UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

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FRIDAY
OCTOBER 14, 2016

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The Panel met in the Bobby Junker Executive Conference Room, One Liberty Center, 1400 North Randolph Street, Arlington, Virginia, at 9:04 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman

Hon. Barbara Jones

Victor Stone

Tom Taylor

VADM(R) Patricia Tracey

WITNESSES:

Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute
Mr. Don Christensen, President, Protect Our Defenders
Mr. Ryan Guilds, Counsel, Arnold & Porter LLP
Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender
Ms. Ann Vallandingham, Senior Policy Advisor to the Director, Office for Victims of Crime, U.S. Department of Justice
Mr. Chris Johnson, Chief Appellate Defender for the State of New Hampshire (via telephone)

STAFF:

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

Mr. Dale Trexler, Chief of Staff

Ms. Julie Carson, Legislative Liaison & Staff Attorney

Ms. Nalini Gupta, Staff Attorney

Ms. Stayce Rozell, Senior Paralegal and Meeting Recorder

OTHER PARTICIPANTS:

Ms. Maria Fried, Designated Federal Officer (DFO)

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

Welcome and Introduction

Maria Fried 4

Elizabeth Holtzman. 5

Civilian Attorneys' Perspectives on Victims' Appellate Rights

Meg Garvin. 8

Don Christensen 23

Ryan Guilds 34

Jason Middleton 45

Ann Vallandingham 57

Chris Johnson 65

Panel Questions. 80

Adjourn. 174

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

9:04 a.m.

MS. FRIED: Good morning and welcome to the Judicial Proceedings Panel's 23rd public meeting. My name is Maria Fried. I'm the Designated Federal Official for the Panel.

The JPP's a congressionally-mandated advisory committee. Publicly available information is provided to the JPP and is posted on the website at www.jpp.whs.mil. Reports issued by the JPP are also posted on the website, as are other materials including transcripts and attachments to public meetings.

The Department has appointed the following distinguished Members to the Panel: The Honorable Elizabeth Holtzman, who serves as the Chair of the JPP; the Honorable Barbara S. Jones; Vice Admiral (Retired) Patricia Tracey; Professor Tom Taylor; Mr. Victor Stone. The Members' biographies are also available at the JPP website.

Please note that there's been a change

to the agenda. Originally, the JPP was going to listen to observations and information from Subcommittee Members who attended site visits at the request of the JPP. The Subcommittee is still finalizing its report and requested to postpone their presentation to a later date. The Chair and I have approved the requested change to the agenda. As a result, the JPP will conclude its public meeting at noon.

Madam Chair?

CHAIR HOLTZMAN: Thank you very much, Ms. Fried, and good morning everyone. I would like to welcome the participants and everyone in attendance today to the 23rd meeting of the Judicial Proceedings Panel. All five of the Panel Members are present here today. Today's meeting is being transcribed and the full written transcript will be posted on the JPP website.

The Judicial Proceedings Panel was created by the National Defense Authorization Act for Fiscal Year 2013, as amended by the National Defense Authorization Acts for Fiscal Years 2014

and 2015.

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

Today's session will address victims' appellate rights under the Uniform Code of Military Justice. This is the second of two meetings on this issue. The first meeting took place on September 23rd, 2016. At the September meeting the Panel heard perspectives from former appellate judges and current military appellate counsel regarding victims' appellate rights.

For this meeting the Panel is pleased to hear additional perspectives on victims' appellate rights from civilian public defenders and victims' rights organizations and practitioners. The presenters will be Ms. Meg Garvin, the Executive Director of the National Crime Victim Law Institute, and I might add

someone who helped the Response Panel greatly, which was the prior incarnation of the Judicial Proceedings Panel; Mr. Don Christensen, the President of Protect Our Defenders; Mr. Ryan Guilds, counsel at Arnold and Porter, LLP; Mr. Jason Middleton, a Supervising Deputy State Public Defender for the Appellate Division of the Colorado State Public Defenders; Ms. Ann Vallandingham, the Senior Policy Advisor to the Director of the Office for Criminal -- Victims of Crime at the U.S. Department of Justice; and Mr. Chris Johnson, the Chief Appellate Defender for the State of New Hampshire who will be joining us by phone.

Is he with us by phone, Dale?

MR. JOHNSON: Yes.

CHAIR HOLTZMAN: Okay. Great. Thanks for joining us today and we look forward to hearing from you and speaking with each of you.

Each public meeting of the Judicial Proceedings Panel includes time to receive input from the public. We received no requests for

public comment at today's meeting. We previously received a total of seven public submissions in the form of letters on victims' appellate rights. All written materials received and reviewed by Panel Members are available on the JPP's website at jpp.whs.mil.

Thanks very much for joining us today. We're ready to begin the meeting. Our presenter is Ms. Meg Garvin.

Ms. Garvin, thank you very much for being with us today and for all your past service to this cause.

MS. GARVIN: Thank you so much. Good morning, Chair Holtzman and Members. I'm very honored and pleased to be here. I'm glad that this issue has resulted in so much discussion and consideration by the Panel and the fact that there have been two hearings on it I understand gives -- give credence to how important this issue is. So I'm pleased to be a part of it.

By way of additional background I know that the Panel and the public has my bio. What I

want to emphasize in that I am a civilian lawyer. I have never practiced in military court. So what I can bring is my expertise in victims' rights litigation practice in the civilian world.

I have worked in state and federal courts. I have assisted on military cases, but have never been the primary lawyer in the military cases. My work in state and federal courts has been in both trial and appellate courts and I've been doing the work since 2003 directly representing victims in those courts as well as serving as either co-counsel or as *amicus* in those courts.

My other background is that I have consulted on the drafting of numerous victims' rights provisions in the civilian context including the Federal Crime Victims' Rights Act of 2004, upon which the NDAA's Article 6(b) rights were modeled.

I am happy to discuss any critical issue that's before this Panel. I've categorized my brief comments into two parts, however. The

first is the general role of victims during appellate moments and the second is notice to victims during the critical stages of appellate procedures that impact their rights.

By way of an umbrella comment, each of my ideas that I'm putting before the Panel fall under the rubric of procedural justice, and I believe that's the lens through which all of this discussion should be happening, specifically the notion of procedural justice, which historically has most often been a lens through which we look at defendants' rights.

It is the fundamental idea that the criminal justice system, in this situation, the military justice system, functions best when those directly impacted; and here both victims and defendants, have their voices meaningfully integrated throughout the entirety of the process and there's transparency of the process such that decision makers have full information of those impacted and those impacted perceive and understand the fairness and transparency of the

process. That's the notion of procedural justice and that's the lens through which all individual rights should be perceived in our system.

So to my first point, what is the actual role of a victim in appellate proceedings? This is actually a complex issue that cannot have a single answer and it encompasses numerous sub-parts. The sub-parts involved include what issues are reviewable, when are those reviewable, by what avenues, pursuant to what standard or standards, plural, of review, and by what authorities? Each of those questions needs to be addressed.

Various proposals have been put before the Panel and Congress, some of which include the idea of, quote, "real party in interest." I believe, however, that the focus should not be yet on the specific language, but instead understanding the goal of victims' rights. Why were the rights put in place in the NDAA? Why were the rights put in place in the Federal Crime Victims' Right Act and in their state parallels?

It was to include victim participation through the trial and appellate processes to increase procedural justice in our system. So therefore we have to return not to the specific language initially, but instead to that goal, participation, and that requires us returning to the fundamental idea of legal standing. The question is about legal standing.

Standing in its simplest form says the person who has an injury or a potential injury to a right that is caused by an actor and that injury is redressable in a proceeding, then the person can and must be heard before the court, any court that is engaging in analysis that is impacting that right and it must be heard before a decision is made.

This simple test has long been acknowledged to apply to privilege holders in the civilian context, and as Judge Baker readily noted in ***LRM v. Kastenberg***, it's also been present in the military system. Importantly, however, the notion of standing and in reading

the judge's testimony before this Panel previously, he acknowledged it's not limited to privilege holders. Anyone who meets a three-pronged test of standing has the right to be heard by the court who is about to impact that person's rights, whether that be a trial or appellate proceeding moment.

The principle of standing is fundamental to the operation of our system, and it has been that way since our founding. The idea comes from the fundamental principle that no one else in the system can articulate the position of the person who has an injury or imminent injury as the same manner as that person. Any assumed alignment of position not only misunderstands the notion of injury and rights, but in the context of victims' rights is actually misplaced.

The assumption that the victim aligns with this trial counsel or prosecution is fundamentally an error of thinking. There are times when there are momentary alignments, but

the notion that the right solely align is misplaced.

So the answer to both the who and the what of appellate proceedings is that when rights are at risk those who own the rights must be heard on them. It's that simple. That means filing pleadings, participating in hearings, if they are held, not demanding new hearings. So in the civilian system for crime victims this means being heard on rights found in provisions such as the CVRA, the MVRA, the TVPA and the state equivalents of those, as well as the privileges. And the MVRA14 is the Mandatory --

CHAIR HOLTZMAN: Excuse me. Could you just explain what those initials mean?

MS. GARVIN: I will. The CVRA is the Federal Crime Victims' Rights Act of 2004. The MBRA is the Mandatory Victims' Rights Act. The TVPA is the Trafficking Victims' Protection Act. Each of those victims have been found in the civilian system to have standing in trial and appellate proceedings, to be heard, to file

pleadings, to participate in oral arguments. And then there are state equivalents of most of those provisions. In addition, they have standing to be heard on their privileges.

So the military should similarly recognize that victims' standing exists whenever there's a right at stake. If one of their rights is going to be impacted, whether that be at the trial court level, whether it be via interlocutory appeal, pre-conviction, or whether it be post-conviction, if there is a right at stake, they have standing on it and should be heard by the decision maker pre-determination. Crafting any artificial list of what a person has standing on that is not the whole sum of all of their rights violates the fundamental principle of standing.

Regarding the how and when and by whom of appellate standing, while the law, civilian and military, has long recognized that standing is not synonymous with party status, what we have seen in the civilian world over 40 years of doing

this work; not me personally, I've only been doing it for 15, I'm very young --

(Laughter.)

MS. GARVIN: -- is that it's become very clear that we need explicit provision of standing. Arguably if I have a right, I should simply have standing and a remedy, right? That's based in *Marbury v. Madison*. I shouldn't have to spell it out. But what we've learned in the civilian jurisdictions in that spelling out that a person who is a victim of crime has standing; i.e., either actually saying they have standing or saying the words "the victim the right to assert these rights in the trial and appellate courts," that's been what's been needed.

So we have jurisdictions across the country that -- in the civilian side that have just spelled it out. Victims have standing. They have standing in the trial court. They have standing then to seek some sort of appellate device. We've seen numerous iterations of what those devices look like crafted from mandatory

***writs of mandamus*, subject to ordinary standards of review. That's the Federal Crime Victims' Rights Act, the CVRA. It's explicit. To expedited mandatory appeal to the highest court of a jurisdiction. That's Oregon. Oregon has expedited mandatory review of victims' rights to the highest court of the jurisdiction. To special action review, which is the Arizona version. Arizona has combined all of its *writs* into a single *writ* called special action. Victims can take by explicit direction special action review or participate in appellate proceedings that are brought by others.**

Notably not all courts have required this explicit provision. We have -- and I know that counsel from New Hampshire's public defender is on the line. Recently New Hampshire's Supreme Court acknowledged that intervention by a victim on appeal was a permissible device in order for the victim to participate in that supreme court's determination of the scope of rape shield protections because it was the victim herself and

her family; she's deceased, who had privacy interests continuing on.

So fundamentally ensuring meaningful rights and abiding by procedural justice means that there has to be an opportunity for review pretrial, which requires interlocutory review devices as well as post-conviction, which requires notice issues, which I'll speak about in a minute.

While civilian jurisdictions have crafted devices that direct appellate review of victim issues to certain courts, when carefully analyzed all of the civilian attempts to do this have been focused on uniformity, meaning that similarly situated victims are treated similarly throughout the entirety of the appellate process. So even those jurisdictions that say misdemeanors go to a court of appeals versus violations of victims' rights versus to the supreme court, all victims are similarly situated.

For the military to achieve this, which I believe they need to, that means there

has to be explicit direction crafted that victims have standing to seek appellate review that reaches all levels of military appellate process, not just the Service level, but all the way through CAAF.

Before moving onto notice, I have one last point before notice, and that is, I want to pause on the idea of *amicus* participation. In reading the transcript of the prior proceedings in some of the submissions many people have posited that hearing from victims as *amicus* curiae is sufficient to allow victim voice on appeal. That proposition is fundamentally flawed in my opinion for at least two reasons.

First, it misunderstands the nature and concepts of *amicus* and individual rights. *"Amicus curiae"* by translation is "friend of the court." The role of an *amicus*, having served as *amicus* numerous times in my career, is to help the court in its adjudicative process. It is usually providing policy or analysis or a proposed test, a proposed rule of law. That's

the role of *amicus*.

The nature of individual rights, which is what we're actually speaking about here, is that a person with a right has very much at stake and will be directly and personally impacted by the outcome. Those are two fundamentally different voices that a court would be hearing from.

The second reason the *amicus* is different is that it is just lesser in the system. Courts can choose to listen to it. They can choose to ignore it. They can give fewer page numbers, page limits to it. They can give oral argument or not give oral argument. Simply put, *amicus* is an inadequate proxy for a victim's voice. They're not the same.

To my second point; and I'll be brief here, is notice to victims of both fact and content of issues moving through appellate review when it's not initiated by the victim. Returning to my umbrella idea of procedural justice, what's quite clear in both the theory and practice of

procedural justice is that it requires clear, transparent and predictable procedure. It cannot be that you get some access in one court, some access in another, or that there's cult of personality. When you have friendships, you get access to documents and information and other times you don't.

This is certainly something that the civilian world has struggled with and continues to struggle with. However, in the civilian system, state and federal, there are publicly accessible docketing systems that generally allow for access, not only to the fact of a filing, but to the non-confidential content of that filing. I'm speaking of things like PACER.

The question of what must be noticed to and served on a victim simply goes back to my very first point: When there is a right at stake and a person would have standing to speak on that, they have to have notice that that right is implicated in a proceeding such that they could then defend their right. So in appeal anything

upon which a victim would have standing to be heard; i.e., any right that might be put at risk, should be noticed to them and served upon them.

Failure to do this means not only that the person with a direct and personal interest in the outcome of a particular decision would be left in the dark, but the decision maker isn't going to hear from all the relevant voices and the decision will be lesser. It will be a weaker decision.

In prior hearings much discussion has been made about the burden of notice and service, and I understand that, but the policy here should be first and foremost to acknowledge the principle that when someone has a right, they have standing to speak on it and they have to know when something is going to happen.

I will close there. I look forward to questions at the end of the Panel and I thank you for allowing me time to speak today.

CHAIR HOLTZMAN: Thank you very much, Ms. Garvin.

We'll next here -- our next presenter will be Mr. Don Christensen, who is the President of Protect our Defenders.

Mr. Christensen, thank you for --

MR. CHRISTENSEN: Thank you.

CHAIR HOLTZMAN: -- for coming.

MR. CHRISTENSEN: Madam Chairwoman and Members of the Panel, thank you for providing me the opportunity to address you today on this important subject. Let me first say that I agree with everything that Meg just said, and said it better than I ever could.

I am the President of Protect our Defenders, a human rights organization dedicated to advocating for victims. That gives me the opportunity -- victims of military sexual assault. That gives me the opportunity to interact with victims constantly and get feedback from them real world how things are working.

Secondly, I was a member of the United States Air Force for over 23 years, all of that in the JAG Corps. I served as a defense counsel

twice, as a prosecutor numerous times, as an appellate counsel, as a military judge, and was selected to be an appellate military judge when I decided to retire. So I do have experience in this.

I'll be happy to address the four areas that you have expressed an interest in during questions, but I first believe it is necessary to see how the reforms passed by Congress and enacted by the President are working in the court-martial and appellate setting and to what extent the military justice system is failing victims in the appellate process.

We still have too many trial and appellate judges who are ignoring the reforms to Military Rule of Evidence 513 mandated by Congress and the President. Cases such as ***Lippert and EV v. Robinson*** demonstrate that all too often victims face insurmountable hurdles in protecting their communications with therapists. We see that the appellate rights in Article 6(b) are insufficient to enforce the 513 privilege and

other privileges and to develop an area of law that has been long neglected by the appellate courts.

The *writ of mandamus* presents too great of a burden for victims to achieve meaningful review and relief on appeal. As this Panel knows, a *writ* is a drastic and extraordinary remedy reserved for really extraordinary causes. In order to prevail a victim must prove that the right to an issuance of a *writ* is clear and indisputable. In other words, the bar is set extraordinarily high for a victim to get appellate relief. This high standard is compounded by the fact there is a dearth of 513 case law, meaning that when it comes to a 513 issue, there is almost no issue that could be brought before the court that is clear or indisputable making relief virtually impossible.

A recent case of *EV v. Robinson* serves as a stark example of this reality. *EV* is a civilian married to an Air Force member in

Okinawa. She reported being sexually assaulted by a Marine and in the ensuing court-martial the military judge ordered portions of her therapy records disclosed to the accused. The victim asked the judge to reconsider his ruling and provided additional evidence on the issue. However, the judge refused a request to reconsider his prior ruling stating that Rule for Court-Martial 905 limited requests for reconsideration to parties.

To the extent; and this is my first recommendation, the judges are ruling this way, I'd urge this Panel to recommend that 905(f) be amended to include victims or witnesses with an enforceable right as someone who could ask for reconsideration of a judge's ruling.

At this point the SVC appealed to the CCA, the Navy-Marine Corps CCA. The CCA rejected the appeal the same day it was received and in a one-paragraph decision the court found EV failed to show the right to a *writ* was either clear or indisputable. Again, it's an extremely burden.

EV then appealed to CAAF, which found, as I'm sure you're aware, that they did not have jurisdiction based on the wording of 6(b).

There were two interesting things to note about the Navy's arguments before CAAF: First, the Navy government counsel were now representing the military judge, the trial judge, taking a position completely contrary to the trial counsel's position at trial.

Second, the Navy, in an effort to convince CAAF it did not have jurisdiction, argued if EV was not satisfied with the ruling of the CCA, quote, "she also has access to Article 3 courts," end quote. That will become important.

Consistent with the Navy's decision -- or concession that Article 3 courts could review the judge's ruling, EV filed for an injunction in the D.C. District Court and the case was docketed before Judge John D. Bates. However, now the Navy through the DOJ switched positions and opposed EV's attempt to have the merits of her case heard in an Article 3 court in direct

contrast to their argument before CAAF. Instead, the Navy opposed EV by challenging venue and arguing the court should abstain from exercising jurisdiction using a line of cases involving military members' challenges to court-martial or administrative procedures adverse to the military member.

EV's case was one of a first impression of a civilian arguing for relief from a military judge's ruling in violation of her privilege. Now, I would point out this is a privilege that's recognized as a constitutional right by the Supreme Court and is a procedural right in the MRE 513.

Of interest, the Navy made no attempt to defend the ruling of the military judge, a fact noticed by Judge Bates. During oral argument Judge Bates asked the government if it wished to be heard on the merits, but the government declined the invitation to defend the military judge's ruling.

As a result of the government's demur,

Judge Bates made the following comments: quote, "Because you know that on the merits it seems to me EV has some persuasive arguments with respect to Judge Robinson's rulings, I'll simply note that to the extent that Judge Robinson referred to the constitutional exception, that doesn't seem right when Congress said get rid of it and the President then did get rid of it." And to the extent that it relies on the crime fraud exception, that's pretty attenuated argument that he has." He concluded, "It seems to me the ruling has some holes," end quote.

Despite his concerns on Judge Robinson's rulings, Judge Bates found D.C. was not the proper venue and issued an eight-page published opinion. Judge Bates noted the problems victims have faced in the military justice system with respect to 513 including Robinson's failure to properly follow the recently enacted standards before a judge even reviews records *in camera*.

Judge Bates further called Robinson's

rulings for disclosing the records, quote, "questionable," end quote, and concluded his opinion by stating, quote, "Transfer of this case should not be mistaken for agreement with Judge Robinson's ruling. Serious challenge to the propriety of these rulings have been presented," end quote.

The fact that Judge Bates took the additional step to address the merits of EV's case is telling. Judge Bates simply could have limited his opinion to the issue of venue. By going into the historical barriers that victims face in general and specifically the serious challenges to Judge Robinson's rulings Judge Bates was sending a strong message to the Navy. Unfortunately, the Navy refused to listen to Judge Bates.

After the case was transferred to the Eastern District of California, the Navy through the DOJ continued the fight to deny EV a chance to have the merits of her case heard. For a second time the Navy made no attempt to defend

the military judge's ruling. Instead, in direct contradiction to its position before CAAF that EV had access to an Article 3 court, the Navy now argued for the first time the very course of conduct they championed before CAAF was barred by sovereign immunity.

Unfortunately, despite no effort to refute the highly critical findings of Judge Bates, the Navy was able to successfully slam the door on a victim it knows full well has been wronged.

What are the lessons of EV? First, all too often judges are refusing to follow the law as written. There is a simple refusal to acknowledge 513 as a legitimate privilege rather than a speed bump to disclosure.

Second, the *writ of mandamus* makes appeals of erroneous judicial rulings nearly impossible to successfully appeal.

Third, the lack of access to CAAF or Article 3 courts serves as a barrier to meaningful relief and inhibits development of

law. Without the court's guidance in 513 trial judges will continue to review and release records rather than risk being overturned on appeal if there's a conviction. This practice results in the privilege all too often being pierced out of fear of reversal rather than legal necessity.

I encourage this Panel to recommend five areas of reform: First, give victims and witnesses; for example, 513 applies to all witnesses, not just victims, the right of direct appeal to the CCAs with a discretionary appeal to CAAF.

Two, after appeals are exhausted, give victims and witnesses the right to review an Article 3 court with an expressed waiver of sovereign immunity for the purpose of such review.

Three, make it clear that military judges should not be represented by the government at a -- appellate attorneys. Let me say it again. Make it clear that military judges

should not be represented by government appellate attorneys. Instead, the court should follow the practice of ***LRM v. Kastenberg*** and have the Judge Advocate Generals appoint a counsel not currently serving as a government appellate counsel. It makes no sense that on appeal the government is taking a position adverse to what the trial counsel took at trial.

Four, establish tenure for both trial and appellate judges. I concur with Judge James Baker's testimony before this Panel concerning tenure. It is time to end the practice of revolving door judicial assignments. The development of law is central to protect the rights of those accused of crimes, and victims as well as the interest of society is too important to have judges moving in and out of the position every year or two.

And finally, five. A case argued just this week before CAAF demonstrates the need to amend 513 to make it clear that privilege applies to the communications of the therapist to the

patient as well as the therapist's diagnosis. It became very clear that CAAF has concerns about the way 513 is written and do not believe that the diagnosis of the therapist based upon the communication of the victim is protected by 513. As it is written right now, it says the communications made by the patient to the therapist are protected, but is silent on the communications from the therapist to the patient and the diagnosis of the therapist.

I thank you for the time and I look forward to answering questions you may have on the appellate process and your four areas of concerns.

CHAIR HOLTZMAN: Thank you very much, Mr. Christensen.

Our next presenter will be Mr. Ryan Guilds, counsel at Arnold & Porter.

Mr. Guilds, thank you for your presentation here.

MR. GUILDS: Thank you, Madam Chair and Members of the Panel. Thank you for the

opportunity to appear today. As Madam Chair mentioned, my name is Ryan Guilds. I'm a civilian attorney in the white collar criminal practice group of Arnold & Porter.

A few years ago I developed and currently supervise a pro bono initiative that trains and supports volunteer lawyers representing sexual assault survivors in civilian and military criminal proceedings. The initiative has counseled dozens of crime victims, sexual assault survivors in both civilian and military criminal proceedings in connection with the prosecution of their rapes.

In addition, I am the current board chair of the Network for Victim Recovery of D.C. NVRDC is one of the largest direct service providers of legal counsel in the country. It's one of the -- its mission is to respond in part to all adult reporters of crime or sexual assault in the District and to provide comprehensive holistic services to all of those in the adult community here in the District who need our

services.

I had the privilege of appearing before this Panel in 2014 in connection with your hearings on 412 and 513 and commend the excellent work of the Panel and your staff as you continue to focus on the important issues affecting our military justice system and sexual assault survivors.

I particularly appreciate the opportunity to appear in connection with your consideration of appellate issues affecting sexual assault survivors and I hope that my experiences in both the civilian and military courts will be beneficial.

I'll start first with the question of notice to victims, and I'll say what any good crime victims' rights lawyer would tell you and probably what Meg would echo, I hope, and certainly what she has -- I've heard her say in the past, and that is that it is critical for victims of sexual assault to receive timely and comprehensive notice of all appellate

developments. A crime victims' substantive right to be informed about court developments is ubiquitous in civilian jurisdictions across the country.

For example, the Federal Crime Victims' Rights Act mandates that victims receive notice of all public court proceedings. Neither the CVRA nor the "Attorney General Guidelines for Victim and Witness Assistance" differentiate between trial and appellate proceedings and notice is provided in both circumstances.

Practically, notice of appellate developments is often provided to federal victims through the Victim Notification System, nor VNS, which is employed by the federal government to communicate with victims and assisted in meeting notice obligations under the CVRA.

In some cases courts have taken proactive steps themselves to provide notice to victims as part of the court's obligation under the CVRA to ensure that all crime victims are afforded their rights under the Act.

In addition, for cases in which a private or public interest lawyer has represented a victim at trial, it is my experience that victims' counsel will monitor the matter on appeal and provide information to their clients throughout the appellate process.

But to be effective, notice must be timely, substantive and comprehensive. Crime victims have a concrete invested interest in understanding what is happening in the appeals of their assailant's conviction. For this reason notice should not be limited to developments that maybe have been interpreted by the court or the government as directly impacting sexual assault victim's substantive rights. For example, 412, 513.

In my experience everything matters to rape survivors when it comes to the details of their attacker's criminal prosecution. For this reason empowering victims starts and ends with free and unfettered access to information about the criminal process. Issues decided on appeal

could potentially result in the release or retrial of the convicted assailant, outcomes that obviously directly impact the victim. Thus, any system that seeks to respect the dignity of survivors and give them faith in the process should include comprehensive and timely notice of appellate developments.

Notice by itself is not enough, however. Information without understanding does nothing to fulfill the obligation we have to respect and support survivors in the criminal justice process. For this reason the best systems of appellate notice include the provision of victim legal counsel to explain and if necessary enforce the rights of victims on appeal. In the cases that I have supported and in those of NVRDC, for example, we monitor the matter on appeal and provide counsel throughout the criminal appeals process.

Where victims' rights are directly implicated victims must also have the opportunity to be heard. The Federal CVRA provides victims

with a concrete interlocutory process to hear their grievances in the form of *mandamus* relief. Victims have a right to seek *mandamus* relief for all nine of the substantive rights guaranteed to crime victims under the CVRA. *Mandamus* relief requires action by a single judge or panel within 72 hours absent party agreement.

Significantly, federal appellate courts apply ordinary standards of appellate review in deciding issues under the CVRA, and if the court of appeals denies the relief, the reasons for the denial must be clearly stated on the record in a written opinion.

The current interlocutory relief provided to sexual assault survivors in meeting criminal proceedings does not adequately protect or empower crime victims. Recent changes expanding the interlocutory process to all Article 6(b) rights is a positive development, but the *mandamus* process is deeply flawed. Because of the discretionary nature of *mandamus* relief and the tilted review process in such

proceedings that Don did a great job of explaining, victims are not getting their grievances fully and fairly heard by military criminal branch courts. The lack of a mandatory review deadline makes the current *mandamus* process particularly ineffective when the issue at stake occurs during the court-martial proceedings where time is of the essence.

The problems with the current situation are made worse by the fact that the branch criminal courts are not required to issue substantive opinions when they deny relief, something federal appellate courts must issue. The silence that follows a denial only serves to undermine victims' trust and respect in the military justice system.

Compounding these matters, as Don mentioned, the Court of Appeals for the Armed Forces' recent decision holding that it does not have authority to hear victim *mandamus* petitions prevents civilian oversight and undermines the development of a consistent and well-established

jurisprudence in this area.

Beyond the interlocutory process this Panel has right identified the potential need for victim participation in the direct appeal process as an issue meriting analysis. In federal civilian courts prosecutors are empowered to assert victims' rights as part of the direct appeal process, but victims do not have a right to appeal outside of the *mandamus* procedure. Instead, when victims' rights are directly affected by ongoing appellate proceedings; standing, I would imagine, is what we're talking about, victims typically move to formally intervene.

While intervention is not always granted, it has been granted by some federal courts, particularly when the right asserted is a privilege or other privacy interest directly implicating the victims' rights. Although I would add, to Meg's point, that when you have standing, you have standing and it shouldn't be limited to particular and defined rights.

On the question of *amicus*, an *amicus* brief, even if accepted by the court, is not adequate to protect a victim when her rights are directly implicated. Nothing in the rules requires a military court to accept or even consider *amicus* views and *amicus* status does not give the victim any real substantive rights or meaningful skin the game. It is the equivalent of holding up a sign outside of a boxing ring hoping someone will notice while two fighters fight over the box of private therapy records sitting in the room.

Finally, I would note that some previous presenters in this Panel's prior session expressed concern that allowing a victim to participate in the appellate proceedings would erode a defendant's constitutional protections and constitute an unfair two on one situation. Candidly, I hear this every time I make an argument on behalf of a victim in any proceeding, whether it's at trial or at the appellate level.

These concerns are misplaced -- and

I'm a defense attorney. These concerns are misplaced and fail to accept the fundamental truth behind victims' rights and the victims' rights movement generally, namely that victims have distinct and personal rights that cannot be fully protected or vindicated by the government.

Participation of a victim in an appellate court proceeding relating directly to the rights under Article 6(b) does not, in my view, implicate any real due process concerns for the defendant, nor does it result in an unfair or unbalanced ganging up on the criminal defendant. Where a victims' right are directly implicated, the victim has a right be heard, and that right does not evaporate simply because the matter is now in a new procedural posture.

In closing, I commend this Panel and the military victim legal counsel on their important efforts on behalf of survivors. The branch SVCs represent some of the largest victims' rights organizations in the world. Their work has the potential to not just improve

the experience of sexual assault survivors in the military, but across the nation. They and you are in many ways the tip of the spear in the fight to empower and give voice to the sexual assault survivors in this country.

And I thank you for the opportunity to appear before you today and welcome any questions you might have.

CHAIR HOLTZMAN: Thank you very much, Mr. Guilds, for your testimony, and I apologize for mispronouncing your name.

MR. GUILDS: That's okay. Everyone does, madam.

CHAIR HOLTZMAN: Mr. Middleton, Jason Middleton will be our next presenter. He's a Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender.

Thank you very much, Mr. Middleton, for traveling here to help us understand this issue.

MR. MIDDLETON: Thank you, Madam Chair

and Members of the Panel.

Just briefly; I know the Panel has my biography, but I practiced civilian -- and let me know if you can't hear me -- I practiced -- I'm a civilian attorney. I was in trial practice from '93 to 2000. And then since 2000 I've primarily done appellate work. I'm currently a supervisor in the Appellate Division of the Public Defender's Office. We're a statewide organization, and we handle essentially all felony indigent appeals, direct appeals for the State of Colorado.

I have no military experience and I don't represent any victims, so my understanding is my presence here is largely informational for this Panel regarding what we do in Colorado on these issues and some of my perspectives related to that.

So the issues, as I understand them, regard notice of appellate proceedings, victim privacy during review of *in camera* and privileged materials and victims' standing on appeal.

I do need to give the disclaimer that these opinions are my own and not representative of the Colorado State Public Defender's Office.

Briefly for context I wanted to provide an overview of what we have in Colorado. We had a Constitutional Victim Rights Amendment enacted in 1993. After that was enacted, our General Assembly enacted enabling legislation to give effect to those rights. The enabling legislation sets forth a number of critical stages at which victims have varying rights. Some just provide the right to notice. Others the right to notice and be present. And then there are some that provide the right to notice, to be present and to be heard.

The ones that have a right to be heard generally deal with setting of bail, modification of bail, entry of plea, sentencing, any re-sentencing or modification of the sentence, any modification of no contact orders that are in existence in relation to the criminal proceedings, and also subpoenas regarding any

privileged material of the victim.

Regarding the notice provision, our Statute is fairly simple and it states specifically, "If a person convicted of a crime against a victim, seeks appellate review or attacks the conviction or sentence, the District Attorney or the Office of the Attorney General, whichever is appropriate, shall inform the victim of the status of the case and of the decision of the court."

That's not very specific. It's rather broad. My understanding of how it works in practice is that either the Attorney General or the District Attorney is usually in contact with the victim by either phone or mail and generally keeps the victim advised as much as the victim would like to be advised. I know frequently when we have oral arguments that victims and victim family members show up for those arguments and observe.

With respect to privileged materials, in Colorado essentially on appeal we only see

what the parties below us see. So if a trial court conducts an in camera review of privileged materials and discloses some of those materials to the parties, but keeps some of them under seal and does not disclose those, then I will not as appellate counsel see those materials. They will be sent out to the appellate court and I have the ability to ask the appellate court to perform an in camera review of those materials to determine whether they should have been disclosed by the trial court.

I have a few concerns with that procedure as an advocate, one of which the quality of review I think sometimes depends on the experience and background of the judges conducting the review.

The other is that the court is usually not as familiar with the record and potential issues to which the records might relate as an advocate is and they're viewing it oftentimes somewhat in the abstract, which can make it difficult. Some things are I think obvious to

anyone who's practicing. Other things may not be so obvious and the concern would be that the court might miss something that an advocate would be able to point out.

I will note that our court of appeals has said in one opinion that they would like us to specify as much as possible what we're looking for because if the court understands why information is sought, it can review the record with a more discerning eye and better determine whether disclosure is necessary. The problem with that is we have no idea what's in there, so it's hard for us to tell the court what to look for to help them out when we don't have any idea what may be in those sealed records.

Another thing that I would point out; these are not concerns, they're just for the Panel to consider in relation to this type of approach, is that our courts have noted that the in camera reviews can be time-consuming and difficult. You're really sort of shifting resources from defense counsel maybe to the

court. And I don't know, but I would assume that in many cases where defense counsel reviews the records they may not raise any issues related to those records if there's nothing in the records if there's nothing in the records that they believe warrants an appellate briefing.

When we don't see the records, we usually just ask the court to perform the in camera review because we don't know what's there and we can't make a determination whether there is a legitimate appellate issue. So we're essentially forcing the court to do these reviews in situations where we, if we are reviewing, might say there's nothing there; I'm not going to raise that issue on appeal. That's not a concern. That's just for the Panel's consideration in relation to this.

Understanding that this Panel is attempting to balance victim privacy interests with due process concerns, again as an advocate I believe that allowing the defense counsel to view the materials and either assist the court in

pointing out what materials should have been disclosed or decide not to raise the issue better protects the defendant's due process rights.

Having said that, I can't say that we have had or noticed any problems with our current procedure essentially because we don't know if things that aren't being disclosed should have been disclosed, but I can't identify any problems with what we've been experiencing in Colorado.

I would note that those procedures do not apply to materials under our Rape Shield Statute. Under the Rape Shield Statute we have a very similar procedure to what I understand MRE 412, and the materials that a court does not rule are admissible are then sealed. They come up on appeal. Since the parties below had access to those materials and the court relied upon them in the ruling, we get access to those on appeal for making any relevant arguments. Sometimes we have to request the court of appeals to open those sealed documents to us, but if we do, they will give those to us so that we can make any

appropriate legal arguments.

With respect to direct appeal, we do not really provide any rights to victims in Colorado regarding direct appeal. We do with respect to the privilege issue. Victims or privilege holders can seek essentially an interlocutory appeal, what's called an original proceeding, in our supreme court to try and prevent disclosure of those records in the first place.

Our supreme court is fairly protective of victims and disclosures and our standards for an original proceeding in the supreme court are essentially the supreme court exercising its discretion to hear the case. So there's not any huge legal hurdle for them, but it is discretionary with the supreme court. So they do not have to take it. More often than not they do.

But with respect to direct appeal our supreme court has held that our Victim Rights Amendment does not confer any legal standing on victims, and our supreme court has also held that

third-party intervention in criminal cases is not appropriate given the public prosecution model. And so based on those we do not really have any direct appeal rights related to victims.

When I was contacted about speaking on this topic, I did sort of an informal poll of our office. We have approximately 45 lawyers and I wanted to see if anyone who -- some of which have been in the office for 20-plus years -- if anyone had ever had a situation where a victim had attempted to intervene on direct appeal. And there was one attempt that I am aware of where the victim had an ongoing civil suit, wanted to be served in the criminal proceedings and participate in those as well. Based upon our supreme court precedence in no third-party intervention the court of appeals denied that motion.

I have some concerns regarding victim participation in the direct appeal, one of which is the one already identified by Mr. Guilds, which is the aspect of sort of doubling up or

tripling up or quadrupling, depending on how many victims are involved and what the issues are, and the impact that has on appellate defense counsel's time and resources in responding to multiple briefs and victims on direct appeal in addition to the prosecution.

I think it somewhat diverts the attention on direct appeal, which at that point the issue is the lawfulness of the conviction and the sentence. And it's based upon the existing record and the law. And essentially everything that anyone needs to know is already there for the appellate courts to decide the case. So I think that there can be a danger of diverting attention. I think it would depend on how it's implemented in part.

Another concern I have is that I think it could chill defendants from raising particular issues on appeal. If faced with the prospect of if I do the appeal one way, it's me versus the prosecution. If I do it another way, it's me versus the prosecution plus one, two or three

different victims. So again, I think implementation would be a big part of it. I do think it could have an negative impact on defendant's due process rights. And those would be my concerns.

So that is essentially how Colorado works. Those are my perspectives on some of the issues before this court. I hope it was helpful and I look forward to answering any questions. And thank you for having me.

CHAIR HOLTZMAN: Well, thank you very much. We're not a court. Probably not even not yet.

(Laughter.)

CHAIR HOLTZMAN: Probably not never. Not ever. But thank you very much for your presentation.

Our next presenter will be Ms. Ann Vallandingham, who's the Senior Policy Advisor to the Director Office for Victims of Crime, U.S. Department of Justice.

Thank you very much and welcome.

Thank you for coming.

MS. VALLANDINGHAM: Thank you. Good morning, Madam Chair and Members of the Panel. Thank you for the opportunity to speak with you today on this important issue.

My name is Ann Vallandingham and I am the Senior Policy Advisor to the Director for the Office for Victims of Crime within the Office of Justice Programs for the Department of Justice. I have been with the Office for Victims of Crime since February 2015.

OVC works to enhance the nation's capacity to assist crime victims and to provide leadership in changing attitudes, policies and practices to promote justice and healing for all victims. The office administers the Crime Victims Fund which supports programs and services that focus on helping victims in the aftermath of crime and continuing to support them as they rebuild their lives.

Prior to joining OVC I served as a counsel for the majority Staff of the Senate

Veterans Affairs Committee, and as a senior policy advisor for Senator Jim Webb. As way of further background I served nearly 12 years on active duty as a judge advocate in the U.S. Navy. Subsequently, in 2012 I joined the Navy Reserves and currently serve as a commander with the Naval Reserve Unit at the Naval War College in Newport, Rhode Island.

My initial tour as a judge advocate nearly 17 years ago was a prosecutor with the Trial Services Office in Pensacola, Florida. I prosecuted a myriad of cases including child abuse, sexual assault, domestic violence and child pornography.

During my military career I have also served on board the USS Constellation as a staff judge advocate for Naval Special Warfare Group 4, as the officer in charge for the Naval Justice School Detachment located in San Diego, California, and as a DOD congressional fellow for Senator John Warner.

My deployments, including serving as

a staff Judge Advocate with Special Operations Forces in Djibouti and in the Philippines and then serving for one year as the staff Judge Advocate for the Joint Forces Special Operations Component Command in Iraq.

Now I would like to discuss the Crime Victims' Rights Act, the CVRA. The CVRA establishes the rights of crime victims in federal criminal proceedings and provides mechanisms for victims to enforce those rights.

The CVRA has had a tremendous impact on the Department of Justice and in turn on victims of federal crime. The rights provided by the CVRA are guaranteed from the time that criminal proceedings are initiated and cease to be available if all charges are dismissed either voluntarily or on the merits, or if the government declines to bring formal charges after the filing of a complaint. Victims are taking part in cases by attending court proceedings, exercising their right to be heard and receiving notifications of public court proceedings.

The Department of Justice's automated Victim Notification System, VNS, was implemented in late 2001. The Executive Office for U.S. Attorneys, Office for Legal and Victim Programs, manages the VNS Program. For victims of federal crimes the VNS provides an essential repository for the collection of victim contact information. The contact information maintained in the system is used to provide notifications to the victims of the status of a case as it proceeds through the criminal justice system.

Information is provided to victims by system-generated letters, email, a toll-free automated call center and a secure Internet site. Victims can also use the VNS toll-free call center or the VNS Internet site to update their contact information or elect to discontinue receiving notifications.

Victim information is entered in VNS by the investigative federal agencies that participate in the VNS program. The majority of the victim information is provided by the Federal

Bureau of Investigations and the U.S. Postal Inspection Service directly from their respective case management systems. In addition to FBI and USPIS the Bureau of Alcohol, Tobacco and Firearms and Explosives and the Department of Homeland Security, Immigration Customs Enforcement also participate in the VNS Program.

When an investigative agency participates in the VNS Program, the system provides information about the existence of the investigative case. For example, a notification would indicate a case is under investigation or if a case is declined for prosecution.

In Fiscal Year 2016 approximately 440,000 victims were entered in VNS. This system currently has approximately 3.8 million registrants who have elected to receive VNS notifications. Once criminal charges are filed and made available to the public, the U.S. Attorney's Offices will provide notifications. Notifications from the U.S. Attorney's Offices include information about the criminal charges,

all public court hearings, the disposition of the charges and sentencing information.

Regarding appeals, VNS provides notice of direct appeal from the criminal case, the date of oral arguments and outcome of the direct appeal. Also post-trial the Federal Bureau of Prisons will use the VNS to provide custody status notifications to victims for convicted defendants sentenced to the care of the U.S. Attorney General.

The majority of the notification events, about 80 percent, involve the U.S. Attorney's Offices due to the significant number of public court hearings held during a criminal case. For Fiscal Year 2016 the system generated over 15 million notification events.

Also under the "Attorney General Guidelines for Victim and Witness Assistance" published in 2011, victim service professionals and the various investigative agencies and litigating components of DOJ provide numerous services to victims of federal crimes. The

services may include such things as counseling and social service referrals, assistance with creditors, providing information about victim impact statements and assistance with securing compensation.

Additionally, the CVRA established mechanisms to enforce crime victims' rights. Pursuant to the Act, DOJ established a process for receiving and investigating victim-related complaints against DOJ employees who violate or fail to comply with the rights set forth in the CVRA. The Office of the Victims Rights Ombudsman --

CHAIR HOLTZMAN: Excuse me. Can we focus on the appellate issues?

MS. VALLANDINGHAM: Oh, yes. Absolutely.

CHAIR HOLTZMAN: I'd appreciate that, because that's really what the point of this hearing is. Thank you.

MS. VALLANDINGHAM: Okay. Then I will reiterate a bit of what Ryan said, just I'll make

it brief. But basically that the victims, under the CVRA, have the right to file a *writ* of *mandamus*, and that must be ruled within 72 hours, as you are already aware.

But in addition, on a direct appeal the government may assert as error any denial of the victim's rights in the proceeding. A government attorney seeking to file a petition or a direct appeal must obtain written authorization from the Solicitor General in addition to any other approvals required by that attorney's office or section.

Panel Members, that concludes my remarks and my introduction and I thank you very much again for this opportunity to be with you today.

CHAIR HOLTZMAN: Thank you very much for sharing that information with us and coming here to testify, to make a presentation.

Our next presenter will be Mr. Chris Johnson, Chief Appellate Defender for the State of New Hampshire via telephone.

Mr. Johnson, can you hear us? Have you heard the prior testimony as well?

MR. JOHNSON: Yes, Madam Chairman, I have. Thank you.

CHAIR HOLTZMAN: Thank you very much. Well, you're welcome to proceed. Thank you for being willing to talk to us via phone.

MR. JOHNSON: Well, thank you very much for inviting me. It's an honor to participate in this panel. And I would like to commend also your staff attorneys that have been so diligent in this week in pointing me in the direction of public documents.

CHAIR HOLTZMAN: Would you mind getting closer to the phone or to the microphone, or the phone, whatever instrument you're speaking through?

MR. JOHNSON: Okay. Let me press up my volume then maybe. Can you hear me now better?

CHAIR HOLTZMAN: Yes, that's a little better.

MR. JOHNSON: Okay. Very good.

CHAIR HOLTZMAN: Thank you.

MR. JOHNSON: All right. I'll try to speak a little loudly as well.

CHAIR HOLTZMAN: Thank you.

MR. JOHNSON: So thank you also to your staff that has so diligently helped me to prepare.

Like Mr. Middleton, my background lies exclusively in the civilian defense field. And so I think my remarks are probably best focused on the experience here in New Hampshire as we have recently had occasion to try to think through these issues more carefully than we have probably for many years, if ever, in the past.

I begin with an important distinction that New Hampshire law recognizes and that guides our analysis of victim participation in trial and appeal matters, and that is a distinction between legally privileged materials on the one hand and private but not legally privileged materials on the other.

For example, legally privileged materials would be doctors' records, therapists' records in which private medical information, for example, is contained. Doctors and therapists are not allowed to reveal that information to outsiders in court or out of court at any time or place except with the consent of the patient or the order of a court.

On the other hand, private but not legally privileged materials; for example, such as rape shield information, is not similarly protected in the sense that it isn't records. The people in the world who know the information are free to speak about it if they wish to do so. It is only there are certain provisions in the court when the discussion of the admissibility of such evidence is undertaken that there are some sealing and privacy measures that are procedural.

So to begin with how New Hampshire law addresses the first category, which is doctors' records, therapists' records; and some of your panelists have addressed this, we are rethinking

this in New Hampshire. And so I begin with our trial process very briefly because it eliminates the appellate process.

In order for a criminal defendant to get access to therapists' records, medical records, legally privileged information, they have first to make a threshold showing that those records are likely to contain relevant matters. Then what happens is an in camera review in which the lawyers do not participate at all and it is just done by the court and the court staff, and it concludes with a ruling about whether those materials should be available for use at trial or not.

There is no provision for victim participation in that process either at the moment, and I think the reason for that is that there is not at that point a case-by-case analysis any balancing that goes on between privacy and the defendant's interest in a fair trial. The balancing has gone on at a prior kind of legislative rulemaking phase. And so in New

Hampshire the rule is that a defendant may not use -- or may not get access to and may not use therapists' records, doctors' records unless the contents of those records are; and this is the phrase, "essential and reasonably necessary for a fair trial."

So when the court is considering that evidence there isn't anything -- you know, privacy, the concern for privacy has been factored in in constructing the standard as so demanding. And then the question that the court considers only is -- has to do with what's the prosecution's theory of the case, what's the defense theory, what's the content of the record? Those are matters which don't depend, I think, on the particulars of the victim's participation.

There is -- in the appeals court then what happens in New Hampshire is that the degree of disclosure to the lawyers that happened in the trial court is repeated. And so if the trial judge said these documents are not relevant, the trial lawyers can't see them. The appellate

lawyers may argue that that's error, but the appellate lawyers don't get to see the documents either. The appellate court's review of the trial court's decision is in camera, just as the trial court's review was.

There is at present in New Hampshire some concern about the quality of this procedure. The concern is that our adversarial system -- or that we have an adversarial system for good reason and it is superior to an inquisitorial judge-centered system in that, especially pretrial, it is very difficult for a trial judge to assess whether particular items of information contained in these records will or will not be essential and reasonably necessary for a defense at a trial that has not yet happened.

And so the potential adjustment that will take place in New Hampshire's review of this first category of record is that it will become from a two-phase process a three-phase process. So the first phase remains the same. The defense will have to make a threshold showing of the

likelihood that the records contain relevant information.

And then there will be an in camera review in which those parts of the records that the trial judge found relevant after a judge-only in camera review would then be made available to the lawyers on both sides so that they could argue whether the content of those records is essential to the defendant's right to a fair trial.

And again, that depends on what the prosecution's theory of the case is, it depends on what the defense theory is, it depends on what other evidence is available, and it depends on the contents of the record. I don't think it's envisioned that the victims would participate then because they don't participate in our procedure at present. And the analysis there is not -- the victim's interest again is manifested and covered in the legislative decision that the standard shall be very high before a defendant is allowed to use this evidence at trial. Again,

the standard is the trial will not be fair. It would be an unconstitutional trial without the evidence.

So that is how the first category of information is addressed in New Hampshire, to my understanding.

I move now to the second category, which is the not-legally privileged but unquestionably private. And this example here is rape shield information. What happens in New Hampshire at present is in the trial court the defendant will or the state will file a motion when it is known that there is information that the defense probably wants to introduce at trial that is to be described as rape shield information. The trial court will hold a closed to the public, but of course inclusive of the lawyers since they already know the information, hearing at which the question is again is this information essential to a fair trial?

We don't do unfair trials in this country. And so if it's essential to a fair

trial, it will be able to be used. If it's not, it won't. The victim's interest in the privacy again has been reflected in the very high standard a defendant must meet in order to have the information available to use at trial.

On appeal -- and again, so I guess what I would say about -- the last word about the trial court in this respect is that closure in the trial court is understood to be proper because the trial judge's decision is accountable to the supreme court. The concern about closing course that I've articulated in the case that we have here is that accountability of the decision maker, the judge is an essential part of a fair judicial proceeding.

Accountability correlates with quality. Decisions taken in private which do not have to be explained to the public are not as likely to be correct as decisions which have to be explained to the public or to some higher authority. So in the trial court of course, as I said, the higher authority is the supreme court.

Closure of the matter in the trial court does not sacrifice any interest in accountability.

In the appellate court, in this second category of information, again because the lawyers had it in the trial court, there's no question of access of the lawyers to the information. They have it in the trial court. They have it on appeal. The question that we've been grappling with; and it is certainly a difficult one with powerful points to be made on both sides, is whether the appellate proceeding should be open.

And so the scenario here is that the defendant argued in the trial court that there was rape shield evidence that was essential to his right to a fair trial or her right to a fair trial. The trial judge disagreed. The defendant is convicted. The defendant appealed. This is the issue the defendant raises on appeal. What are the appellate court procedures or what procedures should the appellate court adopt with respect to preserving or not preserving the

privacy of the information as it was maintained in the trial court?

The position I have advanced in our New Hampshire case is that in the appellate court there is no higher authority as a matter of state law, unlike the trial judge who answers to the appellate court. Appellate proceedings have to be open, therefore, because the appellate court doesn't answer to the public. It answers to nobody.

And it is not our system to say that we pick great judges. We just trust them to come up with correct decisions in private, which they need not make an explanation. Our system rather is trust but verify. Courts need to be transparent. They need to be open. And so in New Hampshire we're grappling with this question of are the briefs on appeal in the case scenario I described -- can the public read them, or can it see only a redacted version of them? Should the oral argument be open so that the public can attend and watch or should it be closed?

And maybe most importantly when the supreme court comes to write its opinion at the end of the case, can it reveal the information? In order to explain its analysis, it will have to because the question of whether the particular information was essential to the defendant's right to a fair trial depends on what the information was, what the prosecution's theory was, what the defense theory was.

And an opinion that says we agree with the state, we affirm the conviction, we cannot explain why because to explain why would be to explain, to reveal the information, that is a procedure that is not in my opinion to be preferred. It is a painful choice because here we see conflicting in a very direct way the absolute important concern for privacy and the absolute important concern for accountability and quality.

The resolution I suggest that courts of law would have to take in circumstances like this is that, faced with that conflict, a court

of law has to pick transparency, accountability and justice and not -- when privacy requires a compromise in the quality of the appellate process, privacy must yield. This is unfortunate, I understand, because it means that a victim whose information may end up being not something the jury should have had to hear -- maybe the trial judge was right and now the defendant has appealed. And just because the defendant's appealed, that privacy that was so carefully maintained in the trial court will be lost on appeal. That is unfortunate.

But most cases don't get to appeal. Most cases plead. It is only a few cases that end up in this circumstance. And because there is no other way to accommodate privacy without -- in the appellate court without sacrificing that important interest in accountability and quality, my recommendation, for what's it's worth, would be that appellate proceedings have to be open.

With respect finally to the question of victim participation in the appellate court, I

will have somewhat less to say. We did have an experience with -- Ms. Garvin, who is present, played a valuable role in that. It's functionally what -- the role that she and her co-counsel played was not quite the same as *amicus* because they were allowed to share the state's time as the oral argument on this appellate procedural question.

And so it was certainly larger than an *amicus* role, but it wasn't -- to my understanding they have not claimed and won't be seeking a role in filing a brief and advocating the underlying question in the particular case, which is whether this particular information should have been admitted at trial and whether the judge made a mistake in excluding it. And so in a sense the victims have very properly weighed in at what would be kind of a legislative policy level as to what the appellate procedure should be in general. They haven't sought to weigh in on the particulars of what the right outcome was in this particular case with respect to the trial judge's

decision. And that seems to me also proper.

But I guess the last thing I would say about this issue that our common law system depends, it seems to me, on the judicial elaboration of important doctrines like the rape shield doctrine. And so appellate courts have to be able to publish opinions that describe the information that was -- is being litigated about. If only -- not only for transparency, but also for the edification of future judges and future cases that will themselves face rape shield issues.

They need to consult detailed case law to know how to rule in those future cases. And if privacy overtakes that, the law itself becomes in some sense partially private and that would undermine the quality of future appellate -- or future trial judges' decisions because they wouldn't have the benefit of detailed appellate opinions in similar cases.

I look forward very much to the court's questions and I thank you again for the

opportunity to participate.

CHAIR HOLTZMAN: Thank you very much for your presentation. We'll start with Panel questioning.

Mr. Taylor?

MR. TAYLOR: Well, yes, thanks to all of you for sharing your valuable insights with us, and for some of you welcome back for a second round. We appreciate your assistance to us over the last couple of years.

Ms. Garvin, I was interested in the way you had set up the possibilities of the way to address the standing issue. You mentioned three different models, as I recall, three different ways that one could approach it. Is there a best practice on standing for appellate rights, or are you just like all in?

(Laughter.)

MS. GARVIN: Generally, all in, but all in once you do the actual three-prong standing analysis. So if I have a right at stake that is at risk in an appellate proceeding, then

I have standing to speak about it.

So reflecting back on the New Hampshire case that we were just speaking about, that Mr. Johnson was just speaking about, let me just elucidate a little bit of the facts and how we intervened in that case, because I think it's useful.

So as Mr. Johnson said, there was a conviction in a rape and murder case and the defendant is taking a direct appeal, right? That appeal is proceeding on a particular track.

And, Mr. Johnson, of course chime in if I get any of the factual pieces wrong because I intervened at the supreme court level.

Along the way the Supreme Court of New Hampshire had a rule modification that came into place that said upon motion of any party; that part was pre-existing, or a motion of the court, any record that had been sealed below could be unsealed during the appellate process. So we're in the appellate moment. There is a direct appeal happening.

And the supreme court -- and New Hampshire's Supreme Court in that case said, hey -- they didn't actually say hey -- this is my teacher side coming out -- let's -- we're going to unseal certain matters in this case, but we want to get the opinions of the parties to that case; i.e., the State of New Hampshire and the defense counsel.

In that moment the victim's family, who by law are also victims because the direct victim is deceased, said wait a second, we have a privacy interest here also under the U.S. Constitution as protected by rape shield, and by New Hampshire victims' rights law we have the right to dignity. We therefore have standing in this appellate moment in this collateral moment of the direct appeal to chime into the New Hampshire Supreme Court, right?

So we did a straight standing analysis. Is the court's pending release of rape shield information -- does that implicate my privacy rights? And now I'm putting myself in my

role of my client. Does it implicate my privacy rights, my statutory dignity rights? Is that implicated? Is that about to be injured? Answer, yes. Is it being caused by the action that's being litigated? Yes. Is it redressable by the New Hampshire Supreme Court? Yes. Therefore, we have standing. We move to intervene in that moment and we participated to the extent necessary to protect that right before the New Hampshire Supreme Court.

Mr. Johnson flagged whether or not we're going to, also going to try to intervene in the direct appeal on the merits, and that's not before -- that wasn't before them then; it's not before them now. If one of our rights, if there was a specific right at issue, whether that be a state equivalent of the CVRA or Article 6(b) -- if that was going to be implicated in a court decision, then I'd argue, yes, the victim has standing and I'd say, do the three-prong analysis and they get to be heard.

MR. TAYLOR: Thank you very much. It

seems that one of the arguments we heard last time from those who are still interested in this but think that maybe establishing a right is not the right or proper course of action is that the *amicus* briefs or the opportunity for *amicus* briefs might be adequate, that that opportunity is adequate, excuse me.

So I would just invite anyone who would like to comment on that about whether and to what extent you think the filing of *amicus* briefs is some sort of substitute, or just as good as, or another way to approach this issue of protection of victims' rights on appeal. We could start with you if you'd like, Ms. Garvin.

MS. GARVIN: Well, I'm happy to start. Having -- here's a little caveat. I love my job. I love that I get to participate as *amicus* in cases all over this country, but I will tell you when I file an *amicus* and my staff attorneys have spent 75, 100 hours drafting that and attempting to put in front of a court a well thought out, carefully crafted policy statement and analysis,

we submit the brief and we hold our breath. And the conversation in our office is, is anyone going to read it?

And that's the reality of *amicus*. Is anyone going to read it? And if they read it, are they going to give it any weight? Because by law it's not as weighty. And so it is simply not -- structurally it's not a substitute for someone who has an individual right at stake. And we shouldn't be having folks who have personal rights at stake wondering, is anyone going to read it?

MR. TAYLOR: Mr. Christensen?

MR. CHRISTENSEN: Yes, once again I agree with everything Meg said, and I think this is one where the horse is already out of the barn. CAAF's already had two arguments where they've -- at least where they've allowed SVCs to argue for their client. Air Force court has held that, the Navy court, the Marine -- or the Coast Guard court. So I don't know why it would step back and say *amicus* is an adequate substitution.

As Meg says, it's up to the court whether they read it. It's up to the court whether they comment. It's up the court if it has any impact whatsoever on them.

And I think it's important that -- and I think Meg would agree with me, that standing is not the same as a party. I don't personally think that victims should be a party on the appellate side or on the trial side, but standing is a different thing. I think the EV case is a perfect case. Here we have a victim who has -- a civilian who was brought into the court-martial process purely because she was sexually assaulted and is now having the military judge, somebody who is yes a judge, but is a member of the executive branch in the military, saying I'm going to pierce your privacy rights and too bad if you don't like it. So standing is important.

I think we sometimes only think of the military justice system as dealing with military people. The military justice system has the ability to reach out in a way that I think our

founding fathers would be surprised at, and to tell civilians when they're only ties to the military is that they're a victim of a crime that certain rights of yours are going to be infringed. And that's why I think Article 3 review would be so important, is because right now it's the military reviewing the military, the executive branch reviewing the executive branch and rights are infringed upon without any access to an Article 3 court.

So *amicus* is inadequate. We already have people arguing, in standing I agree with Meg, is the way to go.

MR. TAYLOR: Mr. Guilds, would you like to add anything to that?

MR. GUILDS: I don't really have anything more to add. I mean, I completely agree with what they've said. I mean, I've had specific experiences. One of the first cases I took was the Naval Academy football case, and in that case I had to file an *amicus* in connection with 412/513 records. And I had no idea whether

or not the court would review it. And I had to be honest with my client about that fact. And that's not something that's comforting to a survivor to know that they don't have that personal skin in the game.

So I think that the *amicus* process is certainly valuable. I've drafted them on behalf of organizations, but I shouldn't have to draft them on behalf of the survivor whose rights are specifically at stake in the case.

MR. TAYLOR: Mr. Middleton, would you like to comment on that?

MR. MIDDLETON: Recognizing the concerns that are being expressed, I don't know that *amicus* would necessarily be an adequate substitute. I can say that, with our court at least, I think if the victim or an attorney representing a victim has something substantial to add to the issues before the court, then our court will generally accept an *amicus* and consider that *amicus*. So it is a way for them to add to the arguments being presented if there is

something for them to add.

However, it is discretionary with the court. They do not have to allow it. I think generally they will, again if there is something substantial being added, but I don't know that it would be an adequate substitute standing alone.

MR. TAYLOR: Ms. Vallandingham, do you have anything on that?

MS. VALLANDINGHAM: Thank you. I think -- and I need to put a disclaimer out that this is not DOJ's opinion. This is my personal opinion. I echo what my colleagues here have said and I just want to reiterate that the concern would be the consistency or the weight that's given versus from one circuit to another circuit.

And then also when you look at the options that may be available when the circuits are split versus a motion to intervene. So that's my comment.

MR. TAYLOR: Thank you. Mr. Johnson, would you like to add anything to that?

MR. JOHNSON: I don't think I have anything particularly to add beyond what I've already said, but thank you for asking.

MR. TAYLOR: Madam Chair?

CHAIR HOLTZMAN: Thank you very much. Admiral Tracey?

VADM TRACEY: Mr. Johnson, if I could; I apologize if I did not hear you correctly, I thought I understood you to say that the State of New Hampshire is currently struggling with whether the appellate proceedings will be open and what that will mean in terms of the availability of information that had been treated as private in the lower court. Is that -- did I understand that correctly?

MR. JOHNSON: Yes, that's right. So I think Ms. Garvin accurately described the scenario that we're confronting, and it's ongoing. And so just to add some more detail to it, the question -- so the information that's under seal is the appellate briefs so that the public can't see them, at least can't see them in

their complete form. There are redacted versions that are publicly available.

The question has arisen as to whether the oral argument on the issue of the fairness of the trial and the necessity or lack thereof for this evidence to be admitted. The court has held that it's going to be open, but I just got an order today on the email that the court -- open to the public, but the court wishes -- and I haven't studied this order carefully yet; and I will email it to you, Ms. Garvin, too, if you haven't seen it --

(Laughter.)

MR. JOHNSON: But what it says is that in effect -- and as a defense it says that counsels at the oral argument should confine their arguments to the -- to what they could say if they were speaking only on the redacted brief, so that I'm not going to be able to say -- if I understand this order correctly, I'm not really going to be able to describe the evidence that is at issue as to whether it should have been

admitted or not at the oral argument. And I find that deeply problematic.

And the court hasn't said anything about how it will write its opinion, but it seems as though it will write an opinion if I don't prevail, which doesn't really convey in detail the reasoning, because to do so would sort of reverse the entire course of privacy that up until now has prevailed.

And as I said in my comments, that also is concerning in that the court will be censoring itself, at least in the opinion that it releases publicly. And what does that mean for the development of the law and what does that mean for the accountability of the court?

VADM TRACEY: I'm not a lawyer, so maybe this is a stupid question, but doesn't this issue exist in other jurisdictions and how have they dealt with it?

MR. JOHNSON: So my impression is, and I think Ms. Garvin has done some research on this as well -- my impression is that most other

courts in other states develop and publish opinions developing a rape shield jurisprudence. If the circumstances are like this, the evidence has to be admitted. If the circumstances are like that, it doesn't.

And so I think New Hampshire's supreme court is heading off in a direction that is unprecedented and worrisome.

VADM TRACEY: So, Ms. Garvin, you have something to add.

MS. GARVIN: Yes. So two points: One, this is ongoing litigation, so we are both -- and we are on different sides. Not opposite sides. There are three sides. Three people are arguing in this state victim defense. So one might presume, and you would be correct, I have a different opinion on this right now. But broader, stepping away from this case that we're discussing specifically, the question that's going on in New Hampshire is slightly different than what I believe is before this Panel.

The broad strokes, however, are the

question of what is the balance privacy and access on appeal? Those are the themes that are at issue in New Hampshire and also here. In New Hampshire; just one little footnote that folks should be aware of, New Hampshire has perhaps one of the strongest public access rights in the country because it includes public right to access to information and to documents. And it has been interpreted and has a long-established tradition of being perhaps the most open and accessible courts. So there's uniqueness to the litigation in New Hampshire that doesn't exist elsewhere.

But the fundamentals of what Mr. Johnson is speaking about, how it plays out in other courts is that when things are sealed and deemed irrelevant, sometimes courts do speak about those in their opinions. And we have been working nonstop to cease that practice.

A court opinion; and I'm just going to give a hypothetical here -- a court opinion that has found that my prior sexual history, that for

instance includes the fact that I like to have sex with seven men at one time when one has a hockey stick, right -- let's say that's my hypothetical past sexual history and that's what I enjoy, right? A court that has deemed that irrelevant does not need to write in its decision the details of what's done with a hockey stick. That's irrelevant to the determination. It's irrelevant now.

That's what's being decided. What's the scope? How much do you have to say to give guidance? You can simply say some categoric statements about my prior sexual history and what was deemed -- why it was deemed irrelevant. That's what's being discussed in various cases around the country. And when courts step over the line and by their inartful drafting themselves violate my privacy, that's problematic and we shouldn't abide by it.

CHAIR HOLTZMAN: Thank you very much. Judge Jones.

JUDGE JONES: So if I -- I'd just like

to go back to *amicus* versus party for a minute, and I agree *amicus* was not the right answer here. It doesn't make any sense to me. That's not really who the victims are. I don't think they should be a party either. Do you need a name or is it enough to have standing? That's all I want to sort of resolve with the first question. Meg. Or do you have a proposal for a name?

MS. GARVIN: No. I actually had stricken from my statement that in some ways we're in a semantic scheme right now. I don't believe you need a specific name. Folks have taken different approaches to this in the state civilian systems. Maryland, and I know Mr. Stone is an expert on Maryland's law, has taken one approach. Others have taken others.

I mean fundamentally, it is just standing and it's --- do they in the moment have the capacity to be heard, and for purposes of what they are being heard on, they're a party to that moment, but they're not a party to the merits and the underlying proceeding, right.

When I participate on my right to be heard, I'm not a party to the underlying criminal case. I'm simply being heard on that issue. I've said this to the prior iteration of this panel, right. This is actually not as novel as we all think it is. When the media has a First Amendment right at play in a criminal case, they come in.

They don't become a party to the underlying criminal case, but they come in and they assert their First Amendment right at the trial court level. They do it at the appellate court level. We go through a standing analysis. They get to be heard and then they go away.

JUDGE JONES: Oh, I'm sorry. Go ahead Mr. Christensen.

MR. CHRISTENSEN: No. Yeah, I agree. I don't think there's any reason to call them parties. I think it does potentially create challenges constitutionally, standing. I think Meg said it great. You make that issue, that issue's resolved and then you move on to a

different world, and I agree that the media has shown that this works.

I think one of the things when we put it in the court-martial process, we have to remember that it is a unique process, and so if someone is in Article 3 court or a state court and you're in the media, you -- the trial judges rules adverse to you, you're going to go right up to the appellate court system.

In our system, if you're being ruled adversely to, it's not clear where you're going to go next, and those constitutional rights are still there. Standing gives you that ability to address that. I know that in the Bergdahl case this very issue is being addressed in California, based upon a court-martial, and I'm not sure where Bergdahl is being courted. I think in Texas.

MR. GUILDS: Judge, I would just add that --

JUDGE JONES: Oh, I'm sorry.

MR. GUILDS: Just for me for, you

know, when I sit in the court-martial in the back, right, when I've got a survivor whose rights are at stake, I wait for the opportunities for those three things that are requisite for standing to occur, and then I stand up and I make the arguments on behalf of the survivor.

During the course of a court-martial my last week, there are obvious circumstances where I'm going to speak, perhaps in the context of 412 or 513. But there are other perhaps less obvious moments, and those are the same analysis and we don't call it something special when I stand up, right. We call it me advocating on behalf of my client on an issue that has, she has a say, a stake, skin in the game.

JUDGE JONES: What would her say be? Give me an example that isn't encompassed by 412 or 513.

MR. GUILDS: Sure. What we frequently -- well, what we're currently confronting in the -- what I would describe as the VLC community is an effort by defense counsel to find some way to

interview our clients, despite the fact that our clients have the right to refuse an interview, and the defense community is a creative bunch of folks who find different ways to make arguments with respect to why, if they don't get an interview, there has to be deposition.

JUDGE JONES: That's not really a trial.

MR. GUILDS: No, it's occurring at trial, like at the trial itself. The defense counsel is standing up and saying Your Honor, I was refused the right to an interview and I think as the result, a deposition should be taken or this proceeding should be postponed.

JUDGE JONES: Is there a military requirement for deposition of a victim?

MR. GUILDS: There is Judge. There is not a requirement. There is a law. There is a standard that must be met with respect to whether or not a deposition would be granted. So go ahead.

JUDGE JONES: Okay.

MR. CHRISTENSEN: I would say that prior to a very recent change, that there was -- if a victim did not meet with a defense counsel, the judges were ordering, as a matter of due course, deposition. The standard for deposition at that time was the judge would grant, unless there was a reason not to and it was very pro-deposition.

That has been reversed now, that there has to be a showing of why you have to have a deposition. But there are still judges who, because of equal access to witnesses which really is historically based on that because you have a worldwide military mission, you can't let the government interview witnesses and the defense witness is sent off to the Iraq.

That was, you know, kind of the historical basis. But that language, equal access to witnesses, is used to say well, the government talked to Ryan's client. I have equal access; therefore, I get to do it. So it is an issue that we see frequently, that there is a

push to interview the witnesses.

They have a right now, not to be interviewed, but they're still pushing. There are still judges who want to do that, and that is something that's gone through the appellate process as well.

MR. GUILDS: So my only point is --

JUDGE JONES: But obviously that's not necessarily a privacy interest. I'm just --

MR. GUILDS: Correct, it's not. I mean it's an interest that is reflected -- well, we believe is reflected in, I believe it's reflected in 6(b). So it's a right that I believe I have an opportunity to stand for, to stand up and argue on behalf of my client.

My only point is regardless of what it is, and many times what it is how the conditions of how the witness or how the survivor is going to be treated throughout the court-martial process, right. The timing, those things.

My only point is is that throughout that process, I am constantly evaluating what my

rights, what my client's rights are and where she has a direct involvement, versus where I'm an observer, right, where you know, if the client's making a motion to, you know, suppress evidence, right, I'm sitting there observing so that I understand that issue, so I can explain it to my client. That's my job in that moment.

But if that motion somehow affects the ability of my client's privacy interest, then I have -- she has skin in the game and it's my job to stand up, and that happens at the trial, at the court-martial level, it happens in the 32, it happens in the pretrial proceedings. It happens in the conferences.

It happens throughout the process. My only point is the appellate situation is not unique. It's not different. You could do the same analysis.

JUDGE JONES: I haven't been recognizing people all along. Mr. Middleton or Ms. --

MS. VALLANDINGHAM: Vallandingham.

JUDGE JONES: Vallandingham. Did either of you have any comment?

MS. VALLANDINGHAM: No thank you.

MR. MIDDLETON: I think part of the difficulty comes in defining the limits, because there are a lot of evidentiary rulings at the trial court that involve a victim's rights to some extent. For instance, there's evidentiary rules regarding character evidence, character truthfulness or untruthfulness.

If we're getting into a ruling regarding the victim's character or reputation for untruthfulness, is that something that now they're going to have a right in the appeal process? I think many people here would probably say yes. I think it gets unwieldy and again, there's a distinction between the direct appeal process and the trial process.

At the trial level, judges are making decisions based on a number of things, not necessarily even evidence. The evidentiary rules can be relaxed. They're seeking input to

exercise their discretion in making certain legal decisions.

When you move to the appellate level, the stage is already set in terms of the facts in the record, and at that point it's an application of those facts to the law. That's why I do think there is a distinction between involving victims in the trial level versus the appellate level.

MS. VALLANDINGHAM: No, I have nothing further.

JUDGE JONES: Where do you stand, Mr. Garvin, Mr. Christensen, Mister -- with respect to the situation where the judge has reviewed a record in camera. Actually, that's not the situation. If you have a 412, for instance, there's no -- there aren't records. There's testimony. There's a proffer. The judge listens to it. It's all sealed.

The defense is -- it's obviously available to the defense. The defense gets to argue there's a ruling. Let's assume it's adverse to the victim and the government usually

aligned, and then you get your *mandamus*. Now what's happening in the military system right now?

I know that there is a distinction, there's a bit of dispute or debate going on about whether a *mandamus* has to be strict review or straight appellate review, and I think basically, as I see it, most of -- at least two of the circuits have said it's not a *mandamus* in a technical sense. That's merely a mechanism.

Where is it at though? Is this still in the process of going through the appellate courts in the military, or are some judges on *mandamus*? Are some of the courts, the appellate courts actually looking at it?

MR. CHRISTENSEN: Yes. We have decisions from the Army, Court of Criminal Appeals, in which they did grant *mandamus* and that had to do with Judge Lippert, who had had at least three different times been appealed through *writ of mandamus*, where he was just basically ignoring -- I remember I heard those cases were

both 412 and 513.

JUDGE JONES: Well presumably in each instance, the trial judge ruled against the government aligned with the victim's rights and the victim's stance.

MR. CHRISTENSEN: Right.

JUDGE JONES: These were 512 and 513 or just --

MR. CHRISTENSEN: I believe they were 412 and 513 issues.

JUDGE JONES: Okay.

MR. CHRISTENSEN: Then the Coast Guard Court of Criminal Appeals recently ruled that the judge erred on a 412, excuse me, 513 issue. So that has happened. The Navy court has ruled adverse to a victim on a 513 issue.

JUDGE JONES: So when it went to the appeal stage, what was public, what was not public? That's what I'm interested in.

MR. CHRISTENSEN: Oh, what's public and not public? Okay.

JUDGE JONES: Yes.

MR. CHRISTENSEN: Well, the 513, nothing was public. There was --

JUDGE JONES: And neither the defense nor the prosecution had seen the 513?

MR. CHRISTENSEN: Okay. So in the Navy case, the judge had not released that yet. He had said I'm going to release that and when the SVC said we're going to appeal, he withheld releasing it and then through the appellate process that was withheld, I believe he released it today, and this started about eight months ago.

JUDGE JONES: So I'm sorry. I probably just didn't hear you. So when it got to the appellate process, did the appellate lawyers get to look at it to make their arguments, or it simply went up?

MR. CHRISTENSEN: It simply went up.

JUDGE JONES: Okay.

MR. CHRISTENSEN: So her counsel did. He had seen it, but it had not been released to the other parties, not what was going to be

released. They knew what the judge's ruling was, but the actual document had not been released to either party. I don't think it was necessary at that time to be reviewed by any appellatory --

JUDGE JONES: But anyone looking at this, including the two lawyers, would not know what was in the 513? It would only be judge to judge?

MR. CHRISTENSEN: The judge did not see it either was my understanding because it -- right.

JUDGE JONES: So he didn't make sort of a decision about the materials either?

MR. CHRISTENSEN: Right, right.

JUDGE JONES: I see. So there have been no review of the materials?

MR. CHRISTENSEN: Right.

JUDGE JONES: Well then let me switch to this. If a judge does review the materials and makes a finding, who should be entitled to look at those records on appeal? I guess is my question.

MR. CHRISTENSEN: Sure. I think it's a two-step process.

JUDGE JONES: Right.

MR. CHRISTENSEN: Okay, first step, right, as you all know, there's now a standard that is -- that wasn't there when I was a judge, about when the judge should order production and review in camera the records. It's a higher standard the defense has to meet.

That should be the first thing an appellate court is reviewing, was the judge correct if he said I am going to order production and I'm going to review in camera. To make that decision, there's absolutely no reason to review the mental health records or therapist records because that decision's supposed to be made without ever reviewing them.

So if the appellate court says judge, you were wrong. You should have never reviewed these records, or you should never order production of the records because the defense did not meet the threshold for review --

JUDGE JONES: Through the fishing expedition argument, yeah.

MR. CHRISTENSEN: Right, right. Then there's no reason for the appellate court to review, right? Once they get over that threshold, then they had to look okay, this is what the judge said needed to be disclosed, and this is his basis for saying it needed to be disclosed.

The court should first do an in camera review and believe, and see okay, is there something there that should have been disclosed, and if they think that the error has been committed or there's a reasonable argument that error has been committed, then those records that were ordered disclosed by the judge should be provided by seal to the appellate counsel. But it's a two-step process.

JUDGE JONES: But the trial court counsel would not see them in that circumstance?

MR. CHRISTENSEN: Well, I would say that would also depend.

JUDGE JONES: It would get unsealed only to the appellate counsel?

MR. CHRISTENSEN: Right. But you have to remember, of course, if they had civilian counsel, the civilian counsel is taking the appeal, the civilian counsel could very well be acting as appellate counsel as well, and obviously they could then see them. So they, yeah. There is a possibility of spilling over between their roles as appellate counsel --

JUDGE JONES: Is that likely in the military, for the military counsel though, the trial --

MR. CHRISTENSEN: The military counsel, no. But civilian. But we do have a lot of cases with civilian counsel and we do have a lot of cases where civilian counsel also handle appeals. So they could possibly do it.

Now, I'm not one who is saying that no one should ever see the record. I'm just saying that the law has procedures and those procedures should be followed, and all too often now they're

not being followed. That's my biggest concern, is that we have procedures there and as I said, it shouldn't just be a speed bump.

When I was a trial judge before we had the first threshold, what would always happen is both parties would come to me and say judge, we want you to review these records in camera, and I've reviewed thousands upon thousands upon thousands of pages of mental health records, and I think I disclosed, you know, a few dozen pages, you know.

Most mental health records really have nothing that anybody needs to see. But as long as we go through the procedure, now we have a higher burden, that a lot of those records are reviewed and that had been that burden there. I would never order production or I would have never reviewed them in camera.

I think, you know, with some minor fixes to 513 and minor fixes to the appellate process, the process will work. But the biggest problem we have, going back to -- I can't

remember his name, the man from New Hampshire was talking about, is you need a development of the law, and right now we don't have a development of the law, especially with 513 issues.

Now the 412 that is very unlike New Hampshire, we have very good development of the law, and I would say that 412 rarely in the court-martial process is an issue. It is pretty usually obvious when 412 evidence is admissible, and it's pretty obvious when it's not.

It's pretty rare that I think that ruling of a judge is going to be one that the possibility of appeal or a successful appeal is made is pretty slim, and I would also say that my experience is that usually the defense will have some sort of 412 issue once they get the ruling that's adverse to them.

You know, they understood when they made it that the likelihood was not too great they were going to get it. In my experience, 412's just rarely admissible, and rarely going to be an appellate issue.

JUDGE JONES: And when it is adverse though and you go on, there have been cases, I think you mentioned three times.

MR. CHRISTENSEN: Right.

JUDGE JONES: With 412 once that first appeal or *mandamus* as it's now called is decided, and let's assume it's decided again adverse to the government aligned with the victim or however you want to put it, then what? Is there another avenue above?

MR. CHRISTENSEN: So if I understand your question correctly, if we're at trial and there's a ruling adverse to the victim and it goes up to the CCA, to the Service court?

JUDGE JONES: Yes.

MR. CHRISTENSEN: And the Service court rules adverse to the victim?

JUDGE JONES: Again, yes.

MR. CHRISTENSEN: Yes. Well no, there's not because --

JUDGE JONES: I just wanted to make sure I understood the statute as it is now.

MR. CHRISTENSEN: Yeah, yeah. CAAF says they don't have jurisdiction and the Article 3 courts are saying sovereign immunity. So that's it.

JUDGE JONES: Okay, got it. Thank you. That's very helpful.

MR. GUILDS: Judge, let me just comment on the one thing just to --

JUDGE JONES: Yeah, Mr. Guilds.

MR. GUILDS: --on just one thing that you said, and I don't know if I heard Don right or not, but just to give my two cents on this. So in this circumstance where the court, the trial court, the trial judge does review the records in camera and then the question is on appeal whether or not the parties should get access to those records, I see no reason why they should.

The invasion that comes with the disclosure of 513 records is something I don't have to explain to this panel. You wrote on it eloquently and I believe you all understand it.

But it is a significant invasion, and if it is expanded to the lawyers who represent the person who has been convicted and is responsible for the survivor's trauma, that is a significant event in the life my client, and it cannot be underestimated.

So I don't see any reason why that event has to occur, given that the standard on appeal is to review what the trial court had before it, and the parties do not have those materials at trial, so why should they have them on appeal.

So I just wanted to add my perspective on I think that issue that you're all looking at.

MR. CHRISTENSEN: If I can just add --

JUDGE JONES: But I would -- I just wanted to say that if there is a situation where, you know, that may not be the case, where there is some, you know, the lawyer for the victim, let's say, has already seen them and there comes a point where someone on the appellate court, for

instance, has some concerns about the -- I guess my problem is I'm really worried about the notion that you couldn't let an attorney who might be in a position to make a good argument on why these documents should or should not be disclosed, might not be important in some cases under some circumstances, especially if the provision is that it's lawyers' eyes only.

I mean, obviously, it could not go to whoever they were representing the matter with the victim. But I'm talking about defense and trial counsel.

MR. GUILDS: I mean, and I appreciate that concern, right. As a defense attorney myself I've handled cases, and I understand the desire for us to afford our clients vigorous due process rights and I get that perspective. But at the end of the day no right, including a defendant's rights, are absolute, right?

I mean every right is a balance, and here for me the balance is that you've had a court who has already determined that the

materials do not need to be disclosed.

You take that up on appeal and perhaps, I think what might address your concern is if there is something specifically within those records that the court identifies as particularly concerning. Perhaps there could be a special procedure narrowly ---

JUDGE JONES: Or maybe they just realize they don't understand what they're looking at and need help in the context of the facts of the case. I don't know.

MR. GUILDS: Right. Yeah I mean for me, that court is always -- should be always reviewing that with the deference of the court that's decided it before, right. So for me it would have to be an incredibly high standard for that court to determine that there was legal error from the court below in not disclosing that information.

Perhaps there could be a circumstance where there was some obvious piece of evidence that would have met the definition at the time,

because that's really what should be determined, right, that you could perhaps create a very narrow procedure for that purpose.

From my perspective, I don't like those narrow procedures, because they lend to the opportunity for abuse, but I can certainly see that as a potential possibility to address your concern.

JUDGE JONES: I do have one question just sort of for everyone. I guess the question is this. Is there a debate about whether the right to a fair trial and the right to a victim's privacy are on an equal footing, or doesn't the right to a fair trial trump a victim's right to privacy? And I'm saying this in the abstract. I recognize that.

CHAIR HOLTZMAN: Could you pick a different verb?

JUDGE JONES: Pardon me?

CHAIR HOLTZMAN: Could you pick a different verb?

JUDGE JONES: I could if I remembered

what I said. Sorry. I think he got it.

MR. GUILDS: I will try to avoid that. I'll go first, and I'm sure everyone has a perspective. I think it's a false choice. I don't think you ever are comparing a fair trial against a victim's privacy rights. I think what I'm saying is that you can have a fair trial and still respect a victim's privacy rights, right?

I have a case going to court-martial in two weeks, where there are intimate details about the sexual activity of my client that are going to come out, that I'm not objecting to. Why? Because they relate to a period of time directly related to the offense, and I don't feel like I have a 412 argument there.

But there's no -- there's no balance. There are going to be things that come out that are hugely impactful and difficult for a survivor to hear, right. But that's not the question. I didn't do a balance there, right? You don't have to choose one or the other.

On the other hand, in that same case,

defense counsel is trying to bring out an eight year old allegation of rape that my client made against somebody else, right. So that obviously, from my perspective, has absolutely no bearing on that court-martial that's going to take place.

JUDGE JONES: And I don't disagree with you.

MR. GUILDS: So that's -- my only point is --

JUDGE JONES: So long as the decisions are being made in terms of what the law is, where there is no trumping, if you will, it's whether or not it's relevant and that lack of not just relevance, but that were the evidence not to go in, right, it would compromise the defendant's right to a fair trial.

MR. GUILDS: Absolutely, and I think that's always going to be the standard, and that's always -- whether it's privacy interests or confidential information from the government, right, records, whatever it is. There's always going to be a balance.

That doesn't mean we're not considering appropriately the defendant's rights. It means that we live in a system where no right is absolute and all those balancing of considerations have to be taken into account.

MR. MIDDLETON: Probably somewhat unsurprisingly, I do think the defendants' rights to a fair trial take primacy in our criminal justice system. It's not directly on point with what this panel is addressing, but there is a United States Supreme Court case of *Payne v. Tennessee*, which is a capital murder case, and one of the things being addressed was the ability of victims to make victim impact statements at sentencing regarding the sentencing considerations.

The Supreme Court said that's perfectly fine and legitimate. However, they noted that there would be a point where, depending on the information, it could be so prejudicial to a defendant as to render the trial process, sentencing process unfair for due

process.

So I do think that is the ultimate consideration. I think it's the ultimate consideration at trial, and I think it's even more focused on the direct appeal, because that really is the question, which is, did the defendant receive a fair trial?

MR. CHRISTENSEN: And I would say, you know, that all the rules of evidence are a balance. Hearsay. Hearsay applies to the accused too, and it can keep out evidence that maybe he would want.

All the privileges for us in the military rules of evidence, all the 500 series of privileges are a balance, where we say whether it's the individual's right or society's right, are going to trump, I'm sorry, are going to take precedence over the rights of the accused in that case, and we say that balance is fair.

My biggest concern with the way we treat 513 is we treat it as if it's not a real privilege, and there's a number of reasons. But

we don't see these issues with attorney client. There are many times where an accused is dealing with somebody who is represented by counsel.

Maybe they're co-conspirators. Maybe it's whatever, but that person has counsel. I've never yet seen a judge say well, I'm going to bring the counsel in and I'm going to talk to him in camera and see if he has anything that I should be turning over to the accused because it might be exculpatory. We live with that balance.

I think that's the biggest problem we have with 513, is that it's recognized by the Supreme Court. It's enacted by Congress and the President, yet we still do not believe it's a true privilege. I think one of the reasons is because when it was written and went into effect, the military was over-analyzing it and they wrote 513 exceptions in there that had to do with a commander's concern about say someone's working in a missile silo and he has serious psychological issues.

A commander needs to know that so he

doesn't put him down in a missile silo. MR-513 has nothing to do with the commander's ability to know he has somebody who shouldn't be in a missile silo. But we put that exception in there that have nothing to do with court-martials, so it makes it look like it's not a real privilege.

It's like the constitutional exception, the constitutional requirement. We don't have with the attorney client, we don't have with the priest penitents, we don't have with any other one, but we had it there. It eroded the view of looking at it.

So my answer is that society is already and the law has already put that balance in there, and we just need to view those privileges as they intended to be.

MS. GARVIN: I will just add briefly, I think, and echoing what Ryan had said, it's not a one off answer of does privacy prevail or does fair trial prevail, and I think to echo Ryan's words, a little bit of a false dichotomy, right.

It's always fact-specific in the moment, and you're always analyzing what specific right is at issue in this moment, where is it grounded in law? So are we looking at a constitutional fair trial issue? Are we looking at a federal constitutional privacy issue?

In those moments you figure out which is the weightiest right at issue and in the moment, that one must prevail, but only to the extent necessary. So when fair trial does prevail for a moment, it doesn't mean privacy goes away. It means you protect privacy up to the limit that you can and then you don't.

So on the review of records on appeal, right, we can have an appellate court review and put in place the same procedure that the trial court did, which is review in camera, conduct legal question analysis of whether that in camera review was appropriate while still protecting privacy by not having people invaded, and that's protecting fair trial and privacy, right, and we're doing both at the same time.

So we're always analyzing. If someone only has a rule-based right at issue and someone else has a higher level right, you know, the calculus shifts. But it's always fact- and time-specific, and then you protect them both as great as you can.

JUDGE JONES: Right. I guess we're really all saying the same thing. But I think you start with whether or not after a judge has analyzed it, they believe that some invasion of privacy is necessary to preserve fair trial. That has to be the hallmark.

MS. GARVIN: Excuse me, yes.

JUDGE JONES: You never -- you never make a decision that says this is going to be so horrible for the victim and such an invasion of privacy that even though I think it's essential to a fair trial, I'm not going to let them go into that cross-examination, right?

MS. GARVIN: No court will or should say I'm going to oversee an unfair trial or allow an unfair trial.

JUDGE JONES: Right.

MS. GARVIN: Correct.

JUDGE JONES: I just worry that sometimes the courts look at the privacy rights and actually do try to weigh them, and I don't think you weigh them. I think you determine what's necessary for a fair trial. That's my only point.

MS. GARVIN: I think you're correct, Judge. I think too often the vocabulary gets messed up and we're doing this weighing. But I would add one piece, which is very rarely is it necessary to pierce private information and privacy in order to have a fair trial. It is simply a misunderstanding of the scope of fair trial to see you get that information.

JUDGE JONES: I think you're probably right, very right in the 513 aspect. I'm really much more knowledgeable or experienced in 412, where it becomes much more difficult I think. Thank you, I'm sorry. I've taken up too much time. Mr. Stone.

MR. STONE: I'd actually like to just follow up on that last question, where I heard the answer to say rarely is it necessary to have to uphold privacy where it's needed for a fair trial. I guess what I'd like to ask is if the answer is the same when it's a privilege. Does the privilege get pierced in the same manner, particularly if it's, let's say an attorney-client privilege?

MS. GARVIN: No --- yes. It gets protected to the same level, right. The privileges are based on -- they have evolved from the notion of privacy. So they're just as weighty. So they shouldn't be pierced either.

MR. STONE: Well, I guess my question was, don't they get even more protection than simply a privacy interest? My question before you answer is for all the panel members and it also -- I would like to hear Mr. Johnson's comment if he can hear it because I guess my question was Mr. Johnson, what occurred to me when you were talking about wanting access for

the public.

If a claim is made at a trial, that a defense counsel engaged in fraud and helped the defendant, let's say with his alibi, whether he hid some evidence or did whatever, and the judge hears it in camera, doesn't let anybody else review the information on it, and then decides no, you know, I'm not going to release that to anybody and he lets the trial go forward.

But he says but I may refer this to an ethics panel but the trial goes forward. And then that issue becomes an appellate issue. Is your view the same, that for fair trial that information about the defense counsel's possible ethical violation or even illegal action involving the client fraud should come out to everyone and it shouldn't be handled by the appellate judges reviewing it alone in camera?

MR. JOHNSON: Yes, I think it would be, and let me sort of expand on your hypothetical. So suppose, if I understood correctly, suppose -- you know, the way I think

it would play out is suppose it's discovered in mid-trial that the defendant, defense lawyer has in some way procured false evidence.

I think the prosecution would then be saying mid-trial the jury needs to hear this, because this is evidence of guilt. You know, and the prosecution has a right to a fair trial too without question. So I think that the analysis is the same always in all of these privileges, is you know, if -- as I said before, we don't do unfair trials, at least not on purpose.

If evidence is necessary for a fair trial, it comes out. What I have -- you know, as I've been listening to the discussion what occurs to me is it may be an important point that hasn't fully been articulated yet is that what I don't see with respect to victims is that their privacy interest varies from victim to victim.

That is what I mean that every victim has an absolutely important right in the privacy of their medical records. Every victim has the same and essential, so we're not going to judge

between victims, like one victim might have a better claim on privacy than another.

They all have the same powerful claim, and so the question -- and so it's not when a judge is deciding whether a particular, no, that claim has to be rejected because the fairness of the trial requires it, that's where I mean. There's no balancing. It's not as if some victims -- well, we don't really care about this victim's privacy, so we're going to let it come in even though it's sort of less essential to a fair trial, you know.

Every victim has the same point to make in all of these cases, which is the standard better be darn high before this information is revealed, and the standard is it's essential to a fair trial, and the prosecution is perfectly capable of articulating that point, because the point depends on what the evidence is and has been in the trial and what the theories of the parties are and what the information is.

So it's more of legislative -- the

balancing has happened at the legislative level, and you know to answer your question again directly, I think it's the same balance no matter whose interest, you know, defense lawyers or victims or defendants or whoever, you know, whoever's claim of privacy is the same and it yields under the same circumstances.

MR. STONE: I guess I was trying to go from privacy interests to privilege, and I guess you're telling me you don't believe attorney-client privilege should be privileged at the court of appeals either?

MR. JOHNSON: Well no. I mean what I mean to say is the circumstances in which an attorney-client privilege should be pierced, I mean the attorney-client privilege covers information that, as you know, the attorney and the client are communicating to each other about the representation.

And so what, you know, the circumstances in which that kind of information matters to the decision the court has to make is

only going to be in the scenario I think that you described, which is when there's some fraud going on.

MR. STONE: Let's go back then to our subject matter. It sounded to me like you are against generally rape shield laws. At the moment, you're talking about it on appeal but it seems to me that you feel like on appeal at least, rape shield laws shouldn't shield the victim and their background, even though there's been a legislative decision to adopt a rape shield law.

Because if there's truly a rape shield law, on appeal you couldn't get what you think should occur.

MR. JOHNSON: Yeah. No, not at all. I beg your pardon if I have not expressed myself clearly, because that's not at all what I mean say. The rape shield laws serve a vital function and, you know, I am not going to be one to criticize them. The function they serve is to set that standard, which is, you know, the

information only comes out, not --

You know, most information comes into trials if it's relevant, if it has some potential to make the matters more probable than not, you know. Rape shield evidence is kept out unless a much higher standard is satisfied, and that's where the balancing has happened.

My point on appeal is that the system of justice and common law elaboration of law requires accountability in the decision-makers, and when you hit the highest level of the courts, and it's the appellate court, accountability means public transparency just -- and so it is, you know, and that's why in that context the discussion about evidence in the appellate court --

You know, either we're going to have a secret appeal, which is problematic I believe, or we're going to have an open one, and that is a dichotomy that you can't really avoid.

MR. STONE: But you don't have that same feeling apparently at the trial level,

taking Professor Garvin's analogy. If the woman doesn't want it to come out that on different occasions, at different times unrelated to the case, she's had sex with multiple partners all at the same time, and the judge ruled it irrelevant, you would suggest that because it's an appellate court, they need to put that on the record before saying it's irrelevant. Am I right?

MR. JOHNSON: Yes, yes, and this is why, is because the trial judge is accountable. If the trial judge had the last word, like if for some -- you know, in an alternative world there was no such thing, you weren't allowed to appeal rape shield rulings from a trial court to an appellate court, I would have a different view.

I would say that those proceedings in the trial court would have to be open. But because we have an appellate court, and a trial court has some accountability to the appellate court, it is perfectly acceptable to have the discussions about admissibility take place behind

closed doors in the trial court, because that decision isn't in an ultimate sense, the final decision.

MR. STONE: Isn't every --

CHAIR HOLTZMAN: Mr. Stone, can I just interrupt for one second?

MR. STONE: Yeah.

CHAIR HOLTZMAN: I agree with you, but this is really not the focus of our hearing. So do you want to focus on something else?

MR. STONE: Yeah. I'm trying to bring it back, and I guess what I'm bringing it back to is the following. If we're -- if the military has rules like 412 and 513 and they became -- and they weren't legislatively -- well I guess now on 6(b) some of them are legislatively authorized because sexual assault victims were not coming forward, aren't they going to continue to not come forward when they hear before trial, and they're advised well, it will all be private.

This can't be released at trial, but this will come out on the appeal because we have

an open appeal and the defense counsel will get access to it and it should be on the record. Doesn't it totally defeat the point from the victim's point of view, and I guess the legislators who enacted it, of having 412 and 513 if that's only a protection at one level of the court and not a protection every time this is an appeal?

MR. JOHNSON: If I may just answer that very briefly. What I would say is that 95 percent of cases that are whatever it is don't get to the appellate court. So victims, you know, have that -- you know, they're not going to be inhibited from disclosing on that. And secondly, we don't make a promise to victims now that your prior sexual history will never come out.

(Simultaneous speaking.)

CHAIR HOLTZMAN: Please, Chris, this whole subject --

MR. STONE: Will this goes --

MR. JOHNSON: Because it might if the

trial judge says it's essential to a fair trial.

(Simultaneous speaking.)

MR. STONE: I guess my response, and I'll move to another topic is that it may be 95 percent of the cases are on appeal today, although I thought there was an automatic appeal in all convictions in the military. But even if we're not talking about automatic appeals, it seems to me that defendants who knew that the victim would be chilled and not come forward if the material came out would not choose to plead guilty, because they would now realize that that rape shield is not going to be effective later.

As I said, the military cases do all get appealed. Let's move for a second to the other comment that was made, about whether victims need to be parties to all of the proceedings or only specific ones ahead of time.

Mr. Guilds, you were giving one example of having to be potentially available on every issue, and I didn't know exactly your feelings on if there is a motion in the court,

trial court or any public hearing. So it could be the appellate court, to exclude the victim because the victim's testimony would be materially altered if the victim heard it.

I presume the only way you can respond to that is if you've heard everything that went before, so you have a basis to say that their testimony would not be altered.

MR. GUILDS: Absolutely, I mean that's one of countless reasons why you have to be there for the entire trial, in order to adequately and effectively represent the survivor at a court-martial. You have to understand all of the issues.

It's why we, and I know this is not the topic and I'll be brief, but it's why I continue to emphasize the need for us to have access to all non-sealed filings in a case, so that I can explain to my client what's going on. Certainly that's a perfect example of where I would be in the court and ready -- I'd do this before court to make sure that this issue is

decided before. But if it came up during the proceeding itself, of course I would stand up and make those arguments.

MR. STONE: Let's turn to the *mandamus* question a second, because it's come up a few times. In our last hearing and some of you have reviewed the transcript of it, we heard at least three objections to allowing victims to participate in a manner other than *mandamus*, with everybody saying well, *mandamus* is adequate.

Some of the objections to non-*mandamus* participation were it would be, put too much work on the other counsel to have to respond. It would slow down the proceedings in an unacceptable way. It would burden, be a huge burden on the court to have to consider and listen to three briefs, and finally for some reasons that we've heard here today too, it would be a violation of the defendant's due process because it would be or be viewed as two against one.

And I guess I hear all of those concerns, but I don't understand then why those

same participants don't mind an *amicus* brief, unless as Professor Garvin said, it means that the participants and the court are not reading it. Because if an *amicus* brief is filed, all those concerns are involved.

If I'm wrong about them being different if the victim files a party brief versus an *amicus* brief, or there's something I'm missing there, I guess I'd appreciate some feedback.

MR. CHRISTENSEN: Well, I would say that all three of those objections, you could say the same thing about the *mandamus*. They already respond to them. It already slows down the process, and it already can be viewed as two against one. So we already have a system that incorporates what they're objecting to.

The reason I think we should have direct appeals is because the *writ of mandamus* is too high of a burden, and it's good to hear that some civilian jurisdictions really say it's like *writ of mandamus* light, but that's not the way

the military's viewing it.

And so when you have the standard that I articulated, it's almost impossible to get relief. So that's why you need the direct appeal, and I think the direct appeal should have time standards. I'm very conscious of the fact that as that appellate process is going, the accused could be sitting in pretrial confinement. The accused is under the anxiety of waiting to get his verdict. I understand that.

So I think it should be quick, and to the extent that it's too much work, you know, one great thing about the military appellate system, every branch of Service has an appellate shop. It's not the trial counsel writing the brief. It's, you know, the appellate attorneys at those appellate shops for both the government and trial, unless it's a civilian who wants to take it up.

It's no more work for the trial counsel or the defense counsel, unless again it's a civilian who decides he wants to or she wants

to do it. So I'd reject all three of those arguments. They're nothing unique to the *mandamus*.

MR. STONE: As the one with the most maybe ongoing military experience here in the military courts, are there any cases out there in the military or maybe even outside the military that have said it's an unfair two against one procedure or an unacceptable delay or an unfair burden or due process violation to allow either *amicus* briefs by victims or substantive briefs by victims that are not *amicus*?

MR. CHRISTENSEN: Not in the military. I would say the two against one is also kind of depends on the circumstances. I think Ryan can speak to this, is that there are some times that the government and the victim aren't aligned. The government may very well believe that 513 should be pierced and the victim is like no, I don't want 513 pierced.

Sometimes -- in the EV case, it was the government and the defense counsel taking the

same position. In the other case that was started out, it's called *Kitchens*. I can't remember what it ended up being called last week or this week at CAF, the government counsel and the defense counsel's argument were identical. The government could have stood up and pointed to defense counsel and said what he said.

And so the victim was completely opposed to what the government said. So the two against one I think is a false argument.

MS. GARVIN: I'll be brief, because I agree with what Don was saying. But I wanted to add a couple of things. One, the first three objections that you articulated that are in the record apparently, too much work, slowing down proceedings and burden on courts.

A, I don't think there's evidence of that from the civilian side when victims participate as quasi-party. I'll go with that term for now, quasi-party, right, when they're protecting their rights. There's simply not evidence that it happens.

I mean Arizona, let's go to the example where victims have had the highest level of participatory status for the longest time through the appellate proceedings. There just simply isn't evidence that it happens. In addition, I just have to put this on the record. I know you all have to be pragmatic in recommendations to -- Congress and the military have to factor pragmatism.

But I have to say when we're talking about people with individual rights, whether that's a defendant or a victim, those are also offensive objections. When people, when humans have things at risk, saying that it is too much work cannot be the answer, right. We have to figure it out.

The violation of due process from two versus one, again I think it just misunderstands the nature of the victims' interests, and if in fact there are moments when they are directly aligned and literally I'm going to stand up and say me too, if I'm the victim's lawyer, the court

still retains control over its proceedings to say I'm not going to allow you to spend three hours saying me too, right? There's controls over that.

So it misunderstands the nature, and it ignores the fact that courts retain some level of inherent authority to control actual proceedings in the moment. So the objections are problematic for me.

With regard to *mandamus* itself, you know, when the CVRA was drafted in 2004, it was drafted with the idea that it would be a unique appellate device, and we chose the word *mandamus* because we thought courts would understand it but we put in some language to imply mandatory.

Okay. This is an exercise in the utter failure of language drafting, because it then got interpreted to be ordinary *mandamus*, right, and this high level of review that was not -- I'm not a Congressperson. I cannot speak for the Congressional intent. I can speak for the people who were doing some of the drafting.

Whoops, right. I mean literally whoops.

It got fixed. It got fixed to put in place the actual intent, which is the ordinary standard of review. So if the military is, and in fact it is going down the path of the high level standard of review *mandamus*, that is just not the intention of the rights and it needs to be fixed.

MR. MIDDLETON: Well, if I may just add, and I think I mentioned it in my original comment, I think a lot of -- it would depend on the implementation, because in the --- for instance the *amicus* situation, at least in our courts and I don't know if it's different in the military, the *amicus* brief is -- has a shorter word limit, and they're generally not allowed to participate in oral argument except upon invitation of the court, in which case they have to also work with the party who they're aligned with if they are and split their time.

So there's limitations on the front end as to how much participation there is.

Generally speaking, our court, if there were I would say a number of victims making similar arguments, they probably would want them to join in a single *amicus* rather than multiple *amici*.

And so there are some limitations on the front end. On the back end, our court and generally we see *amicus* in our Supreme Court, not the Court of Appeals, which is really the ones that are having to deal with most of the issues.

Generally they will, if requested, provide more words on the back end. We have word limits. I assume the military does as well, and more time if we need it, because we're responding. So I think, you know, those are considerations that come into play. I think it's more difficult in our regular court of appeals, which is where most direct appeals as of rights go, due to the volume of the appeals that are hearing.

So I think -- and the number of appeals we're doing in that situation. So you know, I do think there could be things that could

be done to ameliorate some of the due process concerns. Whether they would take care of it again, I'm a defense attorney. I tend to go to a parade of horribles.

I recently did a brief involving 22 alleged victims, and I'm thinking how as a practical matter would that work if you're getting into that type of level of victim's right to participate, each individual victim. I think it could become unworkable.

Again though, I think many of these problems are more a matter of perhaps implementation.

MR. STONE: But you don't have any cases that say it's a due process problem do you?

MR. MIDDLETON: I don't. I mean we -- as I said in Colorado, we don't face this. So it hasn't come up with us, and I don't know if it's been addressed in other jurisdictions.

CHAIR HOLTZMAN: Okay. Just a few questions. First of all, let me just make sure I understand the landscape. In how many states

does a victim as a non-party in theory have a direct appellate right?

MS. GARVIN: So I would have hoped to have that hard number for you all by today.

CHAIR HOLTZMAN: If you don't have the exact number, can we get an approximation? Are we talking about five, ten, fifteen --

MS. GARVIN: With crystal clarity, it's around seven to ten, and again I can't be -- and here's why. Things are drafted to say in certain jurisdictions the victim has standing to assert these rights in any court with jurisdiction over the matter.

That hasn't been interpreted. I say that's explicit and that gets me to the appellate court. It hasn't been interpreted. We have defense counsel saying the appellate court doesn't have jurisdiction over that matter. So -- but there are at least between seven to ten where the language is pretty darn clear. There are at least six of those where it actually has happened, right.

Victims have independently participated, either in interlocutory appeal and/or through some mechanism of direct appeal.

CHAIR HOLTZMAN: Could you, would you mind? I mean I don't want to take the time of everyone at this point, but give us those states?

MS. GARVIN: Yes.

CHAIR HOLTZMAN: And also the language that's used, because that would be very helpful.

MS. GARVIN: My hope is to submit to the Committee a chart analyzing the states that have them.

CHAIR HOLTZMAN: Oh okay, great. That would be very helpful. I guess the second question I have going along that line has to do with some language that was suggested to solve the issue of appellate rights, which refers to, quote unquote, the real party in interest. Giving the real party in interest the right to appeal. Do you have any reaction to that language? Mr. Christensen.

MR. CHRISTENSEN: I don't think it's

necessary to do that, and I think that does confuse things and does get to the constitutional concerns. I think standing is all we need to say, you know.

CHAIR HOLTZMAN: You have language in mind that would solve this problem? Yeah, that would be great if you would do that.

MR. CHRISTENSEN: I could definitely, yeah.

CHAIR HOLTZMAN: Okay. Mr. Guilds.

MR. GUILDS: I was just going to say the same thing. I mean I see some easy suggestions here on ways to achieve it.

CHAIR HOLTZMAN: Well, if you have them submit them please.

MR. GUILDS: So and you've got a job to do, so we'll try to help you.

CHAIR HOLTZMAN: Okay. That would be really great just to move things along. I just want to understand also, I want to make a point about rape shield, to follow up along with my colleague. I'll be really brief, as the author

of the rape shield law 412. I find the -- I'm not persuaded by the dilemma that New Hampshire seems to feel that it's caught in, and I think it would be really a disaster to eliminate the rape shield statute. We've worked a very long time and it's been in place for a long time. We worked very hard to get it in place and it's important.

I guess the other question I have is what are the -- Ms. Garvin, you referred to the rights, and that's the standard we should use, when a victim's quote unquote rights are implicated.

But of course that's a very vague standard. What rights are we talking about, because I think Mr. Middleton has raised some important points about that, and you've also raised important points about the manageability of this, what do with numerous victim cases with numerous victims, I mean just for example.

I mean what rights are we really talking about trying to vindicate here, that

aren't being vindicated in the present process? Because I think just to raise, just to remind you of the words that you used, I mean the military is going to say be practical about this.

So are we going to say that there will be interlocutory appeal, they'll be direct appeals on every issue? I mean does the victim have a right to challenge, for example, the sentence? I mean maybe the victim has a right to put forth an impact statement, but after the sentence is issued, can the victim appeal, have a right? Is that a right?

So I'm trying to get you to kind of focus on -- rights sounds like a very good word. It is a good word. I'm very sensitive to that word. But really what are we talking about here in a practical way?

MS. GARVIN: Article 6(b) rights and privileges and then federal constitutional rights. Those are the three categories that are most readily identified. There may be some other statutory rights that extend to the military that

I'm not privy to in the federal -- in USC.

But those are the ones that we're speaking about, those that were pulled from the CVRA and put into Article 6(b), privileges beyond 412 and 513. There are certainly other privileges at risk here or at stake here, and then any other federal constitutional right, right, which there is a federal constitutional right to privacy that's at play in these cases too. So those are the ones we're speaking about.

So if you deconstruct that, do they have the right to challenge the sentence itself?

CHAIR HOLTZMAN: I just used that as an example.

MS. GARVIN: Right, right. But going down that example, well I'd have to find a right, one of those in 6(b), privilege, federal constitution that attaches to that moment and say do I have standing. Then would I be able to challenge it? I'd be hard-pressed to say you could actually challenge the sentence itself if it was done legally correct with affording me my

right to be present, heard and those specific rights.

CHAIR HOLTZMAN: Okay. Then I want to raise -- anybody have something to add to that?

MR. GUILDS: No, I agree.

CHAIR HOLTZMAN: Okay. Then there's always the issue of unintended consequences and they usually crop up. In the states that have allowed these proceedings, direct appeal for example by victims, what kind of problems have arisen? Anybody have -- Mr. Guilds?

MR. GUILDS: I mean I don't -- I have -- I've reviewed the federal intervention cases, and I don't see a problem from my perspective. The problems that you would see are the echo of the arguments, and I understand defense counsel has a job. They're the same arguments we've heard before about the unfairness of the process, although no court I've ever found in the federal system has said that our intervention would violate due process.

So if you look at those cases in the

federal system, where intervention has been the mechanism to get into the appeal process, because of some articulated right, I have not seen any issue within any of those cases that would be considered an unintended consequence.

MS. GARVIN: And then thinking about the landscape of the non-federal and, you know, there's probably someone better to testify about the problems because I haven't -- I also haven't seen the problems. It's been happening in Arizona for a long time. Is there a docket increase? Potentially. I mean the data hasn't been shown to show that there's a significant docket increase, right, at the appellate level.

There's been an attempt to kind of figure that out, but it's been relatively minor. In Oregon where we've done it, in Maryland. I mean what the problems are is that this is a new legal landscape, and we're having courts having to think pretty hard, and the cases sometimes come out in a way that's from a victim's perspective great, and sometimes they come out

from a victim's perspective that aren't great.

But that's just evolution of law. I don't see that as a problem. So you know, I don't know.

MR. GUILDS: I would say that -- sorry Don. I would say the one issue that is -- well, there are many issues unique about the military justice system, right. But one of the great things about this process that's evolved over the last several years, right, has been the appointment of victim's legal counsel to all active duty and military families, right, military dependents.

And so you are obviously in that circumstance if you're extending it to the appellate process. You're going to have hopefully well counseled victims who are going to have an opportunity to be heard more. There is not an equivalent federal system that provides every victim of a crime the right to a lawyer.

So are you going to have more litigation in the military setting as a result of

this? I mean to be honest, you are. I don't see that as a problem. I see that as what I mentioned in my statements, which is the military really being the tip of the spear and affording sexual assault survivors their rights. It's really something that the military justice system can be commended on, because it does not exist in any civilian system that I'm aware of, in a specific right government issued way, right.

There are certainly organizations like mine, NVRDC, that provide counsel. But that is by no stretch of the imagination the typical scenario.

MR. CHRISTENSEN: I think one unintended consequence that people talk about a lot of fear is opening the floodgates to appeal after appeal. I think first, you need to understand that the -- just like the accused wants this trial to be over, most victims want the trial to be over.

So it's the rare victim who is willing to go through that appellate process. Many

victims would say, you know, I don't care if they looked at my mental health records. Nothing in there I'm worried about. Turn it over to them. It just alleviates the issue. Or the judge rules in favor of the victim. Obviously, there's not going to be issues.

So you have to have a case where a victim is willing to push it and where a judge has ruled adverse to the victim. Then I think the other thing will stop the floodgates is, as I said earlier, there really is no case law from CAF or the appellate court, the Service courts, on 513 and what it means.

Once CAF is forced to address this issue, judges will rule consistent with that. I have faith in the judges. Right now they're just kind of ruling haphazard, and that will reduce the --

CHAIR HOLTZMAN: But CAF says it doesn't have jurisdiction.

MR. CHRISTENSEN: Well, I'm confident that either you or Congress, someone will say

okay, CAF, here's your jurisdiction. I think that will --

CHAIR HOLTZMAN: Rule on 513.

MR. CHRISTENSEN: Yeah. It will be fixed, and so I believe as you boil it down, it will -- judges will be ruling in such a way that someone like Ryan will go to the client and say the judge ruled adverse. The law is this way. We could appeal. I don't think it's in our interest to appeal. So I think that fear of opening the floodgates would be only briefly done.

CHAIR HOLTZMAN: Good. I think I just have two quick questions. One is on the mental health records and the fact that under the present system, appellate counsel for defendant can access those if they've been sealed. In other words, what happened below is that the judge felt that the threshold was initially met, looked at the records and then decided not to disclose them.

I think Mr. Guilds, you opposed allowing appellate counsel, the defendant, to

look at that?

MR. GUILDS: I hate it. I detest it in every sense of the way, yes.

CHAIR HOLTZMAN: Okay. But I haven't heard, I think, from Mr. Christensen about that, and maybe Ms. Garvin, I don't know if you've answered that either.

MR. CHRISTENSEN: Yeah. So I would --

CHAIR HOLTZMAN: With the caveat that Judge Jones mentioned, which is that this is, as I understand it, for appellate defense counsel eyes only.

MR. CHRISTENSEN: Correct, correct. I would say currently as written, 1203, Rules for Court-Martial 1203 should be changed, because right now it says sealed records will be provided to appellate authorities, and by definition government appellate counsel and defense appellate counsel are defined as appellate authorities. So they get the records.

Going to the concern that Ryan raised, I agree with him. If you're a victim, you don't

feel any better that appellate counsel's looking at it versus trial counsel or defense counsel or the military judge. I mean these are extremely private things and they don't want anybody looking at them.

I do agree that if you meet the threshold, and that's what you have to decide, what is that threshold, then there are cases where appellate defense counsel will need to be able to look at records to adequately defend their client on appeal.

You know, a bizarre hypothetical. Let's say the trial judge said I'm looking at these records, and even though it says the alleged victim often sees leprechauns and often hallucinates and has been, you know, addicted to methamphetamines, I'm not turning this over.

Well I think an appellate court, once they reviewed those records, would say okay, you get at least this. So I can see the circumstances when they should get it. I understand exactly what Ryan is saying, but maybe

it's because I've been a judge, maybe it's because I've been on both sides. I know Ryan's been on both sides. I do see some circumstances in a rare case where they should get them.

CHAIR HOLTZMAN: But let me play devil's advocate here. Those records are still being revealed to the judge?

MR. CHRISTENSEN: Yes, well and I think --

CHAIR HOLTZMAN: So it's not a total privacy interest.

MR. CHRISTENSEN: Right. I apologize.

CHAIR HOLTZMAN: And you could make the argument -- no, no, no. And you could make the argument that these -- there's another interest that's being advanced here, which is to help the judges understand what the right outcome is by allowing defense counsel to examine them and to say well wait a minute. A mistake was made here, and this is what you should be looking at because, as Mr. Middleton said properly, they are not as familiar with the record.

Maybe you don't have as much time to spend on analyzing the record, and so there is an interest there as well.

MR. CHRISTENSEN: And I can appreciate what you're saying because, as I said before, as a trial judge I reviewed a lot of these records. You review them in a vacuum and you're reviewing some like I don't know. Could be important. So I do appreciate what you're saying.

But this goes back to what Mr. Stone is talking about. It's a privilege. This is a privilege. It's a real privilege, and we don't pierce privileges lightly, you know. And so I think once we start treating that as a real privilege and that trial judge is not just routinely looking at these records, there's not going to be anything for the appellate court to review, because the trial judge isn't going to order their production.

CHAIR HOLTZMAN: I'm talking about the cases where that has been ordered, and then the judge seals it and refuses to disclose.

MR. CHRISTENSEN: And I understand exactly what you're saying Madam Chair.

CHAIR HOLTZMAN: All right.

MR. CHRISTENSEN: I think it's a difficult balance to --

CHAIR HOLTZMAN: Okay. I don't want to take more time. Ms. Garvin, did you --

MS. GARVIN: I'll be brief. In some ways we're a little cart before the horse right now, because the trial level rigorous standard isn't being applied. So first we have to get to a place where this incredibly rigorous standard is actually routinely applied, such that there's been a specific showing of materiality and relevancy, and that's the only moment right, and like I'm just going to emphasize the specificity, right.

But routinely what's happening in civilian and military courts is the fishing expedition idea, this broad swath of there's got to be something in there. So once we get --

CHAIR HOLTZMAN: What you're saying

that despite -- excuse me for interrupting. You're saying basically despite the new rule, it's being honored in the breach.

MS. GARVIN: Yes, so far, right. So we have to get to the place where we've developed it more rigorously, right, and it's getting there, right? We're hopeful. Once we get there, then in, let's say the showing was made. Trial court looks at it and says no, this is not relevant. We're going to go -- you're not getting it, and then that's appealed.

The first step on appeal should be a pure legal analysis by the court without counsel seeing it. Like did the trial court apply law properly.

CHAIR HOLTZMAN: To the threshold, to meet the threshold.

MS. GARVIN: To meet the threshold.

CHAIR HOLTZMAN: Okay, and suppose they find that --

MS. GARVIN: Then the court -- then the court then looks at it and says would we

have made the same decision?

CHAIR HOLTZMAN: Okay.

MS. GARVIN: We have a panel. We have multiple judges. If we don't trust our judges to be doing some of this, we have a different problem. If the court then says whoa, there was an error, then we open it up and do something with it. I think we need more and more protections, and we have to trust our courts at some point.

But this also returns to one of the very first points that Mr. Christensen made, which was an echo of Judge Baker, which is notions of tenure of our judges, we need to enhance that so that we actually have judges we can trust. I'm not commenting on any specific judge. I'm saying we need to move more and more towards the judges who have expertise in all of these matters, and allowing them to develop that over time.

CHAIR HOLTZMAN: Mr. Middleton, I've left you out of this whole thing. Is there

something that you want to add?

MR. MIDDLETON: Well, I don't necessarily disagree with I think generally what people are saying, which is there usually is an initial threshold that needs to be met before any records are produced or examined. My concern comes with the fact that, as Mr. Christensen was pointing out, oftentimes the trial judge is reviewing these records in a vacuum prior to trial, and there can be things that occurred during the trial, for instance the victim's testimony, that would make portions of the records very relevant.

But unless the trial judge has all those records categorized in their head to remember that when the victim testifies, no one will know and if we can't point that out to an appellate court, they may not recognize the problem either, because the focus may not be on the victim's testimony if defense counsel doesn't know that that's an issue.

MR. STONE: Yeah. Just on this same

1103A, which is really what we're talking about, this appellate giving access to defense counsel only, I was puzzled that more people don't think that the rule is not only unique but peculiar, because in the military, the appellate defense counsel is not by definition the defendant's trial counsel.

So since he's not the defendant's trial counsel and he's not allowed to communicate with the defendant, it seems to me that if I was a defendant I'd say wait a second, I'd want to know what's in there because that guy was not my trial counsel and he doesn't have the same appreciation at just looking at this transcript that I would have had or my trial counsel would have had, and the truth is he's not much different than the judge. He's looking at a dry record. So I mean doesn't anybody have any concern that it's a peculiar sort of rule where by definition in the military you don't have the same counsel on appeal?

MR. GUILDS: I mean I would agree with

you. I don't think it's a surprise. I agree. It does seem -- it does seem odd.

MR. STONE: I mean if defendant's pro se, then what happens?

MR. GUILDS: I think from my perspective, here's what I would say. None of my clients are going to believe it. Doesn't matter if it's true. None of my clients are going to believe that their attacker is not going to look at their records, right.

I'm not suggesting that anyone is doing anything unethical. I'm suggesting the effect on my clients. So every time someone else looks at the records, it's another opportunity for me to be revictimized and for my privacy to be invaded.

CHAIR HOLTZMAN: Have your clients complained to you about this provision?

MR. GUILDS: My clients have not complained to me about this specific provision, because I have not successfully been able to appeal any of these issues.

CHAIR HOLTZMAN: Thank you.

MR. CHRISTENSEN: I will say, Madam Chair, that we have heard this complaint when I worked at appellate government ---

CHAIR HOLTZMAN: Okay, thank you. I appreciate that. Okay. Well, our time has run out. I just want to say thank you to panel members and Mr. Johnson to you sitting in New Hampshire very much for your expertise that you're willing to share with us and for your patience in answering our questions. I really appreciate it and again we look forward to receiving these submissions from you. Thank you very much.

MR. STONE: Thank you, Madam Chairman.

MR. JOHNSON: Thank you.

MS. FRIED: Thank you. The meeting's closed.

CHAIR HOLTZMAN: Thank you. Thank you panel members too.

(Whereupon, the above-entitled matter went off the record at 11:51 a.m.)

A

a.m 1:11 4:2 174:22
abide 95:19
abiding 18:4
ability 49:8 86:22 98:13 103:9 123:13 126:2
able 31:9 50:4 73:1 79:7 91:19,21 157:19 165:10 173:21
above-entitled 174:21
absent 40:7
absolute 76:17,18 118:19 123:4
absolutely 63:17 110:14 122:4,17 132:20 141:9
abstain 28:3
abstract 49:21 120:15
abuse 58:13 120:6
Academy 87:20
accept 43:5 44:2 88:20
acceptable 137:21
accepted 43:2
access 21:3,4,6,13 27:13 31:3,20 38:21 52:16,18 68:5 69:2 74:6 87:9 94:2,6,8 101:12,19,21 116:17 130:22 139:2 141:18 163:16 172:2
accessible 21:12 94:11
accommodate 77:16
account 123:5
accountability 73:13,16 74:2 76:18 77:1,18 92:15 136:10,12 137:20
accountable 73:10 137:11
accurately 90:17
accused 26:4 33:15 124:11,18 125:2,9 144:8,9 161:18
achieve 18:21 25:5 154:13
acknowledge 22:14 31:15
acknowledged 12:18 13:2 17:18
Act 5:20 9:17 11:22 14:17,18,19 17:3 37:6 37:22 59:7 63:8
acting 112:7
action 17:8,10,12 40:6 83:4 84:4 131:15
active 58:4 160:12
activity 121:11
actor 12:11
Acts 5:22
actual 11:5 80:20 109:2 148:7 149:3
add 6:22 42:20 87:15 87:17 88:19,22 89:1 89:22 90:2,19 93:10 98:19 117:13,15 126:17 129:12 146:13 149:10 158:4 171:1
added 89:5
addicted 165:16
addition 15:3 35:14 38:1 55:6 61:3 64:5 64:10 147:6
additional 6:17 8:21 26:6 30:9
Additionally 63:6
address 6:8 23:9 24:6 30:9 80:13 98:14 119:3 120:7 162:14
addressed 11:13 67:22 72:5 98:15 123:13 151:19
addresses 67:20
addressing 123:10
adequate 43:3 84:6,7 85:22 88:15 89:6 142:10
adequately 40:16 141:11 165:10
Adjourn 3:20
adjudicative 19:20
adjustment 70:17
administers 57:16
administrative 28:6
Admiral 4:18 90:6
admissibility 67:16 137:22
admissible 52:15 114:9 114:21
admitted 78:15 91:6 92:1 93:4
adopt 74:21 135:11
adult 6:5 35:19,21
advanced 75:3 166:16
adversarial 70:8,9
adverse 28:6 33:7 98:8 105:22 107:16 114:17 115:1,7,13,17 162:9 163:8
adversely 98:11
advised 48:16,17 138:20
advisor 2:6 7:9 56:19 57:7 58:2
advisory 4:8
advocate 33:4 49:13,20 50:3 51:20 58:4,9,17 59:1,4 166:6
advocating 23:15 78:12 99:13
Affairs 58:1
affirm 76:11
afford 118:16
afforded 37:21
affording 157:22 161:4
aftermath 57:18
agencies 60:20 62:20
agency 61:8
agenda 5:1,8
ago 35:5 58:10 108:12
agree 23:10 76:10 85:15 86:6 87:12,17 96:2 97:17 98:1 138:8 146:12 158:5 164:22 165:6 172:22 173:1
agreement 30:4 40:7
ahead 97:15 100:21 140:18
Air 23:21 25:22 85:19
Alcohol 61:4
alibi 131:4
align 14:1
aligned 106:1 107:4 115:8 145:18 147:21 149:19
alignment 13:15
alignments 13:22
aligns 13:19
allegation 122:2
alleged 151:6 165:15
alleviates 162:4
allow 19:12 21:12 89:3 128:21 145:10 148:2
allowed 67:5 71:22 78:6 85:18 137:14 149:16 158:9 172:9
allowing 22:20 43:15 51:21 142:8 163:22 166:18 170:19
altered 141:4,8
alternative 137:13
ameliorate 151:1
amend 33:21
amended 5:21 26:14
Amendment 47:6 53:21 97:7,11
amendments 6:7
amici 150:4
amicus 9:12 19:8,11,16 19:17,18,19 20:1,9,15 43:1,1,6,6 78:6,10 84:5,5,10,17,19 85:4 85:22 87:11,21 88:6 88:15,20,21 96:1,2 143:1,4,8 145:11,12 149:13,15 150:4,7
analogy 137:1
analysis 12:14 19:21 42:5 66:18 68:19 71:18 76:4 80:21 82:20 83:20 84:22 97:13 99:11 103:18 127:18 132:8 169:13
analyzed 18:13 128:10
analyzing 127:2 128:1 153:11 167:2
and/or 153:3
Ann 2:6 3:15 7:8 56:18 57:6
answer 11:7 14:3 75:9 83:4 96:2 126:13,19 130:3,6,18 134:2 139:9 147:15
answered 164:7
answering 34:12 56:9 174:11
answers 75:6,9
anxiety 144:9
anybody 113:13 131:6 131:9 158:4,11 165:4 172:18
apologize 45:10 90:8 166:12
apparently 136:22 146:15
appeal 15:10 17:4,19 19:13 21:22 25:6 26:19 31:19 32:4,12 32:12 33:6 38:5,22 39:16,18 42:4,8,9 46:22 48:22 51:15 52:16,18 53:2,4,7,19 54:4,11,20 55:5,8,19 55:20 62:4,6 64:5,9 66:19 73:6 74:8,19 75:18 77:12,13 81:10 81:11,22 82:17 83:13 84:13 94:2 104:14,17 107:18 108:8 109:21 112:6 114:13,13 115:6 116:16 117:9 117:12 119:2 124:5 127:14 135:7,8,14 136:8,18 137:14 138:22 139:1,8 140:5 140:6 144:5,5 153:2,3 153:20 156:6,11 158:9 159:2 161:16 161:17 163:9,10 165:11 169:12 172:21 173:22
appealed 26:17 27:1 74:18 77:9,10 106:20

140:15 169:11
appeals 18:18 31:18 32:14 38:10 39:19 40:11 41:18 46:11,11 50:5 52:20 54:17 62:3 69:17 106:18 107:13 112:18 134:12 140:8 143:19 150:8,16,17 150:18,21 156:7
appear 35:1 36:10 45:7
appearing 36:2
appellate 2:5,7 3:10 6:9 6:14,14,15,18 7:7,12 8:3 9:9 10:2,3 11:5 12:2 13:7 14:4,22 15:19 16:14,20 17:12 18:11,16 19:2,3 20:19 24:2,3,11,13,15,21 25:2,13 32:21 33:1,5 33:10 34:13 36:11,22 37:10,12 38:6 39:7,13 40:8,9 41:13 42:11 43:16,21 44:8 45:17 46:7,8,20 48:5 49:6,7 49:8 51:6,11 55:3,13 63:15 64:21 68:3 69:22 70:2,3 74:3,11 74:20,21 75:4,7,7,8 77:3,17,20,22 78:8,19 79:6,17,19 80:16,22 81:20,21 82:16 86:9 90:11,21 97:12 98:9 102:5 103:16 105:3,8 106:7,12,14 108:9,15 108:15 110:11,18 111:4,17 112:2,7,10 113:20 114:22 117:22 127:15 131:12,18 136:12,15 137:7,16 137:19,20 139:12 141:2 144:7,13,14,16 144:17 147:4 148:13 152:2,15,17 153:17 159:14 160:16 161:22 162:12 163:15,22 164:11,17,18,19,19 165:1,9,18 167:17 171:18 172:2,5 174:4
appellatory 109:4
application 105:5
applied 168:11,13
applies 32:10 33:21 124:10
apply 12:18 40:9 52:11 169:14
appoint 33:4
appointed 4:14
appointment 160:11
appreciate 36:9 63:18 80:9 118:13 143:9 167:4,9 174:6,12
appreciation 172:14
approach 50:19 80:15 84:12 96:16
approaches 96:13
appropriate 48:8 53:1 54:2 127:19
appropriately 123:2
approvals 64:11
approved 5:7
approximately 54:7 61:14,16
approximation 152:6
area 25:1 42:1
areas 24:7 32:9 34:13
Arguably 16:6
argue 70:1 71:8 83:19 85:19 102:15 105:21
argued 27:12 31:4 33:19 74:14
arguing 28:3,9 87:12 93:15
argument 20:14,14 28:1,18 29:10 43:20 75:21 78:7 91:4,16 92:1 111:2,14 118:4 121:15 146:5,10 149:17 166:14,15
arguments 15:1 27:5 29:3 48:18,19 52:19 53:1 62:5 84:1 85:17 88:22 91:17 99:6 100:4 108:16 142:3 145:2 150:3 158:16 158:17
arisen 91:3 158:11
Arizona 17:8,9 147:1 159:11
Arlington 1:10
Armed 41:18
Army 106:17
Arnold 2:4 7:5 34:18 35:4
Article 6:7 9:18 24:21 27:13,16,22 31:3,21 32:16 40:19 44:9 83:17 87:5,10 98:6 116:2 156:18 157:4
articulate 13:12
articulated 73:12 132:16 144:3 146:14 159:3
articulating 133:18
artificial 15:14
asked 26:5 28:18
asking 90:3
aspect 54:22 129:18
assailant 39:2
assailant's 38:11
assault 6:5 23:17 35:8 35:11,19 36:7,12,21 38:14 40:15 45:1,5 58:13 138:17 161:5
assaulted 26:1 86:13
Assembly 47:8
assert 16:14 42:7 64:6 97:11 152:12
asserted 42:17
assess 70:13
assessment 6:3
assignments 33:13
assist 51:22 57:13
assistance 37:9 62:18 63:2,4 80:9
assisted 9:6 37:16
assume 51:1 105:21 115:7 150:12
assumed 13:15
assumption 13:19
attaches 157:18
attachments 4:13
attacker 173:9
attacker's 38:19
attacks 48:6
attempt 27:21 28:15 30:22 54:12 159:15
attempted 54:11
attempting 51:19 84:20
attempts 18:13
attend 75:22
attendance 5:14
attended 5:3
attending 59:20
attention 55:8,15
attenuated 29:10
attitudes 57:14
attorney 2:15 35:3 37:8 44:1 46:5 48:7,7,13 48:14 62:10,17 64:8 88:17 118:3,14 125:1 126:9 134:17 151:3
attorney's 61:20,21 62:13 64:11
attorney- 130:8 134:10
attorney-client 134:15 134:16
attorneys 32:21 33:2 60:4 65:11 84:19 144:16
Attorneys' 3:9
author 154:22
authorities 11:12 164:17,20
authority 41:20 73:21 73:22 75:5 148:7
authorization 5:20,22 64:9
authorized 138:16
automated 60:1,14
automatic 140:6,8
availability 90:13
available 4:8,20 8:5 59:16 61:19 68:13 71:6,14 73:5 89:18 91:2 105:20 140:20
avenue 115:10
avenues 11:10
avoid 121:2 136:20
aware 27:2 54:12 64:4 94:5 161:8

B

back 21:17 80:8 81:2 85:22 96:1 99:2 113:22 135:4 138:12 138:12 150:6,11 167:10
background 8:21 9:14 49:15 58:3 66:9 135:10
bad 86:17
bail 47:17,18
Baker 12:19 170:13
Baker's 33:11
balance 51:19 94:1 118:20,21 121:16,20 122:22 124:10,15,19 125:10 126:14 134:3 168:5
balancing 68:19,21 123:4 133:8 134:1 136:7
bar 25:12
Barbara 1:17 4:17
barn 85:17
barred 31:5
barrier 31:21
barriers 30:12
based 16:8 27:3 34:4 54:3,15 55:10 98:16 101:13 104:20 130:12
basically 64:1 106:7,21 169:2
basis 101:18 111:8 141:7
Bates 27:19 28:17,18 29:1,14,16,22 30:8,10 30:15,17 31:9
bearing 122:4
beg 135:17
behalf 43:20 44:19 88:7 88:9 99:6,14 102:15

believe 10:8 11:17 18:22 24:8 34:3 51:6 51:21 93:21 96:12 102:12,12,14 107:9 108:10 111:11 116:22 125:14 128:10 134:10 136:18 145:19 163:5 173:7,9
beneficial 36:14
benefit 79:19
Bergdahl 98:14,17
best 10:15 39:12 66:11 80:16
better 23:12 50:10 52:2 65:20,22 133:2,15 159:8 165:1
beyond 42:2 90:2 157:4
big 56:2
biggest 113:1,21 124:20 125:11
bio 8:22
biographies 4:20
biography 46:3
bit 63:22 81:5 106:5 126:21
bizarre 165:12
board 35:14 58:16
Bobby 1:9
boil 163:5
bono 35:6
box 43:11
boxing 43:9
branch 41:4,11 44:20 86:16 87:8,8 144:14
breach 169:3
breath 85:1
brief 9:22 20:17 43:2 64:1 78:12 85:1 91:18 141:16 143:1,4,7,8 144:15 146:11 149:15 151:5 154:22 168:8
briefing 51:6
briefly 46:2 47:4 68:2 126:17 139:10 163:11
briefs 55:5 75:18 84:5,6 84:11 90:21 142:16 145:11,11
bring 9:3 59:18 122:1 125:7 138:11
bringing 138:12
broad 48:12 93:22 168:20
broader 93:18
brought 17:13 25:17 86:12
bump 31:16 113:3
bunch 100:3
burden 22:12 25:5 26:22 113:15,16 142:15,15 143:20 145:10 146:16
Bureau 61:1,4 62:6

C

C-O-N-T-E-N-T-S 3:3
CAAF 19:5 27:1,5,11 28:1 31:2,5,20 32:13 33:20 34:2 116:1
CAAF's 85:17
CAF 146:4 162:12,14 162:19 163:1
calculus 128:4
California 30:19 58:20 98:15
call 60:14,15 97:18 99:12,13
called 17:10 29:22 53:7 115:6 146:2,3
camera 29:21 46:21 49:2,9 50:20 51:9 68:9 70:4 71:3,6 105:14 110:8,13 111:10 113:7,18 116:15 125:8 127:17 127:18 131:6,18
Candidly 43:19
capable 133:18
capacity 57:13 96:19
capital 123:12
Captain 2:11
care 62:9 133:9 151:2 162:1
career 19:19 58:15
carefully 18:12 66:14 77:11 84:22 91:10
Carson 2:14
cart 168:9
case 25:15,20 27:18,22 28:8 30:3,10,18,21 33:19 48:9 53:15 55:13 60:10 61:3,11 61:12,13 62:4,15 69:13 71:12 73:12 75:4,18 76:3 78:13,22 79:13 81:3,6,9 82:2,5 82:7 86:10,11 87:20 87:21 88:10 93:18 97:3,7,10 98:14 108:6 117:19 119:11 121:9 121:22 123:11,12 124:19 137:4 141:18 145:21 146:1 149:18 162:7,11 166:4
case-by-case 68:18
cases 9:6,8 24:17 28:4 37:18 38:1 39:16 51:2 54:1 58:12 59:20 77:13,14,14 79:11,14 79:20 84:18 87:19 95:15 106:22 112:16 112:17 115:2 118:6 118:15 133:14 139:11 140:5,14 145:6 151:15 155:19 157:9 158:13,22 159:4,20 165:8 167:21
categoric 95:12
categories 156:20
categorized 9:21 171:15
category 67:20 70:19 72:4,7 74:4
caught 155:3
cause 8:12
caused 12:11 83:4
causes 25:9
caveat 84:16 164:9
CCA 26:18,18,18 27:13 115:14
CCAs 32:12
cease 59:15 94:19
censoring 92:12
center 1:10 60:14,16
central 33:14
cents 116:12
certain 18:12 67:15 82:5 87:4 105:1 152:11
certainly 21:8 36:19 74:9 78:9 88:7 120:6 141:20 157:5 161:10
chair 1:11 4:17 5:7,10 5:11 7:17 8:14 14:14 22:21 23:6 34:15,21 35:1,15 45:9,14,22 56:11,15 57:3 63:14 63:18 64:17 65:5,14 65:21 66:2,5 80:2 90:4,5 95:20 120:17 120:20 138:5,8 139:19 151:20 152:5 153:4,8,13 154:5,10 154:14,18 157:13 158:3,6 162:19 163:3 163:12 164:4,9 166:5 166:10,13 167:20 168:2,3,6,22 169:16 169:19 170:2,21 173:17 174:1,3,5,19
Chairman 65:3 174:15
Chairwoman 23:7
challenge 30:5 156:8 157:12,20,21
challenges 28:5 30:14 97:20
challenging 28:2
championed 31:5
chance 30:20
change 4:22 5:7 101:2
changed 164:15
changes 40:17
changing 57:14
character 104:9,9,12
charge 58:18
charges 59:16,18 61:18 61:22 62:2
chart 153:11
Chief 2:7,13 7:12 64:21
child 58:12,14
chill 55:18
chilled 140:10
chime 81:12 82:17
choice 76:15 121:4
choose 20:11,12 121:21 140:11
chose 148:13
Chris 2:7 3:16 7:12 64:20 139:19
Christensen 2:3 3:12 7:3 23:2,4,5,7 34:16 85:13,14 97:16,17 101:1 105:12 106:16 107:6,9,12,20 108:1,5 108:18,20 109:9,14 109:17 110:1,4 111:3 111:21 112:3,14 115:4,11,16,19 116:1 117:15 124:8 143:11 145:13 153:21,22 154:8 161:14 162:21 163:4 164:5,8,13 166:8,12 167:4 168:1 168:4 170:12 171:7 174:2
circuit 89:15,16
circuits 89:18 106:9
circumstance 77:15 111:20 116:13 119:20 160:15
circumstances 37:11 76:21 93:3,4 99:8 118:7 134:7,14,21 145:15 165:21 166:3
civil 54:13
civilian 3:9 6:18 9:1,4 9:16 12:19 14:9,21 15:19,22 16:10,17 18:10,13 21:9,10 25:22 28:9 35:3,8,11 36:13 37:3 41:21 42:6 46:3,5 66:10 86:12 96:14 112:4,5,6,15,16

112:17 143:21 144:18 144:22 146:18 161:8 168:19
civilians 87:2
claim 131:2 133:2,3,6 134:6
claimed 78:11
clarity 152:8
clear 16:5 20:22 21:1 25:11,18 26:21 32:19 32:22 33:21 34:2 98:11 152:20
clearly 40:12 135:18
client 83:1 85:19 88:2 99:14 101:20 102:15 103:7 117:5 121:11 122:2 125:1 126:9 130:9 131:16 134:11 134:18 141:19 163:7 165:11
client's 103:1,3,9
clients 38:5 100:1,2 118:16 173:7,8,13,17 173:19
close 22:18
closed 72:16 75:22 138:1 174:18
closer 65:15
closing 44:17 73:11
closure 73:8 74:1
co-conspirators 125:4
co-counsel 9:12 78:5
Coast 85:20 107:12
Code 6:4,9
collar 35:3
collateral 82:16
colleague 154:22
colleagues 89:12
collection 60:7
College 58:7
Colorado 2:5 7:8 45:17 46:12,16 47:3,5 48:22 52:9 53:4 56:6 151:17
combined 17:9
come 52:15 75:12 97:8 97:10 113:6 121:12 121:17 131:16 133:10 137:2 138:19,22 139:16 140:10 142:5 150:15 151:18 159:21 159:22
comes 13:11 25:16 38:18 76:2 104:5 116:19 117:21 132:13 136:1,2 171:7
comforting 88:3
coming 23:6 57:1 64:18 82:4 138:17
Command 59:5
commander 58:6 125:22
commander's 125:19 126:2
commend 36:4 44:17 65:11
commended 161:7
comment 8:1 10:5 84:9 86:3 88:12 89:20 104:2 116:8 130:20 140:16 149:11
commenting 170:16
comments 9:22 29:1 92:10
committed 111:14,15
committee 4:8 58:1 153:11
common 79:3 136:9
communicate 37:16 172:9
communicating 134:18
communication 34:5
communications 24:20 33:22 34:7,9
community 35:22 99:21 100:3
comparing 121:5
compensation 63:5
complained 173:18,20
complaint 59:19 174:3
complaints 63:10
complete 91:1
completely 27:8 87:17 146:8
complex 11:6
comply 63:11
Component 59:5
components 62:21
compounded 25:14
Compounding 41:17
comprehensive 35:20 36:22 38:8 39:6
compromise 77:3 122:15
concepts 19:16
concern 43:15 50:2 51:16 55:17 69:9 70:7 70:8 73:11 76:17,18 89:14 113:1 118:14 119:3 120:8 124:20 125:19 164:21 171:6 172:19
concerning 33:11 92:11 119:6
concerns 29:13 34:2,14 43:22 44:1,10 49:12 50:17 51:20 54:19 56:5 88:14 118:1 142:22 143:5 151:2 154:3
concession 27:16
conclude 5:8
concluded 29:11 30:2
concludes 64:13 68:12
concrete 38:9 40:1
concur 33:10
conditions 102:17
conduct 6:2 31:5 127:17
conducted 6:4
conducting 49:16
conducts 49:2
confer 53:21
Conference 1:10
conferences 103:14
confident 162:21
confidential 122:20
confine 91:16
confinement 144:8
conflict 76:22
conflicting 76:16
confronting 90:18 99:20
confuse 154:2
Congress 11:15 24:10 24:17 29:7 125:13 147:8 162:22
congressional 58:20 148:21
congressionally-man... 4:7
Congressperson 148:20
connection 35:12 36:3 36:10 87:21
conscious 144:6
consent 67:7
consequence 159:5 161:15
consequences 158:7
consider 43:6 50:18 88:21 142:16
consideration 8:17 36:11 51:17 124:3,4
considerations 123:5 123:16 150:15
considered 159:5
considering 69:7 123:2
considers 69:12
consistency 89:14
consistent 27:15 41:22 162:15
constantly 23:18 102:22
Constellation 58:16
constitute 43:18
constitution 82:13 157:18
constitutional 28:12 29:6 43:17 47:6 98:12 126:7,8 127:5,6 154:2 156:19 157:7,8
constitutionally 97:20
constructing 69:10
consult 79:13
consulted 9:15
contact 47:20 48:14 60:7,8,17
contacted 54:5
contain 68:8 71:1
contained 67:4 70:14
content 20:19 21:14 69:14 71:8
contents 69:4 71:15
context 9:16 12:19 13:17 47:4 99:9 119:10 136:14
continue 32:2 36:5 138:18 141:17
continued 30:20
continues 21:9
continuing 18:2 57:19
contradiction 31:2
contrary 27:8
contrast 28:1
control 148:1,7
controls 148:3
conversation 85:2
convey 92:6
convicted 39:2 48:4 62:8 74:18 117:3
conviction 32:4 38:11 48:6 55:9 76:11 81:9
convictions 140:7
convince 27:11
Corps 23:22 26:18
correct 73:19 75:13 93:16 102:10 110:12 129:2,9 157:22 164:13,13
correctly 90:8,15 91:20 115:12 131:22
correlates 73:16
counsel 2:4 6:15 7:5 13:20 17:16 23:22 24:2 27:6 33:4,5,8 34:18 35:17 38:4 39:14,18 44:18 49:6 50:22 51:2,21 57:22 82:8 99:22 100:11 101:3 108:20 111:17 111:20 112:2,5,5,6,7 112:10,12,15,16,17

118:12 122:1 125:3,5 125:7 131:3 139:1 142:13 144:15,21,21 145:22 146:4,7 152:17 158:16 160:11 161:11 163:15,22 164:11,18,19 165:2,2 165:9 166:18 169:13 171:20 172:2,6,7,9,13 172:15,21
counsel's 27:9 55:4 131:14 146:5 165:1
counseled 35:10 160:17
counseling 63:1
counsels 91:16
countless 141:10
country 16:17 35:17 37:4 45:5 72:22 84:18 94:7 95:16
couple 80:10 146:13
course 31:4 72:17 73:12,21 81:12 84:4 92:8 99:7 101:5 112:4 142:2 155:14
court 9:2 12:13,14 13:5 15:9 16:19 17:4,7,18 18:18,19 19:18,20 20:7 21:3 25:17 26:20 27:18,22 28:3,13 31:3 32:16 33:2 37:2,7 38:13 40:11 41:18 43:2,5 44:8 48:10 49:2,7,8,11,17 50:3,5 50:8,13 51:1,8,12,22 52:14,17,20 53:8,11 53:13,14,17,20,22 54:16,17 56:8,12 59:20,22 62:1,14 67:6 67:6,8,16 68:11,11 69:7,11,17,20 72:11 72:16 73:8,9,11,21,22 74:1,3,5,7,14,20,21 75:2,4,7,8 76:2,22 77:11,17,22 81:14,15 81:18 82:1,2,18 83:6 83:10,18 84:21 85:19 85:20,21 86:1,2,3 87:10 88:1,16,19,20 89:3 90:14 91:6,8,9 92:3,11,15 93:7 94:20 94:21 95:5 97:12,13 98:6,6,9 104:7 106:17 107:13,15 110:11,18 111:4,10,19 115:14 115:17 116:13,14 117:9,22 118:22 119:5,13,14,17,18 123:11,17 125:13 127:15,17 128:20 134:12,22 136:12,15 137:7,15,16,18,19,20 137:21 138:1 139:7 139:12 140:22 141:1 141:2,21,22 142:15 143:3 147:22 149:18 150:1,6,7,8,16 152:12 152:16,17 158:19 162:12 165:18 167:17 169:9,13,14,21,22 170:6 171:18
court's 17:20 32:1 37:20 70:3,4,5 79:22 82:20
court- 141:12
court-martial 24:11 26:2,9 28:5 41:7 86:12 98:4,16 99:1,7 102:19 103:12 114:8 121:9 122:5 164:15
court-martials 126:5
courted 98:17
courts 9:6,9,10,11,13 16:15 17:14 18:12 20:11 25:3 27:14,16 31:21 36:14 37:18 40:9 41:4,11,13 42:6 42:17 50:19 55:13 75:15 76:20 79:6 93:1 94:11,16,17 95:16 106:13,14,15 116:3 129:4 136:11 145:6 146:16 148:6,14 149:14 159:19 162:12 168:19 170:9
covered 71:20
covers 134:16
crafted 16:22 18:11 19:1 84:22
Crafting 15:14
create 97:19 120:2
created 5:20
creative 100:3
credence 8:19
creditors 63:3
crime 2:2,7 6:22 7:11 9:17 11:21 14:9,17 16:11 17:2 29:9 35:10 35:19 36:17 37:1,5,21 38:8 40:5,17 48:4 56:20 57:8,10,13,16 57:19 59:6,8,13 63:7 87:3 160:20
crimes 33:15 60:6 62:22
criminal 7:10 10:14 35:3,9,12 38:19,22 39:11,19 40:16 41:4 41:11 44:12 47:21 54:1,14 59:9,15 60:11 61:18,22 62:4,14 68:4 97:2,7,10 106:17 107:13 123:8
critical 9:20 10:3 31:8 36:20 47:10
criticize 135:21
crop 158:8
cross-examination 128:19
crystal 152:8
cult 21:4
curiae 19:12,17
current 6:14 35:14 40:14 41:5,9 52:5
currently 33:4 35:6 46:7 58:6 61:16 90:10 99:20 164:14
custody 62:7
Customs 61:6
CVRA 14:11,16 17:3 37:8,17,20 39:22 40:5 40:10 59:7,7,11,14 63:6,12 64:2 83:17 148:11 157:4

D

D 27:19
D.C 27:18 29:14 35:15
Dale 2:13 7:15
danger 55:14
dark 22:7
darn 133:15 152:20
data 159:12
date 5:6 62:4
day 26:19 118:18
deadline 41:5
deal 47:17 150:9
dealing 86:20 125:2
dealt 92:19
dearth 25:15
debate 106:5 120:11
deceased 18:1 82:11
decide 52:2 55:13 165:7
decided 24:4 38:22 95:10 115:6,7 119:15 142:1 163:19
decides 131:7 144:22
deciding 40:10 133:5
decision 10:20 12:16 15:13 22:6,7,9,10 26:20 27:15 41:19 48:9 70:4 71:20 73:10 73:13 79:1 83:19 95:6 109:13 110:14 128:15 134:22 135:11 138:2 138:3 170:1
decision's 110:16
decision-makers 136:10
decisions 73:17,19 75:13 79:18 104:20 105:2 106:17 122:10
declined 28:20 61:13
declines 59:18
deconstruct 157:11
dedicated 23:14
deemed 94:17 95:5,14 95:14
deeply 40:20 92:2
defeat 139:3
defend 21:22 28:16,20 30:22 165:10
defendant 44:11,12 68:4 69:1 71:21 72:12 73:4 74:14,17,18,19 77:9 81:10 123:21 124:7 131:4 132:2 147:12 163:15,22 172:10,11
defendant's 43:17 52:3 56:4 68:20 71:9 76:6 77:10 118:19 122:15 123:2 142:19 172:6,8 173:3
defendants 10:17 55:18 62:9 134:5 140:9
defendants' 10:12 123:7
defender 2:5,5,7 7:7,12 17:16 45:16,18 64:21
Defender's 46:9 47:3
defenders 2:3 6:18 7:4 7:8 23:3,14
defense 1:1 5:20,22 23:22 44:1 50:22 51:2 51:21 55:3 66:10 69:14 70:15,21 71:13 72:14 76:9 82:8 91:15 93:15 99:22 100:3,10 101:3,15 105:19,20 105:20 108:3 110:9 110:21 114:15 118:11 118:14 122:1 131:3 131:14 132:2 134:4 139:1 144:21 145:22 146:5,7 151:3 152:17 158:16 164:11,18 165:2,9 166:18 171:20 172:2,5
deference 119:14
defined 42:22 164:19

defining 104:5
definitely 154:8
definition 119:22 164:17 172:6,20
degree 69:18
delay 145:9
demanding 14:8 69:11
demonstrate 24:18
demonstrates 33:20
demur 28:22
denial 40:12 41:14 64:6
denied 54:17
denies 40:11
deny 30:20 41:12
Department 1:1 2:7 4:14 7:11 56:21 57:9 59:12 60:1 61:5
depend 55:15 69:15 111:22 149:11
dependents 160:13
depending 55:1 123:20
depends 49:14 71:11 71:12,13,14 76:7 79:4 133:19 145:15
deployments 58:22
deposition 100:6,13,16 100:20 101:5,5,8,11
Deputy 2:4 7:6 45:16
describe 79:7 91:21 99:21
described 72:15 75:19 90:17 135:2
Designated 2:21 4:6
desire 118:16
despite 29:13 31:7 100:1 169:1,2
Detachment 58:19
detail 90:19 92:6
detailed 79:13,19
details 38:18 95:7 121:10
determination 17:21 51:10 95:8
determine 49:9 50:10 119:17 129:6
determined 118:22 120:1
detest 164:2
develop 25:1 93:1 170:19
developed 35:5 169:5
developing 93:2
development 31:22 33:14 40:19 41:22 92:14 114:2,3,6
developments 37:1,2 37:13 38:12 39:7
device 16:21 17:19 148:13
devices 16:22 18:7,11
devil's 166:6
DFO 2:22
diagnosis 34:1,4,10
dichotomy 126:21 136:20
Diego 58:19
different 20:7,10 56:1 80:14,15 86:10 93:13 93:17,20 96:13 98:1 100:4 103:17 106:20 120:18,21 137:2,3,16 143:7 149:14 170:5 172:17
differentiate 37:9
difficult 49:22 50:21 70:12 74:10 121:18 129:20 150:16 168:5
difficulty 104:5
dignity 39:4 82:15 83:2
dilemma 155:2
diligent 65:12
diligently 66:7
direct 18:11 22:5 27:22 31:1 32:11 35:16 42:4 42:7 46:11 53:2,4,19 54:4,11,20 55:5,8 62:4,5 64:5,9 76:16 81:10,21 82:10,17 83:13 103:2 104:17 124:5 143:19 144:4,5 150:17 152:2 153:3 156:6 158:9
direction 17:11 19:1 65:13 93:7
directly 9:11 10:16 20:5 38:14 39:3,20 42:10 42:18 43:4 44:8,13 61:2 121:14 123:9 134:3 147:20
Director 2:2,6,12 6:21 7:10 56:20 57:7
disagree 122:6 171:3
disagreed 74:17
disaster 155:4
discerning 50:10
disclaimer 47:1 89:10
disclose 49:5 163:20 167:22
disclosed 26:4 49:10 52:2,7,8 111:7,9,12 111:16 113:10 118:5 119:1
discloses 49:3
disclosing 30:1 119:18 139:14
disclosure 31:16 50:11 53:9 69:19 116:20
disclosures 53:12
discontinue 60:17
discovered 132:1
discretion 53:15 105:1
discretionary 32:12 40:21 53:17 89:2
discuss 9:20 59:6
discussed 95:15
discussing 93:19
discussion 8:16 10:9 22:11 67:16 132:14 136:15
discussions 137:22
dismissed 59:16
disposition 62:1
dispute 106:5
distinct 44:5
distinction 66:16,19 104:17 105:7 106:4
distinguished 4:15
District 27:18 30:19 35:20,22 48:6,14
diverting 55:14
diverts 55:7
Division 2:5 7:7 45:17 46:8
Djibouti 59:2
docket 159:11,14
docketed 27:18
docketing 21:12
Doctors 67:4
doctors' 67:2,20 69:3
doctrine 79:6
doctrines 79:5
document 109:2
documents 21:6 52:21 65:13 69:21 70:2 94:8 118:5
DOD 58:20
doing 9:10 15:22 16:2 127:22 129:11 148:22 150:21 170:5 173:12
DOJ 27:20 30:20 62:21 63:8,10
DOJ's 89:11
domestic 58:13
Don 2:3 3:12 7:3 23:2 41:1,17 116:11 146:12 160:6
door 31:10 33:13
doors 138:1
doubling 54:22
dozen 113:10
dozens 35:10
draft 88:8
drafted 88:7 148:11,12 152:10
drafting 9:15 84:20 95:17 148:17,22
drastic 25:7
dry 172:17
due 44:10 51:20 52:3 56:4 62:13 101:4 118:16 123:22 142:19 145:10 147:17 150:18 151:1,15 158:21
duty 58:4 160:12

E

earlier 162:11
Eastern 30:19
easy 154:12
echo 36:18 89:12 126:20 158:15 170:13
echoing 126:18
edification 79:10
effect 47:9 91:15 125:16 173:13
effective 38:7 140:13
effectively 141:12
effort 27:10 31:7 99:22
efforts 44:19
eight 108:11 122:1
eight-page 29:15
either 9:12 16:12 26:21 48:13,15 51:22 59:16 68:16 70:3 96:5 104:2 109:3,10,13 130:14 134:12 136:17 145:10 153:2 162:22 164:7 171:19
elaboration 79:5 136:9
elect 60:17
elected 61:17
eliminate 155:4
eliminates 68:2
Elizabeth 1:11,16 3:7 4:16
eloquently 116:22
elucidate 81:5
email 60:13 91:8,11
emphasize 9:1 141:17 168:16
employed 37:15
employees 63:10
empower 40:17 45:4
empowered 42:6
empowering 38:20
enabling 47:8,9
enacted 24:10 29:20 47:7,7,8 125:13 139:5
encompassed 99:17
encompasses 11:7
encourage 32:8
ended 146:3

ends 38:20
enforce 24:22 39:15 59:10 63:7
enforceable 26:15
Enforcement 61:6
engaged 131:3
engaging 12:14
enhance 57:12 170:15
enjoy 95:5
ensuing 26:2
ensure 37:21
ensuring 18:3
entered 60:19 61:15
entire 92:8 141:11
entirety 10:18 18:16
entitled 109:20
entry 47:18
envisioned 71:16
equal 101:12,18,20 120:13
equivalent 43:8 83:17 160:19
equivalents 14:12 15:2
erode 43:17
eroded 126:12
erred 107:14
erroneous 31:18
error 13:21 64:6 70:1 111:13,15 119:18 170:7
especially 70:11 114:4 118:7
essence 41:8
essential 60:6 69:5 70:15 71:9 72:20,22 73:14 74:15 76:6 128:17 132:22 133:11 133:16 140:1
essentially 46:10 48:22 51:12 52:6 53:6,14 55:11 56:6
establish 33:9
established 63:6,8
establishes 59:8
establishing 84:3
ethical 131:15
ethics 131:11
EV 24:18 25:20,21 26:20 27:1,12,17 28:2 29:3 30:20 31:2,12 86:10 145:21
EV's 27:21 28:8 30:9
evaluating 102:22
evaporate 44:15
event 117:4,8
events 62:12,16
everybody 142:10
evidence 24:16 26:6 67:17 69:8 71:14,22 72:3 74:15 91:6,21 93:3 103:4 104:9,21 114:9 119:21 122:14 124:9,11,14 131:5 132:3,6,12 133:19 136:5,15 146:17,22 147:5
evidentiary 104:6,8,21
evolution 160:2
evolved 130:12 160:9
exact 152:6
exactly 140:21 165:22 168:2
examine 166:18
examined 171:6
example 25:21 32:10 37:5 38:15 39:17 61:11 67:1,4,10 72:9 99:17 140:20 141:20 147:2 155:20 156:8 157:14,16 158:10
excellent 36:4
exception 29:6,10 126:4,8
exceptions 125:18
exclude 141:2
excluding 78:16
exclusively 66:10
exculpatory 125:10
excuse 14:14 63:14 84:7 107:14 128:13 169:1
executive 1:10 2:2 6:21 60:3 86:16 87:8,8
exercise 105:1 148:16
exercising 28:3 53:14 59:21
exhausted 32:14
exist 92:18 94:12 161:7
existence 47:21 61:10
existing 55:10
exists 15:6
expand 131:20
expanded 117:2
expanding 40:18
expedited 17:4,6
expedition 111:2 168:20
experience 24:4 38:3 38:17 45:1 46:13 49:15 66:12 78:2 114:15,20 145:5
experienced 129:19
experiences 36:13 87:19
experiencing 52:9
expert 96:15
expertise 9:3 170:18 174:9
explain 14:15 39:14 76:4,12,12,13 103:6 116:21 141:19
explained 73:18,20
explaining 41:2
explanation 75:14
explicit 16:5 17:3,11,15 19:1 152:15
Explosives 61:5
expressed 24:7 32:16 43:15 88:14 135:17
extend 156:22
extending 160:15
extent 24:12 26:11 29:5 29:9 83:9 84:10 104:8 127:10 144:12
extraordinarily 25:12
extraordinary 25:8,9
extremely 26:22 165:3
eye 50:10
eyes 118:8 164:12

F

face 24:19 30:13 79:11 151:17
faced 29:17 55:19 76:22
fact 8:17 20:18 21:13 25:14 28:17 30:8 41:10 88:2 95:1 100:1 144:6 147:20 148:6 149:5 163:14 171:7
fact- 128:4
fact-specific 127:1
factor 147:9
factored 69:10
facts 81:5 105:4,6 119:11
factual 81:13
fail 44:2 63:11
failed 26:20
failing 24:13
failure 22:4 29:19 148:17
fair 68:20 69:6 71:9 72:1,20,22 73:14 74:16,16 76:7 120:12 120:14 121:5,7 122:16 123:8 124:7 124:19 126:20 127:5 127:10,21 128:11,18 129:7,14,15 130:4 131:13 132:7,12 133:12,17 140:1
fairly 41:3 48:3 53:11
fairness 10:22 91:4 133:6
faith 39:5 162:16
fall 10:6
false 121:4 126:21 132:3 146:10
familiar 49:18 166:22
families 160:12
family 18:1 48:19 82:9
far 169:4
fathers 87:1
favor 162:5
FBI 61:3
fear 32:6 161:16 163:10
February 57:11
federal 2:21 4:6 9:5,8 9:17 11:21 14:17 17:2 21:11 37:5,13,15 39:22 40:8 41:13 42:5 42:16 59:9,13 60:5,20 60:22 62:6,22 127:6 156:19 157:1,7,8,17 158:13,19 159:1 160:19
feedback 23:18 143:10
feel 121:14 135:8 155:3 165:1
feeling 136:22
feelings 140:22
fellow 58:20
felony 46:11
felt 163:18
fewer 20:12
field 66:10
fifteen 152:7
fight 30:20 43:11 45:4
fighters 43:10
figure 127:7 147:16 159:16
file 14:22 64:2,8 72:12 84:19 87:21
filed 27:17 61:18 143:4
files 143:7
filing 14:7 21:13,14 59:19 78:12 84:10
filings 141:18
final 138:2
finalizing 5:5
finally 33:19 43:13 77:21 142:17
find 92:1 99:22 100:4 155:1 157:16 169:20
finding 109:20
findings 31:8
fine 123:18
Firearms 61:4
first 6:11 10:1 11:4 19:15 21:18 22:14 23:10 24:8 26:11 27:6

28:8 31:4,12 32:9 36:15 53:9 67:20 68:7 70:19,21 72:4 87:19 96:7 97:6,11 110:4,10 111:10 113:5 115:5 121:3 146:13 151:21 161:17 168:11 169:12 170:12
Fiscal 5:21,22 61:14 62:15
fishing 111:1 168:19
five 5:15 32:9 33:19 152:7
fixed 149:2,2,8 163:5
fixes 113:20,20
flagged 83:11
flawed 19:13 40:20
floodgates 161:16 162:10 163:11
Florida 58:11
focus 11:17 36:6 57:18 63:15 138:9,10 156:14 171:19
focused 18:14 66:11 124:5
folks 85:10 94:4 96:12 100:4
follow 29:19 31:13 33:2 130:2 154:21
followed 112:22 113:1
following 4:15 29:1 138:13
follows 41:14
football 87:20
footing 120:13
footnote 94:4
Force 23:21 25:22 85:19
forced 162:14
Forces 59:2,4
Forces' 41:19
forcing 51:12
foremost 22:14
form 8:3 12:9 40:2 91:1
formal 59:18
formally 42:13
former 6:13
forth 47:10 63:11 156:10
forward 7:18 22:18 34:12 56:9 79:21 131:9,11 138:18,19 140:10 174:12
found 14:10,20 26:20 27:1 29:14 71:5 94:22 158:19
founding 13:10 87:1
four 24:6 33:9 34:13
fraud 29:9 131:3,16 135:2
free 38:21 67:14
frequently 48:17 99:19 101:22
FRIDAY 1:7
Fried 2:21 3:6 4:3,5 5:12 174:17
friend 19:17
friendships 21:5
front 84:21 149:21 150:6
fulfill 39:10
full 5:17 10:20 31:10
fully 41:3 44:6 132:16
function 135:19,21
functionally 78:4
functions 10:15
Fund 57:17
fundamental 10:13 12:7 13:9,11 15:16 44:2
fundamentally 13:21 18:3 19:13 20:6 96:17
fundamentals 94:14
further 29:22 58:3 105:10
future 79:10,10,14,17 79:18

G

game 43:8 88:5 99:15 103:10
ganging 44:12
Garvin 2:2 3:11 6:21 8:9,10,13 14:16 16:4 22:22 78:2 80:11,19 84:14,15 90:17 91:11 92:21 93:9,11 96:9 105:12 126:17 128:13 128:20 129:2,9 130:10 143:2 146:11 152:3,8 153:7,10 155:10 156:18 157:15 159:6 164:6 168:7,8 169:4,18,21 170:3
Garvin's 137:1
general 10:1 30:13 37:8 47:8 48:7,13 62:10,17 64:10 78:20
generally 21:12 44:4 47:17 48:15 80:19 88:20 89:4 135:6 149:16 150:1,7,10 171:3
Generals 33:4
generated 62:15
getting 41:2 65:15 104:11 151:8 169:6 169:11
give 8:19 20:12,13,14 32:9,14 39:5 43:7 45:4 47:1,9 52:22 85:6 94:21 95:11 99:17 116:12 153:6
given 54:2 89:15 117:8
gives 8:19 23:15,17 98:13
giving 140:19 153:19 172:2
glad 8:15
go 18:18 87:13 96:1 97:13,14,15 98:8,12 100:20 113:14 115:2 118:9 121:3 122:14 128:18 131:9 134:8 135:4 146:19 147:1 150:18 151:3 161:22 163:7 169:10
goal 11:19 12:5
goes 21:17 68:19 115:14 127:12 131:11 139:21 167:10
going 5:1 15:8 22:8,17 30:12 51:14 82:4 83:12,12,18 85:3,5,6 85:11 86:17 87:4 91:7 91:19,21 93:20 94:20 98:8,11 99:9 102:18 104:14 106:5,12 108:7,8,22 110:12,13 113:22 114:12,20,21 121:9,12,17 122:5,18 122:22 124:17,17 125:6,7 128:15,18,21 131:8 132:22 133:10 135:1,2,20 136:17,19 138:18 139:13 140:13 141:19 144:7 147:21 148:2 149:5 153:15 154:11 156:4,5 157:15 160:16,17,21 162:6 164:21 167:17 167:18 168:16 169:10 173:7,8,9
good 4:3 5:12 8:13 36:16 57:2 66:1 70:9 84:12 114:6 118:4 143:20 156:14,15 163:12
government 27:6 28:18 28:20 32:21 33:1,5,6 37:15 38:14 44:6 59:18 64:6,8 101:15 101:20 105:22 107:4 115:8 122:20 144:17 145:17,18,22 146:4,6 146:9 161:9 164:18 174:4
government's 28:22
grant 101:6 106:18
granted 42:16,16 100:20
grappling 74:9 75:17
great 7:17 25:5 41:1 75:12 97:21 114:19 128:5 144:13 153:13 154:7,19 159:22 160:1,8
greatly 7:1
grievances 40:2 41:3
grounded 127:4
group 35:4 58:17
guaranteed 40:4 59:14
Guard 85:21 107:13
guess 73:6 79:2 109:21 118:1 120:10 128:7 130:5,15,20 134:8,9 138:12,15 139:4 140:3 142:21 143:9 153:14 155:9
guidance 32:1 95:12
Guidelines 37:8 62:18
guides 66:17
Guilds 2:4 3:13 7:5 34:18,19,21 35:2 45:10,12 54:21 87:14 87:16 98:19,22 99:19 100:9,17 102:7,10 116:7,9,10 118:13 119:12 121:2 122:8 122:17 140:19 141:9 154:10,11,16 158:5 158:11,12 160:5 163:21 164:2 172:22 173:5,19
guilt 132:6
guilty 140:12
Gupta 2:15
guy 172:12

H

hallmark 128:12
hallucinates 165:16
Hampshire 2:8 7:13 64:22 66:12,17 67:19 68:1 69:1,18 70:6 72:5,11 75:4,17 81:3 81:16 82:7,14,18 83:6 83:10 90:10 93:20 94:3,4,5,12 114:1,6 155:2 174:9
Hampshire's 17:16,17 70:18 82:2 93:6

hand 66:20 67:9 121:22
handle 46:10 112:17
handled 118:15 131:17
haphazard 162:17
happen 22:17 113:5
happened 69:19 70:16 107:15 134:1 136:7 152:22 163:17
happening 10:9 38:10 81:22 106:2 159:10 168:18
happens 68:9 69:18 72:10 103:11,12,13 103:13,15 146:22 147:5 173:4
happy 9:20 24:6 84:15
hard 50:13 152:4 155:7 159:20
hard-pressed 157:20
hate 164:2
head 171:15
heading 93:7
healing 57:15
health 110:15 113:9,12 162:2 163:14
hear 6:17 22:8 40:1 41:20 43:19 46:4 53:15 65:1,19 77:7 90:8 108:14 121:19 130:19,20 132:5 138:19 142:21 143:20
heard 6:13 12:13,15 13:5 14:6,10,22 15:4 15:13 22:2 27:22 28:19 30:21 36:19 39:22 41:3 44:14 47:15,16 59:21 65:2 83:21 84:1 96:19,20 97:2,3,14 106:22 116:11 130:2 141:4,6 142:7,17 158:1,18 160:18 164:5 174:3
hearing 7:19 19:11 20:7 63:20 72:19 138:9 141:1 142:6 150:19
hearings 8:18 14:7,8 22:11 36:4 62:1,14
hears 131:6
Hearsay 124:10,10
held 14:8 53:20,22 62:14 85:19 91:6
help 19:19 45:20 50:14 119:10 154:17 166:17
helped 7:1 66:7 131:3
helpful 56:8 116:6 153:9,14
helping 57:18
hey 82:2,3
hid 131:5
high 25:12,13 71:21 73:3 119:16 133:15 143:20 148:19 149:5
higher 73:20,22 75:5 110:8 113:15 128:3 136:6
highest 17:4,7 136:11 147:2
highly 31:8
historical 30:12 101:18
historically 10:10 101:13
history 94:22 95:4,13 139:16
hit 136:11
hockey 95:3,7
hold 72:16 85:1
holders 12:18 13:3 53:6
holding 41:19 43:9
holes 29:12
holistic 35:21
Holtzman 1:11,16 3:7 4:16 5:11 7:17 8:14 14:14 22:21 23:6 34:15 45:9,14 56:11 56:15 63:14,18 64:17 65:5,14,21 66:2,5 80:2 90:5 95:20 120:17,20 138:5,8 139:19 151:20 152:5 153:4,8,13 154:5,10 154:14,18 157:13 158:3,6 162:19 163:3 163:12 164:4,9 166:5 166:10,13 167:20 168:3,6,22 169:16,19 170:2,21 173:17 174:1,5,19
Homeland 61:5
Hon 1:11,16,17
honest 88:2 161:1
honor 65:9 100:11
Honorable 4:16,17
honored 8:15 169:3
hope 36:12,18 56:8 153:10
hoped 152:3
hopeful 169:7
hopefully 160:17
hoping 43:10
horrible 128:16
horribles 151:4
horse 85:16 168:9
hours 40:7 64:3 84:20 148:2
huge 53:16 142:15
hugely 121:18
human 23:14
humans 147:13
hurdle 53:16
hurdles 24:19
hypothetical 94:21 95:4 131:21 165:12

I

i.e 16:12 22:2 82:7
idea 10:13 11:16 12:7 13:11 19:8 20:21 50:12,14 87:22 148:12 168:20
ideas 10:6
identical 146:5
identified 42:3 54:21 156:21
identifies 119:5
identify 52:8
ignore 20:12
ignores 148:6
ignoring 24:15 106:22
illegal 131:15
imagination 161:12
imagine 42:12
Immigration 61:6
imminent 13:14
immunity 31:6 32:17 116:3
impact 10:4 13:5 39:3 55:3 56:3 59:11 63:4 86:3 123:14 156:10
impacted 10:16,21,21 15:8 20:5
impactful 121:18
impacting 12:15 38:14
implementation 56:2 149:12 151:13
implemented 55:16 60:2
implicate 44:10 82:21 83:1
implicated 21:21 39:21 43:4 44:13 83:3,18 155:13
implicating 42:19
imply 148:15
important 8:19 23:10 27:14 33:16 36:6 44:19 57:5 66:16 76:17,18 77:18 79:5 86:5,18 87:6 118:6 132:15,20 155:8,17 155:18 167:8
importantly 12:21 76:1
impossible 25:19 31:19 144:3
impression 28:9 92:20 92:22
improve 44:22
inadequate 20:15 87:11
inartful 95:17
incarnation 7:2
include 11:8,15 12:1 26:14 39:6,13 61:22 63:1
includes 7:21 94:7 95:1
including 4:12 9:17 29:18 58:12,22 109:6 118:18
inclusive 72:17
incorporates 143:17
increase 12:3 159:12 159:14
incredibly 119:16 168:12
independent 6:3
independently 153:1
indicate 61:12
indigent 46:11
indisputable 25:11,18 26:22
individual 11:2 19:16 20:2 85:9 147:11 151:9
individual's 124:16
ineffective 41:6
inform 48:8
informal 54:6
information 4:9 5:2 10:20 21:6 38:5,21 39:9 50:9 60:7,8,12 60:17,19,22 61:10,22 62:2 63:3 64:18 67:3 67:5,11,13 68:6 70:13 71:2 72:5,10,13,16,18 72:20 73:5 74:4,7 75:1 76:3,6,8,13 77:6 78:14 79:8 82:21 90:13,20 94:8 119:19 122:20 123:20 129:13 129:16 131:7,14 133:15,21 134:17,21 136:1,2
informational 46:15
informed 37:2
infringed 87:5,9
inherent 148:7
inhibited 139:14
inhibits 31:22
initial 58:9 171:5
initially 12:5 163:18
initials 14:15
initiated 20:20 59:15
initiative 35:6,10
injunction 27:17

injured 83:3
injury 12:10,10,12 13:13,14,16
input 7:21 104:22
inquisitorial 70:10
insights 80:7
Inspection 61:2
instance 95:1 104:8 105:15 107:3 118:1 149:13 171:11
Institute 2:2 6:22
instrument 65:16
insufficient 24:22
insurmountable 24:19
integrated 10:18
intended 126:16
intent 148:21 149:3
intention 149:7
interact 23:18
interest 11:16 22:5 24:7 28:15 33:16 38:2,9 42:18 68:20 71:19 73:2 74:2 77:18 82:12 102:9,11 103:9 130:17 132:18 134:4 153:18,19 163:9 166:11,16 167:3
interested 80:11 84:2 107:19
interesting 27:4
interests 18:2 51:19 122:19 134:9 147:19
interlocutory 15:10 18:6 40:1,14,18 42:2 53:7 153:2 156:6
Internet 60:14,16
interpreted 38:13 94:9 148:18 152:14,16
interrupt 138:6
interrupting 169:1
intervene 42:14 54:11 83:8,12 89:19
intervened 81:6,14
intervention 17:18 42:15 54:1,17 158:13 158:20 159:1
interview 100:1,2,6,12 101:15 102:1
interviewed 102:3
intimate 121:10
introduce 72:14
introduction 3:5 64:14
invaded 127:20 173:16
invasion 116:19 117:1 128:10,16
invested 38:9
investigating 63:9
investigation 61:12
Investigations 61:1
investigative 60:20 61:8,11 62:20
invitation 28:20 149:18
invite 84:8
inviting 65:9
involve 62:12 104:7
involved 11:8 55:2 143:5
involvement 103:2
involving 6:5 28:4 105:7 131:16 151:5
Iraq 59:5 101:16
irrelevant 94:17 95:6,8 95:9,14 137:6,8
Island 58:8
issuance 25:10
issue 6:11 8:16,20 9:21 11:6 25:16,16 26:6 30:11 41:6,11,13 42:5 45:21 51:11,15 52:2 53:5 55:9 57:5 74:19 79:3 80:13 83:16 84:12 91:4,22 92:18 94:3 97:3,21 98:15 99:14 101:22 103:6 107:15,16 114:8,16 114:22 117:14 127:3 127:5,6,8 128:2 131:12,12 140:21 141:22 153:17 156:7 158:7 159:4 160:6 162:4,15 171:21
issue's 97:22
issued 4:11 29:15 156:11 161:9
issues 11:9 18:8,12 20:19 36:6,11 38:22 40:10 46:17,19 49:19 51:3 55:2,19 56:8 63:15 66:14 79:12 88:19 107:10 114:4 125:1,21 141:14 150:9 160:7 162:6 173:22
items 70:13
iteration 97:4
iterations 16:21

J

JAG 23:22
James 33:10
Jason 2:4 3:14 7:6 45:14
Jim 58:2
job 41:1 84:16 103:7,10 154:16 158:17
John 27:19 58:21
Johnson 2:7 3:16 7:12 7:16 64:21 65:1,3,8 65:18 66:1,3,6 81:4,8 81:12 83:11 89:21 90:1,7,16 91:14 92:20 94:15 130:21 131:19 134:13 135:16 137:10 139:9,22 174:8,16
Johnson's 130:19
join 150:3
joined 58:5
joining 7:13,18 8:7 57:21
Joint 59:4
Jones 1:17 4:18 95:21 95:22 97:15 98:21 99:16 100:7,15,22 102:8 103:19 104:1 105:11 107:2,7,11,17 107:22 108:3,13,19 109:5,12,15,18 110:3 111:1,19 112:1,11 115:1,5,15,18,21 116:5,9 117:17 119:8 120:9,19,22 122:6,10 128:7,14 129:1,3,17 164:10
JPP 4:9,11,17,21 5:1,4 5:8,18
JPP's 4:7 8:5
jpp.whs.mil 8:6
judge 12:19 24:2,3 26:3 26:5,7 27:7,7,19 28:16,17,18 29:1,4,5 29:13,14,16,20,22 30:4,8,10,14,14,17 31:8 33:3,10 40:6 58:4,9,17 59:1,3 69:21 70:12 71:5 73:14 74:17 75:6 77:8 78:15 86:14,15 95:21 95:22 97:15 98:19,21 99:16 100:7,15,17,22 101:6 102:8 103:19 104:1 105:11,13,17 106:19 107:2,3,7,11 107:14,17,22 108:3,6 108:13,19 109:5,7,8,9 109:12,15,18,19 110:3,6,7,11,18 111:1 111:7,16,19 112:1,11 113:4,6 114:12 115:1 115:5,15,18,21 116:5 116:7,9,14 117:17 119:8 120:9,19,22 122:6,10 125:6 128:7 128:9,14 129:1,3,10 129:17 131:5 132:22 133:5 137:5,11,12 140:1 162:4,8 163:8 163:18 164:10 165:3 165:13 166:1,7 167:6 167:15,18,22 170:13 170:17 171:8,14 172:17
judge's 13:1 26:16 27:17 28:10,21 31:1 73:10 78:22 109:1
judge-centered 70:11
judge-only 71:5
judges 6:14 24:15 26:12 31:13 32:2,20 32:22 33:10,17 49:15 75:12 79:10 98:7 101:4,11 102:4 104:19 106:13 131:18 162:15,16 163:6 166:17 170:4,4,14,15 170:18
judges' 79:18
judicial 1:3 4:4 5:15,19 6:3 7:2,20 31:18 33:13 73:15 79:4
Julie 2:14
Junker 1:9
jurisdiction 17:5,7 27:3 27:11 28:4 116:2 152:13,18 162:20 163:1
jurisdictions 16:10,16 18:10,17 37:3 92:18 143:21 151:19 152:11
jurisprudence 42:1 93:2
jury 77:7 132:5
justice 2:7 6:5,10 7:11 10:7,10,14,15 11:1 12:3 18:4 20:21 21:1 24:12 29:18 36:7 39:12 41:16 56:21 57:9,9,15 58:18 59:12 60:11 77:2 86:20,21 123:9 136:9 160:8 161:6
Justice's 60:1

K

Kastenberg 12:20 33:3
keep 124:11
keeps 48:16 49:4
kept 136:5
kind 68:21 78:18 101:17 134:21 145:15 156:13 158:10 159:15 162:17
Kitchens 146:2

knew 109:1 140:9
know 8:21 17:15 22:17 29:2 46:2,4 48:17 51:1,9 52:6 55:12 67:13 69:8 72:18 79:14 85:21 88:4,14 89:5 96:14 98:14 99:1 101:17 103:3,4 106:4 109:6 110:5 113:10 113:11,19 114:18 116:11 117:19,20 119:11 124:9 125:22 126:3 128:3 131:8,22 132:6,10,13 133:12 134:2,4,5,17,20 135:20,22 136:2,5,14 136:17 137:13 139:13 139:13 140:21 141:15 144:12,16 147:7 148:11 149:14 150:14 150:22 151:18 154:4 159:7 160:3,4 162:1 164:6 165:12,16 166:2 167:8,13 171:17,21 172:12
knowledgeable 129:19
known 72:13
knows 25:7 31:10

L

lack 31:20 41:4 91:5 122:13
landscape 151:22 159:7,19
language 11:18 12:5 101:18 148:15,17 152:20 153:8,16,21 154:5
largely 46:15
larger 78:9
largest 35:16 44:20
late 60:3
Laughter 16:3 56:14 80:18 91:13
law 2:2 6:22 15:19 19:22 25:1,15 31:14 32:1 33:14 55:11 66:17 67:19 75:6 76:21 77:1 79:3,13,15 82:10,14 85:7 92:14 96:15 100:18 105:6 112:21 114:3,4,7 122:11 126:14 127:4 135:12,14 136:9,9 155:1 160:2 162:11 163:8 169:14
lawfulness 55:9
laws 135:6,9,19
lawyer 9:1,7 36:17 38:2 92:16 117:20 132:2 147:22 160:20
lawyers 35:7 54:7 68:10 69:19,22 70:1,2 71:7 72:18 74:5,6 108:15 109:6 117:2 134:4
lawyers' 118:8
leadership 57:14
learned 16:9
left 22:7 170:22
legal 12:7,8 32:6 35:17 39:14 44:18 53:1,16 53:21 60:4 105:1 119:17 127:18 159:19 160:11 169:13
legally 66:20,21 67:1,10 68:6 157:22
legislation 47:8,10
legislative 2:14 68:22 71:20 78:18 133:22 134:1 135:11
legislatively 138:15,16
legislators 139:5
legitimate 31:15 51:11 123:18
lend 120:5
lens 10:8,11 11:2
leprechauns 165:15
lesser 20:10 22:9
lessons 31:12
let's 82:4 95:3 105:21 115:7 117:21 130:8 131:4 135:4 140:15 142:4 147:1 165:13 169:8
letters 8:3 60:13
level 15:9 19:4 43:21 78:18 81:14 97:12,13 103:12 104:19 105:3 105:8,8 128:3 130:11 134:1 136:11,22 139:6 147:2 148:6,19 149:6 151:8 159:14 168:10
levels 19:3
Liaison 2:14
Liberty 1:10
lies 66:9
life 117:5
light 143:22
lightly 167:13
likelihood 71:1 114:19
limit 127:13 149:16
limitations 149:21 150:5
limited 13:2 26:9 30:11 38:12 42:22
limits 20:13 104:5 150:12
line 17:17 28:4 95:17 153:15
Lippert 24:18 106:19
list 15:14
listen 5:2 20:11 30:16 142:16
listening 132:14
listens 105:17
literally 147:21 149:1
litigated 79:8 83:5
litigating 62:21
litigation 9:4 93:12 94:12 160:22
little 65:21 66:4 81:5 84:16 94:4 126:21 168:9
live 123:3 125:10
lives 57:20
LLP 2:4 7:5
located 58:19
long 12:17 15:20 25:2 113:13 122:10 155:5 155:6 159:11
long-established 94:9
longest 147:3
look 7:18 10:11 16:22 22:18 34:11 50:13 56:9 79:21 89:17 108:16 109:21 111:6 126:6 129:4 158:22 164:1 165:10 173:9 174:12
looked 162:2 163:19
looking 50:7 106:15 109:5 117:14 119:10 126:12 127:4,5 165:1 165:5,13 166:20 167:16 172:14,17
looks 169:9,22 173:14
lost 77:12
lot 104:6 112:15,17 113:15 149:11 161:16 167:6
loudly 66:4
love 84:16,17
lower 90:14
LRM 12:20 33:3

M

madam 5:10 23:7 34:21 35:1 45:13,22 57:3 65:3 90:4 168:2 174:2 174:15
Madison 16:8
mail 48:15
maintained 60:8 75:1 77:11
majority 57:22 60:21 62:11
maker 15:13 22:7 73:14
makers 10:20
making 25:18 52:19 103:4 104:19 105:1 150:2
man 114:1
manageability 155:18
management 61:3
manages 60:5
mandamus 17:1 25:4 31:17 40:2,3,5,20,21 41:5,20 42:9 64:3 106:1,6,9,14,18,21 115:6 142:4,9,10 143:13,19,22 145:3 148:10,13,18 149:6
mandate 6:2
mandated 24:16
mandates 37:6
mandatory 14:13,18 16:22 17:4,6 41:4 148:15
manifested 71:19
manner 13:14 130:7 142:9
Marbury 16:8
Maria 2:21 3:6 4:5
Marine 26:2 85:20
married 25:22
martial 141:13
Maryland 96:14 159:17
Maryland's 96:15
material 48:1 140:11
materiality 168:14
materially 141:4
materials 4:12 8:4 46:22 48:21 49:3,3,6 49:9 51:22 52:1,11,14 52:17 66:20,21 67:2 67:10 68:13 109:13 109:16,19 117:11 119:1
matter 38:4 39:18 44:15 74:1 75:5 101:4 118:10 134:3 135:5 151:7,12 152:13,18 173:7 174:21
matters 38:17 41:17 66:19 68:8 69:15 82:5 134:22 136:4 170:19
MBRA 14:18
mean 14:15 87:17,18 90:12 92:13,15 96:17 102:11 118:9,13,20 119:12 123:1 127:11

132:19 133:7 134:13 134:14,16 135:18 141:9 147:1 149:1 151:16 153:5 154:12 155:20,21 156:3,7,9 158:12 159:12,18 161:1 165:3 172:18 172:22 173:3
meaning 18:14 25:15
meaningful 18:3 25:6 31:22 43:8
meaningfully 10:17
means 14:6,9 18:4,22 22:4 77:5 123:3 127:12 136:13 143:2 162:13
measures 67:18
mechanism 106:10 153:3 159:2
mechanisms 59:10 63:7
media 97:6 98:1,7
medical 67:3 68:5 132:21
meet 73:4 101:3 110:9 110:22 165:6 169:17 169:18
meeting 1:5 2:16 4:5 5:9,14,17 6:11,13,16 7:20 8:1,8 37:16 40:15
meeting's 174:17
meetings 4:13 6:11
meets 13:3
Meg 2:2 3:11 6:20 8:9 23:11 36:18 85:15 86:1,6 87:13 96:7 97:21
Meg's 42:20
member 23:20 25:22 28:7 86:15
members 4:15 5:3,16 8:5,14 23:8 34:22 46:1 48:19 57:3 64:13 130:18 174:8,20
members' 4:20 28:5
men 95:2
mental 110:15 113:9,12 162:2 163:13
mentioned 35:2 41:18 80:13 115:3 149:10 161:3 164:10
merely 106:10
meriting 42:5
merits 27:21 28:19 29:2 30:9,21 59:17 83:13 96:22
message 30:15
messed 129:11
met 1:9 100:19 119:22 163:18 171:5
methamphetamines 165:17
microphone 65:15
mid-trial 132:2,5
Middleton 2:4 3:14 7:6 45:14,15,19,22 66:9 88:11,13 103:20 104:4 123:6 149:9 151:16 155:16 166:21 170:21 171:2
military 6:5,10,14 9:2,6 9:8 10:15 12:21 15:5 15:20 18:21 19:3 23:16 24:2,3,12,16 26:3 27:7 28:5,6,10 28:16,21 29:17 31:1 32:19,22 35:9,12 36:7 36:13 41:3,16 43:5 44:18 45:2 46:13 58:15 86:14,16,20,20 86:21 87:3,7,7 100:15 101:14 106:2,13 112:12,12,14 124:14 125:17 138:13 140:7 140:14 144:13 145:5 145:6,7,7,14 147:8 149:4,15 150:12 156:3,22 160:7,12,13 160:22 161:3,6 165:3 168:19 172:5,20
military's 144:1
million 61:16 62:16
mind 65:14 143:1 153:5 154:6
mine 161:11
minor 113:19,20 159:16
minute 18:9 96:1 166:19
misdemeanors 18:17
misplaced 13:18 14:2 43:22 44:2
mispronouncing 45:11
missile 125:20 126:1,4
missing 143:9
mission 35:18 101:14
mistake 78:16 166:19
mistaken 30:4
Mister 105:12
misunderstanding 129:15
misunderstands 13:16 19:15 147:18 148:5
model 54:2
modeled 9:19
models 80:14
modification 47:17,19 47:20 81:16
moment 13:7 68:17 81:21 82:9,16,16 83:8 96:18,21 103:7 127:2 127:3,9,11 135:7 148:8 157:18 168:15
momentary 13:22
moments 10:2 99:11 127:7 147:20
monitor 38:4 39:17
months 108:11
morning 4:3 5:12 8:14 57:3
motion 54:18 72:12 81:17,18 89:19 103:4 103:8 140:22
move 42:13 72:7 83:7 97:22 105:3 140:4,15 154:19 170:17
movement 44:4
moving 19:6 20:19 33:17
MR-513 126:1
MRE 28:14 52:13
multiple 55:5 137:4 150:4 170:4
murder 81:9 123:12
MVRA 14:11
MVRA14 14:13
myriad 58:12

N

Nalini 2:15
name 4:5 35:2 45:11 57:6 96:5,8,12 114:1
narrow 120:3,5
narrowly 119:7
nation 45:2
nation's 57:12
National 2:2 5:20,21 6:21
nature 19:15 20:2 40:21 147:19 148:5
Naval 58:6,7,17,18 87:20
Navy 2:11 27:6,10,20 28:2,15 30:15,16,19 30:22 31:3,9 58:4,5 85:20 107:15 108:6
Navy's 27:5,15
Navy-Marine 26:18
NDAA 11:20
NDAA's 9:18
nearly 31:18 58:3,10
necessarily 88:15 102:9 104:21 171:3
necessary 24:9 39:15 50:11 69:5 70:15 83:9 109:3 127:10 128:11 129:7,13 130:3 132:12 154:1
necessity 32:7 91:5
need 16:5 18:22 33:20 35:22 42:3 47:1 75:14 75:15,16 79:13 89:10 95:6 96:5,12 114:2 119:1,10 126:15 137:7 140:17 141:17 144:4 150:13 154:3 161:17 165:9 170:8 170:14,17
needed 16:15 111:7,8 130:4
needs 11:12 55:12 113:13 125:22 132:5 149:7 171:5
negative 56:3
neglected 25:2
neither 37:7 108:3
Network 35:15
never 9:2,7 56:15 110:19,20 113:17,18 125:6 128:14,14 139:16
new 2:8 7:13 14:8 17:16 17:17 44:16 64:22 66:12,17 67:19 68:1 68:22 69:18 70:6,18 72:5,10 75:4,17 81:2 81:15 82:1,7,14,17 83:6,10 90:10 93:6,20 94:3,3,5,12 114:1,5 155:2 159:18 169:2 174:8
Newport 58:7
nine 40:4
non-confidential 21:14
non-federal 159:7
non-mandamus 142:11
non-party 152:1
non-sealed 141:18
nonstop 94:19
noon 5:9
North 1:10
not-legally 72:8
Notably 17:14
note 4:22 27:5 29:4 43:13 50:5 52:10
noted 12:20 29:16 50:19 123:19
notice 10:2 18:8 19:6,7 20:18 21:20 22:12 36:16,22 37:7,11,12 37:17,19 38:7,12 39:6 39:8,13 43:10 46:20

47:12,13,14 48:2 62:3
noticed 21:16 22:3 28:17 52:5
notification 37:14 60:2 61:11 62:11,16
notifications 59:22 60:9,18 61:18,20,21 62:8
notion 10:10 11:1 12:22 13:16 14:1 118:2 130:13
notions 170:14
novel 97:5
number 47:10 62:13 104:20 124:22 150:2 150:20 152:4,6
numbers 20:13
numerous 9:15 11:7 16:21 19:19 24:1 62:21 155:19,20
NVRDC 35:16 39:17 161:11

O

objecting 121:12 143:17
objections 142:8,11 143:12 146:14 147:13 148:8
obligation 37:20 39:10
obligations 37:17
observations 5:2
observe 48:20
observer 103:3
observing 103:5
obtain 64:9
obvious 49:22 50:2 99:8,11 114:9,10 119:21
obviously 39:3 102:8 105:19 112:8 118:9 122:3 160:14 162:5
occasion 66:13
occasions 137:3
occur 99:5 117:8 135:15
occurred 130:21 171:10
occurring 100:9
occurs 41:7 132:14
OCTOBER 1:7
odd 173:2
offense 121:14
offenses 6:6
offensive 147:13
office 2:6 7:10 46:9 47:3 48:7 54:7,9 56:20 57:8,8,10,16 58:11 60:3,4 63:12 64:12 85:2
officer 2:21 58:18
Offices 61:20,21 62:13
Official 4:6
oftentimes 49:20 171:8
Oh 63:16 97:15 98:21 107:20 153:13
okay 7:17 45:12 63:21 65:18 66:1 100:22 107:11,21 108:5,19 110:4 111:6,11 116:5 148:16 151:20 153:13 154:10,18 158:3,6 163:1 164:4 165:19 168:6 169:19 170:2 174:5,6
Okinawa 26:1
old 122:2
Ombudsman 63:12
once 61:18 80:20 85:14 111:5 114:16 115:5 162:14 165:18 167:14 168:21 169:7
one-paragraph 26:20
ones 47:16 140:18 150:8 157:2,10
ongoing 42:11 54:13 90:19 93:12 145:5
open 52:20 74:12 75:8 75:16,21 77:20 90:11 91:7,8 94:10 136:19 137:18 139:1 170:7
opening 161:16 163:10
operation 13:9
Operations 59:1,4
opinion 19:14 29:16 30:3,11 40:13 50:6 76:2,10,14 89:11,12 92:4,5,12 93:17 94:20 94:21
opinions 41:12 47:2 79:7,20 82:6 93:2 94:18
opportunities 99:3
opportunity 18:5 23:9 23:16,17 35:1 36:10 39:21 45:6 57:4 64:15 80:1 84:5,6 102:14 120:6 160:18 173:14
opposed 27:21 28:2 146:9 163:21
opposite 93:13
options 89:18
oral 15:1 20:14,14 28:17 48:18 62:5 75:21 78:7 91:4,16 92:1 149:17
order 17:19 25:9 67:8 68:4 73:4 76:4 91:8 91:10,20 110:7,12,20 113:17 129:14 141:11 167:19
ordered 26:3 111:16 167:21
ordering 101:4
orders 47:20
ordinary 17:1 40:9 148:18 149:3
Oregon 17:5,5 159:17
organization 23:14 46:10
organizations 6:19 44:21 88:8 161:10
original 53:7,13 149:10
Originally 5:1
outcome 20:6 22:6 62:5 78:21 166:17
outcomes 39:2
outside 42:9 43:9 145:7
outsiders 67:6
OVC 57:12,21
over-analyzing 125:17
oversee 128:21
oversight 41:21
overtakes 79:15
overturned 32:3
overview 47:5

P

P-R-O-C-E-E-D-I-N-G-S 4:1
PACER 21:15
page 20:13,13
pages 113:9,10
painful 76:15
panel 1:3,9 3:18 4:6,15 5:15,16,19 6:13,16 7:1,3,21 8:5,17,22 9:21 10:6 11:15 13:1 22:19 23:8 25:7 26:13 32:8 33:11 34:22 36:3 36:5 40:6 42:3 44:17 46:1,2,16 50:18 51:18 57:3 64:13 65:10 80:3 93:21 97:5 116:21 123:10 130:18 131:11 170:3 174:7,20
Panel's 4:4 43:14 51:16
panelists 67:22
parade 151:4
Paralegal 2:16
parallels 11:22
pardon 120:19 135:17
part 8:20 35:18 37:19 42:7 55:16 56:2 59:20 73:14 81:18 104:4
partially 79:16
participants 2:19 5:13 143:1,3
participate 15:1 17:12 17:20 43:16 54:15 60:21 61:7 65:10 68:10 71:16,17 80:1 84:17 97:1 142:9 146:19 149:17 151:9
participated 83:8 153:2
participates 61:9
participating 14:7
participation 12:1,6 19:8 42:4 44:7 54:20 66:18 68:16 69:16 77:22 142:12 149:22
participatory 147:3
particular 22:6 42:22 55:18 70:13 76:5 78:13,14,22 81:11 133:5
particularly 36:9 41:6 42:17 90:2 119:6 130:8
particulars 69:16 78:21
parties 26:10 49:1,4 52:16 82:6 97:19 108:22 113:6 116:16 117:10 133:21 140:17
partners 137:4
parts 9:22 11:8 71:4
party 11:16 15:21 40:7 81:17 86:7,8 96:1,5 96:20,21 97:2,9 109:3 143:7 149:19 153:18 153:19
passed 24:9
path 149:5
patience 174:11
patient 34:1,7,9 67:7
Patricia 1:20 4:18
pause 19:8
Payne 123:11
peculiar 172:4,19
pending 82:20
penitents 126:10
Pensacola 58:11
people 19:10 67:13 86:21 87:12 93:14 103:20 104:15 127:20 147:11,13 148:22 161:15 171:4 172:3
perceive 10:21
perceived 11:3
percent 62:12 139:11 140:5
perfect 86:11 141:20

perfectly 123:18 133:17 137:21
perform 49:8 51:8
period 121:13
permissible 17:19
person 12:10,13 13:13 13:15 15:14 16:11 20:4 21:19 22:5 48:4 117:2 125:5
person's 13:6
personal 22:5 44:5 85:10 88:5 89:11
personality 21:5
personally 16:1 20:5 86:7
perspective 117:13 118:17 120:4 121:4 122:4 158:14 159:22 160:1 173:6
perspectives 3:9 6:13 6:17 46:17 56:7
persuaded 155:2
persuasive 29:3
petition 64:8
petitions 41:20
phase 68:22 70:21
Philippines 59:2
phone 7:14,15 48:15 65:7,15,16
phrase 69:5
pick 75:12 77:1 120:17 120:20
piece 119:21 129:12
pieces 81:13
pierce 86:17 129:13 167:13
pierced 32:6 130:7,14 134:15 145:19,20
place 6:12 11:20,21 53:10 67:7 70:18 81:17 122:5 127:16 137:22 149:3 155:6,7 168:12 169:5
play 97:7 132:1 150:15 157:9 166:5
played 78:3,5
plays 94:15
plea 47:18
plead 77:14 140:11
pleadings 14:7 15:1
please 4:22 139:19 154:15
pleased 6:16 8:15,20
plural 11:11
plus 55:22
point 11:4 19:7 20:17 21:18 26:17 28:11 42:20 50:4,16 55:8 63:19 68:18 102:7,16 102:21 103:16 105:5 117:22 122:9 123:9 123:19 129:8 132:15 133:13,18,19 136:8 139:3,4 153:6 154:20 170:10 171:17
pointed 146:6
pointing 52:1 65:12 171:8
points 74:10 93:11 155:17,18 170:12
policies 57:14
policy 2:6 7:9 19:21 22:13 56:19 57:7 58:2 78:18 84:22
poll 54:6
pornography 58:14
Porter 2:4 7:5 34:18 35:4
portions 26:3 171:12
posited 19:11
position 13:13,15 27:8 27:9 31:2 33:7,17 75:3 118:4 146:1
positions 27:20
positive 40:19
possibilities 80:12
possibility 112:9 114:13 120:7
possible 50:7 131:14
possibly 112:18
post-conviction 15:11 18:7
post-trial 62:6
Postal 61:1
posted 4:9,11 5:18
postpone 5:6
postponed 100:14
posture 44:16
potential 12:10 42:3 44:22 49:18 70:17 120:7 136:3
potentially 39:1 97:19 140:20 159:12
powerful 74:10 133:3
practical 151:7 156:4 156:17
Practically 37:12
practice 9:4 20:22 32:4 33:3,12 35:4 46:5 48:13 80:16 94:19
practiced 9:2 46:3,4
practices 57:15
practicing 50:1
practitioners 6:20
pragmatic 147:7
pragmatism 147:9
pre-conviction 15:10
pre-determination 15:13
pre-existing 81:18
precedence 54:16 124:18
predictable 21:2
preferred 76:15
prejudicial 123:21
prepare 66:8
presence 46:15
present 1:14 5:16 12:21 47:13,15 70:6 71:18 72:11 78:2 156:1 158:1 163:15
presentation 5:6 34:20 56:17 64:19 80:3
presented 30:6 88:22
presenter 8:8 23:1 34:17 45:15 56:18 64:20
presenters 6:20 43:14
presents 25:4
preserve 128:11
preserving 74:22,22
President 2:3 7:4 23:2 23:13 24:10,17 29:8 125:14
presiding 1:12
press 65:18
presumably 107:2
presume 93:16 141:5
pretrial 18:6 70:12 103:13 144:8
pretty 29:10 114:8,10 114:11,14 152:20 159:20
prevail 25:9 92:6 126:19,20 127:9,11
prevailed 92:9
prevent 53:9
prevents 41:21
previous 43:14
previously 8:1 13:2
priest 126:10
primacy 123:8
primarily 46:6
primary 9:7
principle 13:8,11 15:16 22:15
prior 7:2 19:9 22:11 26:8 43:14 57:21 65:2 68:21 94:22 95:13 97:4 101:2 139:16 171:9
Prisons 62:7
privacy 18:1 42:18 46:21 51:19 67:18 68:20 69:9,9 73:2 75:1 76:17 77:2,4,10 77:16 79:15 82:12,22 83:1 86:17 92:8 94:1 95:18 102:9 103:9 120:13,15 121:6,8 122:19 126:19 127:6 127:11,12,20,21 128:11,17 129:4,14 130:4,13,17 132:17 132:20 133:2,10 134:6,9 157:8 166:11 173:15
private 38:2 43:11 66:21 67:3,9 72:9 73:17 75:13 79:16 90:14 129:13 138:20 165:4
privilege 12:18 13:3 24:22 28:11,12 31:15 32:5 33:21 36:2 42:18 53:5,6 124:22 125:15 126:6 130:6,7,9 134:9 134:11,15,16 157:17 167:11,12,12,15
privileged 46:21 48:1 48:21 49:2 66:20,21 67:1,10 68:6 72:8 134:11
privileges 14:12 15:4 25:1 124:13,15 126:16 130:12 132:9 156:19 157:4,5 167:13
privy 157:1
pro 35:6 173:3
pro- 101:7
proactive 37:18
probable 136:4
probably 36:18 56:12 56:15 66:11,15 72:14 104:15 108:14 123:6 129:17 150:3 159:8
problem 50:11 113:22 118:2 125:11 151:15 154:6 158:14 160:3 161:2 170:6 171:19
problematic 92:2 95:18 136:18 148:9
problems 29:17 41:9 52:5,8 151:12 158:10 158:15 159:9,10,18
procedural 10:7,10 11:1 12:3 18:4 20:21 21:1 28:13 44:16 67:18 78:8
procedure 21:2 42:9 49:13 52:6,13 70:7

71:18 76:14 78:19 113:14 119:7 120:3 127:16 145:9
procedures 10:4 28:6 52:10 74:20,21 112:21,21 113:2 120:5
proceed 65:6
proceeding 12:12 13:7 21:21 43:20 44:8 53:8 53:13 64:7 73:15 74:11 80:22 81:11 96:22 100:14 142:2
proceedings 1:3 4:4 5:15,19 6:4 7:3,21 11:5 14:4,22 17:13 19:9 35:9,12 37:7,10 40:16 41:1,8 42:11 43:16 46:20 47:22 54:14 59:9,15,20,22 75:7 77:20 90:11 103:13 137:17 140:18 142:14 146:16 147:4 148:1,8 158:9
proceeds 60:10
process 10:18,19 11:1 18:16 19:3,20 24:13 34:13 38:6,22 39:5,12 39:19 40:1,18,20,22 41:6 42:2,4,8 44:10 51:20 52:3 56:4 63:8 68:2,3,16 70:20,20 77:4 81:20 86:13 88:6 98:4,5 102:6,20,22 103:15 104:15,18,18 106:12 108:10,15 110:2 111:18 113:21 113:21 114:8 118:17 123:22,22 124:1 142:19 143:15 144:7 145:10 147:17 151:1 151:15 156:1 158:18 158:21 159:2 160:9 160:16 161:22
processes 12:2
procured 132:3
produced 171:6
production 110:7,12,21 113:17 167:19
professionals 62:19
Professor 4:19 137:1 143:2
proffer 105:17
program 60:5,21 61:7,9
programs 57:9,17 60:4
promise 139:15
promote 57:15
pronged 13:4
proper 29:15 73:9 79:1 84:4
properly 29:19 78:17 166:21 169:15
proposal 96:8
proposals 11:14
proposed 19:22,22
proposition 19:13
propriety 30:6
prosecuted 58:12
prosecution 13:20 35:13 38:19 54:2 55:6 55:21,22 61:13 108:4 132:4,7 133:17
prosecution's 69:13 71:12 76:8
prosecutor 24:1 58:10
prosecutors 42:6
prospect 55:19
protect 2:3 7:4 23:3,13 33:14 40:16 43:3 83:9 127:12 128:5
protected 34:5,8 44:6 67:12 82:13 130:11
protecting 24:20 127:19,21 146:21
protection 14:19 84:13 130:16 139:6,7
protections 17:22 43:17 170:9
protective 53:11
protects 52:3
prove 25:10
provide 35:20 37:19 38:5 39:18 47:5,12,14 53:3 57:13 60:9 61:20 62:7,21 150:11 161:11
provided 4:9 26:6 37:11 37:13 40:15 59:13 60:12,22 111:17 164:16
providers 35:17
provides 39:22 59:9 60:6 61:10 62:3 160:19
providing 19:21 23:8 63:3
provision 16:5 17:15 39:13 48:2 68:15 118:7 173:18,20
provisions 9:16 14:10 15:3 67:15
proxy 20:15
psychological 125:21
public 1:5 2:5,5 4:4,13 5:9 6:18 7:7,8,20,22 8:1,2,22 17:16 37:7 38:2 45:16,17 46:8 47:3 54:2 59:22 61:19 62:1,14 65:13 72:17 73:18,20 75:9,19,21 90:22 91:9 94:6,7 107:18,19,20,21 108:2 131:1 136:13 141:1
publicly 4:8 21:11 91:2 92:13
publish 79:7 93:1
published 29:16 62:19
pulled 157:3
pure 169:13
purely 86:13
purpose 32:17 120:3 132:11
purposes 96:19
pursuant 11:10 63:8
push 102:1 162:8
pushing 102:3
put 11:14,20,21 20:15 22:2 84:21 89:10 98:3 115:9 126:1,4,14 127:16 137:7 142:12 147:6 148:15 149:2 156:10 157:4
putting 10:6 82:22
puzzled 172:3

Q

quadrupling 55:1
quality 49:14 70:7 73:17 76:19 77:3,18 79:17
quasi-party 146:19,20
question 12:8 21:16 36:15 43:1 69:11 72:19 74:6,8 75:17 76:5 77:21 78:8,13 90:20 91:3 92:17 93:19 94:1 96:7 109:22 115:12 116:15 120:9,10 121:19 124:6 127:18 130:2 130:15,17,21 132:8 133:4 134:2 142:5 153:15 155:9
questionable 30:2
questioning 80:4
questions 3:18 11:12 22:19 24:8 34:12 45:7 56:9 79:22 151:21 163:13 174:11
quick 144:11 163:13
quite 20:22 78:5
quote 11:16 27:13,14 29:1,12 30:1,2,3,7 153:18 155:12

R

raise 51:3,15 52:2 156:2 158:4
raised 155:16,18 164:21
raises 74:19
raising 55:18
Randolph 1:10
rape 17:21 38:18 52:11 52:12 67:11 72:10,15 74:15 79:5,11 81:9 82:13,20 93:2 122:2 135:6,9,11,13,19 136:5 137:15 140:13 154:21 155:1,4
rapes 35:13
rare 114:11 161:21 166:4
rarely 114:7,21,21 129:12 130:3
re- 47:18
reach 86:22
reaches 19:3
reaction 153:20
read 75:19 85:3,5,5,12 86:2
readily 12:19 156:21
reading 12:22 19:9 143:3
ready 8:8 141:21
real 11:16 23:19 43:7 44:10 124:21 126:6 153:18,19 167:12,14
reality 25:21 85:4
realize 119:9 140:12
really 25:8 50:21 53:3 54:3 63:19 87:16 91:20 92:6 96:4 100:7 101:12 113:12 118:2 120:1 124:6 128:8 129:18 133:9 136:20 138:9 143:21 150:8 154:19,22 155:4,21 156:16 161:4,6 162:11 172:1 174:11
reason 20:9 38:11,20 39:12 68:17 70:10 97:18 101:7 110:14 111:4 116:17 117:7 143:18
reasonable 111:14
reasonably 69:5 70:15
reasoning 92:7
reasons 19:14 40:12 124:22 125:15 141:10 142:17

rebuild 57:20
recall 80:14
receive 7:21 36:21 37:6 61:17 124:7
received 7:22 8:2,4 26:19
receiving 59:21 60:18 63:9 174:13
recognize 15:6 120:16 171:18
recognized 15:20 28:12 125:12
recognizes 66:17
recognizing 88:13 103:20
recommend 26:13 32:8
recommendation 26:12 77:19
recommendations 147:8
reconsider 26:5,8
reconsideration 26:10 26:16
record 40:13 49:18 50:9 55:11 69:14 70:19 71:15 81:19 105:5,14 112:20 137:8 139:2 146:15 147:6 166:22 167:2 172:18 174:22
Recorder 2:17
records 26:4 29:21 30:1 32:3 43:11 49:19 50:15 51:3,4,4,5,7 53:9 67:2,3,12,21,21 68:5,6,8 69:3,3,4 70:14 71:1,4,8 87:22 105:16 109:21 110:8 110:15,15,20,21 111:15 113:7,9,12,15 116:15,17,20 119:5 122:21 127:14 132:21 162:2 163:14,19 164:16,20 165:10,14 165:19 166:6 167:6 167:16 171:6,9,13,15 173:10,14
Recovery 35:15
redacted 75:20 91:1,18
redressable 12:12 83:5
reduce 162:17
refer 131:10
referrals 63:2
referred 29:5 155:10
refers 153:17
reflected 73:3 102:11 102:12,13
reflecting 81:2
reform 32:9
reforms 24:9,15
refusal 31:14
refuse 100:2
refused 26:7 30:16 100:12
refuses 167:22
refusing 31:13
refute 31:8
regard 46:20 148:10
regarding 6:15 15:18 46:16 47:22 48:2 53:4 54:19 62:3 104:9,12 123:15
regardless 102:16
registrants 61:17
regular 150:16
reiterate 63:22 89:13
reject 145:1
rejected 26:18 133:6
relate 49:19 121:13
related 6:6 46:17 51:3 54:4 121:14
relating 44:8
relation 47:21 50:18 51:17
relatively 159:16
relaxed 104:22
release 32:2 39:1 82:20 108:7 131:8
released 108:6,10,21 109:1,2 138:21
releases 92:13
releasing 108:9
relevance 122:14
relevancy 168:15
relevant 22:8 52:19 68:8 69:21 71:1,5 122:13 136:3 169:10 171:13
relied 52:17
relief 25:6,13,18 28:9 31:22 40:2,3,5,11,14 40:22 41:12 144:4
relies 29:9
remains 70:21
remarks 64:14 66:11
remedy 16:7 25:8
remember 98:5 106:22 112:4 114:1 146:3 171:16
remembered 120:22
remind 156:2
render 123:21
repeated 69:20
report 5:5
reported 26:1
reporters 35:19
Reports 4:10
repository 60:6
represent 44:20 46:14 117:2 141:12
representation 134:19
representative 47:2
represented 32:20 33:1 38:2 125:3
representing 9:11 27:7 35:8 88:18 118:10
reputation 104:12
request 5:4 26:7 52:20
requested 5:5,7 150:10
requests 7:22 26:9
required 17:14 41:11 64:11
requirement 100:16,18 126:8
requires 12:6 18:6,8 21:1 40:6 43:5 77:2 133:7 136:10
requisite 99:4
research 92:21
Reserve 58:7
reserved 25:8
Reserves 58:5
resolution 76:20
resolve 96:7
resolved 97:22
resources 50:22 55:4
respect 29:3,18 39:4,11 41:15 48:21 53:2,5,19 73:8 74:22 77:21 78:22 100:5,19 105:12 121:8 132:17
respective 61:2
respond 35:18 141:5 142:13 143:14
responding 55:4 150:14
response 7:1 140:3
responsible 117:3
result 5:8 28:22 39:1 44:11 100:13 160:22
resulted 8:16
results 32:5
retain 148:6
retains 148:1
rethinking 67:22
retire 24:4
Retired 4:18
retrial 39:2
return 12:4
returning 12:6 20:20
returns 170:11
reveal 67:5 76:3,13
revealed 133:16 166:7
reversal 32:6
reverse 92:8
reversed 101:9
revictimized 173:15
review 6:3 11:11 17:2,6 17:8,12 18:5,6,11 19:2 20:19 25:6 27:16 32:2,15,18 40:10,22 41:5 46:21 48:5 49:2 49:9,14,16 50:9 51:9 68:9 70:3,5,18 71:4,6 87:6 88:1 106:6,7 109:16,19 110:8,13 110:14,22 111:5,11 113:7 116:14 117:9 127:14,15,17,19 131:7 148:19 149:4,6 167:7,18
reviewable 11:9,9
reviewed 8:4 105:13 109:4 110:19 113:8 113:16,18 142:7 158:13 165:19 167:6
reviewing 51:13 87:7,8 110:11,17 119:14 131:18 167:7 171:9
reviews 29:21 50:20 51:2,12
revolving 33:13
Rhode 58:8
rid 29:7,8
right 11:22 12:11,15 13:4 14:1 15:7,11 16:6,7,13 20:4 21:18 21:20,22 22:2,15 25:10 26:15,21 28:13 28:14 29:7 32:11,15 34:6 37:1 40:3 42:3,8 42:17 44:13,14,14 47:12,13,14,16 59:21 64:2 66:3 71:9 74:16 74:16 76:7 77:8 78:21 80:21 81:10 82:15,18 83:9,16 84:3,4 85:9 87:6 90:16 93:17 94:7 95:3,5 96:2,11,22 97:1,5,7,11 98:8 99:2 99:13 100:2,12 102:2 102:13,20 103:3,5 104:14 106:2 107:6 109:11,14,14,17 110:3,5 111:3,3,5 112:3 114:3 115:4 116:11 118:14,18,19 118:20 119:12,15 120:2,12,12,14,14 121:8,19,20 122:3,15 122:16,21 123:3 124:16,16 126:22 127:3,8,15,21 128:2,3

128:7,19 129:1,18,18 130:11 132:7,20 137:9 146:20 147:15 148:3,19 149:1 151:8 152:2,22 153:19 156:8,9,12,12 157:7,7 157:8,12,15,15,16 158:1 159:3,14 160:8 160:10,12,20 161:9,9 162:16 164:16 166:12 166:17 168:3,9,15,17 169:4,6,7 173:10
rights 3:10 6:9,15,18,19 8:3 9:4,16,17,19 10:4 10:12 11:3,19,20,21 13:6,17,17 14:4,5,10 14:17,18 15:7,16 16:14 17:3,6 18:4,19 19:16 20:2 23:14 24:21 33:15 36:17 37:6,22 38:15 39:15 39:20 40:4,19 42:7,10 42:19,22 43:3,7 44:3 44:4,5,9,21 47:6,9,11 52:3 53:3,20 54:4 56:4 59:7,8,10,13 63:7,11,12 64:7 80:17 82:14,22 83:2,2,15 84:13 85:11 86:17 87:4,9 88:9 94:6 98:12 99:3 103:1,1 104:7 107:4 118:17 118:19 121:6,8 123:2 123:7 124:18 129:4 146:21 147:11 149:7 150:17 152:12 153:17 155:11,12,15,21 156:14,18,20,22 158:2 161:5
rigorous 168:10,12
rigorously 169:6
ring 43:9
risk 14:5 22:2 32:3 80:22 147:14 157:6
Robinson 24:18 25:20 29:5
Robinson's 29:4,14,19 29:22 30:5,14
role 10:1 11:5 19:18 20:1 78:3,4,10,11 83:1
roles 112:10
room 1:10 43:12
round 80:9
routinely 167:16 168:13 168:18
Rozell 2:16
rubric 10:7
rule 19:22 24:16 26:8 52:14 69:1 79:14 81:16 162:15 163:3 169:2 172:4,19
rule-based 128:2
ruled 64:3 98:10 107:3 107:13,16 137:5 162:9 163:8
rulemaking 68:22
rules 43:4 98:8 104:9 104:21 115:17 124:9 124:14 138:14 162:4 164:14
ruling 26:5,8,12,16 27:12,17 28:10,16,21 29:12 30:5 31:1 52:18 68:12 104:11 105:21 109:1 114:12,16 115:13 162:17 163:6
rulings 29:4,14 30:1,6 30:14 31:18 104:6 137:15
run 174:6
Ryan 2:4 3:13 7:4 34:17 35:2 63:22 126:18 145:16 163:7 164:21 165:22
Ryan's 101:20 126:21 166:2

S

S 4:17
sacrifice 74:2
sacrificing 77:17
San 58:19
satisfied 27:12 136:6
saying 16:12,13 86:16 100:11 111:8 112:19 112:20 116:3 120:15 121:7 128:8 132:5 137:8 142:10 146:12 147:14 148:3 152:17 165:22 167:5,9 168:2 168:22 169:2 170:17 171:4
says 12:9 34:6 76:10 86:1 91:14,15 110:18 116:2 128:15 131:10 140:1 162:19 164:16 165:14 169:9,22 170:6
scenario 74:13 75:18 90:18 135:1 161:13
scheme 96:11
School 58:19
scope 17:21 95:11 129:15
se 173:4
seal 49:4 90:21 111:17
sealed 50:15 52:15,21 81:19 94:16 105:18 163:16 164:16
sealing 67:18
seals 167:22
second 6:10 10:2 20:9 20:17 27:10 30:22 31:17 72:7 74:3 80:8 82:11 138:6 140:15 142:5 153:14 172:11
secondly 23:20 139:15
secret 136:18
section 64:12
secure 60:14
securing 63:4
Security 61:6
see 24:9,21 48:22 49:1 49:6 51:7 54:8 69:22 70:2 75:20 76:16 90:22,22 101:22 106:8 109:10,15 111:11,20 112:8,20 113:13 116:17 117:7 120:6 125:1,8 129:16 132:17 150:7 154:12 158:14,15 160:3 161:1,2 165:20 166:3
seeing 169:14
seek 16:20 19:2 40:3 53:6
seeking 64:8 78:11 104:22
seeks 39:4 48:5
seen 15:22 16:21 91:12 108:4,21 117:21 125:6 159:3,10
sees 165:15
selected 24:3
semantic 96:11
Senate 57:22
Senator 58:2,21
sending 30:15
senior 2:6,16 7:9 56:19 57:7 58:1
sense 33:6 67:12 78:16 79:16 96:3 106:10 138:2 164:3
sensitive 156:15
sent 49:7 101:16
sentence 47:19 48:6 55:10 156:9,11 157:12,21
sentenced 62:9
sentencing 47:18,19 62:2 123:15,15,22
September 6:12,12
series 124:14
serious 30:5,13 125:20
serve 58:6 135:19,21
served 19:18 21:17 22:3 23:22 54:14 57:21 58:3,16
serves 4:16 25:20 31:21 41:14
service 8:11 19:4 22:12 35:16 61:2 62:19 63:2 115:14,16 144:14 162:12
services 35:21 36:1 57:17 58:11 62:22 63:1
serving 9:12 33:5 58:22 59:3
session 6:8 43:14
set 25:12 63:11 80:12 105:4 135:22
sets 47:10
setting 24:11 47:17 160:22
seven 8:2 95:2 152:9,19
sex 95:2 137:4
sexual 6:5 23:16 35:8 35:11,19 36:7,12,21 38:14 40:15 45:1,4 58:13 94:22 95:4,13 121:11 138:17 139:16 161:5
sexually 26:1 86:13
share 78:6 174:10
sharing 64:18 80:7
shield 17:21 52:11,12 67:11 72:10,15 74:15 79:6,11 82:13,21 93:2 135:6,9,9,12,13,19 136:5 137:15 140:13 154:21 155:1,5
shifting 50:21
shifts 128:4
shop 144:14
shops 144:17
shorter 149:15
show 26:21 48:19 159:13
showing 68:7 70:22 101:10 168:14 169:8
shown 98:2 159:13
side 16:17 82:4 86:9,9 146:18
sides 71:7 74:11 93:13 93:14,14 166:2,3
sign 43:9
significant 62:13 117:1 117:4 159:13
Significantly 40:8
silence 41:14

silent 34:8
silo 125:20 126:1,4
similar 52:13 79:20 150:2
similarly 15:5 18:15,15 18:20 67:11
simple 12:17 14:6 31:14 48:3
simplest 12:9
simply 16:7 20:14 21:17 29:4 30:10 44:15 85:7 95:12 97:3 108:17,18 129:15 130:17 146:21 147:5
Simultaneous 139:18 140:2
single 11:7 17:10 40:6 150:4
sit 99:1
site 5:3 60:14,16
sitting 43:12 103:5 144:8 174:8
situated 18:15,20
situation 10:14 41:10 43:18 54:10 103:16 105:13,15 117:18 149:13 150:21
situations 51:13
six 152:21
skin 43:8 88:5 99:15 103:10
slam 31:9
slightly 93:20
slim 114:14
slow 142:14
slowing 146:15
slows 143:14
social 63:2
society 33:16 126:13
society's 124:16
solely 14:1
Solicitor 64:10
solve 153:16 154:6
somebody 86:14 122:3 125:3 126:3
someone's 125:19
somewhat 49:21 55:7 78:1 123:6
sorry 97:15 98:21 108:13 121:1 124:17 129:21 160:5
sort 16:20 50:21 54:6 54:22 84:11 92:7 96:7 109:12 114:16 120:10 131:20 133:11 172:19
sought 50:9 78:20
sounded 135:5
sounds 156:14
sovereign 31:6 32:17 116:3
speak 18:8 21:19 22:16 22:20 57:4 66:4 67:14 81:1 94:17 99:9 145:16 148:20,21
speaking 7:19 20:3 21:15 54:5 65:16 81:3 81:4 91:18 94:15 139:18 140:2 150:1 157:3,10
spear 45:3 161:4
special 17:8,10,11 58:17 59:1,4 99:12 119:7
specific 11:18 12:4 48:11 83:16 87:19 96:12 127:2 128:5 140:18 158:1 161:9 168:14 170:16 173:20
specifically 10:9 30:13 48:4 88:10 93:19 119:4
specificity 168:16
specify 50:7
speed 31:16 113:3
spell 16:9
spelled 16:18
spelling 16:10
spend 148:2 167:2
spent 84:20
spilling 112:9
split 89:19 149:20
staff 2:9,11,13,14,15 36:5 57:22 58:16 59:1 59:3 65:11 66:7 68:11 84:19
stage 105:4 107:18
stages 10:3 47:11
stake 15:7,12 20:4 21:18 41:7 80:21 85:9 85:11 88:10 99:3,15 157:6
stance 107:5
stand 99:5,13 102:14 102:15 103:11 105:11 142:2 147:21
standard 11:10 25:14 69:10 71:21 72:1 73:4 100:19 101:5 110:5,9 117:8 119:16 122:18 133:14,16 135:22 136:6 144:2 149:4,6 155:11,15 168:10,12
standards 11:11 17:1 29:20 40:9 53:12 144:6
standing 12:7,8,9,22 13:4,8 14:21 15:3,6 15:12,15,17,19,20 16:6,7,11,12,18,19,20 19:2 21:19 22:1,16 42:12,21,21 46:22 53:21 80:13,16,21 81:1 82:15,19 83:7,20 86:6,9,18 87:12 89:6 96:6,18 97:13,20 98:13 99:5 100:11 152:11 154:3 157:19
stark 25:21
start 36:15 80:3 84:14 84:15 128:9 167:14
started 108:11 146:2
starts 38:20
state 2:4,5,8 7:6,8,13 9:5,8 11:22 14:11 15:2 21:11 45:16,17 46:12 47:3 64:21 72:12 75:5 76:11 82:7 83:17 90:9 93:15 96:13 98:6
state's 78:7
stated 40:12
statement 84:22 96:10 156:10
statements 63:4 95:13 123:14 161:3
states 1:1 23:21 48:3 93:1 123:11 151:22 153:6,11 158:8
statewide 46:9
stating 26:8 30:3
status 15:21 43:6 48:9 60:10 62:8 147:3
statute 48:3 52:12,12 115:22 155:5
statutory 83:2 156:22
Stayce 2:16
step 30:9 85:21 95:16 110:4 169:12
stepping 93:18
steps 37:18
stick 95:3,7
Stone 1:18 4:19 96:14 129:22 130:1,15 134:8 135:4 136:21 138:4,5,7,11 139:21 140:3 142:4 145:4 151:14 167:10 171:22 173:3 174:15
stood 146:6
stop 162:10
straight 82:19 106:7
Street 1:10
stretch 161:12
stricken 96:10
strict 106:6
strokes 93:22
strong 30:15
strongest 94:6
structurally 85:8
struggle 21:10
struggled 21:9
struggling 90:10
studied 91:10
stupid 92:17
sub- 11:7
sub-parts 11:8
Subcommittee 5:3,4
subject 17:1 23:10 135:5 139:20
submissions 8:2 19:10 174:13
submit 85:1 153:10 154:15
subpoenas 47:22
Subsequently 58:5
substantial 88:18 89:5
substantive 37:1 38:8 38:15 40:4 41:12 43:7 145:11
substitute 84:11 85:8 88:16 89:6
substitution 85:22
successful 114:13
successfully 31:9,19 173:21
sufficient 19:12
suggest 76:20 137:6
suggested 153:16
suggesting 173:11,12
suggestions 154:13
suit 54:13
sum 15:15
superior 70:10
supervise 35:6
Supervising 2:4 7:6 45:16
supervisor 46:7
support 39:11 57:19
supported 39:16
supports 35:7 57:17
suppose 131:21,22 132:1 169:19
supposed 110:16
suppress 103:4
supreme 17:17,20 18:19 28:13 53:8,11 53:13,14,17,20,22 54:16 73:11,22 76:2 81:14,15 82:1,2,18 83:6,10 93:6 123:11 123:17 125:13 150:7
sure 27:2 98:16 99:19

110:1 115:22 121:3 141:22 151:21
surprise 173:1
surprised 87:1
survivor 88:4,9 99:2,6 102:18 121:18 141:12
survivor's 117:4
survivors 35:8,11 36:8 36:12 38:18 39:5,11 40:15 44:19 45:1,5 161:5
SVC 26:17 108:8
SVCs 44:20 85:18
swath 168:20
switch 109:18
switched 27:20
synonymous 15:21
system 10:14,15 11:3 12:3,21 13:9,12 14:9 14:21 20:11 21:11 24:12 29:18 36:7 37:14 39:4 41:16 60:2 60:8,11 61:9,15 62:15 70:8,9,11 75:11,14 79:3 86:20,21 98:9,10 106:2 123:3,9 136:8 143:16 144:13 158:20 159:1 160:8,19 161:6 161:8 163:15
system-generated 60:13
systems 21:12 39:13 61:3 96:14

T

take 17:11 53:18 70:18 76:21 119:2 122:5 123:8 124:17 137:22 144:18 151:2 153:5 168:7
taken 37:18 73:17 96:13,15,16 100:13 123:5 129:21
talk 65:7 125:7 161:15
talked 101:20
talking 42:12 114:2 118:11 130:22 135:7 140:8 147:10 152:7 155:15,22 156:16 167:11,20 172:1
Tammy 2:11
Taylor 1:19 4:19 80:5,6 83:22 85:13 87:14 88:11 89:7,21 90:4
teacher 82:4
technical 106:10
telephone 2:8 64:22
tell 36:17 50:13 84:18 87:2
telling 30:10 134:10
ten 152:7,9,19
tend 151:3
Tennessee 123:12
tenure 33:9,12 170:14
term 146:20
terms 90:12 105:4 122:11
test 12:17 13:4 19:22
testifies 171:16
testify 64:19 159:8
testimony 13:1 33:11 45:10 65:2 105:17 141:3,8 171:12,20
Texas 98:18
thank 5:11 8:10,13 22:19,21 23:4,5,8 34:11,15,19,21,22 45:6,9,19,22 56:10,11 56:16,22 57:1,2,4 63:20 64:14,17 65:4,5 65:6,8 66:2,5,6 79:22 80:2 83:22 89:9,21 90:3,5 95:20 104:3 116:5 129:21 174:1,5 174:7,13,15,16,17,19 174:19
thanks 7:17 8:7 80:6
themes 94:2
theories 133:20
theory 20:22 69:13,14 71:12,13 76:8,9 152:1
therapist 33:22 34:4,8,9 34:10 110:15
therapist's 34:1
therapists 24:20 67:4
therapists' 67:2,21 68:5 69:3
therapy 26:3 43:11
thereof 91:5
thing 50:16 79:2 86:10 110:10 116:8,10 128:8 137:14 143:13 144:13 154:12 162:10 170:22
things 21:15 23:19 27:4 49:22 50:1 52:7 63:1 94:16 98:3 99:4 102:20 104:20 121:17 123:13 146:13 147:14 150:22 152:10 154:2 154:19 160:9 165:4 171:10
think 49:14,22 55:7,14 55:15,17 56:1,3 66:11 66:13 68:17 69:15 71:15 81:6 84:3,10 85:15 86:5,6,8,10,19 86:19,22 87:5 88:6,17 89:3,10 90:1,17 92:21 93:6 96:4 97:6,18,19 97:20 98:3,17 100:12 104:4,15,16 105:6 106:7 109:3 110:1 111:13 113:10,19 114:11 115:3 117:14 119:3 121:1,4,5,6 122:17 123:7 124:2,3 124:4 125:11,15 126:18,20 128:8,17 129:6,6,9,10,17,20 131:19,22 132:4,8 134:3 135:1,14 143:18 144:5,11 145:16 146:10,17 147:18 149:10,11 150:14,15,20,22 151:9,11 153:22 154:1,3 155:3,16 156:2 159:20 161:14 161:17 162:9 163:1,9 163:10,12,21 164:5 165:18 166:9 167:14 168:4 170:8 171:3 172:3 173:1,5
thinking 13:21 151:6 159:6
Third 31:20
third-party 54:1,16
thought 84:21 90:9 140:6 148:14
thousands 113:8,8,9
three 32:19 55:22 80:14 80:14 93:14,14 99:4 106:20 115:3 142:8 142:16 143:12 145:1 146:13 148:2 156:20
three- 13:3
three-phase 70:20
three-prong 80:20 83:20
threshold 68:7 70:22 110:22 111:6 113:5 163:18 165:7,8 169:16,17,18 171:5
Tideswell 2:11
ties 87:2
tilted 40:22
time 7:21 22:20 30:22 31:4 33:12 34:11 41:8 43:19 55:4 59:14 67:6 78:7 84:2 95:2 101:6 109:4 119:22 121:13 127:22 129:22 137:5 139:7 140:18 144:6 147:3 149:20 150:13 153:5 155:5,6 159:11 167:1 168:7 170:20 173:13 174:6
time- 128:4
time-consuming 50:20
timely 36:21 38:8 39:6
times 13:22 19:19 21:7 24:1 102:17 106:20 115:3 125:2 137:3 142:6 145:17
timing 102:20
tip 45:3 161:4
Tobacco 61:4
today 5:14,16 7:18 8:7 8:11 22:20 23:9 35:1 45:7 57:5 64:16 91:8 108:11 140:5 142:18 152:4
today's 5:16 6:8 8:1
toll-free 60:13,15
Tom 1:19 4:19
topic 54:6 140:4 141:16
total 8:2 166:10
totally 139:3
tour 58:9
Tracey 1:20 4:18 90:6,7 92:16 93:9
track 81:11
tradition 94:10
Trafficking 14:19
trains 35:7
transcribed 5:17
transcript 5:18 19:9 142:7 172:14
transcripts 4:12
Transfer 30:3
transferred 30:18
translation 19:17
transparency 10:19,22 77:1 79:9 136:13
transparent 21:2 75:16
trauma 117:4
traveling 45:20
treat 124:21,21
treated 18:15 90:13 102:19
treating 167:14
tremendous 59:11
Trexler 2:13
trial 9:9 12:2 13:6,20 14:21 15:9 16:14,19 24:14 27:7,9,9 32:1 33:7,8,9 37:10 38:3 43:21 46:5 49:1,11 58:11 66:18 68:2,13 68:21 69:6,20,20,22 70:4,5,12,16 71:5,10

71:22 72:1,2,11,14,16 72:20 73:1,5,8,9,10 73:21 74:1,5,7,14,16 74:17,17 75:2,6 76:7 77:8,11 78:15,22 79:18 86:9 91:5 97:12 98:7 100:8,10,10 103:11 104:7,18,19 105:8 107:3 111:19 112:13 113:4 115:12 116:14,14 117:9,11 118:12 120:12,14 121:5,7 122:16 123:8 123:21 124:4,7 126:20 127:5,10,16 127:21 128:11,18,21 128:22 129:7,14,16 130:5 131:2,9,11,13 132:7,13 133:7,12,17 133:20 136:22 137:11 137:12,15,18,19 138:1,19,21 140:1,1 141:1,11 144:15,18 144:20 161:19,20 165:2,13 167:6,15,18 168:10 169:8,14 171:8,10,11,14 172:7 172:9,13,15
trials 72:21 132:11 136:3
tripling 55:1
true 125:15 173:8
truly 135:13
trump 120:14 124:17
trumping 122:12
trust 41:15 75:12,15 170:4,9,16
truth 44:3 172:16
truthfulness 104:10
try 53:8 66:3,13 83:12 121:2 129:5 154:17
trying 122:1 134:8 138:11 155:22 156:13
turn 59:12 142:4 162:3
turning 125:9 165:17
TVPA 14:11,19
twice 24:1
two 6:10 8:18 9:22 19:14 20:6 27:4 32:14 33:18 43:10,18 55:22 85:17 93:11 106:8 109:6 116:12 121:10 142:20 143:15 145:8 145:14 146:9 147:17 163:13
two-phase 70:20
two-step 110:2 111:18
type 50:18 151:8
typical 161:12
typically 42:13

U

U.S 2:7,11 7:11 56:20 58:4 60:3 61:1,19,21 62:9,12 82:12
ubiquitous 37:3
UCMJ 6:7
ultimate 124:2,3 138:2
umbrella 10:5 20:21
unacceptable 142:14 145:9
unbalanced 44:12
unconstitutional 72:2
underestimated 117:6
underlying 78:12 96:22 97:2,10
undermine 41:15 79:17
undermines 41:21
understand 8:18 10:22 22:13 45:20 46:19 52:13 77:5 90:15 91:20 103:6 115:11 116:22 118:15 119:9 141:13 142:22 144:10 148:14 151:22 154:20 158:16 161:18 164:11 165:22 166:17 168:1
understanding 11:19 38:10 39:9 46:14 48:12 51:18 72:6 78:10 109:10
understands 50:8
understood 73:9 90:9 114:18 115:22 131:21
undertaken 67:17
unethical 173:12
unfair 43:18 44:11 72:21 123:22 128:21 128:22 132:11 145:8 145:9
unfairness 158:18
unfettered 38:21
unfortunate 77:5,12
Unfortunately 30:16 31:7
Uniform 6:4,9
uniformity 18:14
unintended 158:7 159:5 161:15
unique 98:5 103:17 145:2 148:12 160:7 172:4
uniqueness 94:11
Unit 58:7
United 1:1 23:20 123:11
unprecedented 93:8
unquestionably 72:9
unquote 153:18 155:12
unrelated 137:3
unseal 82:5
unsealed 81:20 112:1
unsurprisingly 123:7
untruthfulness 104:10 104:13
unwieldy 104:16
unworkable 151:10
update 60:16
uphold 130:4
urge 26:13
USC 157:1
use 60:15 62:7 68:13 69:2,2 71:22 73:5 155:11
useful 81:7
USPIS 61:4
USS 58:16
usually 19:21 48:14 49:17 51:8 105:22 114:9,15 158:8 171:4
utter 148:17

V

v 12:20 16:8 24:18 25:20 33:3 123:11
vacuum 167:7 171:9
VADM 90:7 92:16 93:9
VADM(R) 1:20
vague 155:14
Vallandingham 2:6 3:15 7:9 56:19 57:2,6 63:16,21 89:7,9 103:22,22 104:1,3 105:9
valuable 78:3 80:7 88:7
varies 132:18
various 11:14 62:20 95:15
varying 47:11
venue 28:2 29:15 30:11
verb 120:18,21
verdict 144:10
verify 75:15
version 17:9 75:20
versions 91:1
versus 18:18,19 55:20 55:22 89:15,19 96:1 103:2 105:8 143:8 147:18 165:2
Veterans 58:1
Vice 4:18
victim 2:2 6:22 11:5 12:1 13:19 16:11,13 17:18,20,22 18:12 19:12 20:20 21:17 22:1 25:10,13 26:4 31:10 34:5 35:15 37:9 37:14 38:3 39:3,14 41:20 42:4 43:3,7,15 43:20 44:7,14,18 46:20 47:6 48:1,5,8 48:15,16,16,18 51:19 53:20 54:10,13,19 60:2,4,7,19,22 62:18 62:19 63:3 66:18 68:15 77:6,22 82:11 83:19 86:11 87:3 88:17,18 93:15 100:16 101:3 105:22 107:16 115:8,13,17 117:20 118:11 123:14 128:16 132:18,18,19 132:21 133:1,13 135:10 140:10 141:2 141:4 143:7 145:17 145:19 146:8 147:12 151:9 152:1,11 155:19 156:7,9,11 160:20 161:21 162:5 162:8,9 164:22 165:15 171:16
victim's 20:15 38:15 64:7 69:16 71:19 73:2 82:9 104:7,12 107:4,5 120:12,14 121:6,8 133:10 139:4 141:3 147:22 151:8 155:12 159:21 160:1,11 171:11,20
victim-related 63:9
victims 2:6 7:10 9:11 10:1,3,16 14:9,20 16:18 17:11 18:15,20 19:1,11 20:18 23:15 23:16,18 24:13,19 25:5 26:14 29:17 30:12 32:9,11,15 33:15 35:10 36:16,21 37:6,13,16,19,21 38:9 38:20 39:15,21,22 40:3,5,17 41:2 42:8 42:13 44:4 46:14 47:11 48:18 53:3,5,12 53:22 54:4 55:2,5 56:1,20 57:8,10,13,16 57:17,18 59:8,10,13 59:19 60:5,9,12,15 61:15 62:8,22 63:12 64:1 71:16 78:17 82:10 86:8 96:4 105:7 123:14 132:17 133:1 133:9 134:5 138:17 139:12,15 140:17

142:8 145:11,12 146:18 147:2 150:2 151:6 153:1 155:20 158:10 160:17 161:19 162:1
victims' 3:9 6:8,15,17 6:19 8:3 9:3,15,17 11:19,22 13:17 14:17 14:18,19 15:6 17:2,6 18:19 36:17 37:1,6 38:4 39:20 41:15 42:7 42:10,19 44:3,3,13,21 46:22 59:7 63:7 82:14 84:13 147:19
Victor 1:18 4:19
view 44:10 51:21 126:12,15 131:13 137:16 139:4
viewed 142:20 143:15
viewing 49:20 144:1
views 43:6
vigorous 118:16
vindicate 155:22
vindicated 44:6 156:1
violate 63:10 95:18 158:21
violates 15:16
violation 28:10 131:15 142:18 145:10 147:17
violations 18:18
violence 58:13
Virginia 1:10
virtually 25:18
visits 5:3
vital 135:19
VLC 99:21
VNS 37:14 60:2,5,6,15 60:16,19,21 61:7,9,15 61:17 62:3,7
vocabulary 129:10
voice 19:12 20:16 45:4
voices 10:17 20:7 22:8
volume 65:19 150:18
voluntarily 59:17
volunteer 35:7

W

wait 82:11 99:3 166:19 172:11
waiting 144:9
waiver 32:16
want 9:1 19:7 82:6 89:13 96:6 102:4 113:7 115:9 124:12 137:2 138:10 145:20 150:3 153:5 154:20 154:20 158:3 161:19 165:4 168:6 171:1 172:11 174:7
wanted 47:4 54:8,13 115:21 117:13,18 146:12
wanting 130:22
wants 72:14 144:18,22 144:22 161:19
War 58:7
Warfare 58:17
Warner 58:21
warrants 51:6
wasn't 78:10 83:14 110:6
watch 75:22
way 8:21 10:5 13:10 19:4 26:12 34:3 55:20 55:21 58:2 76:16 77:16 80:12,12 81:15 84:12 86:22 87:13 88:21 99:22 124:20 131:22 132:3 141:5 142:14 143:22 156:17 159:21 161:9 163:6,8 164:3
ways 45:3 80:15 96:10 100:4 154:13 168:9
we'll 23:1 80:3 154:17
we're 8:8 20:3 42:12 46:9 50:7 51:11 56:12 75:17 81:20 82:4 83:12 90:18 93:18 96:11 99:20 104:11 108:8 115:12 123:1 127:22 128:1,7 129:11 132:22 133:10 136:17,19 138:13 140:8 147:10 150:13 150:21 157:2,10 159:19 168:9 169:7 169:10 172:1
we've 16:9,21 52:9 74:8 142:17 155:5 158:17 159:17 169:5
weaker 22:9
Webb 58:2
website 4:10,11,21 5:18 8:5
week 33:20 65:12 99:8 146:3,4
weeks 121:10
weigh 78:20 129:5,6
weighed 78:17
weighing 129:11
weight 85:6 89:14
weightiest 127:8
weighty 85:7 130:14
welcome 3:5 4:3 5:13 45:7 56:22 65:6 80:8
well-established 41:22
went 107:17 108:17,18 125:16 141:6 174:22
weren't 137:14 138:15
whatsoever 86:4
whichever 48:8
white 35:3
whoa 170:6
whoever's 134:6
whoops 149:1,1
willing 65:7 161:21 162:8 174:10
wish 67:14
wished 28:19
wishes 91:9
withheld 108:8,10
witness 37:9 62:18 101:16 102:18
witnesses 2:1 26:14 32:10,11,15 101:12 101:15,19 102:1
woman 137:1
wondering 85:11
word 73:7 137:12 148:13 149:16 150:11 156:14,15,16
wording 27:3
words 16:13 25:12 126:21 150:11 156:3 163:17
work 9:8,10 16:1 36:5 44:22 46:7 113:21 142:12 144:12,20 146:15 147:15 149:19 151:7
worked 9:5 155:5,7 174:4
working 23:19 24:10 94:19 125:19
works 48:12 56:7 57:12 98:2
world 9:4 15:22 21:9 23:19 44:21 67:13 98:1 137:13
worldwide 101:14
worried 118:2 162:3
worrisome 93:8
worry 129:3
worse 41:10
worth 77:19
wouldn't 79:19
writ 17:10 25:4,7,11 26:21 31:17 64:2 106:21 143:19,22
write 76:2 92:4,5 95:6
writing 144:15
writs 17:1,9
written 5:17 8:4 31:14 34:3,6 40:13 64:9 125:16 164:14
wrong 81:13 110:19 143:6
wronged 31:11
wrote 116:21 125:17
www.jpp.whs.mil 4:10

X

Y

yeah 97:17 111:2 112:9 116:1,1,9 119:12 135:16 138:7,11 154:6,9 163:4 164:8 171:22
year 5:21 33:18 59:3 61:14 62:15 122:2
years 5:22 15:22 23:21 35:5 54:9 58:3,10 66:15 80:10 160:10
yield 77:4
yields 134:7
young 16:2

Z

0

1

100 84:20
11:51 174:22
1103A 172:1
12 58:3
120 6:7
1203 164:14,15
14 1:7
1400 1:10
15 16:2 62:16
17 58:10
174 3:20
1993 47:7

2

20-plus 54:9
2000 46:6,6
2001 60:3
2003 9:10
2004 9:18 14:17 148:11
2011 62:19
2012 6:7 58:5
2013 5:21
2014 5:22 36:3
2015 6:1 57:11
2016 1:7 6:12 61:14 62:15
22 151:5
23 3:12 23:21

23rd 4:4 5:14 6:12

3

3 27:13,16,22 31:3,21 32:16 87:5,10 98:6 116:3
3.8 61:16
32 103:12
34 3:13

4

4 3:6 58:17
40 15:22
412 36:4 38:15 52:14 99:10,17 105:15 107:1,10,14 114:5,7,9 114:16 115:5 121:15 129:19 138:14 139:5 155:1 157:5
412's 114:21
412/513 87:22
440,000 61:15
45 3:14 54:7

5

5 3:7
500 124:14
512 107:7
513 24:16,22 25:15,16 28:14 29:18 31:15 32:1,10 33:21 34:3,5 36:4 38:16 99:10,18 107:1,7,10,14,16 108:1,4 109:7 113:20 114:4 116:20 124:21 125:12,18 129:18 138:14 139:5 145:19 145:20 157:5 162:13 163:3
57 3:15

6

6(b) 9:18 24:21 27:3 40:19 44:9 83:17 102:13 138:16 156:18 157:4,17
65 3:16

7

72 40:7 64:3
75 84:20

8

8 3:11
80 3:18 62:12

9

9:04 1:11 4:2
905 26:9
905(f) 26:13
93 46:6
95 139:10 140:4

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This is to certify that the foregoing transcript

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Date: 10-14-16

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R. Gross

Court Reporter