11 Now, to move on to kind of the latest
12 provisions in Section 547, it is about providing
13 victims notice of any appellate matters. I would
14 agree that notice is very important of appellate
15 matters that do implicate victims' rights. And
16 so some examples of these might be appeals, which
17 raise errors with the MRE 412 or 513 rulings or,
18 like I previously mentioned, those motions to
19 attach privileged materials because of some other
20 error.

21 There are concerns with providing
22 notice of all appellate matters because, in

1 practice, most of the appeals that we see don't
2 actually have any direct implication on victims'
3 rights. And so I think trying to find at what
4 point how we define what implicates victims'
5 rights and really how we practically give notice
6 of any appellate matters in cases where there is
7 often multiple victims and different sorts of
8 crimes and so forth, is something that can be a
9 challenge.

10 I think it is also important that
11 notice is accomplished in a way that is efficient
12 and doesn't create an extraneous or unmanageable
13 burden on the Government. I think I heard this
14 discussed earlier but ACCA has not yet moved to
15 an e-filing system. We are hoping that we get
16 there soon but everything currently is hand-
17 served. That has been my experience in the last
18 three years in the Government Appellate Division.
19 And so if this law now requires you to serve
20 every matter on every victim directly in every
21 case, that would be quite a burden on our
22 offices.

1 And just to give some context, the
2 Government Appellate Division is currently
3 staffed with ten appellate attorneys and two
4 paralegals. And in a single year, we will file
5 around 400 to 500 briefs at ACCA, around 25 to 35
6 at CAAF, and any single one of those briefs or
7 cases will have a range of different issues,
8 ranging from a single error to I have seen up to
9 16 to 20 errors alleged. And so it can be,
10 sometimes, very complicated cases.

11 And like I mentioned before, it gets
12 more complicated when there are cases with you
13 may have a range of different types of victims
14 and multiple victims. And then to figure out
15 where and how to serve them can be a challenge.

16 Now, there was a proposal I heard
17 earlier about notice automatically occurring when
18 you serve these filings on maybe like an SVC
19 appellate office. So, just like we serve on the
20 Defense Appellate Division and Civilian Defense
21 Counsel, maybe there is like an automatic -- you
22 know they have notice of there has been a

1 pleading filed. I think that would relieve the
2 burden greatly.

3 To move into the victim participation
4 on direct appeal, again, this is something that
5 is unprecedented so our office has not previously
6 experienced victim filings on direct appeal. We
7 have seen a couple writs here and there on
8 interlocutory issues. So, the provision, I
9 think, raises several questions and it will be
10 interesting to see how this is going to be
11 interpreted.

12 Again, most assigned errors that we
13 see don't pertain to just MRE 412, 513, 514,
14 which is one way I think to read this provision
15 is that the victim only has a right to file when
16 those rights are directly implicated.

17 I think there is questions if you
18 have, for example, like a factual legal
19 sufficiency error. So, they are saying well, the
20 evidence is not sufficient for the conviction of
21 guilt, based off of a review of 412 evidence, for
22 example. At that point, does the victim also

1 have standing to file a pleading under the
2 Statute or does it not. And I think those are
3 questions that we are going to need to wrestle
4 with and figure out based off of the way that
5 this is written.

6 Another potential question that I
7 would have is we have seen the court, because it
8 has very broad Article 66 powers. It is very
9 unique and different from most other appellate
10 courts, so it can do a lot of things on its own
11 and so if it decides to, grant relief -- and I
12 have seen this before -- for an issue that was
13 not raised by appellant.

14 So, let's say appellant just raises
15 like a normal post-trial delay issue and the
16 court says you know we saw a problem with, I
17 don't know, a 513 ruling or something, and they
18 decide to grant some relief in light of that
19 error, at that point, we don't have a chance, as
20 the Government, to -- we have already filed in
21 regards to the raised error. Obviously, the
22 appeal has already been filed, too. Does the

1 victim, at that point, have a chance and what is
2 their opportunity they have to say something
3 about that?

4 I think probably the final thing that
5 I will talk about is there is a question about a
6 right to appeal interlocutory issues at CAAF.
7 And I think this emerges from the most recent
8 CAAF case, *E.V. v. U.S. and Martinez*. I don't
9 know, looking at 547 on its face, if it directly
10 addresses the concern that was in *Martinez*, which
11 is basically Congress spoke with Article 60 and
12 gave the CCAs jurisdiction but expressly left out
13 CAAF. And that is basically what CAAF said. The
14 opinion says Congress, having legislated in this
15 area, have bestowed certain third party rights on
16 alleged victims. We must be guided by the choice
17 the Congress has made. Congress certainly could
18 have provided for further judicial review in this
19 novel situation. It did not.

20 And there is nothing actually in this
21 provision that actually mentions CAAF expressly.
22 And so I mean there is other ways to interpret it

1 because Article 67 is in there to find room for
2 jurisdiction but it is not expressly in there.

3 In general --

4 CHAIR HOLTZMAN: Well, do you agree
5 with that?

6 MAJ HSIEH: Well, I think that --

7 CHAIR HOLTZMAN: Should 547 explicitly
8 include *Martinez*, the ruling in *Martinez*?

9 MAJ HSIEH: I think that is one way to
10 address it is to actually put an express
11 provision that also grants further appeal to
12 CAAF, instead of making -- what the Statute looks
13 like right now is that or the way that CAAF has
14 interpreted the Statute is that the CCAs are the
15 final court on that issue.

16 CHAIR HOLTZMAN: Okay.

17 MAJ HSIEH: Now, in general, the
18 concerns expressed by the SVCs are understandable
19 and they are important to address in the
20 Government's opinion. But we should, of course,
21 be careful to be precise with the language of the
22 proposed legislation to ensure that it is

1 appropriately tailored to these concerns and it
2 doesn't result in negative, second or third order
3 of consequences that were, of course, unintended.

4 I also understand that there are a
5 range of changes that are forthcoming with the
6 Military Justice Act and in different regulatory
7 changes that might address many of these
8 concerns. And so this proposed legislation
9 should be coordinated in that context.

10 Thank you.

11 CHAIR HOLTZMAN: Thank you.

12 Major Meredith Steer.

13 Maj STEER: Yes, ma'am. Mr. Roger
14 Bruce is going to give a statement on behalf of
15 the Air Force Appellate Government Division.

16 CHAIR HOLTZMAN: Mr. Bruce.

17 MR. TREXLER: Could you speak up,
18 maybe? We can't hear you.

19 CHAIR HOLTZMAN: Mr. Bruce, you are on
20 next. We would like your testimony.

21 MR. TREXLER: Mr. Bruce, are you still
22 there?

1 MR. BRUCE: I am.

2 MR. TREXLER: Okay. We are ready for
3 you. If you have a statement you want to read,
4 go ahead.

5 MR. BRUCE: Can you hear me okay?

6 CHAIR HOLTZMAN: Yes.

7 MR. TREXLER: Yes, sir.

8 MR. BRUCE: Okay. Good afternoon,
9 Madam Chair and Panel Members. I am Gerald Roger
10 Bruce. Major Speer and I have the privilege of
11 speaking with you about victim participation in
12 the appellate process. We are from the Air Force
13 Appellate Government Division.

14 I would like to like three main points
15 in addressing the discussion questions presented
16 to us by the JPP Staff.

17 1) We should not adopt an
18 unprecedented and potentially unconstitutional
19 three-party criminal justice system at the
20 appellate level. Moreover, appellate Section 547
21 will not solve the problem of the release of a
22 victim's sealed mental health records.

1 2) Instead, there is a rather simple
2 change to the law that will address and solve the
3 biggest current problem affecting victims in the
4 appellate process. We should, instead, fix Rules
5 for Courts-Martial 1103A which governs appellate
6 review of sealed records, including a victim's
7 sealed medical and mental health records. And
8 this should be done so in a fashion that provides
9 due process to both the victim and the accused.

10 If we fix RCM Section 1103A, most, if
11 not all, of the problems raised by the SVC
12 community will be solved in a constitutional
13 manner.

14 3) There already exists an
15 underutilized opportunity for victims to be heard
16 during the direct appellate review process,
17 namely the filing of *amicus* briefs.

18 The problem -- we should first
19 identify the problem so we can identify the fix.
20 The first two discussion questions proposed by
21 the JPP Staff cut straight to the heart of the
22 matter. (1) Our current rules regarding

1 appellate counsel access to sealed materials
2 sufficient to protect a victim's privacy
3 interests; and (2) what would be the ideal
4 mechanism to address victim privacy concerns with
5 respect to appellate counsel review of the record
6 of trial without impeding on due process rights
7 of the accused?

8 Simply put, the current rules are not
9 sufficient to protect a victim's privacy
10 interest. But changing RCM 1103A to require
11 Courts of Criminal Appeals to first conduct their
12 own in camera review of a victim's medical and
13 mental health records that were reviewed at trial
14 in camera by a military judge before the
15 appellate court could permit appellate counsel to
16 review the records is a solution we want to
17 propose today.

18 The gist of the RCM 1103A problem is
19 that military judges, as a general rule, all
20 properly conduct an in camera review of the
21 victim's mental health records at trial. In many
22 instances, the military judge concludes the

1 records are not relevant to the issues at trial,
2 refuses to release them to either the trial
3 defense counsel or the prosecutor, and orders
4 them sealed and attached to the record of trial.
5 Then, the record of trial comes up on appellate
6 review with the sealed records attached.

7 The appellate defense counsel requests
8 to review those sealed records the military judge
9 found to be irrelevant and not releasable by
10 merely citing to RCM 1103A. RCM 1103A provides
11 that appellate defense counsel and appellate
12 government counsel, among others, are "reviewing
13 and appellate authorities" entitled to the review
14 of the sealed material. The CCA follows the
15 plain language of 1103A and grants the appellate
16 attorney access to those irrelevant records.
17 Therefore, appellate government counsel had
18 vigorously opposed these requests from appellate
19 defense counsel for access to victim's sealed and
20 irrelevant records for a year in dozens of cases,
21 all without success.

22 We have cited to older CMA and CAAF

1 case law that would require the CCA to conduct
2 their own in camera review of the military
3 judge's in camera review at trial to determine if
4 the trial judge ruled correctly or not. Our CCA
5 has declined to conduct an in camera review and
6 determined that the plain language of RCM 1103A
7 superseded the older case law.

8 Our office also filed five petitions
9 for extraordinary relief at CAAF this year,
10 asking CAAF to order the CCA to conduct an in
11 camera review to determine if the trial judge
12 properly refused to release the victims' records
13 before releasing those same records to the
14 appellate counsel. CAAF summarily denied all
15 five of our petitions, no doubt, because of the
16 clear language of RCM 1103A.

17 Question two asks for the ideal
18 mechanism to fix this concern. If we fix RCM
19 1103A, we will address and solve some of the
20 victim notification concerns that have been
21 raised. RCM 1103A wipes away victim privacy
22 concerns by declaring appellate defense counsel

1 and appellate government counsel are entitled to
2 review those mental health records the judge
3 found to be irrelevant. RCM 1103A should be
4 amended to require the CCA to conduct their own
5 in camera review of the sealed records to
6 determine if the military judge abused his or her
7 discretion in refusing to release the records.

8 If a CCA determines that the judge did
9 not commit an abuse of discretion in refusing to
10 release the records, the CCA would order the
11 records to remain sealed and be attached to the
12 record of trial. The accused could then seek
13 further appellate review of that decision at CAAF
14 and CAAF should be required by the same amendment
15 to RCM 1103A to conduct its own in camera review
16 to determine if the military judge and the CCA
17 abused their discretion in refusing to disclose
18 the sealed records.

19 On the other hand, if after conducting
20 its in camera review a CCA determines the
21 military judge abused his or her discretion in
22 refusing to release the sealed records at trial,

1 the CCA would be required by the amended RCM to
2 notify the victim, the appellate defense counsel,
3 and the appellate government counsel, and provide
4 all an opportunity to be heard before releasing
5 the records. Such a procedure would provide due
6 process to all, an opportunity to be heard,
7 without creating an unprecedented, unmanageable,
8 and possibly unconstitutional three-party legal
9 system.

10 The same notification and opportunity
11 to be heard prior to release should be required
12 in the RCM to apply to CAAF.

13 CHAIR HOLTZMAN: Does that conclude
14 your --

15 MR. BRUCE: Questions one and two of
16 Part 2 of the JPP questions address due process
17 concerns of a quote, "real party in interest"
18 status to victims to file pleadings during direct
19 appellate review. Real party in interest is an
20 appellate term of art borrowed from petitions for
21 extraordinary relief that is inapplicable to the
22 direct appellate review, as confusingly proposed

1 by Section 547.

2 *LMR v. Kastenberg* provides a good
3 illustration. *LMR* was not a direct appellate
4 review case. It is an interlocutory appeal
5 brought by a victim as a petition for
6 extraordinary relief. The accused in that case,
7 named Daniels, was in fact a real party in
8 interest because he was, obviously, a party to
9 the court-martial, as he was being prosecuted.
10 Daniels was permitted, as a real party in
11 interest, to file a brief in that victim's
12 interlocutory appeal under the All Writs Act.

13 Section 547 refuses to place real
14 party of interest status used in petitions for
15 extraordinary relief by incongruently trying to
16 apply to direct appeal. As noted above, yes,
17 Section 537 poses due process concerns by
18 creating an unprecedented three-party criminal
19 appellate system in which two of the parties are
20 aligned against one accused. It is not hard to
21 imagine the trial court finding a due process
22 concern with such an unbalanced appellate legal

1 system not found elsewhere in the United States.
2 Future sexual assault convictions could be
3 jeopardized by such a system, a system that is
4 not rooted in RCM 1103A but also creating a
5 three-party system that certainly prolongs the
6 appellate process and likely undermines an
7 accused's due process rights of timely appellate
8 review.

9 If untimely appellate review occurs,
10 appellate courts would grant relief, which could
11 jeopardize convictions and sentences.

12 Question three in Part 2 asked if
13 victims should be alternatively allowed to file
14 *amicus* briefs during the appeal. Yes, they
15 should and the rules of both CAAF and the CCAs
16 currently permit them to file *amicus* briefs and
17 both courts have accepted them, especially in the
18 early stages of the SVC program, our office
19 encourages victims and their SVCs to file *amicus*
20 briefs.

21 The Air Force Corps specifically
22 invited the victim and her counsel in the United

1 States v. O'Shaughnessy to file an amicus brief,
2 after the CCA concluded the victim was not a
3 party. We are going to attach a copy of the
4 CCA's order in that case.

5 Unfortunately, the victim in that case
6 did not file an amicus brief but, instead, sought
7 to litigate the question of a victim status as a
8 party. Amicus briefs by victims are an
9 underutilized opportunity for a victim to be
10 heard.

11 Part 3 addresses the lack of CAAF
12 jurisdiction to review Article 6b interlocutory
13 appeals filed by a victim as set forth in *E.V. v.*
14 *Martinez*.

15 Section 547 confuses the reciprocity
16 of petitions for extraordinary relief. The first
17 Section 547 does not fit the lack of jurisdiction
18 gap found in *E.V.* In fact, the court expressly
19 applied it to direct appellate review, which is
20 Article 66 and 67 of the UCMJ. That has a very
21 literal appellate perspective, especially when it
22 comes to jurisdiction.

1 And we can expect the CAAF to once
2 again hold that they have no jurisdiction to
3 review a victim's writ appeal filed under Article
4 6b if Section 547 is adopted.

5 If the intent of Section 547 is to
6 remedy the lack of jurisdiction in the review of
7 a case, in my opinion, it does not accomplish
8 that objective.

9 Question two asks if a victim should
10 be permitted to appeal after an interlocutory
11 review by the CCA Staff. And if so, does Section
12 547 provide this route?

13 CAAF has statutory authority to review
14 virtually all other CCA decisions but there is no
15 good reason why CAAF should not also have
16 authority to review a victim's interlocutory
17 appeal of a CCA decision under Article 6b. But
18 as I mentioned, Section 547 does not provide that
19 jurisdiction as presently drafted.

20 In conclusion, fixing RCM 1103A in a
21 manner that would require notifications to a
22 victim and his or her counsel before a CCA could

1 release sealed mental health records that were
2 not released at trial and provide an opportunity
3 to the victim, the accused, and the United States
4 before a CCA could release previously rendered
5 privileged material would solve most, if not all,
6 of the victim notification problems we have
7 experienced and it would do so in a manner that
8 provides due process to all.

9 Thank you for the opportunity to
10 address the panel.

11 CHAIR HOLTZMAN: Thank you, Mr. Bruce.

12 Our next presenter will be Brian
13 Keller. You are with --

14 Maj STEER: Ma'am, I am with Mr.
15 Bruce.

16 CHAIR HOLTZMAN: Okay, so the three of
17 you are a team?

18 Maj STEER: No, ma'am.

19 CHAIR HOLTZMAN: Mr. Keller --

20 MR. KELLER: Did you have one to do?

21 CHAIR HOLTZMAN: -- you are with the
22 Marine Corps. Is that correct?

1 Maj STEER: I was just going to note
2 the fact that Mr. Bruce and I, of course, are
3 expressing our own personal opinions and not the
4 views of the Air Force.

5 CHAIR HOLTZMAN: We understand.

6 MR. KELLER: I would like to echo
7 that, ma'am. My name is Brian Keller.

8 CHAIR HOLTZMAN: Okay, right.

9 MR. KELLER: And I am the Supervisory
10 Appellate Counsel for the Navy-Marine Corps. And
11 please interrupt me if I am less than clear. I
12 may be less than clear but I will try my best to
13 be helpful.

14 I would like to start by saying I
15 think there are three underlying swaths of
16 concern that my office -- or that I see. I am
17 testifying in my personal capacity.

18 One is that when the CVRA was carried
19 over to the military, it was diluted into 6b.
20 So, there were parts taken out of it and I think
21 that that is the cause of some of the issues
22 today. I will get back to that.

1 The second one is that there are
2 problems with the sealing rules. I agree
3 vociferously with what my colleague and friend,
4 Mr. Bruce just told you.

5 And third, I think that there is an
6 issue with reconciling. And I think this has
7 been in the letter that Mr. Koffsky, if I am
8 saying his name correctly -- there was an issue
9 with the notice and access provisions of 547 with
10 the NDAA.

11 So, specifically, I am going to be
12 talking about four things. One is that Section
13 547 is a great shot at trying to fix some of 6b's
14 deficiencies but it is the wrong tool. And I
15 will talk about that.

16 Second, the current proposal to see
17 most pleadings needs to be reconciled. It is
18 duplicative and should be reconciled with the
19 NDAA 2017. And I will talk about that.

20 Third, is that the sealing rules do
21 need to be fixed. Despite what I heard testified
22 to earlier today, I think that there is an issue

1 with the fact -- I will get back to that. I
2 think there is an issue with the fact that people
3 on the appellate level can see things that were
4 sealed to everybody else at the trial level. It,
5 again, indicates distrust in what the judges are
6 doing to say that we get to double-check their
7 work at the appellate level and not trust their
8 sealing order.

9 And fourth, I think that the real
10 party in interest issue misses that the ultimate
11 problem here is jurisdiction. And I think that
12 Colonel Carrier mentioned that. I think that Mr.
13 Bruce may have mentioned that. I think that it
14 has been said before. The real issue is that
15 jurisdiction is just not given to address these
16 problems at the appellate level. I understand
17 you can do it with amicus briefs and I will come
18 back to that but I think the problem gets back to
19 the CVRA being diluted.

20 So first of all, why is this important
21 to us? Well, it is important to my office or to
22 the attorneys that work with me, which is ten

1 attorneys and myself, because I don't have stats
2 like Mr. Bruce does but we see this numerous
3 times throughout the year and every year. First
4 of all, we have cases that the CCA publishes.
5 There is one specific case in Tso, T-S-O, where
6 we believe that the CCA republished materials
7 that shouldn't have been published and we moved
8 the court to fix that. And we couldn't correct
9 that at the CAAF level. But this happens all the
10 time and if the victim was able to take action,
11 then that would be somebody else in the process
12 that could get that going. And I will come back
13 to this.

14 The second issue is there is a case
15 Barry, where the defense filed sealed materials
16 in an unsealed manner. And we repeatedly have to
17 file motions to make sure that those sealed
18 materials are actually sealed. And if the victim
19 was getting copies of these things, then they
20 could also take action if they had jurisdiction
21 at the CCA to do so and I understand they can do
22 so with amicus briefs but there may be a

1 different route.

2 Third, I know I as a counsel, since I
3 first got to Appellate Government in 2005, have
4 gotten calls expressing surprise that a
5 conviction was overturned because they didn't get
6 a copy of the CCA's order. Now, I understand
7 that the different CCAs may be sending copies or
8 requiring copies to be sent but there is no
9 uniform practice on that.

10 And fourth, defense counsel routinely,
11 and this is the 1103A issue, wants to copy sealed
12 materials or look at sealed materials and they
13 get to do so with impunity because our rules are
14 different than how practice is out in the federal
15 circuit courts. And we have -- and I think that
16 if we align our system more with what the federal
17 circuit courts did as far as sealed materials and
18 different certificates of confidentiality, then
19 that would be more assurances for the victims
20 that their privacy rights were being protected.

21 So, I would like to go through,
22 hopefully quickly, these four points. The first

1 issue is 547 being flawed and I think that there
2 are two main problems here. One is that it tries
3 to add a victim as a real party in interest and
4 that is just, as was testified to before and I
5 don't want to be too duplicative, but that is
6 kind of the totality. I mean, either they have
7 standing or they don't have standing at the
8 appellate court.

9 I think that the problem was that when
10 the CVRA was enacted in the military, two
11 provisions were taken out -- and I hope I am not
12 skipping ahead of myself here. But I think that
13 two provisions were taken out and one is that the
14 courts must, in the CVRA it says that the courts
15 must assure that the victims' rights under the
16 CVRA are protected. And that applies to
17 appellate courts in the federal court system but
18 for us, it doesn't apply to us because that part
19 was stricken. So, we don't really know if it
20 applies at the appellate court level or not and I
21 think that is part of what we are talking about
22 today.

1 The second thing is when the CVRA was
2 enacted in the military, there was a provision
3 that said that officers engaged in the
4 investigation and the prosecution of offenses
5 shall ensure that the CVRA's rights are given to
6 victims and that part was also stricken. I
7 understand that that part was moved to the
8 implementation section and it was given to the
9 secretaries, I believe, or maybe the JAGs to
10 issue implementing rules and regulations. But as
11 we all know, in appellate practice, if there is
12 no Statute, there is no jurisdiction. So in my
13 view, if there is a Statute that says that the
14 victims' rights must be accorded at the appellate
15 level, it would be much easier for a victim to
16 then go into the CCAs at the CAAF and say I am a
17 real party in interest. I want my rights to be
18 protected. So in my view, that is the first
19 problem with 547. It tries to create a real
20 party in interest without creating jurisdiction.

21 The second thing, it says the victims

22 --

1 CHAIR HOLTZMAN: I'm not sure I
2 understand that you are saying. I'm sorry, I'm
3 just not following that.

4 MR. KELLER: Yes, ma'am.

5 CHAIR HOLTZMAN: Are you saying that
6 if you just added back the appellate standard in
7 CVRA, that would just solve everything?

8 MR. KELLER: I do believe, ma'am, that

9 --

10 CHAIR HOLTZMAN: Do you need to add
11 something on jurisdiction? I'm just not
12 following that.

13 MR. KELLER: Yes. There are two -- my
14 apologies and thank you for calling me on that.
15 I think that there are two clauses in the CVRA
16 that say that the courts shall afford the victims
17 the rights under the CVRA. And the second
18 provision is that the officers engaged in the
19 investigation and prosecution of crimes shall
20 ensure rights under the CVRA.

21 And there are actual rights that have
22 an ascertainable person that is responsible for

1 those rights, like the court, which is what the
2 CVRA says, then it will be very easy for a victim
3 to go into our Courts of Criminal Appeals and to
4 CAAF and say I am a real party in interest; I
5 want you to strike the sealed material from your
6 pleading. You can also --

7 CHAIR HOLTZMAN: So, I'm just asking
8 you a simple question. Yes or no?

9 MR. KELLER: Yes.

10 CHAIR HOLTZMAN: All you have to do is
11 adopt point one -- I don't know that you need
12 point two -- saying that the court shall assure
13 the rights of the victims and that would overrule
14 the *Martinez* or the *E.V.* case as you called
15 *Martinez*?

16 MR. KELLER: Well, I --

17 CHAIR HOLTZMAN: Would it overrule
18 this recent decision saying the court doesn't
19 have jurisdiction?

20 MR. KELLER: I'm not sure that I am
21 saying that. I am saying that --

22 CHAIR HOLTZMAN: Well, that is what I

1 am trying to understand.

2 MR. KELLER: Yes. Right. Yes, ma'am.
3 No, in fact, I know that I am not saying that.

4 CHAIR HOLTZMAN: Okay.

5 MR. KELLER: What I am saying is that
6 the issues that I just talked about, which are
7 the problems that my office sees, which is that
8 there are unsealed materials filed, there are
9 opinions with sealed materials in them -- so, and
10 I think before we came up here, Lieutenant Miller
11 put it this way and I think it is the best way to
12 put it: that if issues arise with regard to 6b
13 rights for the first time at the appellate court,
14 then they could file as a real party in interest
15 to say strike that pleading.

16 CHAIR HOLTZMAN: So, that would be
17 your solution, as opposed to 547? I'm trying to
18 understand what you are advocating here.

19 MR. KELLER: Well, I am saying that
20 the real party in interest --

21 CHAIR HOLTZMAN: Is that instead of
22 547 real party in interest, you would just have

1 that provision of the Crime Victims' Act.

2 MR. KELLER: Yes, ma'am.

3 CHAIR HOLTZMAN: You don't need 547.

4 MR. KELLER: What I am saying is that
5 provision that talks about real parties in
6 interest does nothing. It doesn't create
7 anything. It just says that you are a real party
8 in interest and you can file pleadings. But if
9 you have no right, then you can't file anything.

10 So, I think that --

11 CHAIR HOLTZMAN: Okay but if you are
12 saying that if you just -- so you don't need this
13 547 provision on real party in interest.

14 MR. KELLER: Yes, ma'am.

15 CHAIR HOLTZMAN: You just need the
16 Crime Victims' Act section about courts
17 protecting the rights of victims.

18 MR. KELLER: I think that if it said
19 that courts shall do their best to protect the
20 rights, then those --

21 CHAIR HOLTZMAN: Okay. So, I'm just
22 trying to understand what your point is.

1 MR. KELLER: Yes, ma'am, then the 6b
2 rights could be easily protected without filing
3 an amicus. That is what I'm saying.

4 MR. STONE: Don't you need the piece
5 that says they have the right to go up on appeal,
6 which is in 3771?

7 MR. KELLER: Well, I think that if you
8 were to change the structure and if you wanted to
9 do something different than what the feds do,
10 then you would do that. That is not what I am
11 advocating.

12 I am not saying you need further
13 appeal or that you should be able to go up to
14 CAAF. I'm just saying if you want to be able to
15 address the concerns that the victims are raising
16 about unsealed materials and you want to create
17 the ability for them to then file in the CCAs or
18 CAAF, I think all you need is that simple
19 language from the CVRA.

20 That is my opinion. I could be wrong
21 but I think --

22 CHAIR HOLTZMAN: I'm sorry. I didn't

1 mean to interrupt. I just wanted to clarify what
2 you were saying.

3 MR. KELLER: Yes, ma'am. I realize I
4 was unclear.

5 CHAIR HOLTZMAN: Okay, please forgive
6 my interruption. Let's go.

7 MR. KELLER: I think that is the
8 easiest.

9 The second one is the notice of
10 appellate matters. And I think that that needs
11 to be reconciled with the section in the NDAA
12 which talks about creating an access system.
13 Once we have that access system, assuming it ends
14 up like PACER or CM-ECF, then we will have caught
15 up to where the feds are and the victims will get
16 notice of everything, just like they do in the
17 federal system. Then, they will be able to file
18 as real parties in interest because they want to
19 protect their 6b rights. And I think that is an
20 easy fix. So, number one, reconcile that.

21 And number two, there are provisions
22 in the NDAA that specifically talk about victims

1 getting copies of number one, the record of
2 trial; number two, the audio of the proceedings;
3 number three, the entry of judgment. And it says
4 that the victims need to get those.

5 So, if the panel does want to
6 recommend that they are getting copies of
7 something, it should be in somewhat like that
8 format. It should say get a copy of the opinion
9 and stick that into 66 and get a copy of the
10 opinions, stick that into Article 67. Because
11 that is really what matters at the appellate
12 level and I think Major Hsieh talked about that.
13 It is all baked into the record already.

14 And if there is something new, you
15 could address that by simply letting them get
16 copies two to four years down the road when that
17 access provision comes into effect for the whole
18 military justice system after looking to see if
19 we can make it work.

20 So, the second point is that the NDAA
21 is talking about access that is appropriate,
22 should be granted in military justice

1 proceedings. Again, that needs to be reconciled.
2 Those sections in the NDAA where they talk about
3 victim access specifically are 901, 902, 903, and
4 they are talking about Article 60 and Article
5 54(e) and they talk about giving the victim
6 automatic access, I think, as to all crimes, not
7 just sex assault crimes. So, again, if you
8 wanted to put something like that in there, I
9 think that that would be a revision to Article 66
10 and 67. Just say send a copy of the opinion to
11 the accused. But, again, I think that is a
12 reconciling because that will be happening two to
13 four years down the road if this access system,
14 if the legislation is enacted and an access
15 system like CM-ECF is implemented. I understand
16 that has been happening for years in the federal
17 system and we are making baby steps but we are
18 getting there. And I think that is what the
19 legislation is talking about.

20 Okay, the other thing is notice of --
21 the second problem in 6b is the notice of -- I
22 think that if there is anything that they get

1 notice of that should be in 6b is -- and this is
2 again the problem with the CVRA being watered
3 down.

4 If I could give a quick aside, so when
5 the CVRA was changed in the military to the 6b,
6 instead of just saying all public hearings, it
7 was they made a specific list of things. And
8 what they did is they, of course, left out
9 appellate proceedings.

10 So, many years ago, when I first got
11 to my office, I know I called Department of
12 Justice and I think Mr. Victor Stone was on the
13 other end of the phone. But I then called over
14 to Criminal Appellate to find out what they did.
15 And of course, they are notified of all oral
16 arguments.

17 So, if anything that is done that goes
18 into 6b, it should be oral arguments because
19 those are the public proceedings that the
20 military justice system has. So, that would be
21 my recommendation there.

22 Third, the sealing issue. Again, I

1 agree entirely with my colleague, Mr. Bruce, and
2 anybody else who has talked about this, 1103A318
3 is too broad. I could be incorrect but I believe
4 several years ago when we pulled up the sealing
5 rules from appellate courts in the Fourth
6 Circuit, they have elaborate sealing rules. And
7 there are certificates of confidentiality and
8 there are different levels of sealing. It can be
9 either in camera and only the judge sees it and
10 that carries up to the appellate level in camera
11 and one of the parties sees it, et cetera.
12 Something like that should be enacted in our
13 system, too.

14 That is not uniform across all the
15 Services. I know that you have been hearing that
16 some of the CCAs have rules for this. Well,
17 first of all, Article 66(f) I think requires all
18 JAGs to get together and together enact rules for
19 the CCAs.

20 So, in the joint rules that are in
21 Volume 44 of the MJ, I'm not sure that there are
22 sealing rules currently but I know that they

1 don't mirror what is in many of the federal
2 courts that I have seen.

3 So, what is the solution? And I do
4 believe that defense counsel and government
5 counsel should not be seeing some of these
6 things, if they weren't seen by government
7 counsel and defense counsel at the trial level.
8 I don't think that creates a problem. I think
9 you have a judge looking at the trial level. I
10 think you have three or more judges looking at it
11 at the CCA level. And if it gets up to CAAF, you
12 are going to have several judges looking at it at
13 CAAF, too. And they can determine whether it is
14 a due process right to see some of those
15 materials.

16 So, what is the fix? This is my
17 proposed fix: 1103A should be amended to remove
18 appellate government counsel and appellate
19 defense counsel from the reviewing authorities
20 because they are not like a court. They are
21 litigants. They have an interest.

22 And 1103A should add a section that

1 talks about appellate litigants that basically
2 says that whatever the level of sealing is that
3 was given at the trial level carries on up
4 through appeal and they can see them, pursuant to
5 whatever sealing rules are enacted at the
6 appellate courts.

7 Now, to make that consistent with
8 federal practice, I would direct you -- I would
9 suggest that you look at Article 36, which is a
10 rule that applies to all courts-martial and I
11 think that was used in Supreme Court case Hamden
12 v. Rumsfeld and it talks about the President
13 enacting rules for a courts-martial and military
14 commissions that are the same, insofar as
15 practicable, with the practice in the federal
16 district courts.

17 Now what that leaves out is it leaves
18 out the federal appellate courts. It doesn't say
19 that you need to enact rules that are consistent
20 with the federal appellate courts.

21 So, because there are many federal
22 appellate courts out there that have rules that

1 talk about sealing that are not like ours, and
2 they don't automatically let the defense counsel
3 look into anything that was sealed at the trial
4 level and let Government Counsel, me, look into
5 any matters that were sealed at the trial level,
6 I would suggest that we kind of throw the ball
7 back to the JAGs.

8 Article 66(f) talks about making those
9 joint rules for the CCAs. I think that
10 Lieutenant Miller came up with this brilliant
11 language but if you enacted something like
12 Article 36 with regard to the CCAs, which is that
13 the JAGs shall pass rules for the CCAs that are,
14 insofar as practicable, close to those in federal
15 appellate courts, then the ball goes back to the
16 President, the ball goes back to the JAGs, and
17 they can look at making rule and see if they work
18 in the military. And it will make it more
19 consistent with what is done out in federal
20 practice.

21 I would note that not only is that in
22 Article 36, it is also in the Military Rules of

1 Evidence, which 18 months after automatically
2 follow what is in the Federal Rules of Evidence.
3 And there is just example after example in the
4 military system, where we are very close to what
5 the feds did.

6 So, that is what I would suggest,
7 something like that. So, let the JAGs figure out
8 deliberately how to make our sealing rules more
9 closely follow the feds and, of course, change
10 1103A.

11 Finally, and I realize I am going a
12 little bit longer, so as quick as possible, I
13 think that 547 goes far more than what the CVRA
14 does, in some ways, but the problem is, as I
15 mentioned before, it creates rights without a
16 remedy. So, what can you do if you are a victim
17 and you get to the CCA and you see sealed
18 materials or you see a 6b violation and you want
19 to remedy it? Well, first you need to be
20 remedied but that is already in the works with
21 the NDAA, in some state, but it doesn't give a
22 specific right to relief.

1 So, I would just humbly suggest
2 something like, as I mentioned up front, the
3 language that is in the CVRA that says that the
4 courts should afford those rights to victims.
5 And it doesn't create a substantive right. It
6 doesn't create a right that interferes with the
7 military justice process. It just lets them file
8 a pleading saying hey, there are sealed materials
9 in here, please strike it, et cetera. I think
10 that would be an easy fix to this issue.

11 I would not create a further direct
12 review, just like the CVRA doesn't for victims.
13 I wouldn't necessarily create further review at
14 the CAAF level. I don't think that is needed.
15 You could do that, if you wanted to. I think the
16 feds don't have that. I think they don't have a
17 statutory right to take the different circuits'
18 CVRA rulings and appeal them to the Supreme Court
19 but it does allow the different appellate courts
20 to respect those 6b CVRA rights at each level of
21 the process.

22 So, that's my only comments. Thank

1 you.

2 CHAIR HOLTZMAN: Thank you very much.

3 Lieutenant Ohley.

4 LT OHLEY: Yes, ma'am. Good

5 afternoon, Madam Chair and Members of the Panel.

6 Thank you for inviting me to speak.

7 I am Tereza Ohley, justice counsel at
8 the Coast Guard's Office of Military Justice and
9 we represent the United States at all levels of
10 appeal and we also participate in the Joint
11 Service Committee on Military Justice and are
12 responsible for Service regulations and policy
13 related to military justice. And we also provide
14 trial counsel assistance.

15 Like all others have said, my opinions
16 are my own.

17 I do not want to be repetitive of what
18 has already been said by all the presenters here
19 today, especially those on this panel and also in
20 the written comments submitted by Department of
21 Defense and by others.

22 First of all, I would just like to add

1 two assumptions and one suggestion for further
2 study. I think we can all conclude that there
3 are certainly situations where there is no one in
4 our current adversarial process to represent an
5 interest of a victim on appeal. And in some
6 narrow situations, it will be necessary for the
7 victim to be able to present their views but in
8 many other situations, there might be a process
9 for the victim to do that outside of the direct
10 appellate process or their interests might be
11 sufficiently aligned with one side or the other
12 in a direct appeal that an amicus brief would be
13 sufficient to raise any additional views or
14 things that they might want to state.

15 And finally, 6b provides the victim an
16 opportunity to present their views and speak at
17 many different points in the trial process and
18 those comments the victim will have made at that
19 point would be available to appellate courts to
20 look at, as they review the record.

21 I would also like to echo the comments
22 that we should look at legislation that is

1 pending and things that are being proposed both
2 legislatively and in rulemaking and in policy, to
3 see whether any of those changes might address
4 some of the concerns and some of the needs of
5 that the victims have at the present. My
6 colleagues have addressed many of those issues.

7 I would like to point towards some of
8 the changes that are suggested to appellate
9 practice and the National Defense Authorization
10 of 2017, specifically in the Senate version, only
11 to state that under the proposed Article 66, the
12 Court of Criminal Appeals would no longer have
13 the responsibility to review an entire record of
14 trial but, rather, would review the issues raised
15 and only if raised by appellate defense counsel.
16 So, any rules that are being considered or any
17 Statutes that are being considered must take into
18 account the possibility that we might have a
19 system where the Courts of Criminal Appeals no
20 longer have independent responsibility to review
21 the entire record of trial and to approve only
22 such findings and sentences that they find or

1 correct.

2 With respect to the issue of continued
3 study, many of my colleagues have stated and
4 alluded to the fact that there may be other
5 jurisdictions, federal jurisdictions, state
6 jurisdictions, as Mr. Stone has stated, and maybe
7 even foreign jurisdictions that have already
8 dealt with some of these issues that have defined
9 the important questions of what are the important
10 victim rights that we are trying to protect,
11 either through 6b or otherwise. What are the
12 best practices for protecting these rights and
13 what, if any, are the consequences on the
14 judicial system in terms of economy on the
15 accused, in terms of due process, and even on the
16 victims themselves, in terms of unintended
17 consequences that might curb the rights that they
18 already have?

19 And for that matter, I would like to
20 suggest that this panel take up Professor Meg
21 Garvin on the offer that she made in her public
22 comment. In her public comment, she offered that

1 the National Crime Victim Law Institute will
2 conduct for this panel a detailed comparison of
3 civilian and military law with respect to victim
4 rights. Such comparison and study of the United
5 States and even foreign practices will be
6 invaluable to understanding how these concepts,
7 practices, and procedures would work in practice
8 and to help us avoid any pitfalls as we try to
9 craft the system that will serve the needs of the
10 victims, protect the rights of the accused, and
11 serve the larger interest of preserving our
12 military justice system.

13 Thank you very much.

14 CHAIR HOLTZMAN: Thank you.

15 PROF. TAYLOR: Well, in the interest
16 of time, I will just make one comment and then
17 ask one question.

18 The comment is that I am happy to hear
19 what Mr. Bruce and Mr. Keller have said about
20 some of the problems that I was suggesting to the
21 earlier panel about the way that we are now
22 dealing with sealed records at 1103A. So, thank

1 you for those comments.

2 My question is, would you consider the
3 participation of SVCs/LVCs any kind of an
4 intrusion or hindrance or nuisance in performing
5 your overall appellate duties on behalf of the
6 Government?

7 MR. KELLER: Can I jump in, sir?

8 PROF. TAYLOR: Anyone.

9 MR. KELLER: Okay, I will just say
10 very, very briefly, since I was too long before,
11 that that was one of the first things I said
12 there, which is it is a burden on us to have to
13 go in and continually file at the appellate
14 courts to correct some of these errors, when
15 sealed materials get included or we believe that
16 the 6b rights aren't being protected. So, it
17 would help.

18 PROF. TAYLOR: Would anyone else like
19 to comment on that question?

20 Madam Chair, that's it for me.

21 CHAIR HOLTZMAN: Admiral Tracey.

22 VADM TRACEY: Just one question for

1 clarification. I think, Mr. Keller, you
2 indicated that you repeatedly see sealed
3 materials being posted in areas where you would
4 not expect them to be or mishandled. Is that
5 because the procedures are not standardized? You
6 have heard fairly detailed descriptions of I
7 think Army-Air Force procedures. Are they not
8 standardized so Navy-Marine Corps doesn't use
9 those procedures? Do you have those procedures
10 but they are not followed or are the procedures
11 themselves not sufficient?

12 MR. KELLER: I think that there are
13 not standard procedures across all the Services.

14 VADM TRACEY: Are your procedures less
15 robust than Army-Air Force procedures?

16 MR. KELLER: No, I don't think so. I
17 think it is just human error but I think that --
18 I mean I am sure it happens. I think that Mr.
19 Bruce was alluding to things happening, too,
20 where under 1103A I think that anytime anything
21 happens where you are aware there is a violation
22 of 6b, you are going to go try to file something.

1 But I think the victims, if they are notified
2 about what is going on, they are more likely to
3 be able to step in and help themselves.

4 VADM TRACEY: Understood. I was
5 asking a slightly different question. That is,
6 we have heard two Services describe fairly robust
7 procedures. One made them equivalent to the
8 handling of classified material, which doesn't
9 typically show up just anywhere. And you are
10 saying that it is common to find materials posted
11 in places you wouldn't expect it to be posted.
12 And I was asking whether that is because -- could
13 you remedy that by implementing procedures
14 similar to those that the Army-Air Force have
15 described?

16 MR. KELLER: Well, I think that the
17 JAGs -- I mean, I guess. I haven't seen their
18 procedures.

19 I think that 66(f) says that all
20 procedures for the CCAs have to be done by the
21 JAGs together. That is the joint rules. So, I
22 don't know what they have in the Army and the Air

1 Force. I think it is just human error. I don't
2 know. I'm not sure of the answer to that
3 question.

4 CHAIR HOLTZMAN: Mr. Stone?

5 Okay, thank you.

6 MR. STONE: Yes, the last commentator
7 said two things that confused me. One was
8 something about there being unintended
9 consequences. And I wondered if she would like
10 to tell me what unintended consequences she had
11 in mind because I need a specific. I don't know
12 what unintended consequences you had in mind.

13 And you also said something about
14 there is other ways to participate outside of the
15 direct appellate process. I don't know what
16 those are either. So, perhaps you could tell me
17 what you had in mind.

18 LT OHLEY: Yes, sir. With respect to
19 unintended consequences for the victims
20 themselves, and again, I don't have a specific
21 proposal as to how this might be remedied, but
22 right now under 6b(e), the victims have a right

1 to petition for extraordinary relief in the form
2 of a writ of mandamus. And part of the test
3 required for granting such extraordinary relief
4 is a showing that the applicant does not have any
5 other form to receive said relief.

6 Now, if a victim were to have a right
7 to participate in direct appeal on that very same
8 issue, that might undermine the victim's ability
9 to receive extraordinary relief at the time that
10 they need it the most.

11 MR. STONE: But they won't need
12 extraordinary relief, would they?

13 LT OHLEY: They would need
14 extraordinary relief at that time, for example,
15 to prevent the --

16 MR. STONE: You mean an interlocutory
17 appeal, basically, as opposed to an appeal after
18 the conviction is final.

19 LT OHLEY: No, sir. A writ of
20 mandamus to prevent the records from being
21 exposed in the first place.

22 MR. STONE: That would be an

1 interlocutory appeal, wouldn't it?

2 LT OHLEY: Yes, sir.

3 MR. STONE: So, therefore, since they
4 have no other interlocutory appeal, the Statute I
5 don't think would be a problem, would it?

6 LT OHLEY: That remains to be seen,
7 sir. I don't have a proposal but I just wonder
8 as to how courts would -- right now, the victims
9 have no other form of relief, specifically, even
10 as *E.V. v. Martinez* has said, once they have gone
11 to the CCA, they cannot even go to CAAF to ask
12 for additional relief and review of this
13 petition. They have one shot.

14 They would have an additional shot if
15 they were to have direct participation in direct
16 appellate --

17 MR. STONE: But it would be too late,
18 then, because the records would be disclosed.

19 LT OHLEY: That would be for the
20 courts to decide but, certainly, it would erode
21 the extremity of their situation where they
22 absolutely would have no other voice in the

1 matter, after they make that petition.

2 MR. STONE: In other words, do you
3 think it would erode their right to privacy if
4 the records are disclosed and then they have an
5 appeal?

6 LT OHLEY: It would not erode their
7 right to privacy, sir, but their situation would
8 be less extreme because they would have another
9 voice in the matter later on down the road, where
10 now it is very clear that they would not.

11 MR. STONE: What are the other views,
12 the other ways you thought outside of the direct
13 appellate process that they can express
14 themselves, you said. And you mentioned also
15 comments in the trial court. In other words, do
16 you think if they make comments to the lower
17 court, they don't need their own standing in the
18 appellate court?

19 LT OHLEY: Sir, I was just stating
20 that in some cases what the victim might have to
21 add may be duplicative of the matters that they
22 have already had a chance to express during the

1 trial court. There are certainly situations
2 where they have a right or an interest that they
3 have neither been able to present during the
4 trial process under the current rules, and that
5 they have not asked any other sort of relief on,
6 and that they are not aligned with either side
7 on. And in those cases, perhaps an amicus brief
8 would be a way for them to express those views
9 that are outside of what is already on the record
10 before the court.

11 MR. STONE: Aren't the Government's
12 arguments and the defense counsel's by definition
13 also duplicative on appeal? Because you can't
14 raise something on appeal you haven't raised
15 below.

16 LT OHLEY: I'm not sure I understand
17 your question, sir.

18 MR. STONE: That's okay. I thought
19 you were opposing appellate standing on the
20 ground that people should just look at what the
21 victim might have said in the trial court.

22 LT OHLEY: I apologize if I was

1 unclear, sir. I'm really proposing that rather
2 than granting broad standing or rights on direct
3 appeal, we might look at those situations where
4 the victim needs to state something on appeal as
5 being somewhat more narrow.

6 For example, and this is not something
7 that we have in the military, we discussed the
8 situation that was previously discussed, the
9 situation of a victim that has been granted
10 restitution. And I thought that interesting on
11 this matter was the case raised by Professor
12 Garvin, *United States v. Laraneta*, it is a
13 Seventh Circuit case, where Judge Posner had
14 written the opinion and essentially that the
15 victim had been granted restitution but, on
16 appeal, the United States chose not to defend the
17 restitution, defending only the sentence. And in
18 that case, Judge Posner said this is a really
19 specific and narrow situation, where the victim
20 is not having their interests represented by
21 argument of the Government because they are not
22 defending this and they have a really specific

1 right that no one is protecting and that is
2 individual to them, which is restitution. And
3 for that reason, based on the broad federal
4 judge's procedural authority, that victim was
5 allowed to intervene.

6 And I believe there are narrow
7 circumstances and I don't have a list of examples
8 right now, sir, I apologize, where a military
9 victim has that problem. They have something
10 unique and particular to them and there is no
11 other voice is that stating their --

12 MR. STONE: That's right and that
13 wouldn't be covered, currently, by 547, would it?
14 Because it limits itself to 412, 513, and 514.
15 So that circumstance would not be covered, right?

16 LT OHLEY: No, sir, it wouldn't.

17 MR. STONE: And I guess the other
18 thing I didn't hear any of the panelists comment
19 on, any of them, has to do with the fact that 547
20 does not cover the circumstance I mentioned to
21 the earlier panel, where defense counsel wants
22 more time before trial. It is a repetitive

1 motion that maybe is a third or fourth request
2 for an extension. The Government does not object
3 but the victim does because the victim, let's say
4 has AIDS and says I'm not going to be there.
5 They may not care that I'm not a witness at the
6 trial because I was drugged and sex was forced on
7 me and other people are the witnesses. I'm not a
8 witness but I do want to see the trial happen and
9 then, on appeal, there is no one to defend the
10 trial judge's ruling when he denies that last
11 extension of time before trial, except the
12 victim. That would not be covered by 547, as I
13 read it.

14 And I didn't hear any comments from
15 any of these panel members, I would appreciate
16 one if you have them, as to any reason why we
17 shouldn't broaden 547 to cover everything in 6b,
18 period. So that if 6b covers it as a right in
19 the trial court, then it is also a right in the
20 appellate court and we should name both the
21 Military Courts of Criminal Appeals and CAAF.

22 Does anybody have any thoughts on

1 that?

2 Maj STEER: Sir, I think LRM v.
3 *Kastenberg* answers that. Under Article 6b, these
4 are rights that victims have. And LRM v.
5 *Kastenberg* said that you do have standing to
6 bring issues on those things. So, I don't think
7 you need to go and legislate again in Article 6b
8 that you have the right to appeal these things.
9 That has been answered. Jurisdiction has been
10 the problem.

11 And so as Mr. Bruce stated, if you add
12 in that the CAAF has jurisdiction to hear
13 something that CCA has denied, I think the victim
14 would be covered in that case.

15 I can also tell you in my personal
16 practice, I have never seen the Government agree
17 with defense on a delay when a victim did not
18 want that. So, in my personal practice, I
19 actually have never seen that happen.

20 MR. STONE: Of course, there are lots
21 of circumstances we don't all see.

22 CHAIR HOLTZMAN: Okay. I'm going to

1 forego my questioning rights because we are four
2 o'clock. If any of you have any further thoughts
3 that you want to share with us with regard to
4 547, please feel free to do that.

5 Meanwhile, I just want to say thank
6 you to all of you for coming, sharing your
7 experience and your thoughts. It has been very
8 helpful to us. And Mr. Bruce, thank you for
9 appearing on the phone.

10 Okay, this will -- maybe we could just
11 stay for a few minutes after.

12 You are excused. Again, thank you
13 very much for your testimony.

14 (Whereupon, the above-entitled matter
15 went off the record at 4:03 p.m. and resumed at
16 4:03 p.m.)

17 CHAIR HOLTZMAN: Excuse me. We are
18 trying to talk here. So, if you have
19 conversation, I know it is very important, would
20 you mind either taking it outside? Would you
21 mind doing that, please? Thank you.

22 Admiral Tracey asked, in light of the

1 concerns that we have heard expressed today and
2 in light of the fact that legislation may be
3 adopted on the subject, and in light of the
4 restrictions upon us with regard to lobbying, how
5 do we make -- how can we move quickly, can we
6 say? Is that the right formulation? I don't
7 want to put words in your mouth.

8 VADM TRACEY: Absolutely.

9 CHAIR HOLTZMAN: How can we move
10 quickly in terms of any thoughts or
11 recommendations we may have with regard to the
12 subject and how should we proceed? Does anybody
13 have any thoughts on that?

14 Admiral, do you have some thoughts
15 that you want to express?

16 VADM TRACEY: No, I actually have
17 questions for the Staff. Are we concerned that
18 legislation may be enacted that has some issues?
19 I think we all agree there are some concerns that
20 legislation is currently proposed. Do we think
21 that could happen prior to our next meeting or
22 what is our --

1 MS. FRIED: I don't know.

2 PROF. TAYLOR: So, it seems to me that
3 we understand from the fact that we have 547 and
4 certain other language that we have looked at,
5 that the Senate Arms Services Committee Staff, at
6 least, is interested in the information that we
7 are developing as we go along.

8 So, one thing we might do is to ask
9 the Staff Director to provide a summary as
10 quickly as possible of the transcript or whatever
11 else might be appropriate, just by way of
12 information. Because I don't know that we are in
13 a position, at this point, to actually make a
14 recommendation.

15 CHAIR HOLTZMAN: Right. I don't know
16 that we are allowed to transmit material but we
17 could put it on our website. Is that correct?

18 MS. FRIED: Yes.

19 CHAIR HOLTZMAN: All right. So, we
20 could provide a summary of the concerns that were
21 raised at this presentation and put them on our
22 website.

1 The second question is do we have time
2 and would there be a forum in which we could
3 consider and make our own determination on the
4 concerns that were raised?

5 MS. FRIED: So, I think you would have
6 to articulate what those concerns are before we
7 put them on the website.

8 CHAIR HOLTZMAN: Oh, we are not
9 putting it on the website. That is a separate
10 point. Maybe I wasn't clear.

11 One is to summarize, put a summary of
12 what we have heard today on the website. Is
13 everyone in agreement with that?

14 MR. STONE: As long as it is
15 accompanied by an expedited transcript. That we
16 move it to get the expedited transcript up there
17 to follow it.

18 CHAIR HOLTZMAN: Well, I don't agree
19 with that. We may not have an expedited
20 transcript, in which case I think it should still
21 go on, if we have a summary.

22 MR. STONE: As long as we are trying

1 to get an expedited transcript.

2 CHAIR HOLTZMAN: Yes.

3 MS. FRIED: We can post the minutes of
4 the meeting.

5 CHAIR HOLTZMAN: Yes, whatever. But
6 I think a summary would be useful because no one
7 is going to go through the minutes. It is
8 unlikely.

9 Okay, so that is number one. We have
10 agreed on that.

11 The second point is we, ourselves, do
12 we want to deliberate on some of the questions?
13 First of all, do we have enough information? And
14 two, do we want to deliberate on the proposals,
15 the questions, the concerns that have been raised
16 and come up with our own view about what should
17 be done with regard to victims' rights on appeal?

18 I mean we started to consider that and
19 so that is really -- I mean that's it but I don't
20 know how quickly we can do that.

21 PROF. TAYLOR: Well, as I recall, the
22 plan, were we not planning to have at our October

1 meeting more information about victims' rights?

2 So, that makes me think that if there is
3 information we don't have at this point, then I
4 wouldn't feel as comfortable making a
5 recommendation after deliberations, as I would,
6 once we got a fuller view of what is out there.

7 I think today has been very useful but
8 it seems there is more out there that we should
9 probably know.

10 CHAIR HOLTZMAN: Right. Maybe one of
11 the things the Staff could do is, in terms of
12 preparing a summary, maybe prepare for us kind of
13 the issues, a checklist of the issues so that we
14 could begin to be thinking about what the choices
15 are and how we feel about them to guide our own
16 thoughts in this process.

17 Is that okay?

18 MS. FRIED: I think the Staff should
19 propose the issues to the Chair and the Chair
20 could adopt them, modify them, make whatever
21 changes need to be made to reflect the views of
22 the panel.

1 CHAIR HOLTZMAN: Oh, yes, well the
2 panel would have to agree on that. I'm not
3 saying that we --

4 MS. FRIED: Right.

5 CHAIR HOLTZMAN: But at least have a
6 checklist of what the options are. Issue number
7 one, should it be called a real party in
8 interest?

9 MS. FRIED: Correct.

10 CHAIR HOLTZMAN: A says A, B says B,
11 C says C. These are the issues. That's all I'm
12 saying. No, we wouldn't make a determination.
13 We would just see what the options that we have
14 been presented so far. Maybe at the next
15 hearing, we will hear further options. But at
16 least for the moment, we could get an idea of
17 what those issues are under the various concerns
18 that have been raised. Does that seem sensible?

19 PROF. TAYLOR: Yes, I think it does
20 but I think one of the things that appears to me
21 is that some of the rules that we are asking
22 questions about don't necessarily require

1 statutory changes.

2 CHAIR HOLTZMAN: Correct.

3 PROF. TAYLOR: So, just as we got a
4 copy of the recommendations that we have been
5 receiving, we have been making informally from
6 the Secretary of Defense's Office, it may be that
7 some of these changes can be made without regard
8 to what happens with the NDAA FY17.

9 CHAIR HOLTZMAN: Exactly but I
10 wouldn't limit the list of issues to what can be
11 solved by Statute.

12 PROF. TAYLOR: I totally agree with
13 that.

14 CHAIR HOLTZMAN: It would be just a
15 list of the various issues that have been raised
16 in this hearing and the prior hearing and what
17 the options that have been suggested up until now
18 to deal with them.

19 Does anybody disagree with that? We
20 may not agree with any of those options. Or
21 there may be a non-statutory approach or some --
22 or we may say nothing should be done about it.

1 MS. FRIED: And your objective is to
2 have these items identified based on what you
3 heard today for the purposes of further
4 discussion.

5 CHAIR HOLTZMAN: Correct. That's all.

6 MR. STONE: So, can we -- are we
7 allowed to have them emailed to us? And are we
8 allowed, as Panel Members, to re-email back --

9 MS. FRIED: No. I think the Staff
10 will be able to send you an issue paper, based on
11 what the testimony reflected today. A discussion
12 of what that is and what should remain and what
13 shouldn't remain needs to be done in an open
14 session at the next meeting.

15 CHAIR HOLTZMAN: Yes. So, at the next
16 meeting, we may have some preliminary discussion
17 about this and maybe there could be room on the
18 agenda for that. But we obviously won't, if we
19 hear new material, we obviously won't be able to
20 finish that at the next session. But at least it
21 will help guide us in terms also of the
22 questioning and our thinking on the subject.

1 VADM TRACEY: Well, I have the
2 opposite concern and perhaps there is nothing we
3 can do about it. And that is that the Senate
4 somehow manages to get an agreement on a piece of
5 legislation that appears to be perhaps an off-
6 point fix to a problem. And once that has
7 happened, how do you recover from that?

8 PROF. TAYLOR: That would be
9 unprecedented.

10 VADM TRACEY: Well, getting to a
11 decision might be.

12 MR. STONE: Then we can meet on how to
13 administratively make their statutory change
14 work.

15 CHAIR HOLTZMAN: But let's all --
16 since they are paying so much attention, Admiral,
17 to what we think, even before we think they seem
18 to know what is going on in our minds -- we won't
19 go into how they are doing that, the Senate Arms
20 Services Committee has an extraordinary capacity.
21 But it may well be that if they do read some of
22 the comments on the website, it may affect their

1 thinking or maybe not.

2 MR. STONE: I have a slightly
3 different suggestion.

4 CHAIR HOLTZMAN: Go ahead.

5 MR. STONE: When we did our prior
6 publications that we released, the drafts of them
7 were allowed to circulate for comment. So, I
8 don't understand why a draft of what we think the
9 important questions are can't similarly circulate
10 among the Members for comment in a way that those
11 drafts go on the public web site. So, if anybody
12 wants to see what the drafts are, the comments,
13 they can see them.

14 MS. FRIED: It is my understanding
15 that we addressed, we sent it to the Panel
16 Members and we sent -- the input was individually
17 provided to the Staff Director, who then
18 identified what the input was at that
19 deliberation, going back and forth.

20 CHAIR HOLTZMAN: That is, I think, the
21 point he is making.

22 MR. STONE: I'd like to do that.

1 MS. FRIED: To the extent we do that,
2 which would be fine, --

3 MR. STONE: Yes, I would like to see
4 the Staff Director send me their summary of what
5 they think the issues were, the questions, or
6 however you want to put it.

7 CHAIR HOLTZMAN: Yes and then you can
8 send your comments back to them.

9 MR. STONE: And then I can simply send
10 more comments back to the Staff Director. I
11 thought that that is --

12 CHAIR HOLTZMAN: Yes, we can't share
13 the comments but we can send them back.

14 MR. STONE: We send them back to the
15 Staff Director.

16 CHAIR HOLTZMAN: Yes, it still doesn't
17 obviate the problem about considering all of this
18 material together.

19 MS. FRIED: Right.

20 MR. STONE: That's what I would like.

21 CHAIR HOLTZMAN: Thank you very much.

22 MR. STONE: So, with this summary,

1 maybe we can get -- I mean it may follow the
2 summary and these are the issues we saw.

3 MS. FRIED: Anything else?

4 All right, the meeting is closed.

5 Thank you.

6 (Whereupon, the above-entitled matter
7 went off the record at 4:16 p.m.)
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13
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15
16
17
18
19
20
21
22

A
a.m 1:11 4:2 87:16,17
 159:20
AAFES 174:18
ABA 10:5
abbreviated 22:21
ABC 169:9,11
ability 39:13 96:4 207:1
 236:17 249:3,10
 312:17 332:8
able 21:13 25:22 26:4
 28:10 32:12 69:17
 95:21 107:2 115:4
 126:14 189:17 197:3
 228:17 230:22 231:4
 231:5 233:1 237:7
 246:20 249:14 250:15
 261:22 262:8,9
 268:14 304:10 312:13
 312:14 313:17 324:7
 330:3 335:3 348:10
 348:19
above-entitled 87:15
 159:19 340:14 352:6
abridges 236:4
absence 202:10
absent 30:16
absolute 42:14
absolutely 28:12 128:1
 148:11 222:4 250:14
 333:22 341:8
absolve 59:6,7
absurd 170:21
abuse 161:11 175:8
 242:3 294:9
abused 175:9 250:17
 294:6,17,21
abuses 187:13
ACCA 280:6 282:14
 283:5
accept 91:19
acceptance 37:9
accepted 195:1 297:17
access 29:15,22 30:22
 31:1,2,11,14,20 32:3
 32:7,9 35:1,6,7 37:15
 39:15 42:8 43:12,14
 53:9 54:15 94:12
 95:21 98:16 107:8
 108:5,6 110:16 117:9
 129:9 130:16 142:12
 143:5 154:21 155:5,6
 163:6 174:14 181:22
 182:6,7,7,9 183:10
 187:9,21 189:5,12
 196:19,20 197:6,10
 197:14,17,21 198:14
 199:9,11,13,19 200:5

200:10 210:15 218:12
 226:14 228:17 246:4
 249:2,9,20 250:11,16
 250:21 259:3 262:12
 267:9 268:12,21
 270:10,12 272:4
 291:1 292:16,19
 302:9 313:12,13
 314:17,21 315:3,6,13
 315:14
accessed 149:14 228:3
accompanied 343:15
accompany 54:6 55:19
accomplish 299:7
accomplished 212:3
 282:11
accomplishing 233:11
accomplishment 12:3
accorded 166:9 307:14
account 61:11 150:22
 325:18
accurate 47:15
accurately 181:14
accused 14:18 15:11
 16:8 17:10 22:14 44:7
 46:9,18 48:8,9 51:16
 56:9 57:3 88:7 108:4
 120:2 126:12 146:11
 146:17 165:14 172:7
 175:3 179:2,11 184:3
 184:5,6 190:2 209:6,7
 209:12 233:18 290:9
 291:7 294:12 296:6
 296:20 300:3 315:11
 326:15 327:10
accused's 47:5 94:1
 297:7
accusers 179:11
achieve 26:14 95:5
achieved 162:8
acknowledge 180:22
acknowledged 194:22
acquired 279:3 280:2,4
acquitted 262:3
act 6:11 37:4,6 42:16
 61:19 78:21 121:19
 194:18 288:6 296:12
 311:1,16
acting 5:7 186:11
action 29:14 36:12 43:5
 171:13 201:21 304:10
 304:20
actions 57:6 79:21
 201:9
active 26:1 34:6 48:1
 180:5 192:12
activity 195:11 197:2
 204:8

actors 15:2
Acts 6:13
actual 164:1 170:10
 259:4,8 308:21
add 75:10 135:6 146:15
 163:14 183:14 217:22
 223:21 227:9 229:10
 230:22 231:4 261:20
 262:21 306:3 308:10
 318:22 323:22 334:21
 339:11
add-ons 226:6
added 29:11 124:4
 308:6
adding 149:17 244:1
 246:11
addition 37:1 170:17
additional 15:21 16:3
 44:2 55:4 85:4,5
 87:19 109:5,6,7,22
 110:1 117:12 184:17
 191:4 211:22 247:4,5
 324:13 333:12,14
Additionally 7:13 39:5
 183:14 196:13 201:19
address 6:22 16:7,17
 24:14 25:19 29:14
 30:3 39:11 41:20 47:7
 47:15 49:3 51:3 63:18
 66:13 69:1 83:3 95:17
 107:18 127:17 153:8
 153:10,18 161:1
 181:13 194:12 210:14
 211:16 217:22 218:16
 220:1 277:11 287:10
 287:19 288:7 290:2
 291:4 293:19 295:16
 300:10 303:15 312:15
 314:15 325:3
addressed 14:9 17:13
 21:8 40:6 84:18 325:6
 350:15
addresses 149:17
 226:20 227:4 286:10
 298:11
addressing 36:5 53:6
 163:8 171:20 241:1
 289:15
adds 149:20
adept 196:1
adhered 63:5
adjectives 137:14
adjourn 3:20 273:19
adjudicative 17:8
administered 234:21
administration 82:14
administrative 170:19
 171:2,9,12,20 176:8

223:6,7,12 224:4
 225:7
administratively
 349:13
Admiral 1:17 3:6 4:18
 7:21 25:17 58:18
 75:17 85:4 87:18
 105:1 111:19 129:6
 233:13 254:9 260:6
 328:21 340:22 341:14
 349:16
admission 37:20 52:9
admit 51:14 174:1
admitted 51:20 55:15
 278:9
admitting 238:12
adopt 289:17 309:11
 345:20
adopted 159:11,15
 249:7 299:4 341:3
adopting 90:8 153:17
adoption 212:4
adult 6:18 267:20 268:2
advance 46:11 193:17
advanced 204:16
adversarial 14:17 15:18
 22:18 61:22 62:14
 92:5 324:4
adverse 95:22 116:21
 171:12 208:13 223:6
 225:9
adversely 171:12
advice 276:3
advise 45:22 183:19
 192:3
advisement 46:16
advises 46:2
advising 45:8 49:13
Advisor 35:22
advisory 4:8 73:9
advocacy 195:13
 203:18
advocate 2:16 5:7
 30:13 38:2 39:2 45:2
 46:3,14 161:8 174:5
 180:5 191:21 196:16
 202:2 205:22 236:20
 258:22 276:21
advocates 31:13 81:15
 97:17 260:12
advocating 310:18
 312:11
affect 16:18 226:3
 349:22
affidavit 34:3,10,11,15
affirmative 199:14
affirming 49:18
afford 308:16 322:4

- afforded** 31:19 39:9
190:13 214:1 220:17
- Afghanistan** 175:13
- aftermath** 140:6
- afternoon** 159:22
179:18 181:10 191:12
289:8 323:5
- age** 153:12
- agenda** 348:18
- ago** 20:9 32:11 47:18
70:8 251:21 260:7
316:10 317:4
- agree** 14:14,16 26:4
41:8 70:2 85:3 91:10
101:22 108:21 136:16
151:14,18 198:14
233:21 243:6 251:3
252:19 269:6 281:14
287:4 302:2 317:1
339:16 341:19 343:18
346:2 347:12,20
- agreed** 344:10
- agreeing** 264:11
- agreement** 84:15
236:16 343:13 349:4
- agreements** 86:18
- agrees** 116:15 151:15
- ahead** 112:19,19
157:12 289:4 306:12
350:4
- AIDS** 148:8 338:4
- aimed** 200:11
- air** 1:19 2:1,2,6,8 8:5
35:22 40:13 41:5,13
41:19 43:11 62:9 80:4
81:3 82:2,19,20 142:2
160:11,13 179:21
180:9,14,21 181:4
182:13,18 184:14
188:11,17 226:8,18
227:6,19 254:22
255:14 258:4 275:2
288:15 289:12 297:21
301:4 330:22
- Airman** 186:19,20,21
262:11
- Airmen** 180:15,17,19
190:12
- Akbar** 177:5,8
- akin** 197:15
- alarmism** 165:3
- Alaska** 115:1
- alcohol** 12:14 60:9,13
- alienation** 164:15
- align** 270:6 305:16
- aligned** 40:10 57:2
296:20 324:11 335:6
- alignment** 87:6
- allegations** 201:16
- alleged** 37:14 166:2,8
166:17 170:8 171:8
176:4 203:6 279:1,21
283:9 286:16
- allegedly** 168:1
- alleging** 177:16
- alleviate** 189:10
- allied** 55:19
- allow** 50:18 56:1,12
75:5 127:5 129:9
157:13 168:11 239:22
242:12 245:5,9
322:19
- allowed** 120:19 133:16
236:8 297:13 337:5
342:16 348:7,8 350:7
- allowing** 31:19 57:9
196:10 250:18
- allows** 56:15 88:17
- alluded** 326:4
- alluding** 329:19
- Alpha** 107:15
- already-existing** 208:7
- alter** 26:14 70:14
- altered** 29:7
- altering** 27:5 107:14
108:13
- alternation** 54:20
- alternative** 165:16,17
165:19 171:14
- alternatively** 297:13
- amended** 6:12 189:11
294:4 295:1 318:17
- amending** 13:4
- amendment** 63:4,4,4,5
100:22 169:11 176:5
177:3 294:14
- amendments** 6:20 13:7
28:16 31:9 128:13,14
165:11 174:21 176:16
- American** 205:7
- amicus** 16:6 40:17
56:12,16 88:6,14,15
88:16 102:16 113:5,7
113:10 123:11 209:17
209:18 290:17 297:14
297:16,19 298:1,6,8
303:17 304:22 312:3
324:12 335:7
- amorphous** 15:16
- amount** 25:10 118:8
- amounts** 182:22
- ample** 12:15
- analog** 117:17
- analysis** 119:5 198:1
244:16
- ancillary** 98:18
- and/or** 10:22 15:4 28:11
- Andrew** 2:3 3:11 160:14
191:9
- anecdotal** 237:13
- anecdotally** 34:21
- Anne** 2:5 3:15 274:17
275:20 276:15
- announced** 244:9
- announcing** 212:16
- answer** 15:6 23:4 62:5
67:20 75:2 76:13
108:10 124:7 144:5
145:10 190:21 192:1
213:5 226:7 234:6
259:14,16,18 264:6
277:4 331:2
- answered** 339:9
- answering** 44:15 68:19
- answers** 21:2 62:1
145:10 220:8 339:3
- anticipate** 196:9
- Antonio** 115:1
- anybody** 23:10 107:19
114:4 115:18 116:10
131:9 139:22 154:6
219:7 220:5 261:19
266:18 317:2 338:22
341:12 347:19 350:11
- anymore** 111:16
- anytime** 26:19 329:20
- anyway** 264:15 271:4
- apologies** 249:17
308:14
- apologize** 76:18 275:10
335:22 337:8
- apparent** 181:13
- apparently** 90:8 123:10
204:17
- appeal** 7:12 15:7 22:17
24:10 30:17 40:7 46:5
46:7 53:5 55:21 56:8
56:21 73:3,12 88:4
90:13 94:5,8 95:18
96:8,21 97:22 99:2,15
100:11,21 102:6
103:18 104:13 106:20
107:5 108:9,17
110:16,17 113:3
116:21 117:2 119:12
122:1,8,12 124:5
129:7 133:9,17
137:10 138:15 140:9
150:12 170:8 171:8
171:13 172:11 176:13
177:8 181:4,8 182:1
184:8,11 185:7
186:15 197:9,10,22
199:10 201:20 202:14
- 206:6 210:12,21
215:5,11 224:2,5,6,12
224:14,15,17 225:15
232:14 233:22 234:8
235:13 238:5 240:15
240:22 241:21 245:12
245:12 250:2 253:5
255:3 259:2,4,4 262:6
268:11 269:6 280:13
280:18 281:10 284:4
284:6 285:22 286:6
287:11 296:4,12,16
297:14 299:3,10,17
312:5,13 319:4
322:18 323:10 324:5
324:12 332:7,17,17
333:1,4 334:5 335:13
335:14 336:3,4,16
338:9 339:8 344:17
- appealed** 21:1 118:3
- appealing** 38:15 100:22
150:11
- appeals** 1:16,18,19,20
7:20 8:6,8 9:15 10:1
14:1 19:7,19 21:1
37:13,16 38:16 41:6
43:12 45:6,9 48:22
49:9 52:15 56:3 62:4
74:7 88:11 93:17,19
96:14,15 97:3,4
105:20 113:6 121:6
122:18 123:13 127:1
140:8,21 143:19,22
144:1,7 146:1,14
155:3,14 166:20
177:22 182:14 184:15
184:18 185:16 186:12
188:2,12,15,18 197:7
206:7 207:13 208:13
210:15 215:22 223:22
226:9,15 236:4 237:2
238:9 255:6 278:1
281:16 282:1 291:11
298:13 309:3 325:12
325:19 338:21
- appeals'** 215:18
- appear** 9:12 37:10
40:15 44:14
- appearance** 37:18
157:15 217:20 256:8
- appeared** 31:6
- appearing** 340:9
- appears** 17:16 140:7
184:6 211:8 346:20
349:5
- appellant** 16:9 50:3
68:10 101:13 102:11
133:11 142:3 150:15

177:2 186:14 188:3,5
 189:17 285:13,14
appellant's 100:21
 176:10,18 177:14,19
 189:7
appellants 176:2 177:6
 190:8 278:19 279:2
appellants' 187:19
appellate 2:1,1,2,4,5,7
 2:8,9,10,10,12 3:4,9,9
 3:14,14 7:1,9,11,15
 7:18 8:10,12,22 13:20
 13:22 15:15 16:1
 19:18 20:1,9 21:10,21
 22:9,11 24:8 30:5,13
 30:20 32:5,5,18 33:1
 34:2,9 36:2,4 37:14
 38:18,22 39:4,6,8,14
 39:15 40:13 41:19,21
 42:12,18,21 43:4,13
 43:22 45:11,12,14,18
 46:1,4,9,11,13,17
 47:17 48:20 49:8,15
 50:9,17,21 51:2 53:9
 53:11 54:11,14 55:18
 55:21 56:22 57:1,1,5
 57:21 63:12 64:17
 68:13 71:15,18 72:4
 72:20 73:1,1,4 88:12
 94:4,12 95:21 96:6
 98:3 101:6 108:6
 109:16 110:21 112:22
 122:2,11 129:13,17
 132:16,22 134:15
 139:3 158:11 160:3,4
 160:11,12,13,15
 161:5,10 171:1,9,19
 176:19 177:6 178:3
 179:20,21 180:9,14
 181:5,6,14,15,19
 182:2,7,8,9,16 183:1
 183:15 184:2,4,22
 185:15,19 186:5,10
 187:2,4,10 188:6
 189:8,12,13 190:5,11
 190:15 191:17 192:5
 192:5,9,11 193:4,20
 194:15,20 195:2,7,11
 196:10,12 197:1,2,2,5
 197:8,11,15,18 198:4
 198:4,6,10,13,18,22
 199:11 200:16 201:9
 201:12,19 202:11,18
 203:17,17,19 204:8
 204:12 205:1 206:4,9
 206:11,18 207:1,3,9
 207:16,19 208:4,12
 209:3,9 211:10,17,19

212:5,11 213:5
 216:17 217:4 218:15
 223:17 226:9 231:13
 233:17 239:4,22
 240:3,19 241:11,18
 241:19 242:9 244:20
 245:15 252:4 253:1
 256:20 257:19 258:14
 258:17 259:11 260:14
 260:15 261:12 263:4
 263:15 264:12 268:15
 272:2 274:16,17,19
 275:3,4,5,7,18 276:17
 277:9,21 278:13
 279:9 280:11 281:13
 281:14,22 282:6,18
 283:2,3,19,20 285:9
 288:15 289:12,13,20
 289:20 290:4,5,16
 291:1,5,15,15 292:5,7
 292:11,11,13,15,17
 292:18 293:14,22
 294:1,13 295:2,3,19
 295:20,22 296:3,19
 296:22 297:6,7,9,10
 298:19,21 301:10
 303:3,7,16 305:3
 306:8,17,20 307:11
 307:14 308:6 310:13
 313:10 314:11 316:9
 316:14 317:5,10
 318:18,18 319:1,6,18
 319:20,22 320:15
 322:19 324:10,19
 325:8,15 328:5,13
 331:15 333:16 334:13
 334:18 335:19 338:20
appellate-specific
 180:4
appellate/victim 47:19
appended 54:1
apple 16:2 103:2
applicability 136:22
applicable 43:9 46:20
 171:4
applicant 332:4
application 19:9 188:18
 195:11 196:4 231:12
applications 123:16
applied 298:19
applies 15:2 137:1
 306:16,20 319:10
apply 17:16,21 18:6,7
 76:1 93:6 135:12,13
 199:8 295:12 296:16
 306:18
applying 21:22
appointed 4:14 139:5

248:7
appointment 183:3
appreciate 25:19 43:21
 44:17 137:12 159:16
 191:14 248:21 258:9
 264:5 265:21 266:10
 275:22 338:15
approach 69:4 158:15
 164:13 165:16,17
 181:18 347:21
approaches 81:22
appropriate 15:14
 18:14 39:17 67:22
 76:14 124:18 125:3
 194:14 207:17 216:14
 231:20 233:19,20
 249:12 280:17 281:8
 314:21 342:11
appropriately 105:18
 196:2 210:9 212:22
 225:20 288:1
approval 33:11
approve 124:16 247:21
 325:21
approximately 10:8
 47:17 182:21
April 7:4 8:20 38:19
 184:19
apropos 93:4
area 19:11 33:6 59:5
 75:2 91:18,20 93:8
 111:4 141:11 229:19
 286:15
areas 13:19 14:22
 15:11 194:2 206:2
 207:3 210:2,3 329:3
arena 205:1
arguable 230:13
arguably 198:11 223:17
argue 16:2 87:2 102:7
 105:11 122:22 167:15
 222:7 233:8 239:11
 241:7 250:16 267:10
 269:15
arguing 66:12 87:4
 102:10 209:21 238:4
 239:11 245:16,17
 255:8 269:21
argument 15:21 16:13
 49:13 56:15 57:4
 97:18 101:18 102:6
 102:15 103:12 113:8
 113:9 184:13 224:7
 226:16 245:19 336:21
arguments 16:4,12
 50:5 58:2 62:22 86:17
 224:1 237:7 241:12
 241:13 257:16 316:16

316:18 335:12
arises 18:1
arising 167:4 177:4
 208:20
Arlington 1:10
arm 60:3
Armed 1:16 7:20 9:15
 10:1 14:2 19:19 21:2
 37:13 48:22 52:15
 62:4 93:18 144:8
 146:1,14 164:17
 166:20 174:16 177:22
 184:18 186:12 188:16
 210:16 226:15
Arms 342:5 349:19
army 1:20,21 2:5 5:13
 5:19 8:7 9:16 45:2,6,9
 45:10 47:18 48:21
 49:6,14,17 50:15 51:1
 53:7 54:10,12 56:11
 57:6,7 75:11,12 79:20
 82:11 88:10 160:9
 161:4,7,8,14 162:16
 163:17 177:5 227:21
 251:8 274:18 276:17
 276:21 330:22
Army's 79:22
Army-Air 329:7,15
 330:14
arrived 49:8
arrives 48:4
art 295:20
article 6:20 11:10 13:8
 13:16 37:1,2,8,11,15
 38:17,21 55:22 59:13
 66:1 69:6,20,22 70:9
 70:15,22 71:4 120:13
 127:11,13,13 147:5
 161:16 170:18,20
 171:21 172:19 173:16
 176:5,15 185:13
 210:17 211:9 215:15
 220:16 223:5 225:11
 235:14 247:13 278:1
 285:8 286:11 287:1
 298:12,20 299:3,17
 314:10 315:4,4,9
 317:17 319:9 320:8
 320:12,22 325:11
 339:3,7
articles 71:3 235:18
 277:1
articulate 90:12 107:3
 242:1 343:6
articulated 221:19
articulating 214:18
articulation 165:10
artificially 148:14

ascertainable 308:22
aside 106:15 113:4
 124:22 316:4
asked 11:4 173:9
 254:10 256:7 297:12
 335:5 340:22
asking 12:18 20:22
 60:18 61:16 72:19
 78:16 123:18 133:3
 167:1 197:15 231:1
 259:17 293:10 309:7
 330:5,12 346:21
asks 49:10 293:17
 299:9
aspects 22:3 92:11
aspirations 192:16
assault 6:18 10:11,17
 10:19 11:2,6,16,20
 12:6 16:17 17:18,22
 18:6 19:13 24:22
 26:12 36:3 48:3 60:13
 76:3,9,11 77:11 78:8
 112:3 113:13 128:9
 138:20 139:12 158:5
 173:11 181:1 203:6
 257:8,9 297:2 315:7
assaults 71:19 113:16
 114:7
assert 134:6 169:6
 238:17 239:9
asserted 208:19
asserting 143:6
assertion 175:5
assess 31:21
assesses 186:6
assessment 6:16
assigned 33:13 82:16
 82:21 163:19 284:12
assignment 148:5
 192:22
assignments 42:17
 147:19
assistance 40:3 176:20
 177:8 185:6 187:14
 323:14
assistant 5:7 115:13
 180:6
Associate 2:6 10:1
associated 205:5
assumed 14:11 236:9
assumes 132:18
assuming 68:7 107:12
 113:11 158:10 238:8
 313:13
assumption 102:19,22
assumptions 324:1
assurances 305:19
assure 186:18 306:15

309:12
assured 207:21
assuring 187:19
at-will 260:11
attach 278:19 279:3,15
 280:4,10 281:19
 298:3
attached 49:22 278:6
 278:20 279:12 292:4
 292:6 294:11
attaches 57:8 118:2
attachment 279:9
attachments 55:17
attempt 165:21 206:22
attempting 27:19
attempts 26:13
attend 6:7
attendance 6:1
attended 203:16,17
Attending 57:4
attention 206:20 209:20
 251:17 349:16
attorney 2:6,17,17
 115:13 163:21 241:10
 274:19 292:16
attorney's 109:6
attorney-client 169:19
attorneys 31:14 34:14
 54:14,16,18 157:20
 184:3 193:5 201:2
 255:2,6,16 261:12
 283:3 303:22 304:1
attributed 76:9 175:6
audience 74:10,16,18
 193:4
audiences 74:17
audio 314:2
August 21:20
authored 15:1 91:2
authorities 32:3,4 43:4
 43:5 113:18 114:11
 187:11 198:8 199:18
 207:11 292:13 318:19
authority 9:17,17 30:12
 42:7 53:9 117:20
 126:11 128:18 130:17
 171:15 178:3,5
 198:13 203:9 215:8
 220:14 222:20 223:14
 299:13,16 337:4
Authorization 6:11,13
 37:6 194:18 325:9
authorize 211:9
authorized 32:9 52:6
 183:20 187:22 200:18
 278:4
authorizes 42:7 53:11
automatic 283:21 315:6

automatically 212:21
 218:22 225:13 283:17
 320:2 321:1
available 4:8,20 9:4
 147:21 148:17 176:22
 219:6 226:14 324:19
average 47:22
AVL 47:21,22 48:6,6,10
 48:13,17,18 49:4,6,12
 50:4,11 57:5,5
AVL's 49:2
avoid 22:20 149:21
 232:2 327:8
avoided 162:19 185:12
 209:4
aware 88:5 106:4 162:3
 193:13 227:16 240:18
 251:5,8 253:13
 329:21
awareness 200:22
 202:15
awkward 162:1

B

B 346:10,10
baby 315:17
back 11:9 20:3,7 59:12
 60:2 61:1 64:14 68:19
 70:10,14 71:16,16
 78:19 83:2 90:21
 102:4 104:2,15,18
 105:13 107:13 110:3
 112:18 114:14 116:10
 135:17 137:4 140:3
 140:13 144:6 153:18
 155:2 170:1 193:21
 213:19 231:22 240:4
 240:6 243:16 244:11
 254:9 267:22 268:7
 269:14,20 301:22
 303:1,18,18 304:12
 308:6 320:7,15,16
 348:8 350:19 351:8
 351:10,13,14
backed 272:12
background 10:20 23:8
 29:3 37:21 45:1
backing 255:9
backlog 109:16
backward 119:20
backwards 99:13
bad 175:18 253:8
bail 120:6
baked 314:13
Baker 1:16 3:5 7:19 9:8
 9:9,10,21 25:22 58:22
 59:17 61:18 64:11,21
 65:3,11 67:7,12 69:2

71:2,6,10,13 74:3
 75:21 76:13 77:1
 79:12,18 84:9,13
 85:22 86:2 87:12
 89:18 90:3,15 93:15
 95:8 96:2,9 100:6,10
 100:13 101:3 102:14
 103:7,10,13 104:15
 104:18,22 111:5,18
 112:6,9,12,14,17
 121:8,10,13 135:1,9
 136:14 137:13 138:7
 140:12 143:11 144:4
 147:10 150:4 151:21
 153:15 156:19 158:16
 158:21 166:14 168:8
 173:9 243:11 244:10
balance 31:17 131:15
 187:18 190:1,7
 249:12 258:16 261:17
 281:4
balancing 181:18 189:7
 281:2
ball 141:6 320:6,15,16
ballpark 64:12
bank 115:11,14
Banker 91:1,5,6
bar 247:2
Barbara 4:17 6:6
barring 172:8
Barry 304:15
based 62:8,10 81:7
 97:11,14 104:10
 118:5 124:18 163:15
 165:4 247:3 284:21
 285:4 337:3 348:2,10
bases 74:8 177:11
basic 198:14 240:13
 252:1 253:9 257:3
 280:3
basically 52:4 114:16
 140:10 286:11,13
 319:1 332:17
basis 123:12 202:9
 231:6 244:17 247:7
basket 83:3
battalion 74:19
battle 28:11
Bavaria 163:18
Baylor 75:12
bear 58:2 159:13
bearing 177:17 183:9
beat 261:8
bedrock 192:15
beginning 138:10 140:4
 167:18 238:4 240:17
behalf 37:10 177:3
 180:19,20 190:20

247:6 288:14 328:5
behavior 195:21
Belgium 163:19 164:6
believe 44:9 144:18
 151:5 166:14 181:12
 192:13 194:19 195:13
 201:6 202:15 203:11
 207:6 209:10 211:1
 227:9 231:16 243:7,9
 249:11 304:6 307:9
 308:8 317:3 318:4
 328:15 337:6
believed 194:2
believes 56:4 127:3
belong 208:21
bench 71:16,16
benefit 5:20 19:8 21:18
 98:7 124:4 131:19
 276:2
benefitted 115:20
best 32:15 44:19 73:7
 107:2 137:5,22
 181:13 234:19 254:3
 301:12 310:11 311:19
 326:12
bestowed 286:15
better 28:17,18 63:6,8
 67:8 68:12 69:3 102:2
 139:8 153:21 197:3
 200:21 209:19 253:11
 266:15 272:10
beyond 17:3 67:17
 92:22 119:17 168:19
 208:5 209:3 212:1
 244:14 264:19
bias 174:1
big 83:4
biggest 239:8 240:10
 290:3
Bill 185:13
binding 22:8
bins 95:14
biographies 4:20 180:2
bit 13:13 97:8,15 133:1
 135:8 139:17 186:4
 223:20 241:4 251:20
 259:21 321:12
bites 16:1 103:2
Black 185:10
blackened 227:4
blank 135:22,22
blindsided 240:21
blunt 248:2
board 133:9 223:12
 235:2 236:16
boards 177:7 223:6
 225:8
Bobby 1:9

bodily 173:19
body 93:9,9
boilerplate 210:5
Bold 164:11
bolts 192:15
book 61:20 145:9
 253:17
borrowed 246:12
 295:20
bother 110:20
bothered 134:15
bothers 135:3
bottom 231:8
bound 61:20 63:16 87:5
 96:22 100:14 200:14
boundaries 179:4
Brady 187:13 239:9,12
 239:19 240:9,10
 242:2 278:22 279:19
brain 141:13
Branch 1:22 2:6 160:10
 161:4 274:19 276:16
Breach 207:18
break 87:11,14 159:17
 159:18 217:19 273:19
breaks 55:8
breath 21:10,11 22:9
brethren 200:17
brevity 14:6
Brian 2:1,9 3:11,17
 160:10 179:17,20
 275:3 300:12 301:7
brief 13:1 29:5 30:4
 60:15 77:17 99:22
 101:8,20 102:4,15,17
 105:9 119:6,7,10
 136:21 151:11 180:17
 206:2 211:5 216:3
 226:6 232:17 272:21
 272:22 273:3 296:11
 298:1,6 324:12 335:7
briefed 69:8
briefing 98:4,16 127:5
briefly 11:14 180:3
 211:16 328:10
briefs 16:6 85:7 209:18
 209:18 283:5,6
 290:17 297:14,16,20
 298:8 303:17 304:22
brig 230:2,3
Briggs 52:14
brilliant 320:10
bring 9:18 36:8 145:17
 339:6
bringing 44:6 209:19
brings 5:4 141:20
 182:11 183:22 206:20
 247:12

British 162:15
broad 68:8 116:7
 138:15 162:9 164:11
 166:6,7 176:17
 177:16 179:3 210:22
 285:8 317:3 336:2
 337:3
broaden 244:14 338:17
broader 35:6 158:7
 185:3 209:19 245:1
broadly 84:1 220:4
 248:13
broken 232:19
brought 36:13 60:20
 74:18 296:5
Bruce 2:6 3:16 181:9
 274:7,20 288:14,16
 288:19,21 289:1,5,8
 289:10 295:15 300:11
 300:15 301:2 302:4
 303:13 304:2 317:1
 327:19 329:19 339:11
 340:8
build 255:19
building 141:5
built 91:12 193:11
bullet 19:21
bullets 19:20
bunch 21:20 97:12
burden 110:19,20
 136:18 149:9,19,20
 150:6 162:8 210:4
 229:3 272:17,18
 282:13,21 284:2
 328:12
burdensome 212:1
 217:5,6,9,16 218:17
Bush 249:19
business 81:5 223:14
busy 92:8
Butler 203:20

C

C 346:11,11
C-O-N-T-E-N-T-S 3:1
CAAF 18:20 19:5 24:10
 24:12 38:5,14 39:19
 48:22 50:3,6 61:8
 109:1 122:19 140:10
 144:16 170:1,4 178:2
 206:7 210:21 211:2,8
 211:11,11,12 283:6
 286:6,8,13,13,21
 287:12,13 292:22
 293:9,10,14 294:13
 294:14 295:12 297:15
 298:11 299:1,13,15
 304:9 307:16 309:4
 312:14,18 318:11,13
 322:14 333:11 338:21
 339:12
CAAF's 41:11
caboodle 265:9
calibrate 233:15
California 146:6
call 15:12 16:22 124:6
 149:19 158:6,8
 183:12 246:11 262:14
called 24:13 36:6 41:3
 91:14 165:3 166:20
 309:14 316:11,13
 346:7
calling 308:14
calls 50:11 305:4
camera 51:11 52:7,11
 52:12,22 53:21 54:4
 106:18 107:16 130:7
 130:20 246:9,15
 270:19 271:7 291:12
 291:14,20 293:2,3,5
 293:11 294:5,15,20
 317:9,10
camp 67:15
candle 124:3
capacity 301:17 349:20
capital 1:21 160:9
 161:4 176:16 177:4
CAPT 191:10 229:11
 233:2,5 242:5 251:20
 261:21 264:22 265:6
 265:10,16 266:1,8,13
 273:20 274:6 276:12
Captain 2:3,14 3:11 5:2
 5:4,6,18 160:14 191:8
 205:8 229:9 243:7
 264:20
capture 85:6 115:4
card 175:18
cardinal 197:20
care 66:18 78:10 151:7
 251:17 269:13 280:8
 338:5
cared 269:22
careful 22:15 31:17
 78:5 144:20 204:21
 287:21
carefully 153:16 179:8
 179:12 194:21 206:19
caregivers 194:6
carried 301:18
Carrier 1:21 3:10 160:9
 160:20,21 220:10
 221:15,18,22 222:4
 224:10,15,19 225:1
 225:17 226:4 243:6
 250:14 251:3 270:14

271:10,14,21 272:4
274:9 303:12
carries 47:22 317:10
319:3
carry 196:10
carrying 31:15
Carson 2:16 169:12
case 15:1,20 19:8 20:1
20:2,8,13 21:17 22:5
22:6,7,8 23:20 26:18
33:12 34:21 38:13
40:14 41:16 48:19
49:5,7,12,13,17 50:6
50:9 52:12 56:19 57:7
57:8,8 64:3,22 66:2
66:15 71:18,20,21,22
72:5 73:12 75:1 84:8
85:16 86:2,7 87:9
91:1 97:2 100:18
103:21 109:15 110:9
114:8,15,20,21 117:6
122:16 132:4 137:10
137:20 139:12 140:7
143:7 146:12 147:16
147:22 153:6 163:12
166:9,10,18,19 169:7
177:22 186:16,20
187:3 188:21 194:8
199:5 202:15 210:20
211:7 215:20 219:8
222:22 231:20 232:7
232:8,11 236:21
241:8 254:1 262:5
269:12 279:14 280:16
282:21 286:8 293:1,7
296:4,6 298:4,5 299:7
304:5,14 309:14
319:11 336:11,13,18
339:14 343:20
case-specific 209:21
cases 11:2 23:2,3 24:21
25:1 36:14 48:1,16
50:19 54:14 62:7,10
63:15,16 65:5,18 75:4
79:22 81:6 91:6 92:9
93:15,20 109:3 111:9
111:14 112:3,4,15
113:7,14,19 114:5,18
115:21 125:4 137:17
138:20 142:1 147:14
150:14 157:14 158:5
169:13,17 177:4
178:15,15,16 179:10
184:9 188:13 218:2
240:10 243:16 248:8
256:1 257:10 269:3
278:18 282:6 283:7
283:10,12 292:20

304:4 334:20 335:7
casting 248:13
catch 21:17 277:22
catching 21:10 22:9
categories 114:10
217:19
category 137:2 218:2
caught 115:16 313:14
cause 123:18 179:5
301:21
caused 110:9 175:5
causes 139:21 238:2
caution 77:13 227:14
cautions 164:10
cautious 239:17
cautiously 190:10
caveat 153:22 239:1
CBS 168:20
CCA 24:4,9 35:5 40:10
75:3 97:5 100:14
105:15,19 106:1
107:16 117:8 124:11
124:16,19 126:10,19
128:10 146:13 292:14
293:1,4,10 294:4,8,10
294:16,20 295:1
298:2 299:11,14,17
299:22 300:4 304:4,6
304:21 318:11 321:17
333:11 339:13
CCA's 298:4 305:6
CCAs 13:12 18:22
21:21 29:2 62:12 67:2
106:5 107:7 109:17
117:16,19,19,21
118:17 125:4 126:6
128:18 286:12 287:14
297:15 305:7 307:16
312:17 317:16,19
320:9,12,13 330:20
cell 231:21,21 232:12
232:18
Center 1:10,10 169:1
203:22
Central 47:14
certain 22:2 72:22 73:5
111:6 141:20 150:12
151:3 157:14 165:4
187:4 203:14 248:8
264:12 277:1 281:1
286:15 342:4
certainly 93:8 119:13
129:20 130:14,17
131:2,8 137:2 152:16
175:21 201:9 229:22
233:9 286:17 297:5
324:3 333:20 335:1
certificate 212:7

certificates 305:18
317:7
Certification 46:22
certify 34:3
cetera 49:21 88:3
317:11 322:9
chair 1:11 3:3 4:17 5:13
5:14 8:3 9:11,19 10:5
25:16 35:13,16 44:16
44:20 57:12,19 75:15
75:17 87:10,13,18
89:6,21 90:4 93:12,14
94:2,14,17 99:6 129:4
130:3,8,11 131:4,9,22
132:12,16 133:14
134:19 136:13 137:11
138:4,9 139:22 140:4
145:19 155:6,19
156:21 157:21 158:2
158:19,22 159:22
160:21 166:14 179:16
179:19 191:1,6 205:8
205:11,12 213:7
224:11,17,21 226:5
229:9 233:13 234:11
234:15 235:1,4,7,9
248:15 249:15 250:1
250:4,6,8 255:22
256:5 258:2,20
259:17 260:3 261:19
264:4,17 265:3,8,15
265:17 266:2,5,9,14
266:20 267:1,5
273:12,15,21 274:3,8
274:22 275:9,12,19
276:6,14 277:14
279:11,18 287:4,7,16
288:11,16,19 289:6,9
295:13 300:11,16,19
300:21 301:5,8 308:1
308:5,10 309:7,10,17
309:22 310:4,16,21
311:3,11,15,21
312:22 313:5 323:2,5
327:14 328:20,21
331:4 339:22 340:17
341:9 342:15,19
343:8,18 344:2,5
345:10,19,19 346:1,5
346:10 347:2,9,14
348:5,15 349:15
350:4,20 351:7,12,16
351:21
Chairman 25:15
challenge 11:22 12:5
12:22 13:4 58:6 115:9
132:7,8 169:8 246:1
247:8 282:9 283:15

challenges 36:7 139:21
190:17 196:14 202:1
challenging 195:15
205:2
chambers 33:8
champion 186:15
chance 20:14 26:2,3
35:11 99:20,21 105:2
134:14 140:19 148:16
216:16 237:17 267:14
269:2,3 285:19 286:1
334:22
chances 105:11
change 36:11,22 44:5,6
52:18 85:19 86:7 87:8
96:6,7 118:17 123:7
123:18 128:16 131:21
132:1 162:13,17,17
162:18 164:7 168:6
172:19 189:9 215:18
216:1 231:5,7 233:16
234:2 235:15 236:19
239:22 240:13 247:13
290:2 312:8 321:9
349:13
changed 72:15 122:9
133:5,7 134:12
233:18 261:6 266:11
316:5
changes 28:21 36:6,13
36:17 38:21 43:17
47:4,9,12 55:22 58:17
128:14,22 129:1
161:19 162:4,10,20
164:11 165:17,18
166:7 170:12 179:7
179:12 190:11 216:17
221:9 227:15,17
229:15 277:1,8 288:5
288:7 325:3,8 345:21
347:1,7
changing 58:12 216:10
238:10 239:4 240:15
291:10
chapter 171:22
characters 227:5
charge 17:2,4 225:13
charged 17:1 79:1
charges 126:10 188:14
charter 181:2
check 151:2 175:18
checklist 345:13 346:6
chief 1:16,17,18,21 2:5
2:6,7,15 5:8,10 7:19
8:4,5 10:2 58:4 61:10
74:4 160:9,17 161:3
161:11 162:15 166:13
205:18 207:12 274:19

- 276:16
child 10:12,17 18:2
53:19 55:3 60:13 78:4
78:7,7 79:13 112:4
113:14,18 114:7,21
173:11 253:19
chime 229:12
choice 143:13 286:16
choices 345:14
choose 46:9
chooses 221:11
chose 232:20 336:16
Chris 7:21
Christian 1:17 3:6
Christopher 1:21 3:10
160:9
CICA 249:14
circuit 305:15,17 317:6
336:13
circuits 122:6
circuits' 322:17
circulate 350:7,9
circumscribing 172:20
circumspect 216:8
circumstance 104:14
218:9 239:7 253:22
337:15,20
circumstances 138:2,3
178:7 179:1 214:6
254:4 337:7 339:21
citations 168:13 244:11
cite 166:15 169:14
170:1
cited 168:21 243:14
292:22
cites 169:17 222:7
265:1
citing 243:15 292:10
civil 114:10 158:17,20
civilian 19:6,6,10,14,15
31:14 65:21 74:13,16
100:5 103:3 105:6
111:2 113:17 115:10
117:18,18 118:9,11
121:19 144:16 147:14
150:1 180:9 190:13
220:19 223:22 226:13
232:9 241:19 283:20
327:3
civilians 260:19
claim 198:12 202:5
209:12 230:14
claims 185:6 209:10
clarification 168:7
329:1
clarified 31:9 211:14
clarify 82:10 182:3
313:1
clarity 67:4 69:13 76:16
77:3 91:11,19,21
145:11
class 77:20,21 85:9,10
85:11 95:7 136:5
172:22 173:21 247:18
classified 53:19 55:3
182:15 183:6 185:1
252:14 330:8
clauses 308:15
clear 12:12 17:17 22:21
66:21 67:17,18 70:5
71:2 77:8 79:6,16
84:9,17 85:2,3,14,20
85:21 86:1,2,3,5,6
87:8 89:2 91:15 116:5
121:17 122:21 143:17
143:21 145:12,13
164:21 168:5 194:3
199:15 202:6 222:10
242:15 251:11 256:16
272:20 293:16 301:11
301:12 334:10 343:10
clearer 152:16 186:4
clearly 79:3 91:18
136:17 145:13 195:7
241:4 251:16 262:7
clerk 31:1 34:5 47:20
54:17,18,21 55:9,13
183:4,12,12 199:1,13
clerks 24:13
client 43:16 142:9
176:21 183:16 263:19
client's 255:10
clients 180:20 183:18
183:19 190:20 247:7
249:4,10 254:16
255:15
climate 72:21 73:3,8
clinic 246:12
clinically 179:10
clogging 209:4
close 248:17 320:14
321:4
closed 51:17 103:17
145:9 223:2 246:17
352:4
closely 77:22 162:7
182:14 201:7 321:9
closing 163:22 196:2
204:20 213:2
clue 145:1
CM-ECF 313:14 315:15
CMA 292:22
Coast 2:4,11 160:17
205:12,19,21 207:8
207:12 275:7 323:8
code 6:17,20 13:8 36:9
69:6 171:6,22 186:1
222:17,19
codification 244:2
codified 197:21
coexistent 215:6
coffee 253:17
cognizable 177:18
cognizant 20:10
cohesion 12:2
Col 3:10 35:15,17 44:19
71:12 72:13,18 75:10
80:4,11,19 81:1 82:9
82:13,17,20 88:4,12
88:22 89:3 93:14
94:10,15 114:13
129:20 130:4,9,12
131:6,11 132:11,14
133:8,18 137:6
139:10 140:17 141:15
143:3 145:17,21
Colin 169:10
colleague 302:3 317:1
colleagues 16:10 61:9
182:16 206:13 242:4
252:20 325:6 326:3
college 139:15
Colonel 1:18,20,21 2:15
3:6,7 5:12,19 8:4,6
35:13 44:16,18,18
57:15 79:19 89:13
121:9,15 140:14
149:13 160:8,20
169:3 179:17 250:13
274:9 303:12
combating 255:18
come 18:4 36:15 37:7
61:1,12 62:12 69:4,15
73:6 79:5 81:12 86:15
95:12 98:12 99:21
101:15 104:8 130:1
133:21 136:15,17
140:3 141:1 145:10
146:3 147:13 148:1
162:17 223:10 229:15
242:9 252:8 254:5
262:5 268:3 269:16
303:17 304:12 344:16
comes 97:2 100:18,19
103:15 104:17 110:1
134:14 135:13 144:15
183:12 210:10 220:22
240:22 270:2 292:5
298:22 314:17
comfort 140:18
comfortable 345:4
coming 73:9 98:4
109:11 134:15 160:6
258:3 274:7 340:6
command 73:7,13,14
75:1 202:5
commander 2:4 3:12
69:16 74:18 160:17
205:9,18 213:8,10
257:6 275:6,9
commander's 71:6
commanders 12:8 44:8
59:4 60:12 69:1
comment 8:19 21:4,9
21:13 58:5 67:5 68:6
68:9 70:6 77:8 92:10
114:12 115:19 125:19
143:9,11 144:6 147:5
152:4,4 165:14
216:16 326:22,22
327:16,18 328:19
337:18 350:7,10
commentator 331:6
commenters 172:2
commenting 89:22
comments 3:8,13,19
8:17 31:11 64:17 70:3
119:19 121:7 161:5
180:17 181:12 191:19
192:1 213:11 220:6,7
258:16 276:19 277:10
322:22 323:20 324:18
324:21 328:1 334:15
334:16 338:14 349:22
350:12 351:8,10,13
commissioned 39:3
commissions 319:14
commit 294:9
committee 4:8 10:5
161:12 213:19 323:11
342:5 349:20
common 21:19 103:14
158:16 223:10,11
330:10
commonly 247:12
communicate 77:2
80:16
communicating 126:2
communication 209:17
communications 27:3
87:22 172:9 177:15
196:15
community 59:8 100:4
290:12
companies 73:21
comparative 164:2
comparison 327:2,4
compelling 75:4
compensation 221:7,8
221:10,14 234:20
compensation/restit...
221:12 231:17

competency 176:21
competent 30:17
 155:10 189:7
competing 93:21
completed 49:14 199:5
completely 54:20
 120:17 157:1
completion 34:2,8
 117:3
complex 1:21 69:14
 160:10 161:4
compliance 34:13
complicated 78:14
 98:20 283:10,12
comply 212:14
complying 34:16
comprehend 152:18
concede 107:10 243:3
conceded 105:16 106:1
concept 92:14 145:16
concepts 93:7 128:15
 157:18 327:6
concern 15:9 16:7,15
 20:4,5 42:11,20 60:20
 90:9 101:10,11 133:8
 135:2 141:20 143:3
 146:10 150:7 156:4
 166:1 174:19 196:22
 206:12 208:11 212:10
 237:19 238:2 239:20
 240:10 244:13 247:2
 248:5 250:22 254:6
 286:10 293:18 296:22
 301:16 349:2
concerned 94:3 121:5
 131:7 229:3 245:14
 248:12 341:17
concerning 43:15 47:1
 120:1,4
concerns 7:9,10,14
 13:19,21 14:14,21
 19:13 40:5 89:16
 101:14 102:5 108:2
 145:21 150:7 165:4
 176:14 189:10 201:3
 207:6 211:16 212:19
 264:18,21 272:19
 273:7 277:2,2,11,20
 280:7 281:21 287:18
 288:1,8 291:4 293:20
 293:22 295:17 296:17
 312:15 325:4 341:1
 341:19 342:20 343:4
 343:6 344:15 346:17
concerted 180:22
conclude 13:2 295:13
 324:2
concluded 298:2

concludes 291:22
conclusion 23:7 73:7
 134:16 299:20
conclusions 104:20
concrete 202:21
concretely 194:21
conduct 6:15 44:1
 51:14,19 52:7 176:7
 200:15 291:11,20
 293:1,5,10 294:4,15
 327:2
conducted 6:17 54:3
conducting 294:19
confer 211:12,14
Conference 1:10
conferences 163:8
confers 210:10
confidence 10:10
 144:17 205:5 207:4
 211:1 236:12
confident 255:12
confidential 163:16
 196:15
confidentiality 305:18
 317:7
confinement 46:19
 47:5 48:8,10 50:15
 120:2,5 131:14
 146:12
confines 62:19
confirm 161:22
confirming 199:6
conflict 42:14 193:19
 252:1
conflicted 252:3
confused 94:10 331:7
confuses 298:15
confusing 79:15 170:21
confusingly 295:22
confusion 171:18 179:5
 222:13
Congress 23:17 28:3
 29:7 32:10 66:20,21
 76:14 122:10,21
 131:16 135:16 144:7
 150:22 211:13 235:16
 286:11,14,17,17
Congress's 60:20
congressional 36:12
congressionally 4:7
conjunction 170:20
connect 268:19
connected 80:9,11
 220:11
connection 114:17,19
 159:14 268:16
conscious 23:6
consensus 37:7

consequence 170:22
consequences 22:16
 165:12 166:7 170:13
 170:15 172:3 248:14
 288:3 326:13,17
 331:9,10,12,19
consequential 201:8
consider 19:15 27:6
 62:20,20 126:15
 127:12,13 145:22
 146:2 150:8 172:19
 172:22 262:18 269:21
 328:2 343:3 344:18
considerable 175:14
consideration 18:18
 125:7 146:18 163:9
considerations 146:8
 209:20
considered 107:9
 173:18 204:14 236:9
 325:16,17
considering 83:7
 125:15 175:2 195:10
 201:5 351:17
considers 190:11
consistent 39:15 41:13
 42:15 193:21 196:4
 210:21 220:7 238:15
 242:11,18 319:7,19
 320:19
consistently 102:20
constitute 196:22
Constitution 167:7
 169:19 170:7 185:13
 185:22
constitutional 169:2
 172:7,10 175:4
 176:11 177:20 178:12
 182:10 186:8,19
 193:15 205:3 239:20
 240:2 241:2 243:20
 244:18 290:12
constitutionally 52:19
 93:22 133:22
constrained 35:4 68:15
construed 167:22
 178:15
consult 56:17
consulting 56:22
contact 36:16 49:4
 199:1
contacted 153:9
contacts 48:13,17
contain 46:16
containing 42:22
contemplate 28:18
contemplated 17:15
 210:12

contemplating 125:18
contemporaneously
 99:14
contention 165:7
contents 69:9 183:2
contest 38:9 39:21
 84:21 133:13 168:17
context 61:5 151:22
 174:18 176:16 204:15
 283:1 288:9
Continent 163:20
contingency 28:12
continually 328:13
continuation 120:1
continue 47:15 49:11
 122:16 181:17 277:17
continued 181:3 326:2
continuing 190:3
 220:12
contours 14:15
contrast 51:22 209:11
contrasting 93:21
contribution 44:17
control 33:16
controlled 253:21
controls 276:12
controversial 195:16
convening 30:12
conversation 61:15
 63:12,14,20 71:14
 93:5 276:9 340:19
converse 57:9
Conversely 40:8
conveyed 69:13
convict 17:7
convicted 142:3,9,21
 261:2
conviction 14:19 17:4
 49:19 100:11 105:15
 105:20 117:6 128:9
 131:13 284:20 305:5
 332:18
convictions 46:3 297:2
 297:11
convince 189:17
 255:20
cooperation 104:4
coordinate 54:17
 207:10
coordinated 288:9
copied 228:22
copies 33:18 34:1,1
 45:14 54:21 199:4,14
 199:15 251:16 304:19
 305:7,8 314:1,6,16
copy 199:2 228:13,14
 298:3 305:6,11 314:8
 314:9 315:10 347:4

- corners** 62:11
corporate 248:4
corporations 173:6
Corps 1:17 2:4,9,15
 10:4 45:3 62:9 68:4
 82:3 109:15 110:9,11
 138:18 160:15 191:21
 192:4,6 198:18
 200:16 201:15 275:4
 275:17 297:21 300:22
 301:10 329:8
correct 8:1 16:16 17:5
 64:21 114:11 128:4
 130:8,11 132:11
 133:10 138:6 140:10
 140:17 217:18 219:16
 235:6 240:3 271:10
 300:22 304:8 326:1
 328:14 342:17 346:9
 347:2 348:5
corrected 240:2
correctly 7:22 15:22
 21:22 64:20 72:14
 293:4 302:8
corrosive 76:8,10
cost 110:2 131:12
counsel 2:2,3,7,8,10,11
 2:12 7:5,6,15 16:3
 21:16,21 28:11 30:6
 30:20 31:7 32:5,18
 33:2,10,18,22 34:3,8
 37:9 38:20 39:4,6
 40:16 41:21 42:6,10
 42:16,18,21 43:13
 45:12 47:2 48:16,16
 48:17 51:2,13,15,15
 53:12 54:5 55:8,10,14
 56:16,18 57:1,2 62:15
 62:22 66:11 68:5
 79:13 80:13,15,21
 86:14,20,21 94:6,12
 95:1,2 104:8,11
 110:11,14 111:17
 116:11 117:9 129:10
 129:10,15 133:21
 134:18 138:19,19
 139:3,4,14 142:11
 147:16 148:2,18,21
 155:5,12 160:12,14
 161:9,10,10 163:1,5
 165:8 167:1,12,14
 172:18,21 173:5
 175:22 176:3,19,22
 177:14 179:20 180:12
 180:13 181:7 182:2,8
 183:1,3,8,15 184:5,22
 185:6,15 186:5,7,10
 187:10,15 189:13
 190:8 192:13 193:2
 193:12 197:3,12,15
 197:18 198:10 199:1
 199:11,12 200:4,7,13
 200:16 201:2 202:19
 203:3,5,13,19 204:9
 206:6,18 207:19
 208:6,12,12 209:9
 211:10 212:5,8,11,12
 215:20 216:2,5,16
 218:4 226:13 228:20
 229:4 237:9 239:15
 241:8,22 245:5,8,13
 245:14,16 247:15
 248:2,7 250:21
 254:13 259:8 262:17
 263:3,5,13 265:16
 267:18 275:3,6,7
 279:15 283:21 291:1
 291:5,15 292:3,7,11
 292:12,17,19 293:14
 293:22 294:1 295:2,3
 297:22 299:22 301:10
 305:2,10 318:4,5,7,7
 318:18,19 320:2,4
 323:7,14 325:15
 337:21
counsel's 133:16
 183:10 206:4,11
 207:1 227:10 335:12
counselors 194:6
counsels 189:22 255:5
count 263:8
counter 197:7
counterargument
 236:18
counterarguments
 237:1
counterpart 181:8
counterparts 190:13
counterparts' 185:4
counterproductive
 201:14
countries 158:17,17,20
country 74:7 111:3
 155:15
couple 11:10 94:11
 101:14 140:3 145:17
 175:10 248:18 251:21
 279:5 284:7
coupled 37:12
course 15:3,10 16:9
 26:1 62:5 65:4 72:16
 135:12 141:8,8
 162:14 247:15 260:7
 278:17 287:20 288:3
 301:2 316:8,15 321:9
 339:20
court 1:16,18,19,20
 7:20 8:5,7 9:15,22
 10:7,8,13 13:10 14:1
 18:15 19:6,6,15,19
 20:1,18,20,20 21:1
 24:17,19 30:11,17
 31:1,7,22 32:17 33:2
 33:7,15,20 34:6,11,16
 34:22 37:10,13 38:16
 39:14 40:15,18 41:5
 42:1 43:11 45:6,9,10
 46:5,13 48:5,21,21
 49:6,8,9,14,17,22
 50:7,15,19 51:1 52:14
 53:7 54:10,11,12,18
 55:13 56:13,14,17
 57:6,7,8 62:4 64:9
 66:6,12 74:7 75:11,12
 79:22 80:6,10,12,16
 81:4,5,6,6,7,16,18
 82:11,14,21 88:10,20
 90:20,21 91:9 93:17
 93:19 95:21,22 96:6
 96:13 97:2,3 98:3
 99:17 100:14,15
 103:3,20 105:5,6,19
 111:2 118:21 122:5
 122:18 125:13,18,20
 127:2,3 129:17
 130:19 132:9 140:8
 140:21 142:2,7
 143:13,22 144:1,4,7
 146:1,5,5,14,14
 150:10,13 152:8
 153:7 155:14,15
 163:5,8 166:20
 167:13,16 169:16
 177:22 178:1,2,12,21
 182:14,22 183:4,5,11
 183:12,20 184:6,12
 184:14,16,17 185:2
 185:15 186:12,16
 188:7,11,15,17
 189:12,17,18 190:17
 193:20 199:1,6
 201:21 202:10 206:21
 207:11,13,16 208:6
 209:17,20 210:5,15
 212:4,21 215:6,18,22
 216:17 218:5,11,15
 222:6 223:1,9,10,11
 223:17 226:8,15,18
 227:7 228:10,13
 230:20 233:17 235:21
 236:1 237:2 239:4
 240:7 244:20 246:13
 260:10 262:7,10
 267:14 268:22 272:8
 278:14 279:7 280:6
 280:15 285:7,16
 287:15 291:15 296:21
 298:18 304:8 306:8
 306:17,20 309:1,12
 309:18 310:13 318:20
 319:11 322:18 325:12
 334:15,17,18 335:1
 335:10,21 338:19,20
court's 20:13 33:8
 54:21 55:9 80:19
 81:17 114:15 142:17
 189:1
court- 40:15 182:4
 230:11 238:7 249:18
court-martial 24:19
 38:7 46:2 53:8 161:13
 161:18 163:2,17
 168:14,22 187:8
 194:9 207:15 220:14
 220:22 223:13 224:13
 225:11 233:7 235:5
 236:10 296:9
court-ordered 222:8
courtroom 46:12 184:4
courtrooms 147:20
courts 18:16 21:16
 29:16,16,18,20 30:13
 31:21 32:6,8 37:6,15
 39:7,15 46:6 47:20
 50:17 56:3 80:17
 86:10 91:16 96:15
 100:5 109:1 113:6,6
 118:12 122:16 123:13
 124:1 126:5,14 127:1
 127:1 141:16 143:19
 145:7 150:1 156:7,10
 157:4 162:10 169:16
 171:1,10,15,20
 178:17 188:1 195:1
 196:1,2 204:5 206:8
 208:4 210:17,19
 218:21 220:22 223:8
 223:22 234:6 239:22
 242:7,9 285:10
 291:11 297:10,17
 305:15,17 306:14,14
 306:17 308:16 309:3
 311:16,19 317:5
 318:2 319:6,16,18,20
 319:22 320:15 322:4
 322:19 324:19 325:19
 328:14 333:8,20
 338:21
Courts- 36:10
courts-martial 27:6
 43:8 56:7 106:21
 163:4 186:2 187:17

190:6 223:7 234:12
253:7 290:5 319:10
319:13
cover 121:2 214:15
337:20 338:17
covered 17:19 18:11
337:13,15 338:12
339:14
covers 215:1 338:18
craft 327:9
crafted 281:4
craziness 167:22
crazy 148:3 244:7 246:5
267:21
create 27:19 58:8,10
171:8,17,18 203:7
247:14 282:12 307:19
311:6 312:16 322:5,6
322:11,13
created 6:11 29:22
31:18 47:18 168:1
170:6 243:19
creates 244:18,19
318:8 321:15
creating 27:8 58:20
209:8 225:15 243:22
245:14 295:7 296:18
297:4 307:20 313:12
creation 50:16
credibility 19:12
credit 175:18
crime 37:3 70:12 72:7
76:8 78:16 114:10
121:3 203:21 220:18
268:10,18 311:1,16
327:1
crimes 18:4 39:16
42:15 45:21 48:2
78:15 113:20 173:3
173:14,19,20 175:15
248:6 282:8 308:19
315:6,7
criminal 1:18,19,20 8:6
8:8 14:15 37:16 38:16
41:6 43:12 45:6,9
49:9 56:3 71:3 88:11
96:15 97:3,4 105:20
140:8,21 143:19,22
144:1 163:12 166:10
169:21 175:3 179:2
182:14 184:14 185:16
188:11,18 207:13
226:8 256:10 289:19
291:11 296:18 309:3
316:14 325:12,19
338:21
critical 59:6 92:2
195:22 198:5 252:5

critically 44:4
cross 15:12
culpability 17:5
culture 58:7,13 62:17
141:5 162:13
curb 326:17
curiae 56:12,16
current 41:10,13 45:8
50:22 171:7 176:17
189:5 192:3 196:17
198:17 203:4 213:21
213:21 214:14,17
215:8,13 243:9
277:10 290:3,22
291:8 302:16 324:4
335:4
currently 10:4 35:21
88:6 126:17 147:6
161:3 174:21 182:18
190:6 203:8 214:20
225:6 227:7 228:4
231:13 270:15 276:16
278:3 282:16 283:2
297:16 317:22 337:13
341:20
curtailing 193:16
cut 113:5 290:21
CVRA 301:18 303:19
306:10,14,16 307:1
308:7,15,17,20 309:2
312:19 316:2,5
321:13 322:3,12,18
322:20
CVRA's 307:5

D

Dale 2:15
dangers 185:11
Daniels 296:7,10
databases 50:15,16,16
date 34:20 46:11 127:6
148:18 183:10
dated 45:21 46:21
day 28:1 33:15 60:11,16
75:13 109:13 144:22
148:21 240:18 272:9
days 263:2
DC 146:5
DD 45:19 46:15,20 48:7
48:14
deadline 77:16 109:9
deal 89:14,16 91:21
114:6 136:19 175:3
249:1 251:13 347:18
dealing 24:10,21,22
248:5 261:4 274:15
327:22
dealt 103:4 150:10
277:8 326:8
debate 75:6 143:20
144:2 153:20
decade 36:18
deceased 175:10
decentralized 81:20
decide 23:5 62:7,10
63:1 107:17 129:19
135:17 136:4 156:16
235:17 285:18 333:20
decided 110:11 122:19
144:5 178:20 214:8
214:10 221:13 238:12
245:16,18
decides 81:7 216:1
225:10 285:11
decision 13:9 18:20
38:16 46:13 50:7
62:17 86:4 96:1 97:10
97:11,13,21 108:16
116:9,18,21 117:14
118:5 125:21 139:9
166:22 167:17,21
168:2,5 184:12
201:20 226:2 230:15
231:2 294:13 299:17
309:18 349:11
decisions 16:19 37:12
46:6 57:8 61:12 68:17
116:6 170:1 171:9
202:8 206:15 263:7
263:21 299:14
declaring 293:22
declined 54:4 293:5
dedicated 135:14
257:12
deeply 248:20
default 31:6
defend 103:18,22 104:5
104:6 105:3 165:15
262:10 336:16 338:9
defendable 230:13
defendant 15:19 99:15
102:10 103:5 145:4
193:16,19 196:7
198:6,8,13,22 201:21
203:15 216:18 230:19
262:2,17
defendant's 196:12,19
197:13 199:22 253:5
261:18
defendants 150:12
197:18 204:18 205:4
256:17
defendants' 257:3
defended 195:5
defender 180:7 182:16
185:19 187:2

defender's 185:4
defenders 197:5
defending 104:13
180:15 257:13 336:17
336:22
defense 1:1 2:1,1,3,4,5
3:9 6:11,13 8:11
15:12 37:5 41:8 45:19
51:12,13,15 53:12
56:18 57:1 104:11
106:7,19 129:10
130:10 132:6 133:15
138:16 147:16 148:18
155:4,12 160:2,11,12
160:14,16,18 161:5,9
161:10 166:11 171:5
176:13 179:20,21
180:9,12,12,14 182:2
182:8,19 184:22
185:15 186:7,10
187:10 189:13 192:5
192:11,12 193:5
194:18 196:8,21
197:3,9,11,15,18
198:10,12,22,22
199:11 200:1,5,16,17
201:1 205:19 206:6
206:18 207:1,19
208:12 212:11 216:16
226:10 234:22 236:20
239:15 241:10,22
245:13,15 247:1
250:21 252:6 253:15
254:7 257:9 258:4
259:8 262:8,16
263:15,20 267:17
272:21 279:15 283:20
283:20 292:3,7,11,19
293:22 295:2 304:15
305:10 318:4,7,19
320:2 323:21 325:9
325:15 335:12 337:21
339:17
Defense's 347:6
deferring 145:15
deficiencies 302:14
deficient 268:13
define 98:18 241:3
282:4
defined 31:10 40:22
41:6 92:17 136:6
326:8
defines 32:4
defining 11:16 173:17
definitely 149:18 159:1
definition 37:8 137:19
137:20 203:2 335:12
degrading 194:5

degree 17:5 31:20
 122:4 141:3 186:21
delay 20:9 22:12,17,20
 146:11,16 147:8
 148:4,13 174:20
 175:5 188:9,20 189:2
 242:21 273:1 285:15
 339:17
delayed 22:13 147:22
 237:16
delays 147:17 202:1
 238:2
deliberate 61:9 181:17
 344:12,14
deliberately 190:10
 321:8
deliberation 223:1
 350:19
deliberations 125:17
 345:5
deluge 201:22
denial 224:8
denied 22:13 50:4
 113:7 122:18 210:17
 273:6 280:10 293:14
 339:13
denies 140:8 338:10
Denise 1:20 3:7 8:6
 44:18
dense 65:4
denude 207:3
denying 123:11,11
Department 1:1 4:14
 5:13 45:19 82:7
 138:16 161:7 171:4
 234:21 316:11 323:20
departmental 82:6
departments 173:6
departure 163:15
depend 95:4 169:18
depending 46:8 56:18
 70:11
depends 69:12 238:20
 241:6 273:12
deposition 37:19
deprives 190:12
Deputy 5:11,18
derogatory 138:11
describe 49:2 50:2
 330:6
described 79:20 249:6
 249:13 251:14 270:21
 330:15
describing 181:15
descriptions 329:6
deserve 78:3 173:21
deserves 201:9
designated 2:22 4:5

19:7 33:7
designed 26:17 69:9
designee 33:13 47:2
desirable 131:5
desire 215:18 252:2,10
desired 170:16
Despite 122:7 302:21
destroy 34:1 199:4
destroyed 34:4,18
 199:16
destruction 34:7,12
detail 39:3
detailed 203:6 327:2
 329:6
details 162:11
detainee 161:10 175:8
detainees 175:9
determination 117:22
 216:13 343:3 346:12
determinations 209:22
determine 43:5 46:6
 176:20 198:11 218:12
 237:5 261:13 262:13
 293:3,11 294:6,16
 318:13
determined 13:10
 200:6 234:19 238:8
 293:6
determines 294:8,20
deterrent 59:4
detour 29:5 30:4
develop 21:19 215:10
 229:17
developed 108:18
 119:3
developing 342:7
development 22:4
 204:4
developments 263:9
devil's 258:21
devote 176:11
DFO 2:22 3:2
dialogue 107:21
dicta 64:7
die 148:9,10
difference 213:16
 241:21 263:3 269:17
different 19:1,2 26:11
 79:12 82:4 96:11 97:8
 97:15,20 100:17
 106:15 110:13 115:12
 117:13 118:15 126:20
 145:10 148:5 150:3
 232:5 236:6,6 241:10
 241:18 248:22 251:19
 268:18 278:21 282:7
 283:7,13 285:9 288:6
 305:1,7,14,18 312:9

317:8 322:17,19
 324:17 330:5 350:3
differentials 12:20
differently 98:2
difficult 95:16 127:9
 152:17 179:7 231:12
 248:9
difficulties 105:8
 175:13
difficulty 153:14
diffuse 79:4
dig 109:16
dignity 173:19
diluted 301:19 303:19
dime 27:2
diminish 201:3
diminished 79:2
diminishing 98:22
direct 7:12 24:10 42:14
 55:21 75:3 96:7,20
 100:11,19 102:6
 110:17 117:2 144:9
 181:8 184:8 185:7
 193:18 198:1 206:5
 282:2 284:4,6 290:16
 295:18,22 296:3,16
 298:19 319:8 322:11
 324:9,12 331:15
 332:7 333:15,15
 334:12 336:2
directed 34:3 150:4
directing 34:10
direction 78:20 113:15
 141:6
directives 43:8
directly 48:13 118:2
 282:20 284:16 286:9
Director 2:3,14 5:3,11
 5:17,19 160:15 192:4
 203:21 342:9 350:17
 351:4,10,15
directors 43:10
disagree 106:5,7
 126:16 200:8 238:6
 238:13 240:13 268:22
 271:11,13 347:19
disagreeing 14:11
 155:17
disagrees 116:16
discipline 256:12
disclaimer 26:6 205:20
disclaimers 9:13
disclose 53:13 177:1
 280:11 294:17
disclosed 51:11 54:4
 55:14 83:13 130:21
 130:22 189:19 333:18
 334:4

disclosing 183:2,17
disclosure 51:10 52:3
 129:13,14 132:3
 169:21 176:18 187:11
 188:1 189:3 195:20
 196:3 198:1,16
 199:10 207:18 249:20
discouraged 33:9
discovery 55:15 110:18
 240:11,11 279:10
 280:12
discretion 142:18 163:3
 187:13 242:3 250:18
 260:22 294:7,9,17,21
discretionary 10:14
 113:5
discuss 93:20 170:16
 181:11 184:12 198:15
 200:18 204:21 208:11
 213:3 261:22 265:20
discussed 53:7 158:7
 184:16 187:8 192:10
 192:13 193:5 234:18
 253:3 278:16 282:14
 336:7,8
discussing 13:5 256:20
discussion 55:5 57:11
 77:9,10 121:1 173:7
 206:3 265:12 289:15
 290:20 348:4,11,16
discussions 35:12 58:2
 195:20
disfavored 16:6
dismissal 188:14
disparities 211:3
disposition 192:19
 194:7 236:9
dispute 121:21
disseminated 208:5
dissemination 207:22
distinction 139:7
 172:16 173:10 184:1
 239:2
distinguished 4:15
 51:5 205:14
distribute 200:18
distributed 155:12
distribution 149:18
district 146:4,5,7,13
 180:7 182:17 185:2
 223:9 319:16
districts 115:12
distrust 185:8 303:5
divine 108:11
division 2:1,4,5,7,9
 80:12 160:12,16,18
 161:5 179:21 180:10
 180:14 181:5,9 192:5

192:6 193:6 226:10
 275:5 276:17 282:18
 283:2,20 288:15
 289:13
Division's 160:3 274:16
divisions 8:12 191:22
Divisions' 3:9,14
docketed 40:9
docketing 188:8
doctrine 17:6 145:12
document 103:16
 129:18 153:2 219:1,6
 219:9,11,12,13,14
documented 153:13
documents 32:20 33:19
 42:3 45:15 50:17
 55:14 88:13 154:21
 155:5,11 167:14
 208:16 219:18 228:7
 228:18 250:11
DoD 18:11 206:13
 227:10
doing 60:8 77:5 99:18
 118:7 130:16 135:14
 142:18 180:3 189:20
 207:12 230:21 236:20
 240:16 248:21 254:3
 260:15 303:6 340:21
 349:19
domestic 173:4,13
door 233:8
dope 69:19
double-check 303:6
doubling 269:10
doubt 17:3 66:22 67:14
 131:19 134:17 135:20
 195:22 293:15
Douglas 186:16
downgrade 225:10
downgraded 225:14,21
dozens 292:20
draft 27:17 28:4 85:14
 138:5 175:1 350:8
drafted 17:15 18:7
 32:13 172:16 174:22
 189:3 213:18 264:19
 299:19
drafter 137:5
drafters' 171:16
drafting 14:7 20:11
 27:22 83:21 134:21
 135:4 143:1,7 155:20
 156:1
drafts 350:6,11,12
dragging 196:11
draw 78:12,13
drawing 79:7 139:7
drawn 79:9 144:13

157:18
drive 226:12
driven 82:6
driving 60:10
drugged 338:6
drugs 268:6
Duckworth 23:20
due 13:19 14:14,15,16
 14:21 15:1,8,9,16
 20:9 22:11 92:4 93:7
 101:12 102:12 103:1
 105:9 107:13 108:1,4
 108:5,9 127:10
 133:14 177:20 179:1
 187:19 188:5 190:7
 190:16 193:14 196:12
 197:13 205:3 207:4
 209:5,7 250:21
 261:15,18 281:5
 290:9 291:6 295:5,16
 296:17,21 297:7
 300:8 318:14 326:15
Duke 162:13
uplicative 302:18
 306:5 334:21 335:13
duration 29:20
duties 31:16 79:14
 139:20 141:21 176:8
 183:16 328:5
duty 26:1 42:16 62:15
 111:10 180:5 192:12

E

e-filing 282:15
E.V 122:16 146:4,6
 286:8 298:13,18
 309:14 333:10
earlier 53:7 64:16 82:10
 115:5 129:21 140:14
 215:16 225:8 282:14
 283:17 302:22 327:21
 337:21
early 189:14 297:18
ease 135:8,10
easier 219:2 307:15
easiest 313:8
easily 86:8 111:15
 153:3,13 312:2
Eastern 180:7 182:17
easy 27:11 95:12
 109:10 153:11,13
 175:11 200:10 217:11
 217:21 309:2 313:20
 322:10
ECF 218:21
echo 206:12 258:16
 301:6 324:21
economy 326:14

Edmond 190:18
educate 276:2
effect 32:14 59:4 70:9
 70:11 76:8,10 176:15
 227:18 314:17
effective 60:1 196:7,21
 197:12 252:6
effectively 166:21
 177:1 195:4 197:22
 199:9 262:10,15
effects 36:19 87:4
 162:6 179:14
efficient 44:11 130:16
 282:11
effort 13:3 180:22 197:4
efforts 181:3 193:14
 194:1
eight 63:14 91:3 101:1
eight-year 71:13
either 10:17 27:5 46:3
 64:2 104:2 127:8
 130:9 134:18 148:4
 153:6 199:10 210:12
 219:15 224:1 239:5
 254:1 292:2 306:6
 317:9 326:11 331:16
 335:6 340:20
elaborate 317:6
elect 47:11
elected 212:11 218:3
election 46:22 47:10
electronic 149:18
 153:12 212:21 227:22
electronically 149:12
 149:14,15,16 153:2
 217:8 228:5,12
element 19:10 191:5
elements 63:3 87:4
eliding 172:16
eligible 40:2
eliminate 189:20 253:4
eliminating 40:11
 135:19
Elizabeth 1:11,13 3:3
 4:16 35:18
Ellerbrock 91:4,7 93:18
else's 20:2
email 49:2 212:22
 217:22 218:16 227:4
emailed 348:7
emails 50:11 226:20
embarrass 200:12
embarrassed 268:2,7
 270:2
embraces 58:17
emergency 28:13
emerges 286:7
emerging 196:16

emphasize 25:4 185:17
employees 260:12
empowers 207:16
enabling 50:17
enact 317:18 319:19
enacted 52:17 121:17
 172:5 215:14 223:17
 247:12 249:19 306:10
 307:2 315:14 317:12
 319:5 320:11 341:18
enacting 162:6 319:13
encompassed 136:5
encourage 21:5 145:14
encouraged 52:12
encourages 297:19
endless 151:8 152:22
 156:8
endorsing 14:11
ends 184:11 241:8
 313:13
enforce 39:13 90:13
enforced 220:21
enforcement 119:14
 176:9
enforcing 90:11,11
engage 202:11
engaged 307:3 308:18
English 77:2 79:10
enhanced 257:1
enhancing 162:22
enlargements 109:8
enlightenment 158:14
enlisted 58:16 69:7
 174:12 256:14
enlistment 69:8
ensure 44:5 163:4
 178:8 187:12 190:2
 287:22 307:5 308:20
entertain 38:15
entire 26:5 74:19 77:9
 117:22 118:6,22
 123:8 124:18 182:7
 185:16,17 187:1
 207:2 278:2 325:13
 325:21
entirely 67:22 154:10
 268:18 317:1
entitled 45:19 46:21
 139:13 173:1 186:14
 214:6 273:2 292:13
 294:1
entitlement 247:14
entity 40:22
entry 314:3
enumerated 195:12
 209:1 212:7
enumerating 214:2
envelope 55:7,10,12

environment 58:9
envisions 69:22
equal 15:20 202:19
 210:9
equities 97:15 181:18
equity 81:9
equivalent 74:22 82:2
 330:7
erode 333:20 334:3,6
eroding 196:12
erosion 207:4
erred 31:22
erroneous 14:19
 167:16
error 46:7 125:1 129:19
 241:12 279:21 281:20
 283:8 284:19 285:19
 285:21 329:17 331:1
errors 42:17 186:19
 206:20 281:17 283:9
 284:12 328:14
especially 22:18 173:2
 297:17 298:21 323:19
espionage 78:20
 113:21
essential 83:15 193:19
essentially 260:11
 336:14
establish 233:6 257:2
established 81:14
 170:3,9 171:3 181:6
 195:5,18 201:7 202:7
 204:7,10 242:6,14
establishing 144:17
establishment 204:1
estimate 10:10
et 49:21 88:3 317:11
 322:9
ethical 182:10 183:16
Europe 157:12
EV 38:13
evaluate 246:19
evening 139:13
event 11:16 71:19,20
 71:21 72:9,12 203:18
events 179:10
eventual 212:20
ever-expanding 257:17
Everett 74:4
everybody 20:5 22:6
 64:1 69:18 101:21
 102:5 106:21 109:11
 129:9 149:1 151:15
 157:12 253:18 303:4
everyone's 185:21
evidence 37:19,20,22
 38:2,3 39:10 51:5,6,7
 51:9,16,22 52:6,17,19

53:4,14,22 55:15 56:5
 93:22 161:17 167:5,6
 194:11 202:3 230:22
 236:7 238:12 240:1
 241:9,14 270:16
 279:22 284:20,21
 321:1,2
evidentiary 167:15
 186:5 278:8
ex 99:18 154:2,5,8,11
 154:14,18 172:8
 176:18,21 177:9,9,13
 178:4 198:3 246:16
 261:5
exact 260:16
exactly 67:1 83:21
 91:21 95:5 103:7
 136:14 214:19 224:10
 241:17 244:12 245:11
 247:9,10 263:22
 347:9
exam 145:9
examination 33:5
 172:10
examine 15:13 32:18
 42:1 43:4 44:3 183:4
examined 143:16
examining 270:18
example 16:8 18:4 22:5
 49:18 50:3 53:18
 78:15 119:14 136:20
 137:19 147:15 152:7
 158:8 159:2 170:14
 172:8 188:21 214:4,5
 222:10 267:15,16
 271:22 279:1,13
 284:18,22 321:3,3
 332:14 336:6
examples 281:16 337:7
exceeded 188:12
Excepting 14:20
exception 52:20
exceptions 30:12 40:4
 77:14
excerpt 118:1
excess 112:2
excessive 12:14 60:9
 60:13
exchange 100:7
exciting 179:7
excluded 225:13 236:8
 238:12 241:9 279:19
excluding 119:11
 241:14
exclusion 38:4 202:4
exclusively 13:12
exculpatory 187:6
 239:14

excuse 253:1 340:17
excused 340:12
execute 200:7
execution 194:9 205:2
executive 1:10 36:12
 161:12 167:6 168:22
 170:6 172:6 178:10
 179:3 203:21 243:19
 244:17
exercise 79:7 88:2
exercising 260:22
exhibit 33:4,11 246:7
exhibits 29:19,21 30:2
 30:3,7,8,22 32:1,3
 55:18 142:5 182:20
 245:22
exist 108:15 248:11
 258:17,19
existed 244:15
existence 220:22 221:1
 259:5
existing 157:4 207:7
 264:11
exists 87:1 203:9
 210:13 244:2 247:9
 247:11 290:14
exited 238:7
expand 139:1,20,20
 229:17
expansion 171:14
 191:16 202:9 204:22
 209:2 213:4
expansive 203:1
expect 30:18 99:7
 232:6 299:1 329:4
 330:11
expectation 203:7
expectations 192:16
 195:18 201:1
expected 192:18 212:6
expedited 343:15,16,19
 344:1
expense 172:18,21
experience 5:5 25:11
 62:3,8 73:17 151:8
 157:19 161:9 162:2
 196:13 207:11 216:19
 237:14,22 260:1
 262:14 269:11 280:6
 280:15 282:17 340:7
experienced 180:11
 284:6 300:7
expert 164:2 176:20
 177:7 192:8
expertise 5:21 111:10
 159:7 160:6
explain 49:16 69:15
 88:14 121:9 132:9

182:1 199:13 203:9
explained 60:7 195:5
explaining 253:11
explains 49:8
explanation 266:10
explicitly 287:7
explore 129:5
exposed 332:21
exposes 207:19
exposure 198:17
 199:17 201:4
expound 149:8
express 136:7 151:12
 276:20 287:10 334:13
 334:22 335:8 341:15
expressed 7:14 20:21
 21:3,7 42:10,20
 287:18 341:1
expressing 149:13
 301:3 305:4
expressly 144:19 176:6
 183:19 211:6,11
 286:12,21 287:2
 298:18
extend 77:16 110:11
 113:9 119:5
extending 103:5 110:14
 110:15 112:21
extension 194:20 338:2
 338:11
extensions 136:21
extent 17:21 18:5 27:15
 29:18 68:10 72:19,22
 81:12 83:7 84:1,3
 107:1,8 120:22 162:5
 172:5 184:7,15
 199:21 215:9 218:20
 351:1
extinguished 96:5 98:1
 99:3 116:22
extinguishing 96:18
extra 16:8 105:9 108:22
 146:16,16
extraneous 97:12
 282:12
extraordinary 56:2 96:3
 117:1 121:15 122:4
 126:7 127:8 293:9
 295:21 296:6,15
 298:16 332:1,3,9,12
 332:14 349:20
extreme 271:21 272:6
 334:8
extremity 333:21

F

f 265:18,19
face 27:18 201:22

272:14 286:9
facilitate 50:20
facility 50:16
fact 24:21 73:4 75:21
 85:15 87:2 105:18
 111:8 120:16 122:15
 122:21 154:19 188:13
 195:3 219:10 222:5
 262:16 296:7 298:18
 301:2 303:1,2 310:3
 326:4 337:19 341:2
 342:3
fact-finding 62:12
factor 150:8 237:2
factors 246:12
facts 62:21 100:15
 231:1,4
factual 86:18 117:20,21
 128:19 284:18
factually 17:5
fail 172:12 239:19
failed 239:13
fair 14:17 17:8 92:5
 102:8 178:8 192:3,19
 197:13 199:22 200:7
 206:14 233:19 242:18
 254:19 257:15
fairly 116:7 329:6 330:6
fairness 15:17,17 16:15
 16:19 254:12,18
 257:3
faith 143:14 205:5
faithful 181:1
fall 67:15 84:6
fallback 27:20
falls 16:20 231:9
familiar 114:15 141:9
 156:7 157:4,17
 182:15
families 174:2,17
famous 169:10
famously 162:12,16
far 69:3 119:2 142:13
 190:16 256:3 270:8
 305:17 321:13 346:14
fashion 99:18 207:17
 290:8
favor 174:2 177:15
 241:14 254:15
fears 196:6
feasible 131:3,5
federal 2:22 4:6,8 19:6
 146:4,5 169:16 180:6
 185:2,4,7 218:21
 220:19 223:8,9 234:6
 305:14,16 306:17
 313:17 315:16 318:1
 319:8,15,18,20,21

320:14,19 321:2
 326:5 337:3
feds 312:9 313:15
 321:5,9 322:16
feel 68:15 128:5 134:11
 225:19 252:12 254:17
 255:12 258:5,13,18
 273:5 340:4 345:4,15
feeling 255:7
feelings 123:19
feels 136:4
feet 235:15
felt 63:19 68:11 155:9
 234:19 258:14
fewer 249:9
field 10:15 21:15,16,18
 28:7 63:13 113:22
 114:2 257:17 258:15
Fifth 63:4
fight 27:12 258:9
 261:10
fight 247:5
figure 72:3 83:21 128:3
 132:12,19,22 148:16
 151:1 238:14 283:14
 285:4 321:7
figured 115:15 251:12
file 23:5 30:21 31:3
 34:10 40:16 56:1,13
 56:14 110:15 119:9
 130:15 132:8 140:15
 142:13 149:14 156:15
 156:17 199:3,5
 208:14,16 209:9,12
 228:4,6 267:10
 271:20 272:22 279:2
 283:4 284:15 285:1
 295:18 296:11 297:13
 297:16,19 298:1,6
 304:17 310:14 311:8
 311:9 312:17 313:17
 322:7 328:13 329:22
filed 34:10,15 41:2
 105:9 146:4 147:12
 149:5 154:15,16
 167:11 184:10 217:20
 219:11,12,13,21
 272:21 284:1 285:20
 285:22 293:8 298:13
 299:3 304:15 310:8
files 182:19 207:10
filing 77:16 109:8
 136:21 149:15 154:11
 188:22 212:5,21
 216:3 217:21 218:11
 290:17 312:2
filings 50:19 57:5
 136:20 154:5 177:16

181:7 217:4 226:11
 255:4 283:18 284:6
fill 46:20
final 46:13 50:6 117:6
 264:5 286:4 287:15
 332:18
finally 22:6 26:3 160:16
 176:14 210:7 211:15
 321:11 324:15
financial 174:6
find 24:13 48:11 60:11
 67:14 104:9 105:19
 111:16 120:16 125:1
 128:8 137:21 149:3
 156:19,21 175:12,21
 176:3 178:11 231:5
 239:8,13 282:3 287:1
 316:14 325:22 330:10
finding 124:22 169:7,10
 179:4 217:7 296:21
findings 49:18 52:21
 124:17 129:21 200:9
 202:4 325:22
finds 124:17,19
fine 66:9 124:7 219:8
 230:3,4 250:9 269:21
 277:18 351:2
fine-tuning 196:11
finish 348:20
finished 145:18 267:2
fire 263:6 264:3
firm 269:19
firmly 189:3
first 7:2 9:8 10:21,22
 14:13 17:14 19:21
 23:8,12 25:12 39:19
 41:21 60:3 63:3 65:6
 67:16 76:15 77:8 95:6
 96:14 97:9,20 103:3
 116:6 129:4,8 130:2
 135:10 138:17 143:12
 160:8 165:15 169:11
 182:6 206:2 207:8,10
 211:13 213:20 248:16
 276:18 277:19 290:18
 290:20 291:11 298:16
 303:20 304:3 305:3
 305:22 307:18 310:13
 316:10 317:17 321:19
 323:22 328:11 332:21
 344:13
Fiscal 6:12,13 194:17
fit 76:15 89:17 141:14
 141:15 298:17
five 6:5 91:9 180:8
 213:20 255:2,6 258:3
 261:2 293:8,15
five-minute 87:10,14

273:19
fix 290:4,10,19 293:18
 293:18 302:13 304:8
 313:20 318:16,17
 322:10 349:6
fixed 302:21
fixing 299:20
flawed 306:1
flexible 58:20
flux 221:5 229:14
focal 92:4
focus 14:6 17:17 23:11
 45:7 71:11 76:2 77:19
 92:11 94:18,21 117:5
 234:2 236:2 277:10
focused 194:1,10 204:3
 230:7 233:11
focuses 89:9
focusing 29:1 277:15
folks 23:2
follow 41:10 58:1
 155:19 280:8 321:2,9
 343:17 352:1
follow-up 34:16 49:4
 61:5
followed 21:7 155:13
 168:18 329:10
following 4:15 14:22
 34:8 138:1,2 160:4
 214:1 225:7 279:13
 308:3,12
follows 169:22 221:4
 292:14
Force 1:19 2:1,2,6,8 8:5
 35:22 40:13 41:5,13
 41:19 43:11 62:9 80:4
 81:3 82:20 142:2
 160:11,13 179:21
 180:9,14,21 181:5
 182:13,19 184:14
 188:11,17 226:8,18
 227:7,19 254:22
 255:14 258:4 275:3
 288:15 289:12 297:21
 301:4 329:7,15
 330:14 331:1
Force's 82:2
forced 338:6
Forces 1:16 7:20 9:15
 10:1 14:2 19:19 21:2
 37:13 48:22 52:15
 62:4 93:18 144:8
 146:1,15 164:17
 166:20 174:16 178:1
 184:18 186:13 188:16
 210:16 226:15
forcing 252:20
forego 340:1

foreign 326:7 327:5
foresee 162:5 277:13
forestall 195:19
forfeiture 120:18
forget 279:21
forgets 263:12,13
forgive 75:19,19 313:5
forgiveness 11:9
form 8:22 22:22 45:19
 45:21 46:2,4,15,20,21
 47:6,8,10,13 48:7,14
 48:18 332:1,5 333:9
forma 210:6
format 314:8
former 1:16,17,18,20
 7:18,19 8:3,5,7 13:10
 178:1 182:16
formerly 10:3
forms 209:16
formulation 341:6
formulations 248:22
Fort 75:13
forth 71:17 90:21 188:9
 190:5 281:6 282:8
 298:13 350:19
forthcoming 288:5
forum 343:2
forward 8:14 35:12
 44:14 57:10 79:5
 99:14 117:2 119:20
 128:22 135:18 141:1
 213:13 227:11 229:16
fought 27:13
found 12:18 21:12,14
 35:3 37:3 43:16 114:5
 147:20 167:11 178:2
 186:21 212:13 262:3
 292:9 294:3 297:1
 298:18
foundation 115:6
founded 19:13 204:19
 208:22
founding 181:2
four 6:5 7:18 10:2 11:15
 15:11 62:10 70:11
 85:3 156:22 177:4
 206:2 302:12 305:22
 314:16 315:13 340:1
fourth 15:15 63:4
 100:22 206:9 211:15
 303:9 305:10 317:5
 338:1
frame 135:17 188:12
framed 75:22
frames 245:13
framework 68:8
frankly 99:14 100:3
 105:17 109:17 149:7

226:9 239:11 258:6
 270:2
fraud 175:18
free 147:7 148:3,13
 340:4
freedom 169:1
frequently 73:20
 206:17
Friday 1:7 60:6,15
Fried 2:22 3:2,21 4:3,5
 5:15 342:1,18 343:5
 344:3 345:18 346:4,9
 348:1,9 350:14 351:1
 351:19 352:3
friend 12:16 302:3
friends 12:9
front 97:14 98:9 117:15
 178:14 322:2
fruit 159:14
frustrating 71:17 72:4
frustrations 63:11
fulfill 182:9 183:15
fulfilled 186:8
fulfillment 43:6
fulfills 79:21
full 80:3 86:19 119:3
 121:2 182:8
fully 259:1
fun 67:13
function 81:4,4,10
 227:12 248:20
functions 80:1,5 267:7
fundamental 137:14,18
 193:14 237:6 252:1
 254:11,18
funding 50:14 139:20
funnel 116:7
further 30:16 35:12
 59:20 62:6 70:14
 127:5 159:5 170:16
 189:19 197:22 202:14
 207:15,17 209:8
 215:13,17 245:19,19
 286:18 287:11 294:13
 312:12 322:11,13
 324:1 340:2 346:15
 348:3
future 27:8,18 102:21
 297:2
FY17 347:8

G

Gaddis 93:16
gain 30:22 41:1 108:19
 110:4,7,8
game 124:3
gap 82:19 298:18

Garries 177:21
garrison 26:21
Garvin 326:21 336:12
gasoline 28:8
gather 111:10
gee 63:5
general 5:7 15:17 39:2
 43:11 161:8 164:8
 165:8 202:14 205:22
 227:10 236:16 260:12
 276:21 287:3,17
 291:19
General's 45:2
generalities 165:5
generally 32:9 41:8
 81:5 155:22 157:10
 223:2 240:5 245:5
 252:16 278:5
generals 174:5
generates 218:22 219:1
gentleman 275:14
gentlemen 191:12
Gerald 181:9 289:9
German 164:6
germane 176:12
gesturing 244:21
getting 16:1 20:6 29:21
 84:4 103:1 106:18
 126:8 128:17 155:4,5
 234:8 248:1 304:19
 314:1,6 315:18
 349:10
gist 291:18
give 15:8 19:22 25:14
 26:6 99:20,21 101:6
 105:2 107:8 123:3
 131:19 137:4 147:15
 149:2,21 170:16
 214:3 216:2 219:21
 237:12 254:12 267:14
 267:15 268:22 270:9
 270:10 276:2 282:5
 283:1 288:14 316:4
 321:21
given 38:18 41:18 76:5
 130:9 133:12 159:13
 210:9 218:10 233:19
 260:18 303:15 307:5
 307:8 319:3
gives 92:12 122:20
 147:6 270:8
giving 104:12 105:8
 110:4 149:15 214:11
 232:12 244:1 268:11
 315:5
Glen 2:15
global 26:11 27:10
 28:20

go 18:13 30:21 64:5
 65:13 67:17 70:14,17
 72:5,8 87:3 96:4
 104:1 111:16 112:19
 112:19 115:10 117:2
 119:17 125:13 131:19
 134:3 147:4 168:19
 217:12,14 222:2
 226:16 227:17 240:20
 251:13 252:18,20
 256:3 261:8 264:19
 265:13 267:21 270:8
 271:18 272:8 278:16
 280:12 289:4 305:21
 307:16 309:3 312:5
 312:13 313:6 328:13
 329:22 333:11 339:7
 342:7 343:21 344:7
 349:19 350:4,11
goal 12:6 21:4 59:2
 66:14 135:18 195:6
goals 26:15 162:8
goes 33:2 50:1 54:8
 118:8 124:6,19
 128:20 139:3 144:5
 152:5 169:14 174:22
 175:17 215:17,17
 221:1 228:12 254:9
 257:22 259:2 265:11
 269:14 316:17 320:15
 320:16 321:13
going 18:21,22 20:6
 27:12 28:1,9,18 45:9
 47:20 53:4 60:5 64:5
 69:19 70:10,13,17
 71:15 72:11 73:2,15
 81:12 83:20 94:7
 97:11,13 99:6 100:16
 104:3,4 105:4 106:1
 107:7,9,15,19 108:10
 114:6,14 115:4 117:7
 123:4 125:13,15
 130:1,5,6 131:19
 135:20 136:5,6
 137:15 141:2 144:15
 146:13,15 148:9
 153:8 154:5,20
 155:17 160:1 168:4
 170:1 219:22 225:22
 227:14,16 232:14
 238:9 242:12 243:16
 244:11 246:19 251:22
 253:1,2 257:2 261:8
 261:10,13 265:12,13
 266:17 269:15,21
 270:3 277:10 284:10
 285:3 288:14 298:3
 301:1 302:11 304:12

318:12 321:11 329:22
 330:2 338:4 339:22
 344:7 349:18 350:19
good 4:3 5:15 9:12
 34:14 35:17 61:4
 79:17 109:17 117:17
 131:5 143:14 159:22
 179:18 191:12 252:13
 254:16 270:11 289:8
 296:2 299:15 323:4
Google 174:18
gotten 18:16 65:15
 237:3 305:4
governing 43:8,10
government 2:7,8,9,11
 2:12 3:14 8:11 15:22
 30:6 41:7 42:16 53:12
 56:18 57:1 81:4,10
 102:9 103:1 104:12
 105:16,17 106:1,6
 124:14 125:6 126:13
 175:7 181:5 189:14
 189:21 202:16,20
 203:19 206:6 228:11
 228:14 232:15 239:6
 239:12,17 255:1
 258:9 273:1,5 274:16
 275:3,5,7 276:17
 281:8 282:13,18
 283:2 285:20 288:15
 289:13 292:12,17
 294:1 295:3 305:3
 318:4,6,18 320:4
 328:6 336:21 338:2
 339:16
government's 176:7
 287:20 335:11
government- 247:14
governs 53:8 249:20
 290:5
gracefully 258:8
grade 185:20,21
grading 264:1
grand 260:19
grandmother 124:2
grant 113:8 122:5 125:5
 143:18,21 231:2
 285:11,18 297:10
granted 35:7 42:10 50:4
 55:1 56:14,16 119:15
 123:14 126:13 182:21
 210:6 211:2 314:22
 336:9,15
granting 40:11 49:20
 332:3 336:2
grants 20:15 40:18
 287:11 292:15
great 10:10 25:21 36:11

74:20 78:10 134:22
 151:7 164:6 196:22
 215:12 302:13
greater 91:11,21 173:1
 173:5 215:10 249:8,9
greatest 199:21
greatly 30:9 284:2
grope 259:18
ground 238:11 335:20
grounds 243:14 245:6
group 73:16 95:14
 161:12,15
Guantanamo 175:11
Guard 2:5,11 160:17
 205:13,19,21 207:8
 207:13 275:7
Guard's 323:8
guess 10:15 32:15 61:5
 61:16 64:14 77:18
 94:10 95:9 97:18
 108:3 116:3 126:16
 132:5 134:4 145:9
 159:3,17 217:1
 219:22 221:3 229:11
 230:9 231:8,14 264:8
 274:3 275:13 330:17
 337:17
guest 103:20
guestimate 112:10
guidance 41:11 204:18
guide 345:15 348:21
guided 286:16
guilt 49:18 186:20
 284:21
guilty 17:2 43:16 262:3
 262:19
Gupta 2:17
guy 98:11
guys 70:21

H

halt 197:10 198:1
 199:10
Hamden 319:11
hand 101:11,12 196:18
 294:19
hand- 282:16
hand-delivered 228:6
hand-wringing 167:20
handle 111:8
handled 114:1,2
handling 30:1 182:3,15
 184:21,22 330:8
handpicks 261:1
hands 253:22
handshake 61:8
happen 27:21 28:2
 141:17 158:18 227:14

338:8 339:19 341:21
happened 104:9 129:14
 150:14 268:5 349:7
happening 12:17 23:14
 29:2 78:18 80:15
 117:17 118:11 271:2
 315:12,16 329:19
happens 50:2 116:17
 118:10 122:13 182:1
 263:13 279:6 304:9
 329:18,21 347:8
happy 61:1 213:5,11
 220:9 327:18
hard 112:18 175:21
 237:5 243:2 296:20
harder 24:8,9
Hardy 169:4
harm 172:12 200:11
harmful 165:13
harming 209:5
harsh 120:17
hate 18:3 78:15,16
 203:7 222:5
head 264:20
headlines 178:16
health 7:16 11:18 78:1
 169:5 177:7,12
 196:20 198:21 200:4
 239:9 259:4 268:17
 279:16 289:22 290:7
 291:13,21 294:2
 300:1
healthcare 252:16
healthy 219:18
hear 7:18 19:7 43:22
 44:18 74:7 101:19,21
 122:19 160:2 179:17
 205:9 213:11 220:9
 254:17 255:15 262:17
 288:18 289:5 327:18
 337:18 338:14 339:12
 346:15 348:19
heard 7:5 15:8 23:3
 38:12 86:21 90:19
 91:13,22 92:17,19,22
 93:2 94:8,11,16 97:7
 97:9,20 102:19
 107:19 108:15,17
 116:12 119:20 120:8
 120:10,15 124:15
 125:10,12 126:1,8,18
 145:6 156:12,13
 166:19 167:2,4,20
 170:5,19 172:17
 187:8 190:14 203:14
 225:6,8 227:20
 243:21 244:19 248:22
 249:6 259:16,21

271:16 278:15,21
 282:13 283:16 290:15
 295:4,6,11 298:10
 302:21 329:6 330:6
 341:1 343:12 348:3
hearing 1:5 8:14 51:17
 53:16 120:1,4,9
 122:18 126:18,19,20
 127:15 136:22 165:1
 184:20 222:16 223:1
 223:3 224:2,9 246:10
 246:17 247:1 252:21
 277:22 317:15 346:15
 347:16,16
hearings 37:18 46:12
 222:18 225:16 316:6
hearsay 245:6,9
heart 135:7,9 165:6
 290:21
heavy 128:9
held 38:5 188:7 260:11
help 24:14 58:8,10
 70:12 98:3 136:1
 141:14 153:19 180:22
 201:3 327:8 328:17
 330:3 348:21
helped 260:6
helpful 13:18 22:4,6
 62:7 91:20 159:3
 266:12 277:16 301:13
 340:8
helping 269:10
helps 135:19
Hennis 177:10
Hereto 16:21
hesitation 257:10
hey 64:5 124:7 322:8
high 12:14 22:22
 121:13,14 122:4
 212:12 272:8
higher 46:5 178:1,17
 206:21
higher-level 206:16
highest 141:3 178:20
hindrance 328:4
Hines 2:15
historical 173:15 185:8
historically 114:14
 220:13 277:8
history 65:19 67:21
 121:18 122:7 192:22
hit 247:10
hold 299:2
holder 38:8 39:20 83:10
 83:18,22 84:20 86:10
 86:18 95:19 99:19
 168:16
holders 15:3 85:10 88:3

89:12 95:10
holding 64:6
holds 95:20
Holtzman 1:11,13 3:3
 4:16 5:14 8:3 9:19
 25:16 35:13,16,18
 44:16,20 57:12 75:17
 87:10,13,18 89:6,21
 90:4 93:12 94:2,14,17
 99:6 129:4 130:3,8,11
 131:4,9,22 132:12,16
 133:14 134:19 136:13
 137:11 138:4,9
 139:22 145:19 155:6
 155:19 156:21 157:21
 158:2,19,22 159:22
 179:16 191:1,6 205:8
 205:12 213:7 224:11
 224:17,21 226:5
 229:9 233:13 234:11
 234:15 235:1,4,7,9
 248:15 249:15 250:1
 250:4,6,8 255:22
 256:5 258:2,20
 259:17 260:3 261:19
 264:4,17 265:3,8,15
 265:17 266:2,5,9,14
 266:20 267:1,5
 273:12,15,21 274:3,8
 274:22 275:9,12,19
 276:6,14 277:14
 279:11,18 287:4,7,16
 288:11,16,19 289:6
 295:13 300:11,16,19
 300:21 301:5,8 308:1
 308:5,10 309:7,10,17
 309:22 310:4,16,21
 311:3,11,15,21
 312:22 313:5 323:2
 327:14 328:21 331:4
 339:22 340:17 341:9
 342:15,19 343:8,18
 344:2,5 345:10 346:1
 346:5,10 347:2,9,14
 348:5,15 349:15
 350:4,20 351:7,12,16
 351:21
home 60:6 69:20
 150:20
homework 185:20
 264:1
Hon 1:11,13
honest 19:20 144:21
honor 191:13
honorable 4:16,17 7:19
 9:8 35:18 179:19
 192:19
Hood 75:14

hope 7:21 9:18 13:2
 29:3 60:17,19 150:5
 151:3 159:12 271:1
 306:11
hopefully 20:3 305:22
hoping 151:11 282:15
host 96:8
hour 109:12
hours 138:6,12
House 2:3 3:11 160:14
 191:9,10 229:11
 233:2,5 242:5 243:7
 251:20 261:21 264:22
 265:6,10,16 266:1,8
 266:13
Hsieh 2:5 3:15 274:18
 275:20 276:5,14,15
 276:16 277:19 279:14
 279:20 287:6,9,17
 314:12
huge 115:20
huh 256:1
human 329:17 331:1
humbly 322:1
humiliating 194:5
hundreds 109:3,3,4,4,5
 109:5
hung 237:3
hurdle 247:4
hurdles 245:19
hyperbole 186:17
hypo 271:22 272:6
hypothetical 105:14
 106:3 239:2 240:14

I

idea 28:9 116:11 133:10
 214:10 220:12 225:14
 266:16 268:6 346:16
ideal 291:3 293:17
identifiable 231:10
 252:15
identification 18:12
identified 18:19 80:2
 172:1,3 178:14
 257:22 348:2 350:18
identifier 83:8
identifies 95:13
identify 16:3 18:11
 83:21 95:7 249:16
 290:19,19
identifying 162:7
Il 27:13 28:6
illness 148:8
illustration 296:3
images 53:18 55:4
imagine 14:21 24:18
 296:21

immediately 279:7
immodest 168:9
impact 15:10 61:13
 62:17 67:10 101:12
 146:16 201:10 205:3
 249:3 262:2
impacts 12:1 147:9
impairing 249:9
impartial 25:8 257:15
 259:13
impeach 15:13
impeding 291:6
implement 73:19 164:3
implementation 36:8
 307:8
implemented 315:15
implementing 307:10
 330:13
implicate 211:20 212:6
 281:15
implicated 284:16
implicates 282:4
implicating 167:2 195:8
implication 282:2
implications 62:22
 114:1 277:12
import 118:10 134:22
importance 21:10
 22:10 117:12 118:22
 144:14,16 166:4
 170:10 256:15
important 11:18 18:19
 19:9,14 20:4 23:16
 24:18,19 44:4 75:8
 116:19 132:10 137:8
 156:13 159:8 161:1
 166:5 167:3 178:15
 183:22 187:5 194:19
 198:21 205:1 236:6
 248:19 256:6,11,11
 256:12 257:1 259:3,7
 259:9,10,11 262:16
 281:14 282:10 287:19
 303:20,21 326:9,9
 340:19 350:9
importing 118:13
imposed 230:4 249:5
impossible 197:11
 203:12
imprecise 241:5
impressive 9:20
improper 65:12 200:11
improperly 198:20
improved 165:21
improvement 43:19
 44:4
improvements 36:14
 162:6

impunity 305:13
inadmissible 51:20
inadvertently 203:7
inapplicable 295:21
inappropriate 76:5,7,11
 77:10,19 78:13
inaugural 193:1
incident 174:3
inclinations 268:8
include 4:13 7:10 8:10
 29:8 32:5 42:6 88:1
 119:22 138:13 151:22
 155:18 177:12 188:5
 194:3 201:16 287:8
included 55:18 120:14
 136:16 246:6 328:15
includes 8:17 48:2 54:2
 87:1 121:20
including 15:2 30:12
 60:12 127:2 201:10
 216:5 290:6
inclusion 29:13 202:3
incongruently 296:15
inconsistency 133:2
 164:15
incorporation 37:2
incorrect 317:3
increase 140:22
increases 164:13 166:6
 210:22
increasing 230:19
incremental 36:18
incur 170:12
independent 6:16 25:8
 190:15 234:10 325:20
indicate 121:22
indicated 20:8 23:21
 25:1 85:10 144:11
 329:2
indicates 48:15 303:5
indicating 34:11,17
indictment 260:20
indistinguishable
 183:6
individual 48:2,5,19
 217:13 260:21 337:2
individually 350:16
individuals 173:1 196:3
ineffective 185:6
 187:14
inequity 139:17
Infantry 10:3
inference 144:9
inferior 64:9
influence 162:4 202:5
inform 14:2 80:18
informally 347:5
information 4:9 29:9

45:20 47:3 48:7,11,14
 51:18 52:3 53:13,19
 83:13,17,18 84:5 88:1
 88:19 95:7,11,14,20
 97:12 98:17 132:10
 142:8,19 177:2 187:5
 207:22 208:5,8
 239:14 242:22 243:1
 249:2 251:15 252:5
 252:14,15,16,18,22
 253:2,2 262:1 342:6
 342:12 344:13 345:1
 345:3
informed 102:2 116:9
 181:4
infrastructure 28:3,4
infrequent 208:9
infringe 172:6
infringement 172:8
infringing 199:21
inherent 178:5
inherently 96:22 101:17
 246:5
initial 155:7 167:8
 175:1 247:10
initially 49:5 72:18 74:9
 172:16 263:9
initials 55:10 227:4
innocent 60:4
inoperable 27:10
input 8:18 116:8 119:1
 119:2 128:6 159:11
 350:16,18
insert 109:22
inserting 110:1 124:4
insight 133:13
insofar 319:14 320:14
instance 25:12 95:6
 96:14 97:9,21 116:6
 199:11
instances 67:9 124:14
 279:5 291:22
instant 27:2
Institute 327:1
institution 248:3
institutional 81:17
institutions 174:6
instructors 43:9
insubordination 113:20
integrity 16:22 173:19
intend 66:19
intended 17:21 18:5
 37:1 43:17 67:20 76:6
 77:9 276:20
intends 66:20
intense 252:10
intent 21:3,6 137:4
 171:16 194:10 211:13

299:5
intention 17:17 74:9
interest 17:9 39:8,17
 40:12,21 41:7,17,18
 50:9 51:4,8 52:1
 56:19 116:13 140:16
 141:11,19 142:7,16
 143:7 144:20 145:3,4
 145:8 147:11 148:12
 148:12 152:6,11,12
 156:5,15,17 167:15
 169:20 171:10 194:3
 194:4 195:4 196:14
 199:20 202:7,10
 204:12 208:17,18
 209:16,22 229:19,21
 230:1 231:10 233:9
 234:20 242:7 243:18
 244:16 257:21,22
 270:5 291:10 295:17
 295:19 296:8,11,14
 303:10 306:3 307:17
 307:20 309:4 310:14
 310:20,22 311:6,8,13
 313:18 318:21 324:5
 327:11,15 335:2
 346:8
interested 50:10 90:7
 342:6
interesting 61:19 192:7
 203:16 284:10 336:10
interests 45:12 51:1
 53:6 93:21 131:18
 141:2 190:9 194:22
 195:12 198:9 201:8
 201:10,13 206:3,11
 208:21 209:2,3 210:8
 210:11 227:1 242:14
 257:20 264:13 291:3
 324:10 336:20
interfere 105:4 172:4
interferes 322:6
interlocutory 23:3 40:7
 121:6 122:1 206:8
 210:16,19 284:8
 286:6 296:4,12
 298:12 299:10,16
 332:16 333:1,4
internal 54:12 56:11
 168:13 280:8
interplay 222:11
interpret 21:5 67:11
 135:12 143:14 286:22
interpretation 168:3
interpreted 204:7
 284:11 287:14
interpreting 90:21
interrupt 301:11 313:1

interrupted 63:15
interruption 313:6
intervene 56:10 208:9
 209:18 210:3 237:15
 337:5
intervening 238:5
intervention 237:19
introduce 5:1
introduction 3:2 13:1
intrusion 98:14 328:4
invaded 123:2
invalidate 179:2
invaluable 327:6
inversion 24:6,7,16
 106:14
investigation 169:9
 307:4 308:19
invitation 43:21 49:3
 56:13
invite 193:20
invited 297:22
inviting 44:22 205:16
 323:6
invoke 150:13,16
involve 112:3 183:17
involved 10:11,17
 12:14 41:1 81:9
 149:11 181:19 278:9
involvement 257:18
involving 6:18 10:19
 50:19 195:13 201:11
 201:16
Iraq 175:12
ironed 165:7
irrelevant 195:20
 269:16,22 271:3
 292:9,16,20 294:3
issue 7:2 11:21,22 12:4
 29:1 33:20 60:20 65:6
 70:1 73:14 81:19,21
 83:3 87:5 90:17 94:5
 98:8 100:22 101:1
 103:17 105:16 111:22
 116:13 117:4 118:2
 120:7 121:2,5 123:22
 125:9,19 126:14
 127:3,6 129:5 130:4
 133:7,15 138:14
 143:8 144:12 152:9,9
 152:10 178:20 182:12
 184:16 189:18 192:10
 198:5,10 200:21
 201:19 202:6 208:10
 222:1 223:11 227:17
 229:12 232:13 234:12
 240:8 245:13 249:1
 250:17 254:11 256:9
 257:5,6 262:5,7

263:14 267:12 269:7
 272:9 278:21 281:10
 285:12,15 287:15
 302:6,8,22 303:2,10
 303:14 304:14 305:11
 306:1 307:10 316:22
 322:10 326:2 332:8
 346:6 348:10
issued 4:11 125:8
issues 14:5,6,7 18:12
 18:12 24:14 38:12
 39:11 40:8 61:13,14
 63:16,17 77:22 81:7,8
 86:12,16 104:19
 107:13,18 108:12
 118:4 126:5,6 134:21
 150:9,18 153:18
 161:1 165:2 170:10
 182:22 192:13 195:3
 202:13 240:12 242:9
 250:13 256:20 273:4
 283:7 284:8 286:6
 292:1 301:21 310:6
 310:12 325:6,14
 326:8 339:6 341:18
 345:13,13,19 346:11
 346:17 347:10,15
 351:5 352:2
Italy 163:18
items 34:17 279:7
 348:2
iteration 72:7

J

JAGs 307:9 317:18
 320:7,13,16 321:7
 330:17,21
James 1:16 3:5 7:19 9:8
jeopardize 297:11
jeopardized 297:3
job 62:15 63:2 77:1
 81:17 186:9 240:17
 253:11 268:4
jobs 243:1
Johnson 169:7
join 164:9
joining 5:5 8:13 9:6
joint 161:11 203:16,17
 317:20 320:9 323:10
 330:21
joking 44:20
Jones 4:17 6:6
joy 25:21
joyful 65:3
JPP 4:6,7,9,10,11,17,20
 5:3,6,17 6:9 14:3
 289:16 290:21 295:16
JPP's 9:4

jpp.whs.mil 4:10 9:5
Jr 1:18 3:6
JSC 161:14
judge 1:16,16,17,19,20
 2:16 3:5 5:7 6:6 7:19
 8:4,5,7 9:10,13,21
 10:2,2 23:22 24:2,4,4
 24:5,8,9,9,11,12,20
 25:12,22 30:13 31:3
 31:13 33:12 39:2 43:1
 45:2,4,5 46:3,13
 51:19 52:11,21 53:20
 54:3,5 58:4,22 59:17
 61:10,18 62:16 63:12
 64:11,21 65:3,11,12
 65:18,22 67:7,12 69:2
 71:2,6,10,13,18 72:4
 72:20 73:1,1,4,18
 74:3,4 75:19,21 76:13
 76:18 77:1 79:12,18
 84:9,13 85:22 86:2
 87:12 89:18 90:3,15
 93:15 95:8 96:2,9
 97:5 100:6,10,13
 101:3 102:14 103:7
 103:10,13 104:15,18
 104:22 105:21,22
 106:17 107:17 108:7
 111:5,18 112:6,9,12
 112:14,17 118:19
 119:15 121:8,10,13
 130:6 131:7 132:19
 133:10 134:2,8 135:1
 135:9 136:14 137:13
 138:7 140:12 143:11
 144:4 147:10 150:4
 151:21 153:15 155:9
 156:19 158:16,21
 161:8,13,18 163:2,17
 166:14,19,21 167:9
 167:19 168:8 173:9
 174:5 178:6 180:5
 186:6 187:3,14
 191:21 198:4,20
 205:21 207:12 214:8
 221:9 223:13 231:2
 232:5,11,19,20 239:6
 239:10 243:11 244:10
 246:9,19 250:17
 252:22 253:1 257:15
 260:12 261:14 262:13
 263:5,10,12 267:17
 267:21 268:9 269:15
 269:20 270:16 271:7
 272:6,9 276:21
 291:14,22 292:8
 293:4,11 294:2,6,8,16
 294:21 317:9 318:9

336:13,18
judge's 36:2 61:7 63:9
 202:2 293:3 337:4
 338:10
judges 7:18 11:17
 14:16 16:5,11,22
 23:18 24:15 25:7 30:8
 31:13 52:6,13 61:19
 62:7 65:7 66:15 68:11
 82:11 85:3 91:9 92:7
 93:6,6 99:13 101:22
 107:16 108:8 110:8
 110:20,21 111:8
 115:19 123:6,10
 127:2 132:9,12,22
 133:9,9 134:15
 135:11,11 147:19
 167:21 190:15 200:14
 232:9 244:6 259:13
 260:1,2,5,5,8,15
 261:13 291:19 303:5
 318:10,12
judges' 3:4 206:15
 260:7
judging 61:20
judgment 25:10 124:6
 125:1 234:7,8 235:18
 314:3
judicial 1:3 4:4 6:2,10
 6:16 8:16 32:21 42:3
 44:21 61:16 123:5
 125:17 209:5 210:22
 286:18 326:14
judiciary 190:16
Julie 2:16
jump 245:6,8 328:7
June 52:5,18
Junker 1:9
jurisdiction 20:20
 38:14,19 64:18 66:3,8
 66:10 114:18 118:17
 143:18,21 145:6,13
 146:2 150:13,16
 171:1,19 220:13
 223:10 243:15 286:12
 287:2 298:12,17,22
 299:2,6,19 303:11,15
 304:20 307:12,20
 308:11 309:19 339:9
 339:12
jurisdictional 20:15
 65:18 150:11
jurisdictions 117:18,19
 326:5,5,6,7
jurisprudence 186:3
jury 72:1 260:19,20
justice 6:18,21 11:19
 19:7,16 22:12,13,13

25:2,5 36:1,10,16
 37:7 40:1 43:20 44:10
 59:21 74:11 77:22
 92:13,15,18 93:3,7
 161:20 162:20 163:10
 165:13 170:5 171:6
 185:10 186:1,3
 191:17 192:17,20
 206:15 219:17 243:21
 248:12 256:10,10
 288:6 289:19 314:18
 314:22 316:12,20
 322:7 323:7,8,11,13
 327:12

justiciable 210:11

justify 203:12

K

Kastenber 38:5

166:12,16,18 168:1,4

222:6,7 243:13,15

244:9 296:2 339:3,5

keenly 162:3

keep 12:13 146:19

253:22 261:9

Keeping 10:13

Keller 2:9 3:17 275:4,17

300:13,19,20 301:6,7

301:9 308:4,8,13

309:9,16,20 310:2,5

310:19 311:2,4,14,18

312:1,7 313:3,7

327:19 328:7,9 329:1

329:12,16 330:16

kept 130:12 278:13

key 37:12 83:17

kid 70:16 72:3

killing 119:10

kills 12:2

kind 27:12 58:7,8 76:10

85:12 105:7,9 131:17

132:3 138:17 145:2,3

165:20,20 167:22

177:1 178:13 216:4

216:13 227:20 229:14

248:4 257:5 281:11

306:6 320:6 328:3

345:12

kindly 60:7

kinds 227:6 279:11

kit 86:19 265:9

knew 30:17 158:12

159:2 193:18 272:12

know 9:21 11:11 17:1

20:4 23:9 26:17,18

27:11 28:7 29:7 32:14

34:17,21,21 51:16

60:3 62:16 63:19 64:1

66:9,15 72:5,10 74:21

75:2 78:21 81:6,11

86:4 89:6 98:2,5,6

115:13,18 119:4

123:15 125:6 126:22

127:17 133:3,12

134:3,4,6,21 136:3,3

137:14 139:18 143:12

143:12 149:20 157:6

157:12,16 158:4,18

159:9 164:3 180:2,21

196:4 197:19 199:19

200:20 207:8 215:13

216:6 219:5 220:5

221:5 222:13 225:1,2

225:19 227:14 231:6

232:7 241:5 245:8

247:16 250:20 251:6

251:15 252:2,8,11,12

253:13 254:19 255:13

255:19 256:18 258:8

265:8,10 266:3,15

269:14 271:9,19

273:11 274:8 276:11

283:22 285:16,17

286:9 305:2 306:19

307:11 309:11 310:3

316:11 317:15,22

330:22 331:2,11,15

340:19 342:1,12,15

344:20 345:9 349:18

knowing 141:1

knowledge 69:12 88:8

105:14 187:2 220:20

known 212:9 218:5

Koffsky 302:7

Kreutzer 177:5

L

L 2:15

labels 183:9

lack 7:11,12 42:11

174:9 298:11,17

299:6

lacked 38:14

ladies 191:12

landmark 179:10

landscape 215:2

language 30:9 39:1

75:22 84:1,19 95:13

121:20 122:9 135:5

144:10 152:15 156:6

157:3,5,17 158:14

176:17 186:15 211:6

214:14,18,19,20

237:3 241:4 244:21

264:6 265:5 266:11

273:18 287:21 292:15

293:6,16 312:19
 320:11 322:3 342:4
Laraneta 336:12
larding 261:5
large 112:14 173:6
 248:3 263:1,7
large-scale 263:17
largely 82:6 194:10
larger 61:14 74:10,15
 264:2 327:11
late 149:3 274:15
 333:17
latest 281:11
Laughter 72:17 76:22
 216:21 229:5 238:21
 255:21 256:2,4
 258:11 264:16 273:14
Lauren 2:2 160:13
 179:22 238:1
law 10:5 13:5 17:14
 18:5 20:13,19,21 21:5
 21:17,18,19,22 22:4,8
 22:15 23:16 29:14
 52:12 64:3 65:1,20
 66:5,6 67:3,16,17,17
 67:18 69:14 70:4,14
 72:5,12 74:8 77:2
 79:15 85:2,3,16 86:3
 86:7,13 87:2,7,8,9
 89:11 91:20 92:13
 93:6 98:6 105:21,22
 116:14,16 132:21
 134:11 135:13,13
 137:20 144:19,19
 152:7 153:17,20
 158:17,17,20 162:4
 163:11 164:2,12
 166:7 179:8 197:4
 200:6 202:7 210:20
 211:7 231:6 243:9
 247:11 264:11,15
 266:7 280:16 282:19
 290:2 293:1,7 327:1,3
law's 17:7
lawful 195:4 196:3
lawfully 29:22 204:16
lawsuit 41:1,3
lawyer 9:12 28:10 75:18
 76:18 98:9,12 99:21
 241:5,6 257:9
lawyers 14:16 69:15
 70:20 77:12 174:7
 238:19 271:11,13
lay 73:4 138:1
lazy 136:13 138:11
 149:6
LCDR 205:11,14 215:4
 216:7,19,22 217:18

218:9,19 219:16
 220:4,10 221:15,18
 221:22 222:4 224:10
 224:15,19 225:1,17
 226:4 243:6 251:3
 257:7 270:14 271:10
 271:14,21 272:4
lead 59:5 68:16 91:1
 156:7
leader 12:16
leader's 60:15
leaders 12:9 58:15 59:9
 60:21
leadership 11:21 12:5
 12:22 13:3 35:22 58:6
 58:12,12 59:22 72:21
 73:3
leading 203:22
leads 111:3 188:3
learn 24:2 25:10
learned 11:1,5
leave 40:16 56:14
 120:19 148:6 150:20
 156:2
leaves 319:17,17
lectern 163:9
leeway 134:8
left 36:19 37:14 200:9
 268:3 286:12 316:8
legal 5:9 7:6 13:21
 21:11 30:7 40:2 42:7
 46:7 62:5,13 63:7
 80:7,13,14,20 86:17
 86:22 92:11 95:2,2
 98:8 100:3 117:9
 138:19 148:12 170:12
 173:6 174:6,14
 186:19 193:2,12
 201:13,22 206:19
 254:13 277:7 284:18
 295:8 296:22
legally 17:4 195:5
 230:13
legislate 76:14 92:21
 339:7
legislated 286:14
legislation 36:7 39:6
 76:1 84:11 89:15,19
 90:6 94:19,21 135:4
 159:10,15 171:4
 204:5 256:21 287:22
 288:8 315:14,19
 324:22 341:2,18,20
 349:5
legislations 90:8
legislative 2:16 44:2
 65:19 67:21 85:1 93:9
 121:18 122:7 137:5

legislatively 325:2
legislator 136:3
legislature 95:3
legitimate 138:21
 229:18
length 234:18
lesser 186:20
let's 27:18 62:1 65:20
 100:18 138:5 152:3
 259:6 285:14 313:6
 338:3 349:15
letter 18:11 49:6,10
 50:1 302:7
letters 8:22 14:9,12
 48:18 49:1,12,16 50:1
 137:7
letting 21:18 119:9
 190:19 314:15
level 13:20 40:6 45:18
 47:17 49:9 50:21 56:1
 56:4 60:12 74:2 88:12
 95:21 96:19 97:19
 101:6 102:6 106:16
 108:5,7,15,19 113:1
 116:5,22 117:7,13
 129:13,14,22 132:3
 132:14,15,17 140:19
 222:20 230:16,17
 240:4,19 252:4,4
 258:14,17,18 259:5
 259:10,11,12 260:1
 260:14,14 261:9,12
 264:2 267:17 278:13
 289:20 303:3,4,7,16
 304:9 306:20 307:15
 314:12 317:10 318:7
 318:9,11 319:2,3
 320:4,5 322:14,20
levels 50:8 60:21 317:8
 323:9
Lewis 5:12,20
Lewis 146:7
liaison 2:16 47:19
 50:20 79:20 80:18
Liberty 1:10
lieutenant 1:21 2:4,10
 2:11,15 3:17,18 5:12
 5:19 160:8,16,20
 205:9,17 274:9 275:6
 275:8,9,10,16 310:10
 320:10 323:3
Lieutenants 12:19
life 11:17 26:5 268:4
light 13:20 23:7 24:20
 66:21 79:15 85:16
 128:10 185:5 204:1
 208:7 285:18 340:22
 341:2,3

likelihood 166:6 172:2
limit 23:4,5 32:9 35:1
 143:5 150:13 189:12
 193:7 198:16 347:10
limitations 207:17
limited 31:20 38:11
 39:13 40:1 43:14 56:9
 111:9 119:21 143:18
 144:1 169:14,14
 187:21 199:18 207:11
 210:1 215:2
limiting 33:20 35:6
 148:14 187:21,22
 195:7 196:2
limits 194:14 257:17
 337:14
Lind 1:20 3:7 8:7 44:18
 44:19 72:13,18 75:10
 82:9,13,17 88:4,12,22
 89:3 93:14 94:10,15
 114:13 121:9,15
 129:20 130:4,9,12
 131:6 137:6 139:10
 145:17,21 149:13
 169:2,3
line 78:6,12,13,17 79:6
 79:7,8,9,12 137:17
 144:13 230:10 231:8
 235:19
lines 249:5
lingering 134:17
link 50:14
linked 194:21 204:9
LIOs 17:6
list 316:7 337:7 347:10
 347:15
listed 84:15
listens 175:16
lists 214:22
literal 144:6 298:21
literally 20:16,19 30:21
 64:19
litigants 43:1 210:4
 318:21 319:1
litigate 250:12 281:10
 298:7
litigated 137:22 152:19
 155:7
litigation 1:21 39:8
 135:20 136:9 137:16
 149:22 151:8 153:1
 156:8 160:10 161:4
 172:12 176:17 179:4
 184:8 188:17,19
 202:18
little 13:13 28:13 29:1
 68:22 71:14 106:11
 118:1 131:6 133:1

135:8 152:16 192:6
 215:17 216:8 241:4
 242:21 251:20 259:21
 261:2 274:15 277:7
 321:12
live 161:22 239:17
lives 50:12 172:13
 179:11
LMR 15:1,6 18:19 22:5
 38:11 41:11 65:15
 84:16,18 86:3,12,19
 166:17 167:11 250:14
 296:3
LMR's 167:15 168:13
lobbying 341:4
locate 150:15
located 48:12
location 223:13
lodge 237:1
log 50:18
logged 33:14
logical 133:1
logistical 170:12
 175:13
logistically 175:3 248:9
long 28:1 39:14 46:8
 73:13 100:1 109:20
 140:14 217:9 218:14
 219:9 226:10 232:17
 257:18 258:1,5
 328:10 343:14,22
long-protected 170:4
long-standing 168:15
long-term 11:18 203:22
longer 32:11,16 96:17
 162:19 199:16 227:12
 227:17 254:2 321:12
 325:12,20
longstanding 38:8
 84:20 86:9 248:11
look 8:14 27:7 28:15,16
 35:12 44:5,14 57:10
 64:4 65:19 66:1,4,6
 67:16,21 69:17 70:15
 72:1 81:18 83:18
 113:19 119:20,22
 123:22 133:22 134:4
 134:14 153:16 158:13
 173:20 213:19 229:16
 241:1,19,20 246:20
 247:6 252:22 253:18
 253:20,21,21 259:8
 263:16 264:6 281:2
 305:12 319:9 320:3,4
 320:17 324:20,22
 335:20 336:3
looked 131:17 342:4
looking 16:10 99:13

128:21 134:10 145:5
 164:22 173:16 206:19
 217:13,14 227:11
 239:5,18 244:13
 251:20 259:13 286:9
 314:18 318:9,10,12
looks 14:3 48:10 102:7
 106:17 131:1 251:14
 287:12
lose 19:8,9 128:6
 148:16
losing 19:2
loss 193:22 214:10
lot 6:4 73:18,20 86:7
 92:8 129:22 132:2
 164:18 165:2 166:1
 214:9 244:3,6 251:17
 255:1 262:14 265:12
 285:10
lots 339:20
love 101:9 109:11
Loving 177:5
low 212:12
lower 21:16 46:6
 230:20 242:7 334:16
lowest 58:16
LRM 38:5 296:2 339:2,4
Lt 3:10,12 275:8,11,16
 323:4 331:18 332:13
 332:19 333:2,6,19
 334:6,19 335:16,22
 337:16
LTC 160:21
luck 113:1
lunch 159:18 273:20
lurking 185:11
luxury 24:15

M

M.J 93:17,19 186:14
 188:10
ma'am 8:2 25:18 129:20
 191:4,10 224:16
 234:4 237:12 242:6
 249:18 250:5 259:15
 261:16,21 262:21
 265:7 266:8,13
 273:13,20 274:6,21
 275:11 276:13 288:13
 300:14,18 301:7
 308:4,8 310:2 311:2
 311:14 312:1 313:3
 323:4
macro 14:6
Madam 5:13 9:11 25:15
 44:20 57:18 75:15
 160:21 179:18 205:11
 289:9 323:5 328:20

main 208:10 289:14
 306:2
maintain 28:3,4 33:16
 230:10
maintained 54:10
Maj 191:4 226:6 228:2,4
 228:10,16 229:1,8
 237:12 238:18,22
 241:15 254:21 256:3
 258:3,12 262:21
 273:8,13 274:21
 276:5,15 277:19
 279:14,20 287:6,9,17
 288:13 300:14,18
 301:1 339:2
Major 2:2,5,8 3:15,16
 160:13 179:22 180:11
 180:17 190:20 191:2
 226:5 238:1 274:17
 275:2,20 276:4,14,15
 288:12 289:10 314:12
majority 10:10 12:13
 40:5 66:5 112:1,14
 113:13 114:5
maker 78:5
making 97:18 100:20
 102:19 114:8 141:10
 143:13 162:9 187:16
 226:21 227:15 236:20
 270:19 287:12 315:17
 320:8,17 345:4 347:5
 350:21
malicious 200:11
maltreatment 59:14,15
man 149:6
manage 96:22
managed 109:7 115:16
Management 5:8
managers 7:6,9,13
 193:1
manages 349:4
mandamus 13:11 18:21
 22:22 37:17 56:2
 121:11,20,22 122:3,3
 122:11,13,18,20
 123:12,17 140:9
 272:9 332:2,20
mandamuses 123:14
mandate 6:15 113:19
 203:10
mandated 4:7
manner 12:15 23:3
 91:17 92:20 212:17
 216:9 219:20,21
 290:13 299:21 300:7
 304:16
Manual 36:10 43:8 56:7
 186:1 190:5

March 45:21 46:21
Maria 2:22 3:2,21 4:5
Marine 2:4,15 10:4 62:9
 68:3 82:3 110:9,11
 138:18 160:15 191:20
 192:4 198:18 200:16
 201:15 252:7 262:4
 262:10 300:22
Marines 60:5
markup 141:8
martial 36:11 40:16
 182:5 230:12 238:8
 249:19
Martin 184:19
Martinez 13:9 38:13
 122:17 140:7,11
 144:5 243:13 286:8
 286:10 287:8,8
 298:14 309:14,15
 333:10
Maryland 152:7,15
 153:4 157:11 203:21
 204:2,4,7,16 272:8
Maryland's 153:17
master 25:11
material 33:21 35:2
 53:10 54:8 55:3 83:11
 106:17 129:7 169:21
 183:17 184:10,13,15
 236:11 279:12,19
 292:14 300:5 309:5
 330:8 342:16 348:19
 351:18
materially 233:16 234:2
 236:19
materials 4:12 9:2
 42:12 43:13 53:17
 182:13,15 183:4,8,11
 184:7,21 185:1 189:1
 189:4,5 200:19,21
 249:21 278:7,11,19
 280:9 281:19 291:1
 304:6,15,18 305:12
 305:12,17 310:8,9
 312:16 318:15 321:18
 322:8 328:15 329:3
 330:10
matter 40:4 55:7,11
 83:16 87:15 90:20
 91:22 116:15 155:21
 159:19 162:21 163:10
 165:6 167:2 176:12
 181:11 196:22 202:6
 247:11 282:20 290:22
 326:19 334:1,9
 336:11 340:14 352:6
matters 14:8 15:7 25:2
 25:2,3 26:9 31:22

- 36:1 41:21 42:22 43:4
45:11,18 54:20 55:6
147:12,13 163:6
167:15 175:2 179:9
195:8,13 197:6
201:11,12,17,18,19
202:20 204:12 205:1
208:19 253:5 261:21
281:13,15,22 282:6
313:10 314:11 320:5
334:21
maximum 162:5
MCM 31:9,11
mean 61:19 81:19 87:5
88:15 90:1 95:5,12
112:16 116:15 124:13
126:12 128:21 129:11
129:14 131:11 132:14
132:17 133:12 138:4
138:10,16,21 145:15
151:1 157:20 158:1,4
158:6 159:1 164:14
165:17 171:11 174:12
182:7 217:6,8 229:22
230:5 232:21 234:16
245:4 251:10,16
252:13 253:13,20
256:6,7 257:5 260:8
264:9 265:20 286:22
306:6 313:1 329:18
330:17 332:16 344:18
344:19 352:1
meaningful 43:18 44:6
194:2,22 199:22
means 10:18 12:15
32:8 77:15 85:21 86:1
86:21 91:22 145:1
174:9 192:8 214:3
236:17 237:1,9,10
meant 65:14 111:14
121:18 135:21,22
151:21,22 152:2
measure 76:7
measured 181:17
measures 73:20 170:9
252:9
mechanics 29:21 192:8
mechanism 142:7
144:17 212:16 218:11
225:3,15 234:1
242:20 276:10 291:4
293:18
mechanisms 232:1,3
medical 132:20 133:16
177:12 196:20 250:1
290:7 291:12
meet 23:22 109:8 134:9
184:5 203:10 273:6
349:12
meeting 2:18 4:4 6:2,7
6:8 7:3,4,8 8:9,16,19
8:20 9:3,7 29:4
120:11 160:1 225:8
274:1 341:21 344:4
345:1 348:14,16
352:4
meetings 4:13 7:2 9:4
Meg 326:20
member 69:7 202:4
226:13
members 4:15 6:5 9:3
35:18 44:21 57:13,15
57:19 59:7,8,10 61:10
78:22 160:22 165:14
174:2 179:19 190:9
205:14 261:1,2 262:2
262:17 275:22 278:22
289:9 323:5 338:15
348:8 350:10,16
members' 4:19
men 164:17 174:16
mental 7:16 169:5
177:7,12 196:20
198:21 200:4 239:8
268:17 279:15 289:22
290:7 291:13,21
294:2 300:1
mentality 26:21
mention 111:19,20
112:1 209:14 210:7
219:5
mentioned 22:10 71:12
71:13 96:10 110:9
111:13 112:5 147:10
167:8 173:12 175:8
210:2 215:16 217:22
227:10 272:18 281:18
283:11 299:18 303:12
303:13 321:15 322:2
334:14 337:20
mentioning 111:7
mentions 286:21
Meredith 2:8 3:16 275:2
288:12
merely 86:17 292:10
meritorious 209:11,12
merits 94:16,17
merrier 101:20
message 64:3 69:13,19
69:20 70:16 72:20
73:15 76:15 77:4
messaging 69:3
messed 246:19
met 1:9 23:10 63:3
195:7 272:19
Meyer 2:4 3:12 160:17
205:10,11,14,18
213:8,11 215:4 216:7
216:19,22 217:18
218:9,19 219:16
220:4 257:7
Michael 2:4 3:12 160:17
205:9,18
micro 14:7
middle 28:10
midst 125:17
military 3:4 6:18,21
11:20 12:21 13:22
16:18,21 18:17 19:7
19:12,16 20:10 23:17
23:19 24:4,20 25:5,7
25:14 29:17 32:8
35:22 36:2,10,16 37:6
37:19,21 38:1,3 39:9
40:1 43:1,20 44:10
45:4 47:14 51:4,6,7,9
51:22 52:5,6,13,16,18
52:20 53:3,13,20,21
54:5 56:2,5 59:7,8,21
62:3,17 65:22 74:8,11
74:17,17 100:4
111:14 113:6,17
114:3,17,19,19 115:8
115:19 118:12 120:20
122:16,17 123:13
139:9,16 144:15
147:15,19 149:10
150:2,18,19 151:7
153:7,7,16 161:17
162:12,20 165:13
166:18,21 167:5,9,19
167:21 169:13 170:5
170:22 171:1,6,9,15
171:19 174:2,11
178:5,6 181:14,15
184:1,4 185:9,11
186:1,2,4,6,14 187:3
187:14 188:1 190:8
191:17 192:8,17
194:10 200:13,14,14
201:1,2 202:2 206:17
213:4 214:7 215:9,22
219:8 220:21 221:9
231:2,18 232:5
239:10 241:18 243:21
244:4,6 246:12
250:17 252:22 256:10
257:8,9 259:22 260:7
260:8 262:13 270:15
270:16 288:6 291:14
291:19,22 292:8
293:2 294:6,16,21
301:19 306:10 307:2
314:18,22 316:5,20
319:13 320:18,22
321:4 322:7 323:8,11
323:13 327:3,12
336:7 337:8 338:21
military's 116:1
Miller 2:10 3:17 275:16
275:16 310:10 320:10
mind 10:13 18:4 99:9
102:1 146:19 154:12
187:7 277:14 331:11
331:12,17 340:20,21
mindful 109:18,21
minds 349:18
mine 66:18 101:7
205:20
minimize 162:5
minimizes 14:18
minor 40:3 249:4
minority 184:9
minute 119:18 159:17
minutes 74:22 340:11
344:3,7
mirror 318:1
mirrors 184:22
misconceptions
181:13
misconduct 59:11
mishandled 329:4
misheard 150:5
misses 303:10
missing 274:12
mission 12:2 78:2
116:1,2
misunderstanding
124:11
mitigate 196:5 256:8
mitigated 207:7 212:20
Mizer 2:1 3:11 160:11
179:17,18,20 191:2
249:11,17 250:3,5,7
250:10 259:15,21
260:4 262:22 263:22
Mizer's 258:16
MJ 52:14 317:21
modifications 36:20
modify 211:9 345:20
modifying 49:19,20
molestation 114:21
moment 11:9 90:7
346:16
monitoring 34:7
month 182:21
months 70:8 148:9
188:8,16 321:1
moot 198:6
morale 12:2 256:12
Moreno 20:8 109:14
188:10

morning 4:3 5:15 35:17
36:1 163:16 164:11
164:19,22 166:1,15
169:4 173:8 187:9
190:14 193:6 217:22
222:12 243:12 249:6
254:10 259:22
motion 31:4 33:19
40:18,19 51:14 52:8
53:15 56:14,16 75:4
105:10 167:1,8,10,13
177:13 182:19 188:22
199:3,6,15 210:3
227:11 267:8 269:2
279:3,6 338:1
motions 55:17 147:11
177:17 182:20 209:18
280:10,10,14 281:18
304:17
mount 196:21 197:12
mouth 23:10 90:1 264:9
341:7
move 26:19 27:1 28:9
28:10 68:11 111:16
115:1,12,14 141:6
150:19 190:10 213:13
218:20 278:19 281:11
284:3 341:5,9 343:16
moved 50:12 73:13
111:11 114:22 115:21
147:17 226:19 279:15
280:4 282:14 304:7
307:7
movement 145:14
moves 99:16
moving 114:9 115:8
137:20 148:19 227:19
227:21 266:16
MRE 15:4 29:7,11 38:12
100:20 130:5 195:8
195:13,17,19 196:5
196:11,16,18 201:11
281:17 284:13
MREs 195:15
multiple 71:19 86:10
102:7 123:16 141:22
142:2,6 201:16 282:7
283:14
murdered 18:3
Murphy 177:5

N

N 1:10
Nalini 2:17
name 4:5 47:7 178:1
183:10 205:17 228:20
275:1 276:15 301:7
302:8 338:20

named 30:11 296:7
names 226:20 274:4
narrow 116:16 121:11
128:19 179:8 222:1
261:11 324:6 336:5
336:19 337:6
narrowing 175:16
narrowly 84:4 257:19
nation's 181:2
national 6:11,13 10:6
11:21,22 12:3 25:3
28:13 37:5 78:1,2
185:1 194:17 325:9
327:1
natural 252:10
naturally 182:11
nature 13:22 19:3 36:18
74:10 260:17 268:19
Navy 2:3,10,14 5:8,10
5:18 8:4 81:22 82:3,7
160:15,15 180:4
191:9,20 192:4,12
193:2,11 198:18
200:15 201:15 203:4
203:5,10 242:13
Navy- 2:3
Navy-Marine 1:17 2:9
109:15 192:6 275:4
275:17 301:10 329:8
NDAA 302:10,19
313:11,22 314:20
315:2 321:21 347:8
necessarily 20:2 26:12
52:10 87:1 101:7
121:4 124:5 154:2
155:21 156:9 158:4
161:6 165:5,6 174:14
175:1 179:2 208:22
209:21 225:14 238:18
240:12 322:13 346:22
necessary 39:18 43:6
52:8 140:15 170:11
172:9 176:8 178:7,11
183:19 187:17 196:21
198:12,15,17 200:6
280:1,18 324:6
necessity 64:22 97:7,9
122:5 149:7
need 23:14 40:11 59:12
59:20 62:3,16 66:12
69:15 70:13 76:17
81:11 84:14,15 85:15
97:19,20 103:18
111:8 114:1,2 118:18
119:6 123:6 125:14
136:4 148:17 151:14
164:1 166:8 171:18
173:5 175:22 184:16

190:2 196:3 199:13
199:18 205:19 208:8
216:7 233:21 242:11
243:1 251:19 253:20
278:17 285:3 302:21
308:10 309:11 311:3
311:12,15 312:4,12
312:18 314:4 319:19
321:19 331:11 332:10
332:11,13 334:17
339:7 345:21
needed 31:1 43:19
147:20 199:17 322:14
needs 28:17 44:8 84:5
91:10 106:12 107:19
152:22 232:22 240:2
266:11 302:17 313:10
315:1 325:4 327:9
336:4 348:13
negative 288:2
negotiations 104:11
neither 14:10 20:17
39:17 75:18 198:7
335:3
net 248:13
never 27:12 28:1 57:21
76:14 77:13,13 103:3
105:15 106:19 107:4
184:5,6 231:21 253:4
253:9 271:3 339:16
339:19
Nevertheless 37:11
208:2
new 5:2,11,17,18 40:12
147:19 148:18 167:22
172:5 225:15,16
230:22 231:1 244:8
256:22,22 263:2
314:14 348:19
news 168:21 169:11
251:6
night 60:6 164:21
nights 60:15,15
Ninety-three 59:16,17
NMCCA 32:11 34:20
35:10
nominal 41:3
non-party 38:6 168:14
169:8
non-sealed 219:6,9
non-statutory 347:21
non-unanimous 261:3
normal 122:2,12 244:8
268:4 285:15
normally 40:8,10,21
53:22 55:6,16
normative 63:9
note 10:20 14:4 19:5

20:12 31:12 52:16
86:3 176:14 203:1
212:19 220:10 301:1
320:21
noted 204:11 296:16
notes 165:1
notice 7:11 41:20,22
42:17,18 43:19 45:11
45:17 47:13 98:17
105:8 136:18 149:2
149:11,15,21 150:18
151:5,9,14,16,19
153:1,2,5,11,11,13
154:5,7,16,17 155:4
155:11 168:19 181:7
201:9,12 202:12,15
202:17 206:9 211:16
211:18,19,22 212:3
212:16,18,22 214:16
215:19 216:2 217:4
217:20 218:6,6,13,22
219:1,12,21 222:17
225:21 248:8 267:13
270:11 281:13,14,22
282:5,11 283:17,22
302:9 313:9,16
315:20,21 316:1
noticed 192:21
notices 217:21
noticing 149:9
notification 57:6
293:20 295:10 300:6
notifications 47:16
49:11 80:1 299:21
notified 46:10,12 47:8
47:12 50:13 218:17
316:15 330:1
notifies 47:2 50:5
notify 47:14 80:20
82:13 125:14 295:2
notifying 18:14
noting 30:15 191:18
notion 123:4 237:6
240:13
novel 286:19
nuance 51:3 138:12
nuisance 328:4
number 16:12 47:8,15
49:2 65:4 115:20
150:6,14 187:22
220:1 313:20,21
314:1,2,3 344:9 346:6
numbering 235:18
numbers 23:4 226:20
numerous 304:2
nuts 192:14

O

o'clock 66:7 340:2
O'Shaughnessy 298:1
object 208:2,15 245:6
 338:2
objection 103:16 237:6
objective 299:8 348:1
obligation 126:15 185:5
 189:15
obligations 141:21
 186:9 239:20
observation 26:11
 28:20 219:19 254:22
observations 13:18
observed 163:20 164:4
obstacles 245:20
obtain 50:18
obtains 48:7
obviate 351:17
obvious 132:5 204:5
obviously 59:3 64:6
 74:10 129:1 255:9
 270:22 285:21 296:8
 348:18,19
occasionally 75:6
occur 7:3 48:21 188:7
 216:10 218:13
occurred 34:12 73:5
 115:5
occurring 19:3 106:4
 283:17
occurs 12:21 184:9
 216:5 227:13 297:9
October 7:3 344:22
odd 11:12 193:3,9
off- 349:5
offence 243:22
offense 17:2 40:14 46:9
 63:3 173:16
offenses 6:19 43:15
 173:4,17,18 175:17
 307:4
offer 97:13 100:16
 104:2 326:21
offered 326:22
office 47:20 54:18 55:9
 165:8 255:10 263:1
 277:8 283:19 284:5
 293:8 297:18 301:16
 303:21 310:7 316:11
 323:8 347:6
officer 2:22 10:3 39:3
officers 163:5 174:12
 201:2 307:3 308:18
offices 5:9 81:13 185:5
 282:22
official 4:6 10:21 32:20
 42:2 191:20 199:18
 199:19 200:20 276:20

officials 10:22
oh 66:14 76:17 111:20
 111:21 123:4 217:1
 265:8 269:7 272:3
 275:10 276:6,7 343:8
 346:1
Ohley 2:11 3:18 275:6,8
 275:11 323:3,4,7
 331:18 332:13,19
 333:2,6,19 334:6,19
 335:16,22 337:16
okay 9:10 27:22 29:2
 68:21 70:17 77:1
 80:22 81:11 82:8 83:3
 87:12,13 89:1,4,6
 96:1,4,12 99:6,10
 112:13 117:5 125:10
 125:14 131:4,9
 134:19 139:22 155:19
 156:2 158:21 159:5
 191:6 214:14 222:3
 233:13 243:5 250:4,8
 254:8 256:5,22
 258:20 264:14 266:1
 266:2,20 269:8
 273:10,15 274:14,18
 274:22 275:1,12,19
 276:14 277:16 279:18
 287:16 289:2,5,8
 300:16 301:8 310:4
 311:11,21 313:5
 315:20 328:9 331:5
 335:18 339:22 340:10
 344:9 345:17
old 60:5 70:20
older 292:22 293:7
omitting 168:13
on/off 142:15
once 102:18 117:5
 227:17 228:12 274:10
 278:10 299:1 313:13
 333:10 345:6 349:6
one's 67:9
ones 115:4,22
open 31:7 76:3 206:16
 219:17,19 348:13
opened 30:18 111:5
 268:21
opening 90:15 134:10
 163:21 166:13 272:21
operable 32:14,16
operate 22:7
operated 26:20 74:12
Operations 5:8
opine 240:8
opining 131:7
opinion 39:12 49:22
 65:13 73:9 85:18

125:7 168:10 204:11
 214:5 239:3 240:7
 242:3 276:19 286:14
 287:20 299:7 312:20
 314:8 315:10 336:14
opinions 21:20 65:7,8
 81:8 301:3 310:9
 314:10 323:15
opponent 164:7,8
opportunities 74:14
opportunity 5:1 9:12
 11:3,7 12:16,22 15:20
 22:16,17 25:19 35:19
 44:13 59:1 68:6 70:4
 74:20 92:16,22 93:1
 97:17 126:8 132:7,8
 161:1 180:1 191:15
 202:17 204:21 213:3
 222:18 224:8 242:1
 242:19 286:2 290:15
 295:4,6,10 298:9
 300:2,9 324:16
oppose 197:22 199:9
 279:8 280:13
opposed 162:16,19
 173:11 264:14 280:5
 292:18 310:17 332:17
opposing 335:19
opposite 349:2
opt-in 212:15 218:10
 240:20
option 107:7 134:11
 240:20
options 346:6,13,15
 347:17,20
oral 49:13 50:5 56:15
 57:4 101:18 102:6
 184:13 224:1,7,9
 226:16 316:15,18
order 26:14 30:10,16,19
 31:7 33:20 34:16 54:4
 54:6 68:12 69:1,15
 84:16 85:19 116:8
 125:11 130:22 150:16
 167:6 168:22 170:6
 170:13 172:6 183:1
 184:17 187:12 189:1
 197:6 221:10,13
 242:18 243:19 244:17
 245:18 246:5,14
 255:19 278:16 288:2
 293:10 294:10 298:4
 303:8 305:6
ordered 34:1 37:18
 54:3 182:4 232:19
 272:7
ordering 52:21 221:14
 270:17

orders 29:19,20 34:7
 53:1,20 178:10 179:3
 292:3
ordinary 122:8 256:14
original 32:19 42:2 54:8
 54:9,15 68:20 91:1
 113:19 278:14
originally 111:14 114:4
Orr 1:18 3:6 8:5 35:14
 35:15,17 71:12 80:4
 80:11,19 81:1 82:20
 89:13 131:11 132:11
 132:14 133:8,18
 140:14,17 141:15
 143:3
ought 113:17 122:22
 216:1 232:21 234:1
 235:13,22
outcome 19:2 92:14
 236:19 238:3 259:1
outcomes 14:5
outline 137:8
outreach 74:5 75:1,7,12
outright 188:14
outset 25:1
outside 63:9 100:4
 171:5 276:9 324:9
 331:14 334:12 335:9
 340:20
overall 137:4 230:1
 238:2 328:5
overarching 237:19
overbreadth 172:14
overburdened 123:19
 124:1
overcome 23:1
overlay 118:14
overly 179:3
overrule 309:13,17
overruled 91:3
oversight 65:21
overt 64:2
overturn 238:9,10
overturned 305:5
overturns 211:7
overwhelming 113:13
 114:5

P

P-R-O-C-E-E-D-I-N-G-S
 4:1
p.m 159:21 274:2,2
 340:15,16 352:7
PACER 218:21 219:5,6
 313:14
page 23:4 213:19
pages 109:2 232:17
 273:3

paid 230:4 251:17
panel 1:3,9 4:4,15 6:3,5
 6:10 7:5,17 8:17 9:3
 10:21,21 25:20 31:3
 32:22 33:3,12 35:19
 38:21 44:21 57:13,15
 57:20 61:11 66:20
 70:7 89:10 102:20
 123:15 134:22 160:22
 165:2 179:19 180:1,2
 181:10,16 190:10,21
 191:14 202:12 205:15
 215:16 220:6 221:6
 227:21 231:16 234:5
 236:15 248:17 261:2
 268:15 273:22 274:14
 275:22 278:22 289:9
 300:10 314:5 323:5
 323:19 326:20 327:2
 327:21 337:21 338:15
 345:22 346:2 348:8
 350:15
Panel's 93:15
panelists 274:4 337:18
panels 8:10 45:5 68:16
 72:1,1
paper 348:10
papers 53:15 55:19
 132:8
paragraph 213:20
 265:11
paragraphs 166:12
Paralegal 2:18
paralegals 283:4
parallel 220:18
parallels 182:14
paranoid 246:22
paraphrasing 68:22
pardon 169:14 170:22
 172:15
parity 17:20
part 58:14 60:14 67:22
 92:17 93:2 100:21
 119:15 164:5 203:2
 215:10 222:19 234:7
 235:10,17 243:2
 258:22 270:19 271:3
 271:5 272:1,2 278:4
 278:10 295:16 297:12
 298:11 306:18,21
 307:6,7 332:2
parte 99:18 154:2,5,8
 154:11,15,18 172:9
 176:18,21 177:9,9,13
 178:4 198:3 246:16
 261:5
participant 169:15
 234:4

participants 6:1 164:16
 179:14 246:18
participate 35:11 56:21
 101:5 209:15 214:13
 323:10 331:14 332:7
participated 51:17
PARTICIPATES 2:20
participation 19:10
 45:13 55:20 56:20
 162:22 163:7 206:5
 284:3 289:11 328:3
 333:15
particular 13:8 26:12
 77:19,21 84:8 92:19
 92:19 103:19 151:6
 162:21 164:9 165:11
 173:13 239:7 255:3
 337:10
particularly 77:20
 141:7 146:11 229:12
 230:6 252:3 259:12
parties 40:11,19 41:14
 41:22 56:8,10 88:6
 98:7 105:10 118:4
 125:14,22 126:11,12
 127:4,6 140:16
 141:11,21 149:5
 151:13,18 166:3,3,4
 166:10 172:4 187:22
 208:6 218:5 245:12
 257:21,21 281:9
 296:19 311:5 313:18
 317:11
partly 76:6
parts 301:20
party 39:7,17 40:12,21
 41:6,9,12,18 56:20
 98:4 101:5 113:10
 119:1 141:19 142:6
 142:16 143:6 144:20
 145:3,4,8 151:19
 152:6,11,12 156:5,15
 156:16 163:11 166:9
 169:18 171:10 200:19
 202:19 204:13,14
 208:17,17 209:15
 218:12 243:17 244:16
 286:15 295:17,19
 296:7,8,10,14 298:3,8
 303:10 306:3 307:17
 307:20 309:4 310:14
 310:20,22 311:7,13
 346:7
pass 320:13
passes 242:22
path 88:21
patient 29:13
Patricia 1:14 4:18 5:12

5:19
Paul 19:22
pay 120:18
paying 258:9 349:16
payment 231:19
payroll 174:7
pending 325:1
people 18:3,16 21:6
 24:13 27:1,16 61:22
 62:2 67:14 70:5 73:6
 73:13 75:6 79:8 83:4
 84:5 90:5 102:7,10
 107:1 111:17 113:15
 115:8 120:10 125:19
 130:15 136:17 138:8
 147:21 149:21 150:19
 152:1 161:21 163:11
 170:4 173:12,21
 178:14 205:7 242:22
 247:16,19 252:2,11
 253:3 255:7 256:12
 303:2 335:20 338:7
people's 172:13
perceived 24:17 256:22
 258:18
percent 10:16 112:2
perception 15:17 16:16
 102:12 103:10 206:14
 255:11 256:16 257:11
 258:6 261:4
perfectly 19:20 144:21
 155:9
perform 80:1
performed 77:6,7 80:5
 80:6
performing 248:20
 328:4
performs 80:7
period 65:16 71:17
 260:16 338:18
permission 54:16 55:1
 219:14 246:3
permit 129:12 178:6
 210:21 291:15 297:16
permits 187:9 210:18
permitted 33:22 296:10
 299:10
permitting 189:1
 209:15
persistent 26:13
person 17:1 40:22
 58:16 79:3 82:15,21
 83:14 85:9,11,11
 95:19 101:4 114:22
 120:19 121:1,4
 131:13,20 142:20
 154:11,16 169:18
 171:11 173:3,14,20

173:21 175:15 222:8
 226:1 243:20 248:6
 256:14 262:18 267:19
 268:1 276:7 308:22
personal 119:2 177:2
 194:4 202:6 237:13
 237:22 252:10 253:9
 276:19 301:3,17
 339:15,18
personally 5:17 137:3
 229:13 252:15
personnel 55:13
persons 172:22
perspective 36:3
 100:17 194:12 229:2
 263:17 274:16 280:20
 298:21
perspectives 3:4,9,14
 160:3
persuaded 16:12
persuasion 9:17 26:8
pertain 284:13
pertains 143:5
Peter 19:21
petition 38:15 41:2 42:6
 50:4 140:8 211:12
 244:20 296:5 332:1
 333:13 334:1
petitioned 50:3
petitions 10:8,11,16,19
 12:11 42:1 123:12
 210:16 293:8,15
 295:20 296:14 298:16
phase 191:17 197:8
philosophical 61:14
 230:17 243:8
philosophically 230:9
 231:9
philosophies 61:17
philosophy 243:2
phone 2:7 49:2 220:1
 226:20 231:21,21
 232:18 274:21 276:8
 276:9,10 316:13
 340:9
phones 232:12
Photo 54:21
phrase 22:12 152:17
 173:14
physically 184:3 207:13
 228:8
pick 74:3 99:8 137:17
 248:3
picking 248:2
piece 101:9 202:3 312:4
 349:4
piercing 261:11
pilot 197:16

- pitfalls** 327:8
pivot 22:7
place 28:8 41:20 47:7
 63:14 92:7 122:8
 130:2 137:9,10
 138:22 145:11 158:13
 183:5 193:18 198:16
 205:4 211:13 218:15
 222:16 223:2 237:20
 280:17 296:13 332:21
placed 195:2 201:1
 230:11
places 28:19 135:6
 330:11
plain 77:2 79:10 95:13
 227:3 292:15 293:6
plaintiff 41:2,4
plan 344:22
planners 193:1
planning 344:22
platoon 60:14
platoons 73:21
plausible 268:16
play 73:22 144:8 146:9
 245:3 269:9
playing 10:15 258:15
 258:21
plea 104:2
pleading 41:17 56:13
 108:22 153:8 154:8
 154:12 156:17 228:7
 267:11 271:19 284:1
 285:1 309:6 310:15
 322:8
pleadings 41:9,15
 77:15 85:6 98:18,19
 100:2 109:5 110:16
 130:15 135:21 136:8
 136:10,15 137:9
 148:14 149:5,12,13
 149:21 150:1,2
 151:11,13 154:2,15
 156:15 163:6 176:4
 184:10 208:15 212:5
 226:16,21 227:22
 228:17 248:8 277:9
 295:18 302:17 311:8
pleas 223:11
please 14:4 58:3 145:20
 301:11 313:5 322:9
 340:4,21
pleased 5:20 7:17
 160:2
pleasure 192:22
plenty 67:14
pocket 112:18
poetic 161:20
point 14:20 27:7 59:6
 59:22 61:6 65:7 67:7
 75:16 77:18 79:7
 81:20,22 92:4 94:9,19
 97:8,18 106:10,10
 108:14 109:17 117:10
 117:11,14 134:7
 156:1,14,22 157:2,7,8
 165:7 166:17 167:9
 168:7 173:7,13
 178:19 187:16 188:4
 200:2 206:13 210:7
 223:4 230:11 235:11
 235:12 240:9 241:17
 247:13 255:8 265:18
 282:4 284:22 285:19
 286:1 309:11,12
 311:22 314:20 324:19
 325:7 342:13 343:10
 344:11 345:3 349:6
 350:21
pointed 173:10 215:19
pointless 198:7
points 11:15 94:21
 140:3 144:12 145:18
 164:18 289:14 305:22
 324:17
poke 67:13
Poland 159:2
policies 193:13
policy 13:21 17:12
 18:18 35:21 61:6 63:7
 63:7,8 72:11 78:5
 143:13 144:11 162:4
 191:20 209:19 323:12
 325:2
policy-making 93:9
political 27:16,19
poor 73:2
porn 79:13
pornography 10:12,18
 18:2 53:19 55:4 60:14
 78:4,7 112:4 113:14
 113:18 114:7 173:12
 253:19
portability 58:19
portable 26:18 58:21
 111:15,15,21
portion 42:8 197:1
portions 42:5,21 43:14
 142:13 165:11 196:19
pose 115:9 239:21
poses 296:17
posing 101:4
position 5:5 27:20 38:6
 47:19,21 79:20,21
 84:10 106:5,7 107:2
 156:12,13 162:3
 168:14 192:4 211:18
 230:13 342:13
positions 98:6 161:7
 238:5
positive 33:16 36:6,22
Posner 336:13,18
possesses 208:18
possession 54:21
 209:1
possibility 88:18 216:3
 325:18
possible 73:8 77:3
 136:8 137:16,21
 141:3 154:11 162:5
 176:15 199:21 268:5
 270:12 321:12 342:10
possibly 94:18 164:15
 170:21 189:21 222:21
 237:21 295:8
post 344:3
post- 31:20
post-conviction 40:9
 185:19
post-trial 29:19,22
 31:15 45:20 46:7 47:4
 285:15
posted 4:9,12 6:9 329:3
 330:10,11
postpone 149:1
postpone 27:17 107:13
 170:14 189:9 191:16
 229:19 230:11 233:6
 270:20 277:12 285:6
potentially 50:18
 146:16 171:7 175:14
 184:20 189:21 198:5
 201:22 230:18,21
 244:22 261:22 273:8
 289:18
Powell 169:10,10
power 12:20 26:8 62:13
 62:13 178:11
powers 285:8
PR 257:5
practicable 319:15
 320:14
practical 55:6 112:21
 113:12 195:10 230:16
 231:11 237:14,22
 272:18
practicalities 123:9
practically 238:15
 242:20 282:5
practice 14:1 19:18
 40:13 41:10,14 43:10
 54:13 56:12 64:17
 74:11 112:12 155:13
 163:17 177:1 181:14
 181:15 182:13,18
 184:2,4 191:16
 192:15 193:11 194:2
 194:15 195:8,17
 196:10,17 198:18
 213:5 227:8 231:13
 242:13 263:4 267:16
 277:11 282:1 305:9
 305:14 307:11 319:8
 319:15 320:20 325:9
 327:7 339:16,18
practices 45:8 172:5
 194:5 207:8 326:12
 327:5,7
practitioner 57:22
 70:20
practitioners 8:10 37:7
 41:19 43:22 70:12
 107:4 166:5 207:9
pre- 146:11
pre-2016 46:15
pre-trial 163:7 169:9
precedent 38:8 84:20
 86:9 96:1 168:16
 277:7
preceding 119:12
precise 14:15 287:21
Precisely 144:3
preclude 38:7 168:15
 202:10
precluding 211:7
predisposition 195:21
preface 276:18
prefer 216:11
preferable 209:16
preferences 212:17
prejudice 176:10
preliminary 37:18
 348:16
premise 15:18
prepare 345:12
prepared 66:12 164:20
 166:15 277:4,17
preparing 345:12
prescribed 32:7,10
present 1:12 6:6 13:22
 97:17 132:17 133:4,6
 148:6 207:14 217:16
 220:13 222:18 224:8
 236:18 324:7,16
 325:5 335:3
presentation 71:11
 204:3 342:21
presentations 57:14,16
presented 63:16 87:5
 94:20 153:18 289:15
 346:14
presenter 9:8 191:8
 300:12

presenters 1:15 160:5
203:20 323:18
presenting 14:5
presently 17:14 210:18
210:20 299:19
presents 211:3
preserve 44:7 206:14
preserving 327:11
President 30:2 32:7,10
35:7,8 131:16 249:19
319:12 320:16
President's 31:12 35:4
presiding 1:11
press 169:1 197:6
pressure 16:17
prestigious 24:17
presumably 105:4
171:16 172:11
presume 200:10 216:15
217:7 219:7,14 222:3
272:19
presumption 188:8
278:5
presumptuous 13:15
pretty 109:17 133:21
168:8
prevalent 196:17
prevent 12:6,16 23:13
51:10 52:2 59:10
332:15,20
preventative 73:19 76:7
preventing 169:20
prevention 11:5 23:12
59:2 69:3 70:1
prevents 12:2
previous 9:3
previously 39:19
281:18 284:5 300:4
336:8
primary 116:1 205:3
229:20
principal 162:21
principle 170:3 238:7
238:14
principles 192:16
prior 52:5,21 55:12
114:18 117:3 295:11
341:21 347:16 350:5
priority 19:22 20:5 96:8
prisoner 47:1,9,12
privacy 7:14 29:9 31:18
42:14 45:11 51:1,4,8
52:1 53:6 91:13,14
92:2 94:1 95:11
116:13 142:5 177:15
177:18,20 189:6
190:3,9 194:4 199:20
201:3 202:7 206:3,11

208:20 209:2,22
210:8,11 227:1,1
242:14 261:17 277:20
280:7 281:5 291:2,4,9
293:21 305:20 334:3
334:7
private 42:22 142:8
207:22 208:4 252:16
privilege 32:21 38:1,3,9
38:10 39:20,21 42:4
51:8 83:10,11,19,22
84:14,16,21,22 85:9
85:20 86:11,19,22
88:2 89:11,14 90:12
91:15 92:12,19,22
93:11 95:10,19 99:16
103:19 104:1,5,6,12
105:3,18 116:13
119:15,21 120:21
121:1,4 123:1,2 137:1
154:20 168:16,17,19
169:20 185:2 191:13
195:14 245:17 289:10
privileged 52:4,9 53:2,3
103:16 106:17 169:6
177:15 189:22 246:15
278:19 279:4,12
281:19 300:5
privileges 15:3 52:1
90:11,16 106:14
pro 210:6
probably 21:2 59:21
60:9 70:13 73:2 79:3
91:10 106:12 108:11
134:21 136:11 168:8
219:20 266:14 286:4
345:9
problem 18:15 19:22
20:10 59:21 90:10
102:14,16 110:10
111:7,12,13 112:21
113:12 115:2 123:5
136:2 168:3 178:13
217:16 218:18 228:12
228:21 229:2 239:8
251:7,8 256:14 265:4
265:4 285:16 289:21
290:3,18,19 291:18
303:11,18 306:9
307:19 315:21 316:2
318:8 321:14 333:5
337:9 339:10 349:6
351:17
problematic 125:20
203:4 226:22 279:17
problems 96:9 111:6
162:7 172:1 290:11
300:6 302:2 303:16

306:2 310:7 327:20
procedural 92:14,18
93:3,7 337:4
procedure 43:10 54:13
56:12 123:7 178:6
189:5 199:8 295:5
procedures 41:14
48:20 50:22 105:5
190:5 198:16 327:7
329:5,7,9,9,10,13,14
329:15 330:7,13,18
330:20
proceed 341:12
proceeding 92:6 153:8
198:3 207:5 211:20
224:4 225:11,22
226:1 252:21
proceedings 1:3 4:4
6:2,10,17 7:11 8:17
44:21 45:14 56:22
137:8 147:7 148:12
149:10 157:15 163:3
169:21 170:19 171:3
171:20 178:4 194:9
203:14 206:9 211:17
223:7 225:9 261:5
314:2 315:1 316:9,19
process 13:19 14:14,15
14:16,17,21 15:1,8,9
15:15,16 17:8 18:21
19:1 20:9 22:11,21
34:19 36:16 40:1
43:20 44:10 46:8,17
49:9 50:2 53:9 61:22
74:6,6 82:1 92:4 93:8
101:13 102:12 103:1
105:10 106:14 107:13
108:2,4,6,9,13 109:22
133:15 177:20 179:1
181:19 182:3 187:19
188:6 190:7,17
193:15 196:13 197:13
205:3 207:5 209:5,7
231:13 233:22 234:3
236:4 237:16 238:9
249:13,14 250:22
261:16,18 278:8,15
280:22 281:5,6
289:12 290:4,9,16
291:6 295:6,16
296:17,21 297:6,7
300:8 304:11 318:14
322:7,21 324:4,8,10
324:17 326:15 331:15
334:13 335:4 345:16
processed 254:2
processing 109:18
199:5 273:1

produce 53:1
produced 51:11 52:11
53:21 54:6 130:2
production 52:3,8,22
54:3 167:13 246:14
270:17
PROF 65:2,10 67:6 68:7
72:15 75:15 140:2,13
140:18 143:1,4 144:3
146:20 234:14,16
235:2,6 248:16 251:1
251:10 254:8 327:15
328:8,18 342:2
344:21 346:19 347:3
347:12 349:8
professional 183:15
200:15,22 207:20
professionalism 31:13
professor 4:18 57:17
57:18 61:3 64:13
101:15 140:1 248:15
326:20 336:11
proffer 268:16
program 7:6,8,13 74:5
181:6 193:2,12
297:18
programs 74:15 81:14
prohibit 189:4
prohibited 54:22 208:1
prohibiting 183:1
project 26:16
prolongs 297:5
prompted 277:3
promulgated 30:2
32:11 114:4
pronouncing 7:22
proper 43:6 66:4 86:13
188:18 190:6
properly 79:1 271:2
278:9 280:22 291:20
293:12
property 247:22
proponents 114:9
172:19
proposal 141:7 153:15
171:7 172:15,15
213:18 217:10 244:22
277:3,13 283:16
302:16 331:21 333:7
proposals 44:2 237:4
277:15 344:14
propose 123:6 204:18
291:17 345:19
proposed 13:20 36:6
39:1 76:1 90:5,6
94:22 95:3 128:13,15
165:11 170:17,20
174:21 176:5,15

264:7 277:1,7 287:22
 288:8 290:20 295:22
 318:17 325:1,11
 341:20
proposing 89:19,22
 90:5 336:1
proposition 165:16
 166:11
prosecute 12:7 16:19
 36:14 115:17
prosecuted 296:9
prosecuting 257:12
prosecution 23:12,14
 69:5 103:17 148:19
 161:11 254:15 269:11
 269:12,13,18 270:6
 307:4 308:19
prosecution's 119:6,7
 269:19
prosecutions 175:9
prosecutor 5:10 103:15
 103:22 119:5,9 154:9
 225:10 257:8 260:21
 292:3
prosecutorial 260:22
prosecutors 200:14
prospective 166:22
protect 29:19 31:18
 36:15 38:9 39:21
 51:18 83:12,16 84:13
 84:16,21 85:20 86:11
 86:14 142:19 168:17
 170:13 176:1 177:3
 247:22 249:10 264:12
 291:2,9 311:19
 313:19 326:10 327:10
protected 29:8 42:3
 84:6 95:10,20 101:5
 141:2 163:13 187:20
 199:20 209:8 247:19
 278:12 305:20 306:16
 307:18 312:2 328:16
protecting 68:13
 187:18 261:17 311:17
 326:12 337:1
protection 15:4 29:12
 42:11 91:13 92:2,20
 93:10,11 165:21
 171:2 173:1 174:3
 194:4 213:22 223:18
 249:8
protections 39:9 90:17
 173:22 195:19 208:8
 227:6
protective 183:1 184:17
protects 14:17 17:9
 89:11 178:12 187:20
 189:3,6

protocols 55:4
prove 195:15 201:14
 231:12
proved 244:10
proven 17:3
provide 23:18 25:6
 28:11 29:12 36:2
 42:17 43:1,18 65:20
 65:21 66:10 153:10
 181:6 192:1,18,18,19
 212:7 220:14 223:18
 239:14 249:8 262:1
 295:3,5 299:12,18
 300:2 323:13 342:9
 342:20
provided 4:9 38:20 39:5
 39:15 165:9 172:21
 173:5 174:4,15 176:1
 178:3 194:18 201:18
 202:13,16 211:19
 212:15 218:15 240:16
 247:15 286:18 350:17
provider 169:5
provides 25:9 32:2,17
 37:15 43:12 54:13
 196:5 212:22 290:8
 292:10 296:2 300:8
 324:15
providing 16:8 153:12
 281:12,21
provision 13:11 59:14
 172:17 178:9 233:10
 254:5 284:8,14
 286:21 287:11 307:2
 308:18 311:1,5,13
 314:17
provisions 29:8 165:4
 281:12 302:9 306:11
 306:13 313:21
psychological 267:18
psychotherapist- 29:12
psychotherapist-pati...
 195:14
psychotherapist/pati...
 38:1
public 4:4,13 7:4 8:16
 8:18,19,21 51:21 61:6
 75:8,9 88:20 120:1,4
 148:14 160:1 172:18
 172:21 180:6 185:4
 206:14 207:4 211:1
 219:19 220:4 222:18
 226:10,13,22 228:16
 246:17 278:12 316:6
 316:19 326:21,22
 350:11
publications 350:6
publicly 4:8 173:5

published 304:7
publishes 304:4
pull 64:14 68:19
pulled 317:4
punishment 229:19
 230:1,12,19 233:7
 262:4,19
pure 261:5
purported 172:8
purpose 14:6 17:7 37:2
 65:19 67:21 138:7
 156:22 197:20 199:19
purposes 39:8 203:3
 348:3
pursuant 155:13
 182:20 185:1 319:4
pursued 177:10
push 102:3 105:13
 110:3 153:18
pushed 20:6
pushes 113:14
pushing 20:2 104:15,18
 116:10 155:1
put 15:11 23:9 60:3
 90:1 92:4 106:14
 136:11 138:5 142:20
 255:14 264:9 287:10
 291:8 310:11,12
 315:8 341:7 342:17
 342:21 343:7,11
 351:6
puts 47:13
putting 343:9

Q

qualification 231:5
qualified 128:7
qualifier 137:22
qualify 137:14
Quarles 185:11
quarrel 243:8
question 15:6 17:18,22
 18:8 20:22 21:2 59:1
 61:6 62:2 64:15 67:12
 67:20 68:20,21 72:14
 85:1,17 86:22 87:7,21
 89:5,8 90:14 91:13,15
 92:1 101:3 108:3,12
 110:14 116:17 120:7
 129:2 131:12 132:4
 134:20 135:11,19
 138:22 143:2 145:20
 147:10 151:10 152:6
 163:15,22 172:10
 173:15 175:1 197:14
 202:22 213:15 214:13
 214:17 217:2 221:4,5
 226:7 239:21 240:1

241:3 242:5,10
 243:17 245:17 246:13
 247:10,17 249:2
 251:18 254:9,17,18
 256:7 258:21 259:2
 264:5,18 266:19
 271:8 285:6 286:5
 293:17 297:12 298:7
 299:9 309:8 327:17
 328:2,19,22 330:5
 331:3 335:17 343:1
questioning 250:18
 340:1 348:22
questions 3:8,13,19
 11:18 17:12 18:13
 44:15 49:4 57:22
 75:19,20 76:3 87:11
 87:19 113:20 140:1
 147:1,3 159:5 165:1
 173:8 190:21 192:2
 198:19 201:5 213:6
 241:2 248:18 266:21
 277:4 284:9,17 285:3
 289:15 290:20 295:15
 295:16 326:9 341:17
 344:12,15 346:22
 350:9 351:5
quick 89:8 248:18
 267:6 316:4 321:12
quicker 86:7
quickly 122:14 305:22
 341:5,10 342:10
 344:20
quite 20:15,21 85:4
 121:17 143:17 147:14
 251:4 282:21
quote 168:10,10,12
 295:17
quotes 168:18
quoting 167:12 178:2

R

R 181:9
radically 118:14
RADM 8:2 25:18 59:16
 63:22 68:18 71:5,9
 81:2 82:5 83:2 84:12
 95:4 99:10 100:9,12
 101:2 102:13 105:13
 110:13,22 116:3
 118:20 123:21 126:21
 127:10,21 128:1,4,12
 153:22 154:13 155:1
 155:16
raise 85:5 94:5 126:14
 185:5 223:11 232:13
 281:17 324:13 335:14
raised 7:9 89:13 101:14

118:5 125:12 129:5
 140:4,5 150:6 164:10
 164:11 165:3 198:19
 202:13 232:16 285:13
 285:21 290:11 293:21
 325:14,15 335:14
 336:11 342:21 343:4
 344:15 346:18 347:15
raises 11:18 96:8 284:9
 285:14
raising 51:14 81:21
 235:12 312:15
Randolph 1:10
random 260:21
range 283:7,13 288:5
ranging 283:8
rank 230:5
rapid 263:6 264:2
rapidly 26:19
rare 184:14
rational 91:9 111:2
rationale 259:20
RCM 30:3 32:2,13 42:14
 107:11,14,21 188:19
 189:3,11 197:21
 249:18 290:10 291:10
 291:18 292:10,10
 293:6,16,18,21 294:3
 294:15 295:1,12
 297:4 299:20
re-email 348:8
reach 26:16 95:15
reachback 26:22
reached 95:22
reaching 104:19
read 20:13,15,18 64:18
 73:6 98:5 102:1
 108:22 118:18 170:19
 222:22 284:14 289:3
 338:13 349:21
reading 64:22 100:2
 101:9 102:15,16
 117:22 118:3 143:16
 171:14
reads 126:10 206:18
 225:6
ready 9:7 190:21 289:2
real 16:9,11 25:6 39:16
 40:12,21 41:6,18
 90:17 131:12 140:16
 141:10,19 142:6,16
 143:6 144:20 145:8
 152:6,10,12 156:5,15
 156:16 171:10 208:17
 208:17 209:15 243:17
 244:16 257:20 267:16
 295:17,19 296:7,10
 296:13 303:9,14

306:3 307:17,19
 309:4 310:14,20,22
 311:5,7,13 313:18
 346:7
reality 27:16 258:6
realize 313:3 321:11
realizing 72:6
really 60:4 65:14 68:15
 69:12 81:3 83:8,9
 85:13,15 99:11
 105:11 106:15 109:10
 119:11 135:16 140:19
 148:2 153:19 156:11
 159:8 193:8 229:20
 230:6 237:4 248:1
 252:14 256:11 257:11
 258:8 265:21 273:17
 275:22 277:16 282:5
 306:19 314:11 336:1
 336:18,22 344:19
realm 231:10
Rear 1:17 3:6 7:21
 25:17 85:4 105:1
 111:19
reason 16:5 18:20 28:2
 33:11 102:4 106:20
 117:16 120:11 124:20
 125:12 129:11 130:22
 132:5,6 149:4 180:18
 200:20 225:7 242:17
 246:7 270:11 272:11
 272:12 281:1 299:15
 337:3 338:16
reasonable 17:3 163:9
 190:1
reasonably 43:6 120:8
 183:18 211:20 212:6
reasons 92:21 165:10
 170:15 181:16 214:8
 248:12
reassert 237:7
reassess 124:20,21,22
reassessing 126:2
reassessment 120:12
 120:15 124:9,12,15
 125:15 126:1,9
 127:14 128:20 215:15
 216:4 222:14 227:12
reassessments 216:10
rebalancing 258:1
recall 30:5 344:21
receive 8:17 177:16
 213:1 218:6,6 230:20
 332:5,9
received 8:18,21 9:2
 14:10 151:9 177:6
 186:21
receiving 47:16 49:11

153:1 212:16 270:18
 347:5
reception 33:6
recipients 21:14
reciprocity 298:15
recognition 197:5
recognize 39:7 99:12
 118:13 124:13 125:9
 125:11 128:12 154:4
 154:14 178:5 212:10
recognized 14:22 15:4
 39:20 88:7 163:13
 169:15 211:21
recognizes 56:8 64:1
 257:17
recognizing 208:3
recollection 234:16
recommend 23:8 314:6
recommendation
 175:16 231:17 234:12
 316:21 342:14 345:5
recommendations
 229:15 265:22 341:11
 347:4
recommended 231:16
recommends 202:12
reconcile 313:20
reconciled 259:1
 302:17,18 313:11
 315:1
reconciling 302:6
 315:12
reconsidered 231:3
record 29:13 30:10,18
 42:5,8,22 43:15 48:4
 48:10 53:15,18 54:1,7
 54:9,9,14,15,19 55:7
 55:16,19 61:21 62:11
 62:21 68:4 73:5 81:7
 87:16 96:13 97:1,4,6
 97:14 98:5,13 100:15
 110:6 118:1,6,18,22
 119:3,8 123:8 124:18
 130:1 131:1 142:4,20
 150:21 155:8 159:20
 182:8,9 185:16,17
 187:2 189:15 197:17
 198:19 200:5 206:4
 206:12,19 207:2
 232:4,18 241:16
 245:21 246:4,6 247:6
 270:19 271:4,5 272:1
 274:2 278:2,4,6,11,14
 278:20 280:20 281:1
 281:7 291:5 292:4,5
 294:12 314:1,13
 324:20 325:13,21
 335:9 340:15 352:7

Recorder 2:18
records 7:16 29:13,15
 30:1,15 31:15,20
 32:19 33:8,14 34:4
 42:2 45:13 48:5 51:2
 51:10 52:9,10,22 53:2
 53:3,4,20,22 54:2,6
 54:15,17,22 55:2,9
 94:13,18 99:17,19
 129:18,22 130:10,20
 132:20,20 133:17,20
 142:14 177:12 182:3
 182:12 183:2 187:5
 187:12 189:11,18,22
 196:20 197:10,14,19
 198:5,10,11,21 199:2
 199:3,4,9,14,16 239:9
 239:13,18 242:1
 250:2,16,19 259:4,9
 261:11 262:1,6,9,9
 263:11 267:9,13,15
 267:19 268:11,17
 269:1,5,8,13,15,20
 270:18 271:3 272:7
 279:4,16 289:22
 290:6,7 291:13,16,21
 292:1,6,8,16,20
 293:12,13 294:2,5,7
 294:10,11,18,22
 295:5 300:1 327:22
 332:20 333:18 334:4
recover 349:7
recruiting 12:1
rectify 36:21
reduced 53:1 230:5
reduces 216:20
reduction 53:2
refer 45:10 47:20
 179:10
referred 48:6 90:16
 227:3
referring 52:13
reflect 121:19 161:6,8
 191:20 213:12 345:21
reflected 348:11
reflections 160:7
reflects 17:4
reforming 13:4
refused 293:12
refuses 292:2 296:13
refusing 294:7,9,17,22
regard 20:21 26:11
 41:16 108:1 126:15
 138:14 189:10 194:8
 195:12 202:4 207:7
 216:8 226:22 310:12
 320:12 340:3 341:4
 341:11 344:17 347:7

- regarding** 36:3 37:21
38:22 45:10 47:3
48:19 51:1 57:7
170:22 188:18 195:17
196:18 230:14 242:13
249:1 277:20 290:22
- regardless** 18:10
202:13 227:2
- regards** 280:19 285:21
- regime** 74:19
- Region** 5:9
- register** 153:6
- regular** 61:10 123:12
268:4
- regulation** 153:5
- regulations** 43:9
161:21 307:10 323:12
- regulatory** 288:6
- rehearing** 124:9
- reinforced** 241:13
- reinforces** 77:3
- Reismeier** 1:17 3:6 7:22
8:2 25:17,18 59:16
63:22 68:18 71:5,9
81:2 82:5 83:2 84:12
95:4 99:10 100:9,12
101:2 102:13 105:1
105:13 110:13,22
116:3 118:20 123:21
126:21 127:10,21
128:1,4,12 153:22
154:13 155:1,16
260:6
- reiterate** 201:6
- relate** 116:1 214:22
- related** 6:19 19:4 37:17
53:15 201:5,17
204:13 323:13
- relates** 119:18
- relating** 37:20,22 38:2,4
38:12 39:9 142:5
- relation** 213:17
- relatively** 196:4
- releasable** 292:9
- release** 21:20 289:21
292:2 293:12 294:7
294:10,22 295:11
300:1,4
- released** 300:2 350:6
- releasing** 125:16
250:19 293:13 295:4
- relevance** 270:20,22
- relevant** 48:20 55:5
57:6 107:3 187:5
197:6,20 242:2
263:11,15,19,20
270:13 271:12 278:7
279:9 292:1
- reliability** 205:6
- relief** 49:20 125:5
167:13 285:11,18
293:9 295:21 296:6
296:15 297:10 298:16
321:22 332:1,3,5,9,12
332:14 333:9,12
335:5
- relies** 31:12
- relieve** 218:17 284:1
- reluctance** 162:13
- relying** 162:10
- remain** 30:16 53:16
257:21 294:11 348:12
348:13
- remainder** 8:9
- remaining** 181:1
- remains** 333:6
- remarks** 45:7 164:20
205:20 206:1
- remedied** 219:3 321:20
331:21
- remedy** 13:11 22:20
121:11,16 299:6
321:16,19 330:13
- remember** 32:12 73:12
124:21 179:9 244:3
- remind** 60:21
- reminded** 200:4
- reminds** 59:4
- Removal** 33:7
- remove** 33:10 128:18
318:17
- removing** 52:19 135:5
- render** 191:15
- rendered** 37:12 300:4
- renders** 198:5
- repeat** 14:8 214:21
- repeated** 50:10
- repeatedly** 147:17,22
204:6 304:16 329:2
- repercussions** 164:13
164:14
- repetitious** 164:20
- repetitive** 323:17
337:22
- replaced** 232:1
- reply** 273:2,3
- report** 11:13 91:2
- Reports** 4:11
- Repository** 47:14
- represent** 174:20
211:10 249:4 323:9
324:4
- representation** 22:19
22:19 39:22 41:22
42:19 172:20 174:14
189:8 197:12 198:7
203:3,8,13 255:11
- representative** 161:14
217:14 218:16
- representatives** 94:22
- represented** 48:15
217:15 218:4 224:6
237:9 336:20
- represents** 198:8
- republished** 304:6
- request** 31:1,2 32:18
40:15 43:13 54:16
167:3 176:19 177:8
208:4 338:1
- requested** 46:20 177:6
- requesting** 57:4 176:20
- requests** 8:19 42:9 47:6
176:21 177:9,11
292:7,18
- require** 31:7,14 40:19
53:14 55:4 125:13
176:18 182:8 197:4
211:22 278:1 291:10
293:1 294:4 299:21
346:22
- required** 29:8,14 31:6
33:13 36:20 40:20
41:15 52:20 93:22
124:16 129:21 133:22
176:3,5 183:9 198:2
200:6 294:14 295:1
295:11 332:3
- requirement** 85:18
185:14 209:9 212:14
- requirements** 30:7
69:17 207:18 235:20
252:18
- requires** 14:17 33:19
59:9 69:7 212:4
246:10 270:16 282:19
317:17
- requiring** 39:1,6 52:20
176:11 177:13 201:11
210:2 305:8
- reseal** 183:9
- reseals** 55:11
- research** 159:4
- Reserve** 180:5
- residual** 36:19
- resolution** 98:8 148:7
- resolved** 90:10 107:10
107:14 148:10 153:3
- Resource** 203:22
- resources** 139:21 174:7
176:12 257:12
- resourcing** 50:14
- respect** 13:7 45:17 46:1
51:4 73:14 127:10
139:11 174:5 182:12
213:22 256:9 259:22
260:8 291:5 322:20
326:2 327:3 331:18
- respective** 186:8
191:21
- respond** 28:5 60:18
64:4 103:11 138:8
148:17 269:3 273:3
- respondent** 171:11
- responding** 64:12
- response** 62:6 79:16
81:3 89:10 108:11
145:19 165:1 166:22
208:15 231:15
- responsibilities** 43:7
80:3 182:11 185:3
200:22
- responsibility** 59:5,9
80:15,17,20 175:5
176:7 207:20 325:13
325:20
- responsible** 32:22
54:19 135:4 308:22
323:12
- responsive** 208:16
- rest** 20:20 100:3 106:11
130:12
- restitution** 214:7,11,13
215:8 220:11,15
221:2,7 222:8 229:13
229:20 230:6,10,15
231:3 232:10,13,14
232:20 233:6,9,21
234:7,13 336:10,15
336:17 337:2
- restrict** 207:1
- restricting** 138:18
- restrictions** 249:5
252:17 341:4
- result** 53:1 66:11
174:21 188:13 216:11
288:2
- resulted** 188:19
- results** 156:8 161:22
- resume** 160:1
- resumed** 87:16 159:20
274:2 340:15
- Ret** 1:17,18,20 3:6,6,7
- retain** 200:20
- retired** 4:18 7:21 8:4,6
9:14 26:7 36:2 45:3
99:13 131:7
- retrieves** 183:13
- return** 16:13 59:1 98:22
123:22 183:10
- returning** 54:19 55:12
- reveal** 211:6
- revealed** 129:7,8

reverse 103:20,21
105:15,20 106:2
reversed 232:21
review 6:16 10:14 19:5
22:21 34:2,9 42:12
44:1 45:12 46:1,4,10
46:14,17 49:15 51:2
51:11 52:7,7,11,22
53:12,21 54:4,11,17
62:13 66:2 74:13 75:3
99:4 117:20 120:13
123:8 129:17 130:7
130:20 144:16 185:16
188:6 189:14,15
190:11 196:12 197:9
197:19 199:1 206:4
206:12,16 207:2,3,9
207:10,20 210:22
211:5 233:18 239:13
241:10,11 245:22
246:9,15 247:6
275:18 277:21 278:2
278:4 281:9 284:21
286:18 290:6,16
291:5,12,16,20 292:6
292:8,13 293:2,3,5,11
294:2,5,13,15,20
295:19,22 296:4
297:8,9 298:12,19
299:3,6,11,13,16
322:12,13 324:20
325:13,14,20 333:12
reviewed 10:7,11,18
12:12 46:3 55:11
107:15 117:8 234:8
271:7 276:22 291:13
reviewing 11:2 26:2
31:21 32:2,4 42:21
43:3 53:9 97:5 108:7
108:8,18 109:2,2
118:22 183:8 187:1
187:10 189:22 194:16
292:12 318:19
reviews 7:15 46:5 52:13
55:8
revision 161:15,16
173:17 315:9
revisited 241:13,14
revisits 263:14
rid 134:17 254:1
right 13:14 15:8,11,12
15:13 23:13 29:2,9
38:9 39:16,21 42:13
46:10 58:16 64:9 65:2
65:10 66:11,15,16,19
71:5,9 79:4 81:1
82:20 83:8 84:12,21
85:5,19 86:6,11 87:2

87:4 88:4,21 90:3
91:12,14,16 92:3,3,4
94:4,7 95:17 96:4,18
99:2,8 100:12 101:2
101:13,20 102:13
103:13 105:21 106:13
106:16 107:20 108:15
108:16,21 110:5,15
110:17 113:9 116:12
116:21,22 117:1,8
120:8 125:19 126:13
126:17,21 127:4
130:3 131:4,21,22
137:18 138:15,18
139:3 142:18 143:3
145:9,22 147:7 148:3
148:11,15 152:18,20
156:12 158:6,8,22
162:17,18 168:17
169:6 170:4,18 171:2
171:8,13 172:17
175:4 177:16,18,20
178:12 188:6 189:7
190:14 194:7 199:22
201:20 202:11,17
203:8,13,14 208:19
209:11 215:5,6 216:6
217:17 218:8 220:3
220:17 221:10,15,20
221:22 222:2,13
223:19 224:2,10,19
225:6,17 226:1 228:9
228:19,22 232:4
233:1,4,12 235:1,3,8
235:11,20 236:21
243:4,18,20,20
244:12,18,18,19
247:18,22 250:3,6,14
251:18 253:5 256:22
257:1 260:3,19,20
262:14 264:11,17
267:7 271:16,17,19
272:5 274:11 284:15
286:6 287:13 301:8
310:2 311:9 312:5
318:14 321:22 322:5
322:6,17 331:22,22
332:6 333:8 334:3,7
335:2 337:1,8,12,15
338:18,19 339:8
341:6 342:15,19
345:10 346:4 351:19
352:4
rights 3:4,9,14 7:1,10
7:14 9:1 14:18 15:10
17:9 31:19 36:4,15
37:3,4,14,17 38:22
39:13 40:22 43:18

44:7,7 47:4 56:5 67:2
68:14 88:2 89:11
90:11,13 97:22 99:3
101:13 112:22 113:3
119:14,22,22 120:3
121:3,19 122:22
123:1 124:4 139:1
140:20 146:17 147:14
152:9,13 157:3,10
158:7,11 160:4
163:12 164:8,16
165:18,22 166:9
167:3,4 169:2,19
170:6,7,13 172:4,7
174:6,8,10 175:6
176:1,9,11 179:1
185:13 187:18,19,21
188:5 189:6 190:2,3,7
190:12 191:16 193:8
193:11,15,17,18,19
193:21 194:6,20
195:2 196:7,13
197:13,21 201:6
202:9,21 203:15
204:1,4,6,10,13,15,16
204:22 205:4 209:6,7
211:21 212:7 213:4
213:14,17,22 214:22
227:1 229:18 235:13
235:15 236:5 238:16
240:18 248:11 254:13
257:4,19 260:18
261:18 262:12 264:12
274:17 281:15 282:3
282:5 284:16 286:15
291:6 297:7 305:20
306:15 307:5,14,17
308:17,20,21 309:1
309:13 310:13 311:17
311:20 312:2 313:19
321:15 322:4,20
326:10,12,17 327:4
327:10 328:16 336:2
339:4 340:1 344:17
345:1
Rights' 42:16
ripe 216:12
rise 15:8
risk 14:18 18:22 193:16
207:4 209:4
road 314:16 315:13
334:9
robbers 115:11,14
Robbie 74:4
robe 260:6
Robert 2:10 3:17
275:16
Robinson 146:7

robust 44:11 329:15
330:6
Roger 2:6 3:16 274:20
288:13 289:9
role 12:20 19:15 34:6
63:10 77:6,7 135:11
135:12 144:8 186:11
233:17
roles 75:9
room 30:21 67:14 68:11
76:21 98:11 251:13
251:14 287:1 348:17
roommates 12:10
rooted 185:8 297:4
round 64:16 129:3
route 299:12 305:1
routinely 42:10 55:1
147:12 228:21 305:10
Rozell 2:18
rubric 84:7 89:17 90:10
91:19 95:8
rudder 197:16
rule 24:7,16 31:10,12
32:4,11,13,17 33:5
35:4 37:19,22 38:1,3
43:11 51:5,6,7,9,22
52:5,8,9,16,18 53:3,8
53:11,21 54:12 56:5
56:11,15 70:17 71:20
71:21,22 77:15 103:4
106:20 107:6 127:7
137:1 155:10 163:3
168:21 178:19 182:20
187:7,9 207:15 212:4
237:21 249:18 270:15
291:19 319:10 320:17
ruled 38:14 41:11 51:20
115:6 146:1 167:16
293:4
rulemaking 325:2
rules 24:5 27:5 39:10
41:14 43:9 52:2,4
53:13 54:13 56:11
68:12 123:18 161:17
161:21 167:5,6
183:20 187:17 194:10
200:15 210:8 211:21
226:19 227:7 238:11
239:4,22 240:15
242:17 251:12 261:6
261:6 278:8 279:10
280:8,16 281:2,3
290:4,22 291:8
297:15 302:2,20
305:13 307:10 317:5
317:6,16,18,20,22
319:5,13,19,22 320:9
320:13,22 321:2,8

325:16 330:21 335:4
346:21
ruling 56:4 100:14,16
100:19,20 101:5
103:19 105:7 113:2
119:9 202:3 208:13
215:5 263:10 271:10
271:18 285:17 287:8
338:10
rulings 37:17 41:7
141:5 154:20 186:6
206:8 281:17 322:18
Rumsfeld 319:12
run 18:22
Russell 203:20

S

sabotage 165:21
sacrifice 177:14
safeguard 16:10,11,21
safeguards 185:8,14
Sailor 252:6 262:4,10
San 115:1
sanctions 207:19
sanity 177:7
sat 166:14 169:3
satisfied 265:17,18,19
satisfy 133:11 250:21
253:9 254:5
Saturday 60:15
saved 44:19
saw 23:21 28:6 30:19
74:1 112:3 167:19
285:16 352:2
saying 58:15,18 65:14
91:8 95:19 96:12
106:4 107:11 110:3
113:15 123:22 124:3
139:8 141:17,18
145:15 150:7 152:11
154:14 155:17 224:12
235:22 239:5 261:8
264:8,10 271:15,20
272:13,14 284:19
301:14 302:8 308:2,5
309:12,18,21,21
310:3,5,19 311:4,12
312:3,12,14 313:2
316:6 322:8 330:10
346:3,12
says 33:3 84:19 99:15
103:18 106:18 122:10
126:17 127:5,19
132:21 135:6 143:16
149:1,4 153:5 213:22
221:11 222:17 223:2
231:20 232:11 245:7
250:14 259:7 285:16

286:14 306:14 307:13
307:21 309:2 311:7
312:5 314:3 319:2
322:3 330:19 338:4
346:10,10,11
scale 193:20
scales 258:1
scenario 230:18,21
scenarios 101:16
146:15 197:9
schedule 98:16 272:20
scheduled 49:14 50:5
181:9
schedules 109:6 183:3
scheduling 163:10
scheme 231:18
school 270:22
schooling 70:21
schools 74:8
SCIF 183:6 251:15
scope 18:12 172:20
173:9 175:17 235:13
263:8
scratch 253:8
scrutinizes 186:5
seal 30:7 53:16 55:8
184:10 208:8 279:6
sealed 7:15 29:10,14,19
30:2,3,10,11,15,16
31:15 32:1,3 33:10
42:5,11,21 43:4,12
51:18 53:10,13,17
54:8,15,17,19,22 55:2
55:3,6,7,9,11 94:13
94:18 130:13,20
142:5,13 154:8,10
182:4,12,12,19
183:17 184:7,9,13,15
184:20,21 187:11
188:22 189:4,10
199:14 200:19 219:11
219:12,21 228:6,7
245:22 246:7 249:21
262:6 278:11 289:22
290:6,7 291:1 292:4,6
292:8,14,19 294:5,11
294:18,22 300:1
303:4 304:15,17,18
305:11,12,17 309:5
310:9 320:3,5 321:17
322:8 327:22 328:15
329:2
sealing 29:20 30:8,19
31:5 53:8 261:14
280:9 302:2,20 303:8
316:22 317:4,6,8,22
319:2,5 320:1 321:8
seals 31:8

search 100:22 212:12
second 7:2 15:9 18:18
38:13 103:4 106:15
107:14 111:4,13
120:7 188:4 206:5
208:10 254:8 264:7
288:2 302:1,16
304:14 307:1,21
308:17 313:9 314:20
315:21 343:1 344:11
secondly 62:14 156:4
secret 61:7 246:17
secretaries 307:9
secretary 32:22 33:3
161:12 347:6
section 141:9 166:13
194:17 195:6 203:1
211:5,8 214:2 276:22
281:12 289:20 290:10
296:1,13,17 298:15
298:17 299:4,5,11,18
302:12 307:8 311:16
313:11 318:22
sections 14:13 315:2
secure 251:15
security 10:6 11:21,22
12:3 25:3 78:1,2 79:1
79:2 185:2
see 16:22 22:6 33:3
44:19 62:1 65:17
73:18,22 88:18
106:22 107:4,6
112:21 119:11 133:16
148:7,10 153:17
189:2 197:11 216:11
227:12 228:21 229:1
229:14 246:1 247:7
253:1 262:8 263:18
263:18 267:8,9
268:20 269:2 279:2
282:1 284:10,13
301:16 302:16 303:3
304:2 314:18 318:14
319:4 320:17 321:17
321:18 325:3 329:2
338:8 339:21 346:13
350:12,13 351:3
seeing 10:15 98:13
318:5
seek 207:9 210:18
280:12 294:12
seeking 40:16 67:4
197:17
seeks 177:3
seen 11:12,13,14 28:21
36:11 103:3 105:15
151:8 192:18 238:1
253:14 255:5 263:8

267:10 278:3 279:4
279:14 283:8 284:7
285:7,12 318:2,6
330:17 333:6 339:16
339:19
seep 16:19
sees 76:15 106:19
127:3 310:7 317:9,11
segment 19:17
segmented 128:17
selected 260:20
Senate 90:7 95:3 141:7
194:16 266:4,5
325:10 342:5 349:3
349:19
send 72:20 73:20 230:1
240:4 244:20 269:20
272:11 315:10 348:10
351:4,8,9,13,14
sending 230:3 240:5
305:7
sends 49:6,12 57:5
senior 1:20 2:1,5,7,18
8:7 33:12 45:5 68:10
160:12 179:20 260:15
261:12 274:18
sense 15:16,22 61:14
71:1 78:18,21 93:3
119:13 129:6 132:2
133:4,6 151:4 159:10
173:22 214:9 215:3
225:20 229:16 253:10
253:14,16 254:11
sensible 346:18
sensing 279:22
sensitive 280:7
sent 305:8 350:15,16
sentence 49:19,20,21
120:15,16 124:9,9,12
124:15,17 125:2,5,15
126:1,3 127:14,14
128:10,11,20 151:22
186:22 215:14,18
216:1,4,10,18,20
227:11 233:20 237:17
238:3 336:17
sentenced 46:18 48:8,9
sentences 297:11
325:22
sentencing 120:9,12
126:18,19,20 128:18
229:15
separate 80:12 99:1
116:20 117:4 171:4
171:21 191:3 234:9
235:4 343:9
separately 273:5
September 1:7 21:22

Sergeant 60:3
Sergeants 12:19
serious 209:4
seriously 156:5
serve 35:21 41:15 62:3
 176:3 217:7 218:1
 248:7 276:16 282:19
 283:15,18,19 327:9
 327:11
served 9:22 30:5 40:20
 62:9 177:13 180:6,12
 180:13 192:3,11
 228:18 267:13 282:17
serves 4:16 41:22 59:3
 228:14
service 3:9,14 39:2
 75:9 80:7,18 96:14
 97:3 109:1 114:16
 128:7 141:16 146:21
 148:7 160:2 161:11
 165:14 174:4 206:8
 210:17,19 212:8
 217:10 248:19 251:11
 323:11,12
Servicemembers 173:2
 174:20 175:10 205:6
services 2:5 5:9 7:7
 19:2 38:20 79:22
 80:13,14 95:1 110:12
 160:18 164:10 165:9
 174:4 176:1 211:4
 251:7 317:15 329:13
 330:6 342:5 349:20
Services' 8:11
serving 138:7 192:22
 217:8
session 6:22 348:14,20
sessions 163:7
set 79:21 80:3 135:7
 188:9 190:5 244:10
 298:13
setting 124:21 135:9
settled 163:11 178:18
seven 47:18 138:1
Seventh 336:13
sex 173:17,18 257:8,9
 315:7 338:6
sexual 6:18 10:11,17,19
 11:2,6,16,20 12:6
 16:17 17:18,22 18:6
 19:13 24:22 26:12
 36:3 37:21 48:3 51:14
 51:19 60:13 71:19
 76:3,9,11 77:10 78:7
 112:3 113:13,16
 114:6 128:9 138:20
 139:12 158:5 173:3
 173:11 181:1 195:21

203:6 297:2
shaking 264:20
shape 16:4 197:4
share 159:7 194:13
 200:18 340:3 351:12
shared 87:22
sharing 160:6 340:6
ship 197:16
shocked 105:19
shoplifts 247:20
short 16:20 34:16
 122:20 123:3
shorter 71:14
shortly 32:13
shortsighted 28:13
shot 302:13 333:13,14
show 74:10,12,15 99:20
 119:13 226:2 247:16
 270:3 330:9
showed 232:18
showing 245:20 246:3
 246:8 270:20 271:7
 332:4
shows 232:18
shrift 122:20 123:3
Shure 2:2 160:13
 179:22 180:11,18
 190:20 191:2,4 226:6
 228:2,4,10,16 229:1,8
 237:12 238:1,18,22
 241:15 254:21 256:3
 258:3,12 262:21
 273:8,13
shutting 253:7
shy 45:1
side 20:3 22:3 65:7
 102:9 134:18 146:10
 154:17 222:5 251:21
 253:15 324:11 335:6
sides 195:18
sift 64:8
sign 27:17
signaling 66:5
significance 132:20
significant 137:15
 188:17 196:5,14
 197:1 238:1
significantly 237:16
silence 14:10
similar 81:2 177:9
 178:22 242:8 330:14
similarly 350:9
simple 69:19 180:18
 202:16 290:1 309:8
 312:18
simplicity 69:20
simplify 70:22
simplistic 58:1

simply 30:10 83:17
 107:11 108:2,13
 116:4 118:1 129:16
 149:5,6 153:4,16
 212:14 214:20 217:21
 218:22 231:1 239:5
 271:19 291:8 314:15
 351:9
Simultaneous 127:22
 142:22 154:22 224:20
 249:22
sincerely 43:21 191:14
single 76:11 283:4,6,8
sir 25:17 127:21 140:12
 215:4 216:7,22
 217:18 219:16 220:10
 222:4 225:17 226:4
 228:5 229:2,8,8
 249:11 250:22 251:3
 251:20 254:21 271:14
 273:9 275:1 289:7
 328:7 331:18 332:19
 333:2,7 334:7,19
 335:17 336:1 337:8
 337:16 339:2
sit 61:8 134:2 143:15
 168:9
site 350:11
sits 82:16
sitting 129:12 238:19
 253:17 275:14
situation 103:15 104:7
 134:5,13 168:6
 189:16 239:3 245:15
 272:16 286:19 333:21
 334:7 336:8,9,19
situations 128:20 324:3
 324:6,8 335:1 336:3
six 8:21 45:3
Sixth 63:5
sketch 170:17
sketched 68:8
skills 25:10
skipping 306:12
slightly 26:11 100:16
 330:5 350:2
small 12:8 83:4 153:22
smaller 98:21,21
smart 109:11
smarter 108:22
smartest 24:13 98:11
smashed 231:20
Smith 169:12
smoke 69:19
so-called 60:14
society 17:11 19:14
 63:13 78:22
solace 257:14

Soldiers 174:13
solely 101:7 200:11
 233:10
Solider 262:11
Solorio 114:16,18,21
 115:6
solution 136:13 149:6
 271:1 291:16 310:17
 318:3
solve 136:2 252:9
 289:21 290:2 293:19
 300:5 308:7
solved 162:7 290:12
 347:11
somebody 20:2 28:17
 70:13 81:9 83:9 107:9
 110:4 127:12,16
 135:3 228:18 304:11
somebody's 274:12
somewhat 35:3 61:13
 80:5 81:2 82:2 125:20
 314:7 336:5
soon 254:1 282:16
sooner 266:14
sorry 91:2 213:21 264:4
 270:15 274:15 275:12
 275:13 308:2 312:22
sort 26:21 28:20 62:19
 65:22 69:3 72:19,20
 76:8 81:15 95:7 96:11
 96:18 99:1 125:5
 126:1 162:10 165:4
 210:11 220:1 226:7
 237:10 246:5 264:5
 271:1 280:14 335:5
sorts 28:5 30:14 84:3
 282:7
sought 185:12 193:17
 237:18 238:3 298:6
sound 165:10 186:17
 233:4
sounds 99:12,17
source 172:14
space 12:15 28:11 33:6
 183:5,13
sparing 64:22
speak 9:14 25:22 26:3,8
 35:19 44:22 65:7
 114:13 144:22 180:19
 190:19 191:13 205:16
 288:17 323:6 324:16
speaker 89:7
speaking 8:14 109:14
 127:22 142:22 154:22
 155:22 224:20 249:22
 289:11
special 7:5 37:9 38:19
 48:15 62:2 76:10,12

- 95:1,1 138:18 139:2,4
139:13 173:22 181:7
208:11 228:20 229:3
241:8 246:2 255:4
specific 7:10 14:21
42:7 52:21 164:9
165:17,18 167:10
170:9 202:22 204:15
243:14 264:13 265:22
273:18 304:5 316:7
321:22 331:11,20
336:19,22
specifically 42:13
84:18 147:6 159:1
170:1 194:13 297:21
302:11 313:22 315:3
325:10 333:9
specifications 188:15
specified 217:10
specify 118:4 126:5,6
specifying 125:18
spectator 100:6
spectrum 121:2
speeches 74:22
speed 22:12
speedy 15:13,14 22:11
146:17 147:5 175:4
Speer 289:10
spend 100:2 276:1
spending 109:12
spent 11:2 13:3 45:1
109:15 180:8 263:2
spillage 251:7,8
split 122:6
splits 65:5
spoke 102:22 286:11
spoken 105:7
sponte 279:8
spotlight 60:19
spotted 17:13 63:17
spotting 14:4 104:19
stab 138:17
stability 196:9
stacked 256:13,17
258:7
staff 2:13,14,15,16,17
5:2,6,9,17,19 30:13
33:7 162:15 289:16
290:21 299:11 341:17
342:5,9 345:11,18
348:9 350:17 351:4
351:10,15
staffed 283:3
stage 50:9 55:21
stages 189:14 297:18
stake 19:12 120:22
152:13 198:9
stall 165:21
stand 108:14 190:20
standard 19:1 22:22
48:18 65:21 121:13
121:14 122:11 133:20
144:21 185:22 308:6
329:13
standardized 329:5,8
standards 122:2,11
134:9
standing 7:12 10:5
29:16 38:7,11 56:10
84:11 90:18,19 92:12
145:6,12,16 152:1,5,8
152:19 156:11 157:14
167:11 168:15,20
169:5,8,10,15,17
204:13 208:3,14,16
208:22 209:3 210:1
210:10,13 211:2,7,12
211:14 214:15 215:11
216:13 222:2,6,9
230:14 242:6,8
250:12,15 269:18
285:1 306:7,7 334:17
335:19 336:2 339:5
stands 41:1 147:6
start 9:13 14:20 26:10
27:22 58:4 61:4 87:3
95:9 128:17 137:10
148:13 160:20 205:19
213:8 253:6 301:14
started 4:22 58:6 61:15
74:5 88:21 239:16
344:18
starts 214:1,2
state 15:19 17:10
155:14 180:3 204:2
243:9 321:21 324:14
325:11 326:5 336:4
stated 39:19 166:3
326:3,6 339:11
statement 65:16 86:13
90:16 149:6 163:22
164:1 191:3 194:19
288:14 289:3
statements 263:12
states 1:1 14:1 19:18
33:5 43:3 52:14 56:9
88:7 93:16 115:15
145:3 153:4 167:7
168:20 169:2,4,7
171:22 177:10,21
184:19 186:13 188:9
230:2,4 260:11 297:1
298:1 300:3 323:9
327:5 336:12,16
stating 334:19 337:11
station 159:10 266:17
statistic 10:9
statistically 184:13
statistics 12:13 112:12
stats 304:1
status 39:16 40:1 41:18
47:1,5,12 96:16 113:7
120:6 123:11 205:4
215:8 295:18 296:14
298:7
statuses 40:12
statute 27:6 28:12
85:15 86:5,6,8 124:16
126:10,10 127:19
128:22 143:17 152:15
170:7 172:6 220:19
225:5 243:19 244:17
264:7 285:2 287:12
287:14 307:12,13
333:4 347:11
statutes 67:11 127:11
127:18 178:10 179:3
204:8 325:17
statutorily 31:6 244:14
statutory 130:17
182:10 222:20 247:14
265:22 299:13 322:17
347:1 349:13
stay 217:2 266:22
340:11
Stayce 2:18
stays 270:9
Steer 2:8 3:16 274:21
275:2 288:12,13
300:14,18 301:1
339:2
stems 124:10
step 11:9 215:13 330:3
stepping 241:22
steps 146:16 185:20
196:5 315:17
stick 72:11 314:9,10
stipulate 85:2
stirring 164:12
Stone 1:13 4:19 89:7
99:7,8,11 102:18
103:9,11,14 104:17
104:21 105:1 110:7
110:19 111:1,20
112:7,11,13,16,20
115:11 118:16 119:4
121:14 126:16,22
127:20 128:2,5 129:2
140:5 147:4 151:17
152:3 154:7,19 155:3
157:20 158:1,20
213:9,10 215:12
216:15 217:1 218:8
218:14 219:4 220:3,5
221:3,16,19 222:1
223:21 225:5,18
226:7 227:19 228:3,9
228:15,19 229:6
231:14 233:3,12
234:5 235:3,8,11
266:19,21 267:4,6
271:9,11,15 272:3,5
273:10 312:4 316:12
326:6 331:4,6 332:11
332:16,22 333:3,17
334:2,11 335:11,18
337:12,17 339:20
343:14,22 348:6
349:12 350:2,5,22
351:3,9,14,20,22
stopping 141:16
stops 140:20
straight 290:21
straightforward 143:17
strategic 16:2
strategies 263:21
Street 1:10
strength 16:13
strengthen 237:8
strengths 61:22
stressing 162:22
stricken 306:19 307:6
strict 251:4,5
strike 187:17 190:6
281:4 309:5 310:15
322:9
strikes 249:12 261:17
string 168:18 169:22
222:7
structural 111:6,7,12
111:13
structurally 220:12
structure 27:19 82:7
132:18 157:2 206:1
220:20 244:2 312:8
student 139:15
students 77:13
study 324:2 326:3
327:4
studying 60:6
stuff 99:4 112:18 252:2
267:22
sua 279:7
subject 40:4 46:4 152:1
152:5 163:16 184:8
278:7 341:3,12
348:22
subjects 58:9
submissions 8:21
submit 37:19 77:16
190:4
submitted 49:5 323:20

submitting 37:16 44:1
subordinate 86:16
subparagraph 265:6,19
subpoena 169:8
subsequent 36:20
subsequently 263:11
substance 129:17,18
 257:6
substantive 92:13
 110:16 137:21 208:19
 250:13 322:5
substitute 186:10
subterfuge 165:20
success 292:21
successful 88:19 205:2
successfully 77:6,7
 115:16
sucking 116:8
sudden 155:10
suddenly 236:8
suffer 79:2
sufficiency 284:19
sufficiency's 128:19
sufficient 129:16
 284:20 291:2,9
 324:13 329:11
sufficiently 324:11
suggest 130:18 150:17
 151:12 200:3 212:15
 319:9 320:6 321:6
 322:1 326:20
suggested 38:21 90:6
 325:8 347:17
suggesting 118:16,21
 268:13 327:20
suggestion 89:15 90:9
 132:1 137:7 324:1
 350:3
suggestions 159:12
 221:6
suggests 241:11
suicidal 267:22 268:8
suit 234:10
suited 209:19
sum 34:19
summarily 293:14
summarize 343:11
summary 179:6 190:4
 342:9,20 343:11,21
 344:6 345:12 351:4
 351:22 352:2
summer 263:1
superseded 293:7
Supervisory 2:9 275:5
 301:9
supplemental 216:3
supplementing 65:13
support 194:6

suppose 156:16 200:10
 214:5
supposed 70:18 72:3
 108:11 126:5 127:17
 218:13,13 267:2
Supreme 114:15 127:2
 169:16 186:16 190:17
 260:10 319:11 322:18
sure 11:11 13:2,14 26:7
 59:19 61:2 72:13
 78:11 89:19 98:7,11
 100:7 102:3 108:19
 109:10 110:3 116:3,9
 118:12 124:2 130:15
 141:9 143:4 149:2
 187:1 215:7 218:14
 234:11 236:3 242:21
 254:4 278:2,15 280:3
 304:17 308:1 309:20
 317:21 329:18 331:2
 335:16
surely 173:4
surprise 305:4
surrounding 31:22
survived 190:16
survivors 18:2
suspect 18:15
suspended 120:18
SVC 18:9 22:3 217:10
 217:15,20 240:16
 261:7 283:18 290:11
 297:18
SVCs 277:3 287:18
 297:19
SVCs/LVCs 328:3
swaths 301:15
sweeping 84:2 154:2
 170:11
sweeps 84:1,3
swift 122:1
switch 142:15
system 13:5 15:18
 19:16 21:19 22:18
 27:20 44:3,11 58:19
 58:20 62:15 74:11
 98:8,14 133:4,6
 157:11 161:18 162:20
 165:13 170:5 171:17
 185:7 190:11 192:17
 192:17 203:5,12
 205:7 206:15,17
 209:5 211:1 212:21
 218:20 219:15,17
 221:5,8,9,12 223:19
 223:22 227:20,22
 234:20 235:7 236:12
 241:18,19 243:21
 254:14 256:10,13,16

257:15,16 258:7
 260:18 261:1 282:15
 289:19 295:9 296:19
 297:1,3,3,5 305:16
 306:17 313:12,13,17
 314:18 315:13,15,17
 316:20 317:13 321:4
 325:19 326:14 327:9
 327:12
system- 224:21
systems 25:5 41:20

T

T-S-O 304:5
table 9:18 169:3 247:2
 253:17
tactics 60:6
tag 275:1
tailored 49:16 257:19
 288:1
tailors 48:19
take 5:1 16:5 23:11
 25:21 29:5 46:8 61:11
 62:18 87:14 96:5
 114:19 123:4 137:9
 150:22 152:3 156:4
 157:7 159:17 162:9
 215:12 242:5 253:18
 255:12 263:16 267:5
 304:10,20 322:17
 325:17 326:20
taken 34:6 109:19
 138:16 186:15 201:21
 262:15 301:20 306:11
 306:13
takes 23:22 25:11,13
 63:14 81:6 106:6,7
 142:17 183:5 280:8
talk 29:6 60:9 83:9
 92:13 95:17 110:5
 111:4 124:8 128:21
 164:2 166:16 181:21
 182:6 215:14 217:3
 278:22 286:5 302:15
 302:19 313:22 315:2
 315:5 320:1 340:18
talked 75:21 96:2 98:15
 121:10,15 122:17
 135:1 310:6 314:12
 317:2
talking 27:16 45:15
 58:6,9 69:2 71:3,4,7
 79:8 93:16 95:8,9,18
 96:17,21 98:9 99:2,4
 100:7,10 108:17
 109:12 116:20 121:7
 130:4 133:19 141:12
 155:21 156:11 157:21

158:2,5 230:18 232:7
 235:16 245:11 260:4
 263:2 265:9,11
 302:12 306:21 314:21
 315:4,19
talks 120:8 121:1
 141:10 213:16 311:5
 313:12 319:1,12
 320:8
Tammy 2:14 5:2,18
tanks 28:9
targeted 170:10 179:8
 195:3
task 12:7,8,9
tasked 193:7
Taylor 1:14 4:19 57:17
 57:18 60:18 61:3
 64:13 65:2,10 67:6
 68:7 72:15 75:15 93:5
 140:1,2,13,18 143:1,4
 144:3 146:20 234:14
 234:16 235:2,6
 248:15,16 251:1,10
 254:8 327:15 328:8
 328:18 342:2 344:21
 346:19 347:3,12
 349:8
Taylor's 75:20 135:10
 145:20
teaching 69:10,11
team 59:9 161:11
 192:11 300:17
technical 61:13 170:15
 243:14
teenager 267:20,21
 268:1
teeth-gnashing 167:20
telephone 47:8,15
 50:11
telephonically 274:7
tell 11:10 62:16 112:20
 148:14 152:22 167:19
 232:6 259:6 267:14
 331:10,16 339:15
telling 13:15 49:7 66:22
 100:1 113:11 125:22
 126:19
ten 32:15 159:17 255:2
 283:3 303:22
tend 92:10
tendency 20:14 64:18
tends 66:6 255:1
tension 17:14 35:5
 65:17 171:17
tensions 28:6
tenure 24:4 25:7 34:22
 260:9
tenured 23:18 190:14

Tereza 2:11 3:18 275:6
323:7
term 29:9 156:5 167:18
173:15 184:18 217:5
260:13 295:20
terms 35:6 68:9 142:18
144:17 145:7 154:21
157:10 158:14 251:13
256:19 272:17 326:14
326:15,16 341:10
345:11 348:21
test 281:2 332:2
testified 70:7 302:21
306:4
testify 181:10
testifying 301:17
testimony 146:22 226:3
273:16 277:17 288:20
340:13 348:11
Texas 75:14
text 13:21,21 135:18
thank 5:14,14 8:3,13
9:6,10,11,21 11:3,6
25:14,16,18 35:11,13
35:15,19 44:13,16,21
57:9,12,14,15,18
58:22 59:17 61:3 67:6
75:16 79:17 19 82:8
137:11 146:21 147:3
159:6,15 160:5,19,21
160:22 179:15,16
180:1 190:19 191:1,6
191:10,10 204:20
205:7,8,13,15,16
213:2,7,10 248:18
258:1 273:15,18
274:18 276:5 288:10
288:11 300:9,11
308:14 322:22 323:2
323:6 327:13,14,22
331:5 340:5,8,12,21
351:21 352:5
thanks 57:13,19 87:13
theft 113:21
theme 16:14
thing 23:16 65:22 83:6
95:16 100:8,18 112:9
118:3 122:12 124:9
124:10 139:19 150:17
157:9 220:1 224:3
228:5 286:4 307:1,21
315:20 337:18 342:8
things 11:10 22:3 28:16
30:14 69:1 72:10
73:22 74:1,4 75:8
81:15 94:11 98:15,19
101:1 110:18 115:10
134:5 137:9 139:20

140:22 143:12 181:22
214:18 225:16 247:3
280:13 285:10 302:12
303:3 304:19 316:7
318:6 324:14 325:1
328:11 329:19 331:7
339:6,8 345:11
346:20
think 11:11 13:14 19:11
19:14 22:2,5 23:16
25:8,9 27:4 28:17
58:10,14 59:19 60:2
61:19,21 63:9,22 64:1
64:5 65:6,11 66:10
70:3 72:22 73:8,15
75:7 76:15 78:3,12,16
78:19 79:9 87:6,20
89:4,9,13 91:6,7
94:19 95:16 98:21
99:11 100:3,10
101:17 102:5,18,20
106:11 110:10 112:2
114:3 115:5 116:10
116:19 119:6,19
122:15 123:3,9,17
124:10 125:2 127:7,8
129:12 131:2,8 135:5
136:2,15 137:7
141:15 144:15 149:8
149:12,20 152:4,10
152:17 155:14 156:13
157:1,7 174:22 192:2
195:6 213:12,12
215:4 216:11 217:9
218:10 219:17,19
220:6,11 221:11
222:9,10,12 224:11
225:18 229:13 230:16
231:9,11 233:5,8,16
234:14,15 237:11
240:14,16 242:10,10
242:11,12 243:3,10
243:11 244:13 245:9
245:14 246:9 247:10
247:21 248:5 249:12
250:13 251:4,4,22
252:19 253:6,7,16
254:3,20 255:13
256:6,9,13,15 257:22
258:15,17 259:15,19
261:15,16 263:7
264:19 265:10 266:11
269:3,6,10 270:7
272:5,6 274:10
277:19 278:21 279:20
279:22 280:2 282:3
282:10,13 284:1,9,14
284:17 285:2 286:4,7

287:6,9 301:15,20
302:5,6,22 303:2,9,11
303:12,13,18 305:15
306:1,9,12,21 308:15
310:10,11 311:10,18
312:7,18,21 313:7,10
313:19 314:12 315:6
315:9,11,18,22
316:12 317:17 318:8
318:8,10 319:11
320:9 321:13 322:9
322:14,15,16 324:2
329:1,7,12,16,17,17
329:18,20 330:1,16
330:19 331:1 333:5
334:3,16 339:2,6,13
341:19,20 343:5,20
344:6 345:2,7,18
346:19,20 348:9
349:17,17 350:8,20
351:5
thinking 27:5 79:14
159:1 245:2 345:14
348:22 350:1
third 19:17 56:10 71:22
72:7 103:6,9 206:7
210:14 286:15 288:2
302:5,20 305:2
316:22 338:1
thought 13:17 26:5
31:17 60:5 72:18
114:4 120:17 193:8
276:7 334:12 335:18
336:10 351:11
thoughtful 44:1 57:14
57:16 159:13 204:22
thoughts 160:7 191:15
191:19 194:14 215:21
220:8 251:2 256:19
257:4 267:22 273:17
276:3 338:22 340:2,7
341:10,13,14 345:16
thousand 232:9
thousands 10:19 112:4
thread 68:20
three 13:18 14:13 17:13
24:1 66:16,16 70:8
102:10 108:8 132:17
132:21 133:9 134:15
188:13 192:7,12
209:1 210:2,3 214:18
232:17 259:12 260:5
267:19 268:10,17
282:18 289:14 297:12
300:16 301:15 314:3
318:10
three-party 289:19
295:8 296:18 297:5

three-to-two 65:5 86:4
three-two 91:6,7
three-year 260:13
threshold 246:3,8
247:5 271:6
throw 139:6,19 320:6
thumbnail 170:17
Tideswell 2:14 5:2,4,6
5:18 273:20 274:6
276:12
tie 58:17
tied 77:22 201:7 221:7
248:9
ties 58:7
tilts 254:14
time 10:7 16:2,8 23:21
23:21,22 24:12 25:10
25:13 46:8,11 52:12
69:7 70:12 72:6,12
73:12 103:2,5 106:6,8
109:13,19,22 110:1
111:8 115:22 118:8
119:10 123:5 126:6,6
127:2 129:8 136:21
139:19 146:13 150:12
157:6 159:6,16
162:18,18 167:17
175:17 188:12 214:9
244:9 258:5,8 263:6
263:16 265:20 268:19
271:12 272:15,22
276:1 277:13 304:10
310:13 327:16 332:9
332:14 337:22 338:11
343:1
timeline 150:11
Timelines 22:10
timeliness 147:12,13
181:22 188:4
timely 150:16 181:6
188:6 203:16 297:7
times 21:15 23:5,5
28:19 60:2 72:16
73:18 109:7,18 255:1
258:13 263:8 304:3
today 6:1,6 7:17 8:13
9:7 13:15 16:18 25:20
35:11,20 44:14,22
57:10 58:10 87:8
119:22 127:20 146:22
161:2 165:10 180:18
191:14,19 192:14
194:13 205:17 206:2
227:13 277:4,22
291:17 301:22 302:22
306:22 323:19 341:1
343:12 345:7 348:3
348:11

today's 6:7,22 8:19 9:3
told 34:13 302:4
Tom 1:14 4:19
tool 68:22 69:10,11
 302:14
tools 71:7 207:7
topic 277:20
total 8:21 34:19
totality 306:6
totally 268:7 269:16
 347:12
Toth 185:10
touch 192:15
tough 113:1
tours 111:9 192:12
town 139:15
Tracey 1:14 4:18 75:17
 75:18 76:20 79:11,17
 79:19 80:9,14,22 82:1
 82:8,12,15,18 83:1
 85:17 86:1 87:18,20
 88:10,13 89:1,4 147:2
 233:14,15 236:2
 238:6 241:3 243:5
 254:9 266:4 328:21
 328:22 329:14 330:4
 340:22 341:8,16
 349:1,10
track 10:9 80:15
traditional 145:16
 248:10
traditionally 244:15,15
trail 43:2
train 159:9 266:16
training 59:18 60:7
 203:18 262:22
trampled 174:8
transcend 192:14
transcribed 6:8
transcript 6:8 342:10
 343:15,16,20 344:1
transcripts 4:13
transferred 113:17
 146:6 147:21 148:5
transition 212:20
transmit 342:16
travel 75:5
treason 113:20
treat 127:14 252:13
treated 78:8,10 144:13
 163:5 166:4
treatment 76:12 211:3
Trexler 2:15 288:17,21
 289:2,7
trial 15:2,7,13 16:1
 22:11 24:4,8,14,19,20
 25:11 29:15,16,18,20
 30:1,8 31:19,21,22

32:19 33:8,14 40:6
 42:2,8 45:4,13,18
 47:2 48:4,11 51:3,15
 51:21 53:4,18 54:1,7
 54:9,10,16 55:8,15,16
 55:19 56:1,4 61:21
 62:11,21 68:5 70:20
 71:16 73:5,15,18,21
 73:22 74:2 92:5 94:5
 95:20,22 96:12,19
 97:4 100:14,15
 106:16 107:4,17
 108:5,8,15,19 110:19
 113:1 116:5,22 117:3
 117:7 118:19 119:15
 120:2 129:10,14,22
 130:1 131:20 132:3
 132:14,18 133:16
 134:2 142:4,20
 146:12,17 147:5
 148:18 158:9 161:9,9
 163:3,7 164:4,5,16
 166:5 170:8 172:10
 175:4 178:8 179:14
 180:12 181:5 184:1,1
 184:2 185:17,18
 186:7 187:3 189:15
 190:15 193:20 195:1
 196:1 197:13 198:19
 198:20 200:7,17
 201:21 206:5,12,15
 206:19 207:2,12
 215:6 233:19 235:21
 235:22 236:8,19,22
 237:8,18 240:5,6
 241:9,16 244:19
 245:4 246:4,18,19
 252:4 258:18 259:5
 259:10,11 260:14
 261:9 263:3,5,9,18,21
 264:3 267:17 270:4
 272:9 291:6,13,21
 292:1,2,4,5 293:3,4
 293:11 294:12,22
 296:21 300:2 303:4
 314:2 318:7,9 319:3
 320:3,5 323:14
 324:17 325:14,21
 334:15 335:1,4,21
 337:22 338:6,8,10,11
 338:19
trials 16:20 163:20
 185:12 201:15
tribunals 185:9
tricky 222:11 223:20
tried 58:1 88:8 229:17
 257:9
tries 33:16 306:2

307:19
trigger 250:12
triggered 188:10
 189:16
triggering 225:3
trouble 217:7 219:15
 270:13
troubling 115:21
true 22:14 64:1 111:21
 111:21 148:20
truly 122:3
trumps 222:21
truncate 206:22
trust 141:1,5 255:14
 303:7
try 26:18 64:8 69:20
 103:21 157:2 237:12
 247:3,16 252:13
 279:2 301:12 327:8
 329:22
trying 26:16 63:20 64:3
 64:4,4 67:8 69:4
 73:19 83:9,12,16 85:6
 92:18 95:5,6,14 96:21
 98:18 109:15 117:5
 117:11 118:10 122:21
 128:2 140:22 143:14
 150:17 153:19 193:7
 222:7 230:7 236:3,14
 237:10 238:16 241:7
 243:10,12 259:18
 281:9 282:3 296:15
 302:13 310:1,17
 311:22 326:10 340:18
 343:22
Tso 304:5
Tuesdays 66:7
turn 39:11 50:22 272:10
turned 128:10 236:11
 272:7
turning 55:20 59:20
 181:16
turnover 263:1
turns 24:3
twice 75:14 103:2
two 7:2 8:10 16:1 24:5
 37:12 45:4 56:8 66:15
 66:17 72:8 74:22 82:4
 102:9 103:2 114:10
 121:7 131:18 138:2,6
 138:12 139:12 141:14
 143:12 180:8 181:22
 189:21 217:19 226:6
 227:5 254:14,19
 260:5,7 283:3 290:20
 293:17 295:15 296:19
 299:9 306:2,10,13
 308:13,15 309:12

313:21 314:2,16
 315:12 324:1 330:6
 331:7 344:14
two- 260:13
two-and-a-half 180:13
 237:14
type 20:1 72:9 83:14,14
 252:21 262:4,19
types 24:20 283:13
typically 128:7 219:11
 279:8 330:9

U

U.S 1:17,19,20,21 2:1,2
 2:3,4,5,6,8,9,10,11,14
 2:15 9:15,22 45:8
 115:13 122:10 127:1
 160:9,11,13,14,17
 180:4 274:18 275:2,4
 275:6 276:17,21
 286:8
UCI 16:20
UCMJ 7:1 23:17 26:14
 26:17 28:5 36:19 37:1
 37:4,11 43:7 58:8
 59:3,12 67:19 68:22
 69:9,9,22 76:6 114:3
 120:13 128:15 161:16
 171:21 211:9 215:16
 220:19 277:2 298:20
ultimate 59:2 303:10
ultimately 63:2 97:11
 138:22 172:12 190:1
 234:17,18
unambiguous 143:18
 143:21
unavoidable 147:18
unbalanced 296:22
uncertain 37:14
uncertainty 30:1 38:18
 164:14 222:14
unchecked 199:12
unclassified 32:19 42:1
unclear 313:4 336:1
uncommon 148:1
unconstitutional
 289:18 295:8
undercutting 196:6
 204:17
underfoot 174:9
underlying 301:15
undermine 193:14
 236:12 257:3 332:8
undermines 12:1 297:6
undermining 254:6
understand 11:17 67:1
 67:2 69:21 70:17
 89:12 104:21 105:11

113:22 120:12 121:8
 131:22 136:10 145:8
 151:17 152:21 153:14
 154:13 210:20 221:18
 259:19 264:10 288:4
 301:5 303:16 304:21
 305:6 307:7 308:2
 310:1,18 311:22
 315:15 335:16 342:3
 350:8
understandable 287:18
understandably 239:18
understanding 26:22
 55:2 119:19 216:9
 327:6 350:14
understands 69:18
 280:16
understood 64:2,19
 72:14 164:5 193:13
 233:2 330:4
underutilized 290:15
 298:9
undesirable 179:14
undoubtedly 165:12
unduly 212:1 217:5,6,8
 217:16 226:3
unending 201:22
uneven 102:8
unfairly 16:18
unfortunately 6:7 298:5
uniform 6:17,20 19:2,8
 36:9 65:20 69:18
 171:5 186:1 234:20
 305:9 317:14
uniformity 18:19 19:4
 144:14
unintended 22:15
 162:6 165:12 166:6
 170:12,14 179:13
 248:14 288:3 326:16
 331:8,10,12,19
unique 285:9 337:10
unit 12:1,2,8
United 1:1 14:1 19:18
 52:14 56:8 88:7 93:16
 145:2 167:7 168:19
 169:2,4,7 171:22
 177:10,21 184:19
 186:13 188:9 230:2,4
 260:10 297:1,22
 300:3 323:9 327:4
 336:12,16
units 73:19
unjust 186:22
unlawful 202:5
unmanageable 282:12
 295:7
unnamed 175:12

unnecessary 179:5,13
 194:5 201:13 210:4
 212:2
unprecedented 284:5
 289:18 295:7 296:18
 349:9
unprotected 32:20
unpublished 184:11
unreasonable 147:7
 148:3,13 188:9
unrelated 202:20
unsealed 304:16 310:8
 312:16
unsustainable 27:9
untethered 106:11
untimely 297:9
unusual 168:6 178:7
 244:5,5,8
unwieldy 76:2
upends 236:13
upheld 99:16 105:18
uphold 91:16
upload 50:17
uploading 219:1
upset 238:4
upsetting 237:17
upwards 255:2,5
urge 190:9
USC 40:3 55:22
use 12:14 60:9,13 135:2
 152:15 156:1,6 157:4
 163:2 178:4 185:22
 217:5 218:21 262:9
 329:8
useful 157:2,8 344:6
 345:7
uses 45:19 152:15
usually 51:13 216:20
 279:5 280:9,13,17

V

v 38:5,13 52:14 146:7
 168:20 169:2,4,7,9,12
 177:10,21 184:19
 185:10 186:13 188:9
 260:10 286:8 296:2
 298:1,13 319:12
 333:10 336:12 339:2
 339:4
VADM 75:18 76:20
 79:11,17,19 80:9,14
 80:22 82:1,8,12,15,18
 83:1 85:17 86:1 87:20
 88:10,13 89:1,4 147:2
 233:15 236:2 238:6
 241:3 243:5 266:4
 328:22 329:14 330:4
 341:8,16 349:1,10

VADM(R) 1:14
value 16:2 69:11,12,16
vanguard 180:21
varied 30:9
various 67:11 113:7
 123:1 135:6 237:4
 346:17 347:15
varying 50:8
vast 12:13 112:1
vastly 97:19
vector 236:7
venue 82:18 115:2
 146:6
verdict 261:3
version 46:15 194:16
 195:6 265:1,1 266:4,6
 325:10
versions 70:9,11
versus 78:9 93:16
 166:21
vetted 280:22
viable 165:19
Vice 4:18
victim 7:14 17:20 23:15
 28:11 37:8 38:2,15,22
 39:16,22 40:14 41:8
 41:11,16 45:10,11,13
 45:17 46:10,19,22
 47:11,13 48:7,11,13
 48:15,20 49:3,10 50:5
 51:1,4,8,9,15,19 52:2
 53:7 55:20 56:3,17,21
 57:2 76:3 77:19,20,21
 78:4,7,8,21,22 79:14
 79:20 80:17,20 81:14
 82:13 83:7,14,15 84:7
 84:7,19 85:11,12,12
 88:5,8,18 92:16 93:2
 94:4,7 96:16 97:16
 105:2 116:11 117:9,9
 119:12 120:3,14
 121:3 125:10,11
 126:12 131:20 133:11
 134:18 136:6 139:4
 140:19 143:6 147:6
 148:1,20 151:18
 152:8,11 153:5
 154:10,12 166:17,18
 166:21 171:2 187:20
 193:7 194:3,14,20,22
 195:2,3,7,11,21,22
 196:6,16 197:10,22
 199:17 200:7,12
 201:3,6,8,8,13,17,20
 202:1,6,19,21 203:2
 203:12 204:9 206:5
 207:6 208:21 209:2
 210:10 211:11,12

212:7,8,11,13 213:13
 213:17 214:5,12,21
 215:7,11 217:13
 218:3,15 220:18
 221:10,14 225:12,21
 227:3 229:17,18,22
 230:7,8,12,22 231:10
 231:20 232:13,22
 233:9,20 235:21
 236:5,9,17,22 237:7
 237:15,18,19 238:3,7
 240:17 241:7 242:7
 242:16 252:11 253:15
 254:6,12,15 257:18
 257:18 265:12 267:8
 268:14 269:1,5,22
 270:1,10 272:21
 273:4 277:9,11
 279:16 280:7 281:5
 282:20 284:3,6,15,22
 286:1 289:11 290:9
 291:4 293:20,21
 295:2 296:5 297:22
 298:2,5,7,9,13 299:9
 299:22 300:3,6
 304:10,18 306:3
 307:15 309:2 315:3,5
 321:16 324:5,7,9,15
 324:18 326:10 327:1
 327:3 332:6 334:20
 335:21 336:4,9,15,19
 337:4,9 338:3,3,12
 339:13,17
victim's 7:11 11:17
 31:18 37:21 38:6 40:5
 42:13 94:1 104:1,5,6
 104:8 116:11 152:9
 152:18 163:21 167:1
 167:2,14 169:5
 170:18 176:9,19,22
 177:14,18 190:3,8
 193:18,21 194:3
 196:14,19 199:20
 202:9,14,18 206:10
 210:15 212:8 215:5
 216:5 217:14 218:16
 221:20 232:17 236:12
 245:5,8 252:1 270:5
 289:22 290:6 291:2,9
 291:12,21 292:19
 296:11 299:3,16
 332:8
victim-related 197:1
victim/witness 50:20
victims 15:3,21 17:10
 17:16,17,18,22 18:1,2
 18:3,6,9,10,14 22:14
 39:7,12,14 40:20

42:20 44:8 45:20,22
 46:2 47:3,6 48:1,2,3,6
 49:7,12 50:8,18 56:1
 67:1 76:1,4 77:11,21
 78:3 79:5 83:4,5 84:3
 88:1 89:16 97:16
 104:8 105:8 110:8,12
 112:21 122:22 123:17
 128:5 138:14 139:1,7
 139:12 140:14 141:1
 141:10 142:1,2,6,9,19
 144:12 147:11 148:11
 148:15,16 149:2
 155:4,11 157:13
 158:3,4 165:19,22
 166:2,8 170:8 171:8
 173:2,11 175:20,20
 175:22 176:4 177:3
 180:22 187:18 200:3
 200:8,9 201:14,16,18
 203:6 204:12,17
 205:5 207:21 208:3
 208:14,15 209:15
 210:18 211:2,4,17,18
 212:15 219:20 220:15
 238:16 242:12,19
 248:4,6 253:11 257:1
 264:12 272:15 281:13
 282:7 283:13,14
 286:16 290:3,15
 295:18 297:13,19
 298:8 305:19 307:6
 307:21 308:16 309:13
 311:17 312:15 313:15
 313:22 314:4 322:4
 322:12 325:5 326:16
 327:10 330:1 331:19
 331:22 333:8 339:4
victims' 3:4,9,14 6:22
 7:5,6,9 8:22 36:3 37:3
 37:3,9,17 38:20 39:4
 41:21 42:10,15,18
 43:18 48:16 68:13
 95:1,2 110:11 111:17
 121:3,19 138:19,19
 139:2,4,14 142:11
 147:14 148:2,21
 160:3 163:1,4 164:8
 175:6 181:7 189:6
 191:16 193:2,11,12
 193:17 200:13 203:5
 203:19,21 204:1,6,22
 206:7,9 208:11 209:9
 210:1 211:10,21
 213:4,22 228:20
 229:4 235:13 241:8
 248:2 253:9 254:13
 255:4 274:17 277:20

281:15 282:2,4
 293:12 306:15 307:14
 311:1,16 344:17
 345:1
victor 1:13 4:19 162:14
 316:12
view 16:6 19:5 23:11
 24:5 61:7 67:9 68:3
 76:5 87:21 91:19
 101:6,8,19 119:2
 156:1 182:19 188:22
 198:4 210:22 269:19
 276:20 278:12,16
 307:13,18 344:16
 345:6
viewed 253:3
viewing 198:9
views 20:18 63:10
 159:13 301:4 324:7
 324:13,16 334:11
 335:8 345:21
vigorously 292:18
vindicate 174:10
vindicated 140:20
violate 108:4,5,9
 177:19
violated 7:15 148:4
violates 56:4
violating 61:7
violation 78:20 239:12
 240:2,9 242:2 253:9
 321:18 329:21
violations 187:13
 240:11 279:1
violence 173:4,13
Virginia 1:10 180:7
 182:17
virtually 299:14
vitiated 157:1
VLC 193:3,4 197:2
 198:4 199:9 202:18
 217:15 251:21
vociferously 302:3
voice 43:19 94:8,11,15
 117:13 236:22 333:22
 334:9 337:11
Volume 317:21
volunteer 74:17
VWAP 81:14

W

wait 268:12
waive 46:9
walk 228:8,10
walks 33:2
Walmart 174:18 247:20
 247:21 248:1,3
want 13:2 20:19 23:9,15

47:11 50:12 59:15
 66:19 70:5 72:13 78:6
 82:10 92:21 93:10
 99:4,20,21 101:9,12
 101:21 105:2 112:17
 125:22 126:4 128:21
 129:4 131:14 134:20
 136:18 145:22 146:19
 147:4 148:22 149:20
 153:5,10 155:20
 156:1,6,9 160:5
 164:19 165:15 168:9
 181:21 182:6 183:14
 191:3 219:22 220:8
 221:13 240:20 245:22
 252:12 253:4 259:19
 261:19 264:6 266:18
 266:22 268:2,12,12
 269:6,19 270:3 271:8
 276:18 277:6 280:12
 289:3 291:16 306:5
 307:17 309:5 312:14
 312:16 313:18 314:5
 321:18 323:17 324:14
 338:8 339:18 340:3,5
 341:7,15 344:12,14
 351:6
wanted 33:18 35:1 89:7
 111:4 119:16 157:9
 166:16 223:4 229:10
 229:11 273:4,11
 312:8 313:1 315:8
 322:15
wants 23:2 33:10 35:5
 97:13 99:15 103:20
 115:18 127:16 154:6
 226:13 305:11 337:21
 350:12
war 27:10,12,13,14 28:6
war-gaming 245:1
war 227:15
wasn't 73:7 136:10
 141:17 277:21 343:10
watch 73:21 74:19
watching 75:1
watered 316:2
Waterloo 162:14
way 16:20 18:7 29:3
 36:14 45:1 62:2 63:19
 70:4,16,21,22 73:5
 75:22 76:17 78:9
 80:10 81:18,21 85:8
 88:5 91:8 101:18,22
 103:4 106:8,20 107:5
 107:21 108:18 114:6
 115:6 126:9 130:14
 130:16 138:5,16
 139:6 144:9 149:22

150:16 151:3,6
 157:11 178:17 182:1
 213:13 220:20 223:18
 225:5 231:12,15
 232:2 235:17 236:11
 236:13 242:20 249:8
 251:12 253:19 254:15
 258:1,13 267:7 268:7
 268:20 270:9,13,14
 271:18 281:3 282:11
 284:14 285:4 287:9
 287:13 310:11,11
 327:21 335:8 342:11
 350:10
ways 16:7 66:4 157:3
 192:14 286:22 321:14
 331:14 334:12
we'll 85:2 87:13 103:21
 127:5 159:17 179:17
 205:9 213:8 229:6,14
 267:6 273:19
we're 27:11 71:7 77:5
 87:6 89:19 95:18
 121:7 128:2 131:18
 133:18 134:5,13
 140:22 141:4,11
 153:19 155:21 156:10
 158:5 160:1 227:16
 230:21 235:16 242:12
 245:1 246:22 248:5
 248:12,16 254:3
 256:20 261:15 267:2
we've 6:3 26:22 27:2
 68:7 90:4 98:15 99:1
 119:19 193:10 236:3
 236:13 237:3 238:16
 242:6 246:2 255:5
 262:15
wealth 5:4
web 350:11
website 4:10,10,12,21
 6:9 9:4 226:17 342:17
 342:22 343:7,9,12
 349:22
week 60:16 149:1 181:4
 203:18
weeks 192:7
weigh 88:18 194:7
 242:4
weighed 237:8
weighing 131:18
weight 210:9
weird 106:13
Weiss 190:18 260:10
welcome 3:2 4:3 5:1,13
 5:16,22 35:16 44:18
 191:2 219:18 273:17
 275:20,21

well- 77:22 204:18
well-being 11:19 25:2
well-paid 174:13
well-settled 168:8
Wellington 162:14
went 87:16 114:22
 159:20 274:1 340:15
 352:7
weren't 21:22 111:14
 130:2 263:11 318:6
whim 199:12
who've 70:20
wholeheartedly 44:9
wholly 27:9
wide 207:21 224:22
William 1:18 3:6 8:4
willing 104:1
willingness 159:7
 276:1
win 255:22
window 241:12
windowless 183:5
wins 35:8
wipes 293:21
Wisconsin 246:13
wisdom 5:21 28:2
wish 66:10 135:13
 146:9 153:9 199:2
 206:13 212:13 218:5
 218:6
wishes 49:11 144:7
withheld 88:20 198:20
witness 40:14 46:22
 47:11,13 83:15 227:3
 245:7 338:5,8
witnesses 15:12 38:4
 45:20 46:19 47:3,7
 157:13 158:1,3,6,8
 163:22 338:7
woman 128:7
women 27:17 164:17
 174:16
won 104:10
wonder 21:21 112:8
 114:11 215:21 333:7
wondered 331:9
wondering 114:9
 158:12
woodshed 109:19
word 13:14 77:12
 121:20 135:2 137:18
 150:7 154:1 222:14
words 23:10 33:1 40:2
 66:1 90:1 156:2 178:9
 186:17 195:2 217:12
 221:16 249:7 264:9
 334:2,15 341:7
work 26:2 28:19 33:15

60:19 92:8 106:9
 135:17 137:4 148:22
 180:4 185:21 192:9
 222:15 223:3,19
 225:2,4 227:16
 237:21 240:5,6
 242:20 258:4 275:17
 278:17 303:7,22
 314:19 320:17 327:7
 349:14
worked 68:16 161:15
 161:18 183:7
working 26:15 58:11
 78:19 161:12,15
 193:6
works 104:3 127:18
 164:3 321:20
world 25:6 27:1,7,13,14
 28:6 74:16 118:9,11
 219:7 237:20 239:16
 263:16 271:2
worried 248:1
worry 102:11 174:8,17
 224:5 229:6
worse 68:12
worst 27:21
worth 27:4 74:21 83:6
 93:14 124:3,5,7
wouldn't 115:15,20
 122:19 129:16 216:18
 219:15 225:12 228:20
 235:9 256:3 277:14
 322:13 330:11 333:1
 337:13,16 345:4
 346:12 347:10
wrap 141:13
wrestle 285:3
writ 37:16 56:2 96:5,7
 96:20 117:1 140:9
 171:15 210:16 299:3
 332:2,19
write 272:11
writing 145:18 165:9
 224:3
writs 140:15 146:3
 210:19 284:7 296:12
written 9:2 18:20 37:12
 106:21 107:6,22
 145:13 175:19 227:6
 270:15 285:5 323:20
 336:14
wrong 105:17,22 113:2
 178:19 232:21 239:6
 239:10 261:14 265:1
 274:4 302:14 312:20
wrongly 178:18 245:16
 245:18
Wuterich 168:20

X

Y

yeah 228:11
year 6:12 10:8 52:16
 70:20 75:14 109:2,3
 188:13 194:17 283:4
 292:20 293:9 304:3,3
years 6:14 9:22 11:1,13
 20:15 24:2 26:20
 28:22 32:15 34:5 45:2
 45:3,5 47:18 63:14,21
 91:3 109:15 114:22
 170:2 180:8,8,13
 186:2 195:17 196:1
 236:14 237:15 243:16
 244:11 251:21 258:4
 260:5,7 267:19
 268:10,17 282:18
 314:16 315:13,16
 316:10 317:4
yes/no 47:10
yesterday 166:15
yield 75:15
young 60:4 267:20

Z

zealous 22:19 196:7
 252:6

0

1

1 256:1 289:17 290:22
1,000 232:8,11 272:14
1:04 159:21
10 40:3 55:22 256:1
10:32 87:16
10:42 87:17
100 63:15 74:21
1000 10:8
100866 146:7
1044(e) 40:3
11 10:1
11:52 159:20
1103 107:15 251:4
 270:7
1103A 30:3 32:2,13
 42:15 43:3 53:8 187:8
 188:19 189:3,11
 197:21 249:1,12,16
 249:17,18,21 250:10
 261:16 266:22 267:7
 268:13 290:5,10
 291:10,18 292:10,10
 292:15 293:6,16,19
 293:21 294:3,15

297:4 299:20 305:11
 318:17,22 321:10
 327:22 329:20
1103A(b)4(D) 207:16
1103A318 317:2
12-year 71:17
120 6:20 69:20 70:9,22
 161:16 173:16
129 188:10
134 59:13
137 69:6,22 70:15
14 7:3
143 52:14
15 6:14 9:22 11:1,13
 70:8 71:4 225:11
 255:7
15.4 56:11
16 283:9
16.2 56:15
160 3:10
179 3:11
18 188:7 321:1
18-year-old 70:16
191 3:11
1986 74:5 177:21
1995 169:12
1996 30:6
1997 169:12
1998 29:7 30:6 31:5
 52:15
1999 29:11

2

2 213:19 265:6 290:1
 291:3 295:16 297:12
2,000 231:19
2:48 274:2
20 170:1 243:16 244:11
 283:9
2000 169:7
2004 121:19 180:6
2005 249:20 261:7
 305:3
2007 36:9
2011 93:18,19
2012 6:21 161:15
2013 6:12 46:21 55:21
 161:16 166:13 167:18
 244:3,5
2014 6:14 37:6
2015 45:3 52:5,18 55:22
2016 1:7 7:3,4 8:20
 38:13,19 45:21 146:7
2017 194:17 302:19
 325:10
205 3:12
213 3:13
22-year- 60:4

22203 1:11
22nd 6:2 29:5
23 1:7
23.3f 182:20
248 93:17
25 3:6 283:5
2703 45:19 46:16
2704 46:21 48:7,14
276 3:15
289 3:16
2nd 22:1

3

3 185:13 203:2 265:11
 265:18 290:14 298:11
3:01 274:2
30 45:2 70:19
30.4 54:12
300 3:16
301 3:17
31-day 189:2
310 3:17
314 93:19
31st 21:20
323 3:18
327 3:19
35 3:6 283:5
352 3:21
36 319:9 320:12,22
3771 312:6

4

4 3:2
4:03 340:15,16
4:16 352:7
400 283:5
412 15:5 29:8 37:20
 38:12 39:10 40:4 51:5
 51:7,9 53:14 56:6
 85:13 87:6 88:3 89:13
 89:16 90:12,13,22
 91:8,12 92:9 94:16,17
 101:1,5 105:3 106:15
 194:11 195:8,15,17
 195:19 196:5,11
 201:11 208:13,20
 210:8 211:21 213:17
 215:1 235:19 242:15
 245:16,22 246:16,16
 246:20 250:18 264:13
 265:2 281:3,17
 284:13,21 337:14
413 38:12 89:13
44 3:7 317:21
450 63:15
47 186:14
478 186:14
48 52:14

5

5 3:3
50 10:16
500 47:22 231:21 283:5
513 15:5 29:11 37:22
 38:13 39:10 40:5 51:6
 52:1,6,17,19 53:4,14
 53:22 56:6 83:10
 84:16 85:13 87:5
 129:7 130:5 194:11
 195:8,14 196:18
 201:11 208:13,20
 210:8 211:22 213:17
 215:1 235:19 242:15
 246:8 250:19 253:5
 259:2 264:14 265:2
 270:14,16 281:3,17
 284:13 285:17 337:14
513e 246:10
514 38:2 39:10 40:5
 51:6 52:1 53:4,14,22
 56:6 85:14 130:5
 194:11 195:9,15
 196:16 201:11 208:13
 208:20 210:9 211:22
 213:17 215:1 235:19
 242:15 264:13 265:2
 284:13 337:14

537 296:17

54(e) 315:5

547 141:9 143:10
 194:17 195:6 211:6,8
 213:16 214:14,17
 264:7,18 276:22
 281:12 286:9 287:7
 289:20 296:1,13
 298:15,17 299:4,5,12
 299:18 302:9,13
 306:1 307:19 310:17
 310:22 311:3,13
 321:13 337:13,19
 338:12,17 340:4
 342:3

547's 203:1

55 109:2

57 3:8

58th 260:7

6

6 37:11 66:7
60 286:11 315:4
615 38:3 56:6 215:1
62nd 29:4
63 188:10
66 66:1 120:13 127:13
 127:13 186:2 215:15
 278:1 285:8 298:20
 314:9 315:9 325:11

66(f) 317:17 320:8

330:19

67 287:1 298:20 314:10
 315:10

6b 11:10 13:8,10,16

14:3 37:1,2,8,15

38:21 76:12 84:15

119:21,22 121:17

127:11 143:14 147:5

210:18 213:21,21

214:14,20,22 215:2

215:13 220:16 235:14

235:14,15 298:12

299:4,17 301:19

310:12 312:1 313:19

315:21 316:1,5,18

321:18 322:20 324:15

326:11 328:16 329:22

338:17,18 339:3,7

6b's 235:20 302:13

6b(4)(b) 126:17

6b(A)(4)(e) 170:18

6b(a)(6) 214:7

6b(a)2 176:16

6b(a)4(e) 223:5

6b(e) 55:22 331:22

6b(e)(1) 38:17

6b(e)4 176:6

7

70 93:17,19 172:19

211:9 247:13

70(e)3 170:20

703 168:22

8

8 38:19

801 163:4

806 55:22

832 214:22

875 1:10

9

9 3:5 100:20

9:06 1:11

9:07 4:2

90 112:2,10,18

901 315:3

902 315:3

903 315:3

90s 12:14

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In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 09-23-16

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